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Empty International Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed

Keywords

Cultural Property, Restitution, War, International Law: History, Inheritance

**EMPTY “INTERNATIONAL” MUSEUMS’ TROPHY CASES OF
THEIR LOOTED TREASURES AND RETURN STOLEN PROPERTY TO
THE COUNTRIES OF ORIGIN AND THE RIGHTFUL HEIRS OF THOSE
WRONGFULLY DISPOSSESSED**

MICHAEL J. REPPAS II *

The discovery of the earliest civilizations [in the 19th Century] was a glorious adventure story.... Kings visited digs in Greece and Egypt, banner headlines announced the latest finds, and thousands flocked to see exotic artifacts from distant millennia in London, Berlin, and Paris. These were the pioneer days of archaeology, when excavators... used battering rams, brute force, and hundreds of workmen in a frenzied search for ancient cities and spectacular artifacts. From these excavations was born the science of archaeology. They also spawned a terrible legacy – concerted efforts to loot and rob the past.¹

The ethical questions surrounding the acquisition and retention of looted property by museums and art dealers were once a subject reserved for mock-trial competitions in undergraduate humanities and pre-law classes. Recently, however, the debate has moved from the classroom to the courtroom, and the trend seems irreversible. Fueled by aggressive claims from source countries, which are frustrated by stalemate diplomacy that has failed to repatriate their ancient treasures, nation-states are now forcing resolution by litigating their disputes. Such course is also being pursued by the heirs of individuals who were wrongfully dispossessed; who have tried in vain to have the property voluntarily returned by the museums and are now also turning to the Courts for redress. The combination of these actions, and the results thereof, will not only decide the fate of the individual treasures in dispute, but will also decide the fate of entire museum collections and, indeed, the very future of the international museum as an institution.

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1. BRIAN FAGAN, *Foreword* to THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY? xviii, xviii (Phyllis Mauch Messenger ed., 2d ed. 1999).

The dawn of the 21st Century has brought a fresh breeze to the stale and stagnant course of requests for looted property to be voluntarily returned and the invariable refusal by the international museums. The long held assumptions of nation-states and individuals that they are unable to challenge the museum's ownership of these treasures, has changed to a more confident and confrontational stance whereupon they now believe they can legally compel the museums to return their looted treasures. Where the 20th Century embodied a sense of futility, frustration, and incurable loss of property, the 21st Century seems to be one that will empower nation-states and individuals to correct the crimes of the past and to reclaim their looted treasures.

One can observe the stark changes in world opinion by analyzing numerous recent events on this subject. Begin with a consideration of the following general questions: "who can own the past"²; "who has a right to keep the spoils of war"; and "can anyone own someone else's history?" Heretofore, these questions were predominantly addressed only by scholars and academics; now, however, variations thereof are immensely popular today in the general press. A plethora of authors, including this one,³ have analyzed the different takings and demanded the return of looted items based upon historical, moral, ethical, political and/or legal grounds. Scores of books and newspaper articles have flooded the market to address contemporary and historic lootings: the Baghdad Museum; the Kennewick Man; the Sphinx's Beard; the Rosetta Stone; the Parthenon Marbles; and the Nazi Holocaust thefts have captured, and recaptured, our attention. Today's society sees the debate in simple terms of right and wrong, black and white. It is axiomatic that Holocaust survivors and/or their heirs must have their Nazi looted property returned to them. It is axiomatic that the Sphinx Beard and Rosetta Stone belong in Egypt; that the Parthenon Marbles belong in Greece, and on, and on. That ancient treasures have been looted from Nation States as imperial spoils of war and carted thousands of miles away to now be owned by and displayed in the trophy boxes of foreign "international" museums – is simply wrong. That Nazi-looted art from Holocaust victims is owned by and displayed in international museums – is simply wrong. Today's society is intolerant of these lootings and demands that the international museums return them because they have no moral right to own and display such property. That our society is taking this approach and rebelling against the status-quo of *de facto* museum ownership of these looted items, is an indication that a swing in the pendulum, favoring the return of these treasures has occurred. That national and international laws protecting nations and individuals from the pillage of their treasures, and formalize and codify contemporary views on the subject, is more evidence: governmental recognition of the will of the people. The peremptory norm is, undeniably, that looted art and artifacts must be returned to their country of origin and/or to the individuals wrongfully

2. See Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377 (1996).

3. E.g., Michael J. Reppas II, *The Deflowering of the Parthenon: A Legal And Moral Analysis On Why The "Elgin Marbles" Must Be Returned To Greece*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 911 (1999).

dispossessed thereof. And where voluntary return is refused, we are witnessing the next step in process: litigation.⁴

The value of these looted items, beyond their economic worth, is tremendous for both individuals and Nation States. For individuals and/or the heirs of those whose property was stolen, such as those victims of the Holocaust, the return of the looted property is, in part, vindication for the crimes against them and/or their family; it is also a punishment against those who collaborated with and/or profited from the Nazi crimes against humanity. Returning such looted property is essential for providing some closure to the historic crime. Although it cannot erase the crime from their memories, it can, at least, ease the trauma associated with their inability to fully punish the wrongdoers, as well as provide some restitution for the loss.

To a Nation State, the significance of treasures that represent their cultural property, beyond their economic value, are understood when the items themselves embody the personal identity of a people or a nation. In fact, "[c]ultural property is so central to [the] personal identity [of its people] that the International Conference on Cultural Property Rights of the United Nations termed it 'ethnocide' to withhold or destroy cultural property."⁵ An American reader can understand this principle by using any one of our nationally prized possessions, such as the Statue of Liberty, the Lincoln Memorial, or the White House as an example of what constitutes Cultural Property. So too can a British reader understand the emotional tie to the cultural property if the looted item was Nelson's Column or Stonehenge. Virtually every nation has culturally significant property that embodies the historic identity of its people. The immorality and injustice of such items being "owned" and displayed in trophy boxes by a conquering nation is a source of pain, embarrassment, and a sign of *weakness*. In today's society, possession of one's own patrimony is a mark of equality amongst nations.⁶ It is a sign that the country of origin and its people are no longer victims of the crime, the looting, that took place when the rich and powerful pilfered their

4. One should understand that the legal determination as to who "owns" these treasures must, quite rightly, be made on a case by case basis. Additionally, as the question of ownership has historically, and for the most part, gone unchallenged by those dispossessed of the property, we are entering uncharted waters. One must also not forget that such claims are, by their very nature, a risk; the outcome of the litigation cannot be guaranteed. Accordingly, where a voluntary return has not and cannot be negotiated quickly between disputing parties, prolonged litigation should be anticipated, because neither side wants a precedent set. Finally, although there is a growing body of national and international law that favors repatriation, the mere existence of a law or international treaty is often not enough to correct the crimes of the past, although they may be relied upon more readily for contemporary illicit takings.

5. SHERRY HUTT, CAROLINE MEREDITH BLANCO, WALTER E. STERN & STAN N. HARRIS, *Introduction to CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES* xi, xi (Section of Environmental, Energy, and Resources, American Bar Association 2004).

6. Elazar Barkan, *Amending Historical Injustices: The Restitution of Cultural Property – An Overview*, in CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY, 16, 17 (Elazar Barkan & Ronald Bush eds., Getty Publications 2002).

lands. Restitution, therefore, is a psychological victory for a country of origin and its people, and an indication to them, and the world, that they have elevated themselves in the international arena and no longer are too poor and/or too powerless to protect themselves or their cultural treasures.

The major museums of the world that "own" and display looted Holocaust art and/or the spoils of war or trophies of colonialism that were looted from Greece, Turkey, Egypt, China, Africa and other nations in the early 19th century by the British, French and German⁷ empires are no longer part of an academic debate. Instead, they are finding themselves as defendants in high powered and high stakes lawsuits where their entire collections are on the line.

The classic debate where ethical obligations of museums and art dealers were pitted against the rights of the source country from whom the property had been taken, has now evolved into a full-fledged war – a war being fought by governments, individuals, museums, and art dealers who were, heretofore, generally categorized as "cultural nationalists" or "cultural internationalists." The former espousing on the rights of indigenous peoples to claim their treasures from the "looters" of their past; the latter on theories of universality, and the common heritage of mankind as justification for their continued display and ownership of the treasures. The war is waged everyday in civil and criminal courts throughout the world and in the court of world opinion. Though relatively silent for decades, recent events have brought the classic debate to the forefront of the international community and, in so doing, have forced the international museums to face a singular question: should museums be emptied of all their looted treasures?

The answer is not simple, but neither is it one that can be ignored by the museums any longer. Repatriating looted national cultural treasures to their countries of origin would, on one hand, acknowledge the rights of the cultural nationalists and, both practically and morally, reinvest the descendants of the creations with their birth rite. Returning looted art to individuals and/or their heirs would also satisfy society's desire to protect victims and punish profiteers for the wrongful takings. On the other hand, repatriating *all* items would not only take the works away from scholarly study abroad, international public attention, and praise they receive in the foreign institutions, but it would also, in many instances, put the actual property at physical risk, as many individuals and countries lack the economic resources necessary to protect and display them.⁸ In sum, these are questions requiring careful consideration of not just the circumstances surrounding the original taking of the treasures and the laws related thereto, but also one of economics and preservation.

This article seeks to analyze the competing interests between the international museums and the individuals and countries of origin dispossessed of their

7. *Id.* at 19.

8. It is significant to consider here that major museums do not, actually, display *all* the looted treasures they have inherited from the colonial empire. As Barkan expressed, "major museums hoard and deny access to multitudes of objects in their basements. They defend this practice on the grounds that the objects are kept for their protection." Barkan, *supra* note 6, at 31.

treasures, in three parts. The first part will examine the multi-layered ownership structure of a typical museum, and the intentional design thereof crafted in such a way so as to prohibit Trustees from divesting the museum of any part of its collection, regardless of the circumstances surrounding the original taking of the property, or of the museum's subsequent acquisition thereof. More specifically, this section will discuss the establishment of the British Museum as a legal entity created by Parliament and a recent British Court's decision prohibiting the Museum Trustees' from returning undisputed looted art to the heirs of a Holocaust victim whose property was confiscated by the Nazis. The case of *Her Majesty's Attorney General v. Trustees of the British Museum*⁹ is demonstrative of the lengths to which acquiring nations will go to keep their foreign treasures permanently locked away in their trophy display cases.

The second part will analyze the position of the internationalists through consideration of the importance and value of Universal Museums. This section, divided into two parts, will focus on the benefits of utilizing Universal Museums as they presently exist and operate. The first part will consider a self-serving international declaration created by a consortium of major museums to promote the cause of the cultural internationalists and to defend themselves from the international trend favoring the cultural nationalists. In contrast, the second part will focus upon the dark side of museum acquisition practices and will analyze the scandalous roles that many of the leading art museums, trustees thereof, and art dealers have played in the illicit transfer and purchase of a plethora of treasures looted from Nation States and individuals.

The third part will discuss the extrajudicial international trend evinced by a growing number of governments, museums, and individuals throughout the world to voluntarily return looted property to their countries of origin. This section is significant because it demonstrates the customary international law that has and continues to develop, which overwhelmingly establishes a world-wide consensus favoring the voluntary return of looted treasures.

I. TIGHTENING THEIR (LEGAL) GRIP – A CASE ANALYSIS OF *HER MAJESTY'S ATTORNEY-GENERAL V. THE TRUSTEES OF THE BRITISH MUSEUM*¹⁰

Barbarous acts of pillage, plunder and murder give a glimpse of the darker side of man. The wholesale and systematic looting and genocide of a people, however, demonstrate the worst mankind can ever be. These are acts which most of us could not even imagine in our worst nightmares. The Nazi Holocaust was one such horror that shocked the collective soul of the world and reminded us how quickly civilization can collapse. When the Nazi regime was defeated and the

9. *Her Majesty's Attorney-General v. The Trustees of the British Museum*, [2005] EWHC (Ch) 1089. (Eng.).

10. An abridged version of this section was previously published. Michael J. Reppas II, *Cultural Property and the Shortcomings of International Law: A Case Study on the Looting of the Parthenon*, in CLE COURSE NUMBER 78525: LEGAL ISSUES REGARDING THE 'ELGIN MARBLES' AND OTHER STOLEN ANTIQUITIES (November 12, 2005) available at <http://www.ahepa394.org/AHEPA%20CLE%20Course%20Materials%20Copyright%202005.pdf>.

world was shown the full devastation of what they had done, nations united and a plethora of international laws and universal rules and principles were enacted to protect the Holocaust survivors and to punish those who had or sought to profit from the irrefutable crimes of the Nazis.¹¹ The majority of these international laws were aimed at recovering looted property and returning same to the survivors or the victim's heirs.¹² They also sought to hold accountable those who collaborated with and/or benefited from the Nazi criminal acts.¹³

Nazi collaborators are still being sought to this day. Not even seven years ago, in August of 2000, a magnificent settlement was reached in the famous New York District Court case known as the Holocaust Victim Assets Litigation.¹⁴ In this case, a \$1.25 billion settlement agreement was approved by the Court for a class action lawsuit brought against the Union Bank of Switzerland.¹⁵ In said action, the Plaintiffs' alleged that the bank had, *inter alia*, "knowingly retain[ed] and conceal[ed] the assets of Holocaust victims, accept[ed] and launder[ed] illegally obtained Nazi loot and transact[ed] in the profits of slave labor."¹⁶ In so doing, Plaintiffs' alleged that the defendant bank "collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide."¹⁷ The result of that lawsuit was an incredible victory for the survivors and the heirs of the victims. The result also reinforced the

11. The Nuremberg Tribunal recognized the Nazi acts as a "systemic "plunder of public or private property," which violated the Nuremberg Charter. The Nuremberg Tribunal further found that these acts constituted war crimes under international law. See Transcript of Two Hundred and Seventeenth Day, Afternoon Session, Monday, September 30, 1946, 22 Trial of the Major War Criminals Before the International Military Tribunal 482 (1948).

12. See, e.g., Declaration on Forced Transfers of Property In Enemy-Controlled Territory, Jan. 5, 1943, 1943 U.S.T. LEXIS 188, 3 Bevans 754 [hereinafter London Declaration]; The British Committee on the Preservation and Restitution of Works of Art, Archives and other Material in Enemy Hands (established by the Prime Minister of England on May 9, 1944. The Committee's purpose was to assess the status of cultural objects within the British Zone of Occupation following the end of hostilities in Europe); Agreement between the United States of America and other powers respecting the International Monetary Fund, Dec. 27, 1945, T.I.A.S. No. 1501 [hereinafter Bretton Woods Agreement]; Washington Conference on Holocaust Era Assets, http://www.state.gov/www/regions/eur/wash_conf_material.html (last viewed October 3, 2007) (The Department of State and the U.S. Holocaust Memorial Museum hosted the Washington Conference on Holocaust-Era Assets at the Department of State November 30 through December 3, 1998. More than 40 governments as well as numerous international non-governmental organizations with a stake in these issues were invited to send delegations to the conference, which built on the work of the December 1997 London Nazi Gold conference); Eur. Parl. Ass., *Resolution on Looted Jewish Cultural Property*, Doc. No. 8563 (1999) available at <http://assembly.coe.int/main.asp?link=http://assembly.coe.int/documents/adoptedtext/ta99/eres1205.htm#1>; *Stockholm International Forum on Holocaust Education* (January 26-28, 2000) <http://www.holocaustforum.gov.se/> (last visited October 3, 2007); and *Declaration of the Vilnius International Forum on the Holocaust Era Looted Cultural Assets* (Oct. 3-5, 2000) <http://www.claimscon.org/index.asp?url=artworks/vilnius> (last viewed October 3, 2007).

13. See e.g., London Declaration, *supra* note 12.

14. *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y. 2000).

15. *Id.* at 141.

16. *Id.* at 141.

17. *Id.* at 141.

power, influence, and legitimacy of the international laws that were created over a half century ago to punish those that profited from the acts of the Nazi regime. Why then has the world all but ignored a 2005 British court ruling that refused to return undisputed Nazi looted art to the heirs of the victim? This author calls on all educated and fair minded persons to carefully consider the case of *Her Majesty's Attorney-General v. The Trustees of the British Museum*,¹⁸ and to demand that the British Parliament take immediate steps to correct this incredibly unjust and offensive ruling.

On May 27, 2005, the High Court of Justice in London, England issued a ruling that sets a bad precedent for anyone, Nation-State or individual, seeking to reclaim looted property that has found its way into the British Museum's collection.¹⁹ The Court's ruling unequivocally prohibited the British Museum from returning four drawings in the Museum's collection to the rightful heirs of a Jewish man who had the drawings stolen from him during the Nazi invasion and occupation of Czechoslovakia in 1939. The ruling of the Court falls perfectly in line with the two-century old custom and practice of Parliament to facilitate the Museum's acquisition and ownership of prized art and foreign treasures, and to prevent the return of that property to its rightful owners under any circumstances. This case serves as a clear affirmation of the British government's commitment to ignore the illegality and/or immorality of its past acquisition practices. Conveniently the British are able to avoid future claims of improper acquisition and/or unclear title to other pieces of its collection. Additionally, Parliament's actions established another precedent, another hurdle for individuals, and more importantly Nation-States, to overcome in order to repatriate their looted art and cultural property that are a part of the British Museum's collection. The decision will impact a plethora of celebrity pieces, such as the Parthenon Marbles, the Sphinx Beard and the Rosetta Stone, to name a few.

To one unfamiliar with the British Parliamentary system, the decision is, to say the least, unsettling, because it directly conflicts with several International Treaties to which the British have signed and ratified (indeed, they even authored a few!). As will be examined below, the case of *Her Majesty's Attorney-General v. The Trustees of the British Museum* clearly demonstrates how the British government protects the treasures owned and displayed in its national museum, even in situations where it is undisputed and, indeed, it was conceded that the museum did not have proper title to pieces in their collection and were morally obligated to return same.

A. Factual Background

In 1946 the Trustees of the British Museum bought, at auction at Sotheby's, three Old Master drawings;²⁰ a fourth²¹ was purchased separately at about the

18. *Trustees of the British Museum*, [2005] EWHC, *supra* note 9.

19. *Id.*

20. Namely: *The Holy Family* by Niccolo dell'Abbate; *An Allegory on Poetic Inspiration with Mercury and Apollo* by Nicholas Blakey; and *Virgin and infant Christ, adored by St. Elizabeth and The infant St. John* by Martin Johann Schmidt. *Trustees of the British Museum*, [2005] EWHC, *supra* note

same time from another source and was gifted to the Museum in 1949.²² All became part of the collection of the British Museum. It was undisputed that the four drawings were originally owned by a Dr. Feldmann in Brno, Czechoslovakia, and were confiscated by the Nazis in 1939.²³

In June of 2000, the Trustees submitted evidence to the House of Commons Select Committee Inquiry into 'Cultural Property: Return and Illicit Trade,' which specifically stated that "if it were established that the Museum was holding objects looted by the Nazis during the Holocaust, the Museum would wish to find a way to achieve a return of those objects to the victim's family."²⁴ Thus, when heirs of Dr. Feldmann²⁵ made their claim for restitution, not compensation, of the stolen art to the Trustees two years later, the Trustees agreed that they were morally obligated to return the looted art to the Feldmann heirs.²⁶ In their defense, however, it was alleged that "[w]hen the Trustees acquired the drawings in 1946 and 1949 they did so on the mistaken assumptions that title was in each case in order, and given all the facts it is clear that, had they discovered that the drawings had been stolen by the Nazis, they would have expected to return them to their rightful owner in accordance with the declared policy intentions of His Majesty's Government, which they had helped to shape."²⁷ Accordingly, the question was not whether the objects *should* be returned, but rather, *how* the Trustees could do so in accordance with British law.

B. Issues of Law to Be Determined

By reason of the fact that the drawings were looted by the Nazis at a time when Czechoslovakia was occupied by the Germans, were the Trustees under a moral and/or legal obligation to return the stolen drawings to the heirs of Dr. Feldmann? If so, how could the Trustees obtain approval for such proper return under British law?

1. Applicable British Laws Regarding Holocaust Era Assets

In 1943 Her Majesty's Government joined with sixteen other countries to make the *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control*.²⁸ The declaration stated the

9, at [2].

21. Namely: *Dorothy with the Christ Child* by a follower of Martin Schongauer. *Id.*

22. *See id.*

23. *See Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [5], [13].

24. *See id.* at [15].

25. Such claim was advanced on behalf of the Feldmann heirs by The Commission for Looted Art in Europe ("CLAE"). *Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [5]. CLAE "is the expert representative body in Europe dealing with all matters relating to Nazi looted art and other cultural property. It helps families, communities and institutions worldwide with research, identification and recovery of looted cultural property. CLAE is an independent, non profit making body which is mandated to represent the European Council of Jewish Communities and the Conference of European Rabbis." Commission for Looted Art in Europe Website, <http://www.lootedartcommission.com/home> (last viewed on November 15, 2006).

26. *See Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [5].

27. *See id.* at [13].

28. *See Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [10].

intention of its signatories to "do their utmost to defeat the methods of dispossession," and reserved "all their rights to declare invalid any transfers of or dealings with property, rights and interests of any description whatsoever."²⁹ Numerous other committees, accords, and resolutions were formed by, or entered into by, the British Government in subsequent years, including, but not limited to: *The British Committee on the Preservation and Restitution of Works of Art, Archives and Other Material in Enemy Hands* (1944)³⁰; *The Bretton Woods Agreement* (1945)³¹; and *The 1998 Washington Conference on Holocaust Era Assets* (Article 8 of which states: "[i]f the pre-war owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution....").³²

2. Applicable British Laws Regarding the Trustees' Ability to Dispossess Museum of Any Part of its Collection

The 1963 British Museum Act (hereinafter the "1963 Act") provides the guidelines which dictate the powers of the Trustees. Section 3(4) provides that "[o]bjects vested in the Trustees as part of the collections of the Museum shall not be disposed of by them otherwise than under section 5 or 9 of this Act [or section 6 of the Museums and Galleries Act of 1992]."³³ Section 5 of the 1963 Act, authorizes the Trustees to dispose of duplicates, objects made after 1850 and objects unfit to be retained in the collections of the Museum. It also entitles the Trustees to destroy useless objects.³⁴ Section 9 of the 1963 Act, and Section 6 of the Museums and Galleries Act entitle the Trustees to transfer objects comprised in the collections of the British Museum to the Trustees of any other of the specified national museums.³⁵

Additionally, there was a pertinent British precedent applied in this case, which allowed the Attorney General to authorize the Trustees to make "a payment... out of charity funds which is motivated simply and solely by the belief of the trustees or other persons administering the funds that the charity is under a moral obligation to make the payment."³⁶

C. Judgment

The ruling of the High Court prohibited the Trustees from returning the Nazi looted art to the heirs of Dr. Feldman on two main grounds. First, because to do so

29. *Id.*

30. See generally, Allied Forces, Works of art in Greece: the Greek islands and the Dodecanese, losses and survivals in the war / compiled by the Monuments, fine arts and archives sub-commission of the C. M. F., and issued by the British committee on the preservation and restitution of works of art, archives, and other material in enemy hands, (H.M.S.O. 1946).

31. Bretton Woods Agreement, *supra* note 12.

32. See *Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [14].

33. British Museum Act, 1963, c. 24, § 3(4) (Eng.).

34. *Id.* at § 5.

35. *Id.* at § 9; Museums and Galleries Act, 1992, c. 44, § 6(1) (Eng.).

36. *Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [4] (citing *Re Snowden v. Attorney-General*, [1970] Ch. 700, 709-10).

would violate the 1963 Act; and second, to do so would usurp the power of the Parliament.

The Court ruled that the four drawings were, in accordance with Section 3(4) of the 1963 British Museum Act “[o]bjects vested in the Trustees as part of the collections of the Museum.” Accordingly, the drawings could not be disposed of by them otherwise than under section 5 or 9 of the 1963 Act [or section 6 of the Museums and Galleries Act of 1992].³⁷ Further, because the drawings were originals (not duplicates and/or copies) and were not “useless”, the exceptions of Sections 5 and 6 respectively, did not apply. Additionally, because the request would result in the return of the objects to recipients other than a “specified national museum,” the exceptions under Section 9 of the Act, and Section 6 of the Museums and Galleries Act, did not apply.³⁸ The Court concluded that, “[f]or all these reasons... no moral obligation can justify a disposition by the [T]rustees of an object forming part of the collections of the Museum in breach of [Section 3(4) of the 1963 Act].”³⁹ Thus, the Trustees are required to do what they consider to be morally wrong, and retain possession of the drawings until and unless an Act of Parliament entitled them to transfer any of the objects to the heirs of the Holocaust victim.⁴⁰

With respect to the second ground upon which the Court denied the request to return the paintings, the Court did so in three parts.⁴¹ The Court first held that it will not direct or approve anything which is inconsistent with a statute; namely the 1963 Act.⁴² The Court then held that “[t]he powers of a statutory corporation such as the [T]rustees extend no further than what is expressly stated in its governing statutes, is necessarily and properly required for carrying into effect the purposes of its incorporation or such as may fairly be regarded as incidental to or consequential on those things which the legislature has authorised.”⁴³ Finally, the Court held that “where Parliament has specified by statute where the public interest lies, neither the Court nor the Attorney General may take a different view.”⁴⁴ “[T]he general principle which emerges is that the court cannot alter the [sic] statute by a stroke of the pen and cannot therefore direct anything which is inconsistent with the terms of the Act of Parliament in question.”⁴⁵

D. Leges Posteriores Prioras Contrarias Abrogant – The Benefits of the British Parliamentary Democracy

How does one rectify the obvious and apparent conflict between the *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under*

37. *Id.* at [37], [43].

38. *Id.* at [41].

39. *Id.* at [45].

40. *Id.* at [46].

41. See analysis *infra* Part I.D.

42. *Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [22], [37], [45].

43. *Id.*

44. *Id.*

45. *Id.* at [26] (citing *In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society* [1959] Ch. 220, 227).

Enemy Occupation or Control – which requires restitution of the looted Nazi art⁴⁶ – and the 1963 British Museum Act – which prohibits restitution of the looted Nazi art⁴⁷? The answer lies in an analysis of the British Parliamentary system and the role of the British Courts.

One of the most basic tenants enshrined in the unwritten constitution of the United Kingdom, is that Parliament, which consists of the House of Commons and the House of Lords, is legally both supreme and sovereign⁴⁸ to the other branches of government. Unlike the American check-and-balance division of power that limits our Congress, in the United Kingdom, the rule is that any law enacted by the Parliament must be obeyed by the courts;⁴⁹ thus, the courts have no power of judicial review over the acts of Parliament.⁵⁰ Also, unlike their Congressional American counterpart, there are no restrictions on the power of Parliament to make or unmake any law other than a prohibition from enacting any law that binds a successor Parliament, because to do so would necessarily limit the legislative supremacy of that successor Parliament.⁵¹

Accordingly, in cases where the Court is required to consider two conflicting Acts of Parliament and to apply one over the other, the Court employs a simple 'latest in time test' and will rule that the latest Act *impliedly repealed* the earlier Act.⁵² This principle applies not only when an Act expressly amends or repeals an earlier Act, but it also applies where a later Act is inconsistent with an earlier one even if it is silent as to naming the earlier Act.⁵³ Thus, a new law impliedly repeals an old one, if the new statutory provision is inconsistent with, or repugnant to, the continued existence of the old⁵⁴ based upon the maxim "*leges posteriores priores contrarias abrogant*."⁵⁵

In light of the above, one can better understand how and why the Court ruled as it did in *Her Majesty's Attorney-General v. The Trustees of the British Museum*. Essentially, by applying the 'latest in time test,' the Court ruled that the 1963 British Museum Act *impliedly repealed* the 1943 Inter-Allied Declaration to the extent that the earlier Act required the British Museum to dispossess itself of a part

46. London Declaration, *supra* note 12.

47. *Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [36]-[47].

48. "[S]upremacy" connotes [that it is] a body which is hierarchically above all others or which has an authority greater than that of its rivals. [In contrast,] 'sovereignty' . . . suggests omnipotence [or] the ability to do anything. ENGLISH PUBLIC LAW 142-43 (David Feldman ed., Oxford Univ. Press 2004).

49. Arguably, the legislative supremacy of Parliament has been eroded by the enactment of the Human Rights Act 1998 and the European Communities Act 1972, however, discussion of this matter is outside the scope of this article.

50. ENGLISH PUBLIC LAW, *supra* note 49, at 143.

51. *Id.*

52. *Vauxhall Estates, Ltd. v Liverpool Corp*, [1932] 1 K.B. 733, 743-4.

53. *Dean of Ely v Bliss*, (1842) 49 Eng. Rep. 700, 702 (Ch.).

54. 44(1) HALSBURY'S LAWS OF ENGLAND ¶ 1299 (Lord Hailsham of St. Marylebone ed., 4th ed. reissued 1995), *see also* *Churchwardens and Overseers of West Ham v Fourth City Mutual Building Society* [1892] 1 Q.B. 654, 658.

55. *Vauxhall Estates*, [1932] 1 K.B. at 743-4.

of its collection in violation of the later Act – irrespective of the fact that it was looted Nazi art. Note however, the Court ruled that the Inter-Allied Declaration was repealed only to the extent that it was inconsistent with the 1963 British Museum Act; thus, the Inter-Allied Declaration, as a whole, was not repealed, only that part that was inconsistent with the later act.⁵⁶ Accordingly, the Inter-Allied Declaration is still enforceable in the United Kingdom, provided that it is not invoked to recover objects that have been vested to the Trustees of the British Museum.

E. Application of Her Majesty's Attorney-General v. The Trustees of the British Museum to Celebrity Pieces in its Collection such as the Parthenon Marbles, the Rosetta Stone, and the Sphinx's Beard

The judgment of the London High Court of Justice, is a precedent that does not bode well for those pressing for the repatriation of the Parthenon Marbles to Greece, the Rosetta Stone and Sphinx's Beard to Egypt, and other celebrity pieces in the museum's collection. Neither does it bode well for any individual⁵⁷ seeking the return of personal property wrongfully in the possession of the Museum. In the present case, the Trustees were barred by law from returning four Old Master drawings that were undisputedly looted by the Nazis and wrongfully purchased and/or acquired by the British Museum. It was not enough that the Trustees, by their own admission, felt morally obligated to return the drawings to the heirs of rightful owner.⁵⁸ It was not enough that a plethora of international laws and accords had been ratified to protect Holocaust survivors and their heirs from third parties who wrongfully acquired the art.⁵⁹ Incredibly, in fact, the most obvious violation of international law was completely ignored by the Court, namely by allowing the Museum to retain the drawings the Court was allowing the British Museum to profit from the acts of the Nazi looting. Indeed, all of the above were irrelevant to the Court. What was relevant to the Court was only the 1963 British Museum Act and the Court's determination that it would take a special act of Parliament to allow the Nazi looted art to be returned.

For disputed celebrity pieces, such as the Parthenon Marbles, where the Trustees have bitterly opposed the Greek claims for repatriation over the past several decades, the decision gives the British Museum peace of mind. It also allows the Trustees the opportunity to change their collective minds, if they so choose, and take the moral high ground by stating that they believe the sculptures should be returned to Greece (or the Rosetta Stone or the Sphinx's Beard to Egypt, etc.), because the new ruling prohibits them from returning *any* pieces in the Museum's collection, because such would require a special act of Parliament to be accomplished in accordance with the maxim *leges posteriores priores contrarias abrogant*.

56. *Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [45] (stating that moral reasons are insufficient to justify the disposition of property originally looted by Nazi invaders).

57. Or their heirs.

58. *Trustees of the British Museum*, [2005] EWHC, *supra* note 9, at [40]-[41].

59. See, e.g., London Declaration, *supra* note 12.

One can see that this ruling was not simply about the four drawings looted by the Nazis. In fact, although carefully omitted from the text itself, the reason it was advanced at all in the Courts was not to prevail (*i.e.*, to win the case and have the Court rule that the Trustees were allowed to return the looted Holocaust paintings to the heirs of the rightful owner), but rather to lose and to set a precedent that would bar the Trustees from returning their most prized sculptures in the Museum's collection: the Parthenon (a/k/a "Elgin") Marbles. This author does not normally subscribe to conspiracy theories, however, such claim is based upon the specific conduct of the Attorney-General in this case, Lord Goldsmith, who "asked the high court to rule on the drawings after concerns that their return to the heirs of the original owners could create a legal opening for Greece to pursue its claim to the Parthenon marbles."⁶⁰

In light of the above, the ruling denying the return of the drawings to the rightful heirs of the Holocaust victim was a morally bankrupt decision that granted the British Museum a *carte blanche* to own Nazi looted art – in clear violation of international law. It was also a carefully planned and executed plot to ensure the Parthenon Marbles and other celebrity pieces stay in London. Finally, the reader need also be aware of the fact that from my personal contacts in London, I have confirmed that the decision was not challenged on appeal; I leave the reason for that to your imagination.

II. TO WHAT DEGREE IS THE VALUE AND IMPORTANCE OF A UNIVERSAL MUSEUM REDUCED WHEN IT IS ESTABLISHED THAT THEY KNOWINGLY ACQUIRED LOOTED ARTIFACTS?

A. The Universal Declaration

The recent international trend in litigating disputes involving looted artifacts, has not been ignored by the Universal Museums. Indeed, instead of remaining quiet, passively involved in the debate and generally continuing their collective disposition of avoiding direct confrontation with the cultural nationalists, the "International Museum Community" took the offensive in 2002 by preparing a "Declaration on the Importance and Value of Universal Museums,"⁶¹ the verbatim text of which is reproduced below in its entirety.

The international museum community shares the conviction that illegal traffic in archaeological, artistic, and ethnic objects must be firmly discouraged. We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era. The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones.

60. *Ruling Tightens Grip on Parthenon Marbles*, GUARDIAN UNLIMITED, May 27, 2005, <http://www.guardian.co.uk/parthenon/article/0,12119,1494099,00.html>.

61. DECLARATION ON THE IMPORTANCE AND VALUE OF UNIVERSAL MUSEUMS, http://www.clevelandart.org/museum/info/CMA206_Mar7_03.pdf [hereinafter Universal Declaration].

Over time, objects so acquired—whether by purchase, gift, or partage—have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them. Today we are especially sensitive to the subject of a work's original context, but we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source.

The universal admiration for ancient civilizations would not be so deeply established today were it not for the influence exercised by the artifacts of these cultures, widely available to an international public in major museums. Indeed, the sculpture of classical Greece, to take but one example, is an excellent illustration of this point and of the importance of public collecting. The centuries-long history of appreciation of Greek art began in antiquity, was renewed in Renaissance Italy, and subsequently spread through the rest of Europe and to the Americas. Its accession into the collections of public museums throughout the world marked the significance of Greek sculpture for mankind as a whole and its enduring value for the contemporary world. Moreover, the distinctly Greek aesthetic of these works appears all the more strongly as the result of their being seen and studied in direct proximity to products of other great civilizations.

Calls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation. Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. Each object contributes to that process. To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all visitors.⁶²

The Declaration was signed by the Directors of eighteen of the largest museums in the world.⁶³

The Universal Declaration is a perfect summary of the position of the cultural internationalist. Themes of global education, preservation, contribution to study and appreciation of the achievements of the source nation (and all of mankind) are beautifully woven together into a warm blanket that instills a sense of gratitude in

62. *Id.*

63. *Id.* The signatories are listed as: The Art Institute of Chicago; Bavarian State Museum, Munich (Alte Pinakothek, Neue Pinakothek); State Museums, Berlin; Cleveland Museum of Art; J. Paul Getty Museum, Los Angeles; Solomon R. Guggenheim Museum, New York; Los Angeles County Museum of Art; Louvre Museum, Paris; The Metropolitan Museum of Art, New York; The Museum of Fine Arts, Boston; The Museum of Modern Art, New York; Opificio delle Pietre Dure, Florence; Philadelphia Museum of Art; Prado Museum, Madrid; Rijksmuseum, Amsterdam; State Hermitage Museum, St. Petersburg; Thyssen-Bornemisza Museum, Madrid; and Whitney Museum of American Art, New York.

the reader for the benevolent acts of the museums. If one looks beyond the self-congratulatory and self-applauding tone of the document, however, an ironic flaw may be observed, not necessarily with the message, but rather with the messengers.⁶⁴

There is no denying the central role that the major museums of the world, the "Universal Museums," have had in allowing the artistic, scholarly and educational value of cultural property to be understood and appreciated on a global scale. By acquiring and displaying these treasures to the world, the museums not only fostered an opportunity for individuals to be awed and inspired by the aesthetic brilliance and achievement of the individual artist(s) who created the work(s), which instills and/or deepens an appreciation of the culture and history of the peoples who inspired such creation, but also, by displaying the treasures of one geographic group in close proximity to those of another geographic group, the museums have been successful in demonstrating the achievements of all of mankind. There is also no denying that these same museum practices have preserved priceless artifacts, enriched aesthetic sensibilities and encouraged cultural pluralism;⁶⁵ international scholarly access to the cultural properties being core to all the above. That they have enriched and enlightened is a fact, but at what cost?

There is another side of Universal Museums that deserves the harshest of criticism and scorn; namely, their practice of acquiring looted property. The pending criminal trial in Rome, Italy of Dr. Marion True, former curator of antiquities at the J. Paul Getty Museum in Los Angeles, for criminal association and receipt of stolen property, is a leading example of contemporary theft and corruption at the highest levels.⁶⁶ Ms. True is accused of working hand-in-hand with art dealers known for acquiring rare and valuable pieces that have never been cataloged by source nations before; *i.e.*, pieces that would not be found on any country's "stolen artifact" list... in other words: looted artifacts.⁶⁷

Artifact rich countries such as Italy, Egypt, and Greece are the most frequent victims of these thefts.⁶⁸ Tomb-raiders or archeological looters simply obtain new finds, smuggle them out of the country, pass them on to dealers, and then share in the profit when museums purchase them from the dealers – on the "good faith" word of the dealer that the dealers have good title. Source countries who learn of these items being housed in a foreign museum, might believe them to be illicitly transferred from their country, but the burden is on the source nation to prove that they were stolen from their country – who, what, when, how and all the evidence

64. *Cf. John 8:8* (Let he who is without sin cast the first stone).

65. Karen J. Warren, *A Philosophical Perspective on Ethics and Resolution of Cultural Properties Issues*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 1, 6 (Phyllis Mauch Messenger ed., 2d ed 1999).

66. Elisabetta Povoledo, *Italy Sends A Warning With Getty Trial*, *INT'L HERALD TRIB.*, Nov. 17, 2005, at 3.

67. *Id.*

68. See generally Michael J. Reppas II, *supra* note 3.

necessary to support the claim of illicit transfer and lack of proper title are what they must prove when asserting their claims.⁶⁹

B. The J. Paul Getty Museum

To illustrate the point further, consider that in 1988 the J. Paul Getty Museum purchased a collection of some 300 classical antiquities from Lawrence and Barbara Fleischman,⁷⁰ the value of which was estimated to be \$60 to \$80 million.⁷¹ It was later established that “[m]ore than 85% [of the Fleischman collection] has surfaced with no provenance at all... [and] more than 90% of the objects... had ‘surfaced’ [for the first time in] 1974.”⁷² This is not proof that the items were looted, but it certainly raises suspicion. Seventeen years later, lawyers for the J. Paul Getty Museum publicly admitted that half of the masterpieces in their antiquity collection were bought from dealers suspected of selling artifacts embezzled from Italy.⁷³ Again, not proof that any particular items were looted, but this admission certainly placed in question the provenance of all the items in the antiquities collection. To say the least, the corruption, scandalous arrangements, and outrageous conduct of leading art dealers, curators and trustees – the same individuals responsible for stocking the museums of their prized collections – has cast a dark shadow over the legitimacy of museum collections.

69. Consider the case of the 7 ½ - foot statue of the Goddess Aphrodite that the Getty purchased for \$18 million in 1986. The statue is one of the most prized possessions of the Getty's antiquities department. In her proposal to the Board requesting authorization for the purchase, the Getty's curator stated that the statue “would not only become the single greatest piece of ancient art in our collection; it would be the greatest piece of classical sculpture in this country and any country outside of Greece and Great Britain.” Ralph Frammolino & Jason Felch, *A Times Investigation; The Getty's Troubled Goddess; Evidence Mounts that the Centerpiece of Its Antiquities Collection, Acquired Despite Several Warnings, was Looted*, L.A. TIMES, Jan. 3, 2007, at A1. At the time, the proposed purchase seemed almost too good to be true, because such a piece was not known in the international community before the Getty purchase and it would indeed be the centerpiece of the Museum's collection. There was also, however, a significant sign that the piece was illicitly transferred as “[t]here was dirt in the folds of the gown, and the torso had what appeared to be new fractures, suggesting that the statue had been recently unearthed and broken apart for easy smuggling.” Luis Monreal, director of the Getty Conservation Institute, quoted in *The Getty's Troubled Goddess*. *Id.* at A1. In the twenty years since purchasing the statue, “the museum has defended the statue's legality, [by] relying on the dealer's assertion that it came from a Swiss collector. That collector has said it had been in his family since 1939, the year it became unlawful to excavate and export antiquities from Italy without government permission. To claim the object, Italian officials would have to establish that the statue had been found in their country and removed sometime after 1939, something the Getty says the officials have never convincingly done.” *Id.* As the investigation continues, however, it appears more and more likely that the piece was looted and illegally smuggled out of Italy in the mid-1980s. Ralph Frammolino & Jason Felch, *A Times Investigation; The Getty's Troubled Goddess; Evidence Mounts that the Centerpiece of Its Antiquities Collection, Acquired Despite Several Warnings, was Looted*, L.A. TIMES, Jan. 3, 2007, at A1.

70. Barbara Fleischman was a trustee of the J. Paul Getty Museum until she resigned in January of 2006 after it was confirmed that part of the collection she sold to the museum included a stolen ancient Roman sculpture. *Getty Trust Board Member Resigns*, L.A. TIMES (AP), Jan. 26, 2006.

71. Andrew L. Slayman, *The Trial in Rome*, ARCHAEOLOGICAL INST. OF AM., Feb. 6, 2006, <http://www.archaeology.org/online/features/italytrial/>

72. *Id.*

73. *Getty Bought From Suspected Looters*, L.A. TIMES (AP), Sept. 26, 2005.

Over the last decade, the Italian government has launched a public war against the J. Paul Getty Museum to have its looted antiquities returned, encouraged a series of civil and criminal lawsuits against the museum and its curators in the U.S. and abroad. For example, in a well publicized event in April 2004, the Italian government requested the U.S. Attorney for the Central District of California to file a forfeiture complaint against the J. Paul Getty Museum to recover an ancient Greek jar, known as the "Asteas krater," as stolen property belonging to the Republic of Italy. The suit alleged that the jar had been illegally excavated and exported from Italy.⁷⁴ On November 7, 2005, the Getty responded by transferring three objects to the Italian government, including the Asteas krater.⁷⁵ In a second event, after a ten-year investigation, in March 2005 a Roman court charged Marion True, Getty's former curator of antiquities, with criminal charges of knowingly receiving stolen goods.⁷⁶ As the criminal trial proceeded against Ms. True, on June 21, 2006, the Getty (not a named Defendant) *sua sponte* announced that it would return a "number of very significant objects, including several masterpieces" to Italy.⁷⁷ No admission of wrongdoing or of any liability for the museum's acquisition of the pieces accompanied this voluntary return; rather the stated reason was only to assure future collaboration among the parties.⁷⁸

Greece has followed the lead of the Italians and has also aggressively pursued contested pieces in the J. Paul Getty Museum collection. In November 2005, after nearly a decade of diplomatic efforts between the Greek Ministry of Culture and the Getty Museum proved fruitless, Greece announced that it had decided to litigate its dispute with the museum over looted artifacts purchased by and displayed in the museum.⁷⁹ Shortly thereafter, on July 10, 2006, an agreement was reached between the parties, and the museum voluntarily returned two of the disputed objects.⁸⁰ A few months thereafter, in December 2006, the Greek government filed criminal charges against Marion True, the museum's former curator; leading the way for probable future claims against the Museum.⁸¹

In light of the criminal charges brought by the Italian and Greek governments against Ms. True, it might seem on the surface that she was the sole cause of the

74. Press Release J. Paul Getty Trust, Statement Regarding Returned Objects From the Getty (Nov. 7, 2005) http://www.getty.edu/news/press/center/statement05_getty_returns_objects110705.html.

75. *Id.*

76. See Slayman, *supra* note 71 (note, the filing of the criminal lawsuit *preceded* the transfer of the Asteas Krater).

77. Press Release, J. Paul Getty Trust, The J. Paul Getty Trust and the Italian Ministry of Culture
 Issue Joint Statement (June 21, 2006)
http://www.getty.edu/news/press/center/statement06_getty_italiancultureministry.html.

78. Ralph Frammolino and Jason Felch, *Greece Vows Legal Action Against Getty*, L.A. TIMES, Nov. 23, 2005, at A10.

79. *Id.*

80. Press Release, J. Paul Getty Trust, Hellenic Republic Ministry of Culture and J. Paul Getty Trust
 Joint Statement (July 10, 2006)
http://www.getty.edu/news/press/center/statement06_getty_greekcultureministry.html.

81. Jason Felch & Ralph Frammolino, *Getty Lets Her Take Fall, Ex-Curator Says*, L.A. TIMES, Dec. 29, 2006, at B1.

illegal trafficking of antiquities that filled the museum's collection. However, one must reserve judgment on Ms. True, until the criminal trials run their course and the involvement of others, if any, is determined. For her part, Ms. True claims that the museum knew of all her activities, approved all her purchases and, therefore, shares any blame that may be ascribed to her.⁸² In support of her claims, the Los Angeles Times explained that, as the museum's antiquities curator from 1986 to 2005, "True was responsible for recommending what objects should buy from private dealers and at public auctions. The decision to approve her recommendations rested with the museum director, the Getty Trust's chief executive and members of the board of trustees."⁸³ It should be noted, at the time of this article's publication, that the J. Paul Getty Museum has not commented on the validity of the criminal charges against Ms. True by the Italian or Greek governments, nor has it been named as a co-defendant in any pending actions against Ms. True.⁸⁴ The Getty has, however, returned thirty contested antiquities to both Italy and Greece in recent months,⁸⁵ leading to more suspicion as to their knowledge and acquiescence of True's conduct.

C. The Metropolitan Museum of Art

The Metropolitan Museum of Art in New York (the Met) has also been the subject of Italian demands for repatriation of items in its collection.⁸⁶ In late 2005, lawyers for the Italian Ministry of Culture claimed that the Met had twenty-two⁸⁷ pieces in its antiquities collection that were looted from Italy.⁸⁸ Although the museum admitted that it was unsure of the disputed pieces' provenance, just as with its Universal Museum sister the J. Paul Getty Museum, the position of the museum was that "Italy would have to provide 'incontrovertible evidence'" that any of the disputed pieces were illegally excavated before the museum would consider any further action.⁸⁹ Three months later, on February 2, 2006, the Met offered to return twenty of the disputed artifacts in exchange for long-term loans of other artworks and participation on archaeological digs in Italy.⁹⁰ The joint

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Alan Riding, *Why 'Antiquities Trials' Focus on America*, N.Y. TIMES, Nov. 25, 2005, at A4, available at <http://www.nytimes.com/2005/11/25/arts/design/25muse.html>.

87. "The disputed items included a 2,500 year-old vase painted by the Greek artist Euphronios, a 15-piece set of Hellenistic silver and four ancient pots." Vernon Silver & Stephen West, *Metropolitan Museum Offers To Return 20 Disputed Works to Italy*, BLOOMBERG.COM, February 2, 2006, available at <http://www.bloomberg.com/apps/news?pid=10000088&sid=aqrKfX2wmyRw&refer=culture>.

88. See Riding, *supra* note 86.

89. *Id.*

90. See Silver & West, *supra*, note 87. Note that the original position of the Met with respect to one piece in the collection was that the item was previously purchased by Robert Hecht, a U.S. dealer, and that the Met was a good faith purchaser, because Hecht informed them that he purchased same from a Lebanese man whose father acquired it earlier in the century. Italian authorities, however, produced the handwritten memoir of the dealer, seized in a search of his Paris apartment, and expressly stated that the piece was first seen in the early 1970s in Switzerland where Giacomo Medici (an Italian art dealer who obtained looted artifacts directly from tomb raiders) had it kept in storage. The Met purchased the

statement by the Met and the Italian Ministry of Culture stated that the agreement reached "redresses past improprieties in the acquisitions process through a highly equitable arrangement."⁹¹ It must also be noted that the Met has faced similar trustee scandals and looted artifacts claims⁹² to the J. Paul Getty Museum. In fact, many of the claims involve the same dealers and tomb raiders who are involved in the Getty scandals.⁹³

D. Additional American Museums

Other American museums, including The Boston Museum of Fine Arts, have faced similar claims from Italy for allegedly harboring stolen antiquities.⁹⁴ Accordingly, the question then begs as to why American museums are the focus of so many current looting claims. The answer seems to be that American museums, unlike, for example, the British Museum, the Louvre and the Pergamon, that built their collections from 19th and early 20th Century spoils of war, have been forced to build their collections in an environment where source nations have well established laws in effect that deem all new finds to belong to the government and require same some to stay in the country of origin.⁹⁵ Thus, the acquisition of new pieces by an American museum, especially valuable pieces, comes immediately to the attention of foreign governments who can investigate the provenance of such pieces and make a determination as to whether they believe same were looted. The older, Universal Museums, are not under the same type of pressure or scrutiny, even though the pieces comprising their collections were similarly carted away from source nations years back, because their collections are well known throughout the world. The Director of the Louvre in Paris distinguishes the older and newer Universal Museums by stating that "[o]ur works were acquired in a legal way according to the practice at the time."⁹⁶ The reality is, however, that the European museums do not need to stock their collections today, so it is easy for them to take the "moral high ground" and claim that *their* acquisition practices – regardless of their similarity to those of the newer museums – are somehow

pot for \$1 million in 1972. Note further, Medici has been convicted by Italian authorities for trafficking in stolen artifacts and, at the time of this article's publication, was appealing his conviction and 10 year sentence; Hecht is still on trial in Rome along with Marion True.

91. Press Release, Metropolitan Museum of Art, Statement by the Metropolitan Museum of Art on its Agreement with Italian Ministry of Culture, (Feb. 21, 2006) <http://www.metmuseum.org>.

92. For example, consider the case of the Golden Chariot, the centerpiece of a new exhibition at the Met set to open in the Spring of 2007. In this case, a farmer near Umbri found the 6th century B.C. artifact and sold it to a dealer – for two cows. One year later, the Met purchased it from the dealer. The Italians claim that this too was illegally smuggled out of the country. See Richard Owen, *Why Covet Ancient Chariots...*, TIMES ONLINE, Jan. 5, 2007, <http://www.timesonline.co.uk/tol/business/markets/europe/article1289575.ece>.

93. *Id.*

94. On September 28, 2006, The Boston Museum of Fine Art returned 13 disputed artifacts to Italy only months after Italy first requested they be returned as looted items. See *Boston Museum Returns 13 Disputed Artifacts to Italy In Exchange For Loans*, Sept. 28, 2006, INT'L HERALD TRIBUNE; see also Ralph Frammolino & Jason Felch, *Boston Museum Returns 13 Antiquities to Italy*, L.A. TIMES, Sept. 29, 2006, at A4.

95. Riding, *supra* note 86.

96. *Id.* (quoting Henri Loyrette, Director of the Louvre).

forgiven or beyond reproach solely because of the date such pieces were acquired.⁹⁷

E. Universal Museums - Conclusion

The recent international movement to demand the return of and to litigate disputes involving looted artifacts was not ignored by the combined "Universal Museums," *but perhaps it should have been*, at least insofar as applying a little forethought before drafting and issuing the Universal Declaration. One would think that authors taking this "white knight" approach to the debate would have been careful to ensure that their own past conduct conformed with the "conviction" stated in their manifesto that illegal trafficking of archeology and art must be stopped – but that was not the case. In the short time following the publication of the document, three of the architects have been exposed for their involvement in a plethora of illicit trafficking scandals and one former curator is a criminal defendant in two separate trials, in two separate countries, for conspiracy and trafficking in looted art. As the trials and investigations continue, we should expect more indictments and lawsuits to follow.

It would seem to reason that all museums, regardless of their age, must be held to the highest of standards when considering their past acquisition practices and must ensure that their collections are irreproachable, because the integrity of all museums and the provenance of their collections are at stake. Nonetheless, the reality is that source nations rich in cultural property cannot possibly litigate, let alone investigate, every piece in every collection on display in every museum around the world. Not to mention the fact that they would likely not even know about pieces not on display, but those which are stored in museum basements⁹⁸ or otherwise housed in private collections outside the purview of the general public – and the Universal Museums know this. Suffice it to say, that legal challenges will be brought in few instances of special significance. Further, considering that the burden is on the source nations to prove illicit transfers, the museums might feel that the odds are in their favor that ownership of the vast majority of their pieces will never be challenged, let alone proven to have been looted. If this is the course that they chose to follow, they will continue to play dodge-ball until more and more evidence, and scandals, are discovered and brought into the public spotlight.

It is this author's opinion that it is incumbent upon all museums to engage in a serious internal reexamination of the provenances of all pieces of antiquities in their collections, as well as the history of their acquisitions, and to be forthcoming to source nations, and to the world as to the results thereof. Only such an approach will remedy the damage that has, *and will continue to* tarnish their reputations.

97. See *id.* (quoting Neil Brodie, Research Director of the Illicit Antiquities Research Center in Cambridge, England).

98. The practice of hoarding cultural objects "serves no discernible domestic purpose other than asserting the right to keep ... [the objects]. Thus, multiple examples of artifacts of earlier civilizations reportedly are retained by some nations although such works are more than adequately represented in domestic museums and collections and are merely warehoused, uncatalogued, uninventoried and unavailable for display or for study by domestic or foreign scholars." John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 847 (1986).

More importantly, only such an approach will affirmatively resolve the proper disposition of their pieces and will rightly return looted artifacts to their countries of origin without need of litigation. Universal Museums should be reminded that white knights, must, at all times, be honorable and irreproachable.

III. INTERNATIONAL TREND/MOUMENT TO VOLUNTARILY REPATRIATE ITEMS OF CULTURAL PROPERTY TO COUNTRIES OF ORIGIN

Over the last two decades a growing number of incidents involving the voluntary return of items of cultural significance to countries of origin from governments, museums, and individuals have occurred throughout the world. These acts of voluntary repatriation have all occurred extrajudicially and demonstrate an emerging norm in the international community favoring the voluntary return of cultural property to its country of origin. Parts A through C of this section provide a few examples in each category;⁹⁹ voluntary returns by governments (including the British Government's return of the Coronation Stone to Scotland and the Italian Government's return of the Axum Obelisk to Ethiopia); voluntary return by museums (including the University of Heidelberg's return of a fragment of the Parthenon to Greece, Emory University's return of the mummy of Ramses I to Egypt, and Johns Hopkins University's return of a 9th Century Koran to Turkey); and voluntary returns by individuals (including a Swedish woman's voluntarily return of a piece of the Erechtheion to Greece, a British art dealer's return to Greece of a Nazi looted artifact, and the donations of artifacts discovered by private citizens to the Government of Greece).

Part D of this section considers the most famous case of restitution by theft involving a Mayan Codex which was alleged to have been looted from Mexico 150 years before it was subsequently "liberated" from the National Library in Paris and voluntarily donated to the Mexican government by the thief. The significance of this incident lies in the ultimate disposition of the artifact and the tacit agreement of the French Government that the return to Mexico of this treasure was proper.

Finally, Part E of this section considers the November 2006 passage of the United Nations Resolution: *Return or Restitution of Cultural Property to the Countries of Origin*¹⁰⁰ and its impact on the existing body of international law regarding cultural property.¹⁰¹ Taken together, the acts of voluntary repatriation

99. Note that the examples provided in each of the three categories are in no way meant to serve as an exhaustive list of all such voluntary returns that have occurred over the last two decades; they are merely some of the more prominent examples of same.

100. Return or Restitution of Cultural Property to the Countries of Origin, G.A. Res. 61/52, U.N. Doc A/RES/61/52 (Feb. 16, 2007). See discussion *infra* §III, part D.

101. The most prominent of such laws include: The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1972 Convention concerning the Protection of the World Cultural and National Heritage; the 1995 Convention on Stolen or Illegally Exported Cultural Objects; the 1997 Convention for Cultural Diversity and Tolerance; the 2001 Universal Declaration on Cultural Diversity the 2001 Convention on the Protection of the Underwater Cultural Heritage; the 2004 Convention on Jurisdictional Immunities of States and Their Property; and the 2005 Convention for the Safeguarding of the Intangible Cultural Heritage. See Return or Restitution of Cultural Property to the Countries of Origin, *supra* note 100.

described in this section demonstrate the world-wide consensus favoring the position of the cultural nationalist and supporting the purposes of contemporary international laws which mandate the return of illicitly removed cultural property to the source nations – regardless of the time of the original taking.

A. Voluntary Repatriation by Governments

1. The Coronation Stone

Scotland's "Stone of Destiny," a/k/a the "Stone of Scone," a/k/a the "Coronation Stone,"¹⁰² was returned to Edinburgh by the British Government in 1996.¹⁰³ The Stone had been carried off to London in 1296 by King Edward I as a spoil of war and later became part of the British throne.¹⁰⁴ The Stone was prized by the British for its legendary origin and had been a part of every British coronation since its original taking in the 13th Century.¹⁰⁵ The significance to Scotland, however, pre-dates that of the Brits by over 1,400 years to 840 AD when Scottish kings first began to employ the same as part of their enthronement ceremonies.¹⁰⁶ The return of the Stone to Scotland, after 700 years in London, was a celebrated event for cultural nationalists, because the Stone is seen as "the premier symbol of Scottish kingship and, consequently, an embodiment of [Scotland's] cultural and historical identity."¹⁰⁷ The British returned the Stone voluntarily, following thirteen years of heavy demands by Scottish nationalists,¹⁰⁸ as a gesture of goodwill to the Scottish people and a confident assertion of their full and equal partnership in the United Kingdom.¹⁰⁹

2. The Kenyan Obelisk

The 1,700 year-old, 160 ton, 78 ft., ornately decorated obelisk, known as the "Axum Obelisk," a/k/a the "Aksum Obelisk," is regarded as one of Ethiopia's national religious treasures,¹¹⁰ and was added to UNESCO's World Heritage List in 1980.¹¹¹ The Obelisk was looted in 1937 by Italian Dictator Benito Mussolini

102. The Stone is believed to be the biblical Jacob's Pillow. See *Genesis* 28:10-12 (King James) (when Jacob dreamed of a ladder to heaven he took the stones of that place and put them for his pillows and lay down in that place to sleep).

103. Richard Blystone, *Scotland's 'Stone of Scone' Finds its Way Home*, CNN WORLD NEWS, Nov. 15, 1996, <http://www.cnn.com/WORLD/9611/15/stone.of.scone/>.

104. See Barkan, *supra* note 6.

105. The last being to Queen Elizabeth II in 1953. See Blystone, *supra* note 103.

106. See ADJOURNMENT DEBATE, 16 JULY: STONE OF DESTINY 1 (1996), available at <http://www.scotlandoffice.gov.uk/freedom-of-information/document.php?release=11&doc=56>.

107. *Id.* at 1.

108. See Barkan, *supra* note 6, at 31.

109. See ADJOURNMENT DEBATE, *supra* note 106, at 1. It is interesting to note that the Stone was stolen by Scottish nationals in 1950, although recovered and returned to Westminster Abbey three years later. See Philip Coppens, *The Stone of Destiny: Sacred Kingship in the 21st Century*, http://www.philipcoppens.com/stone_destiny.html (last visited Oct. 6, 2007); see also discussion *infra* § III, part D (regarding Repatriation By Theft).

110. *Final Obelisk Section in Ethiopia*, BBC NEWS, Apr. 25, 2005, <http://news.bbc.co.uk/2/hi/africa/4472259.stm>.

111. See UNESCO's World Heritage List, <http://whc.unesco.org/en/list/15> (last visited Jan. 25, 2007) (regarding Aksum, Ethiopia).

during his short occupation of Ethiopia.¹¹² The city of Axum, where the obelisk was created, was the capital city of the ancient Axumite kingdom (1st Century AD), and the birthplace of the biblical Queen of Sheba.¹¹³ The cultural significance of the Axum Obelisk to the people of Ethiopia is tremendous because it represents their ethnic identity.¹¹⁴ Indeed, Axum is legendary for having been the city where King Solomon brought the Ark of the Covenant, and the Obelisk represents one of the few tangible historic monuments that link its present citizens to their famous ancestors.¹¹⁵ The voluntary return of the Obelisk by the Italian Government in 2005 was hailed as a significant achievement for world-wide repatriation efforts.

B. Voluntary Repatriation by Museums

1. Piece of the Parthenon Frieze Returned to Greece

On January 22, 2006, the University of Heidelberg announced that it would return a piece of the Parthenon's north frieze to Greece "in recognition of the significance of the Parthenon as part of the world's cultural heritage."¹¹⁶ The University expects the Greek Ministry of Culture to donate a replacement work of art to its Collection of Antiquities in return for the Parthenon fragment "in accordance with the current international practice."¹¹⁷ Indeed, Greece has promised to the world that for every piece of the Parthenon returned, it will offer another antiquity to the donor in a goodwill gesture.¹¹⁸ The return of this fragment marks the second significant return in the last few years of Parthenon pieces taken abroad¹¹⁹ and continues to lend support to the cultural nationalists who demand that every missing piece of the Parthenon be returned to Greece, most particularly, those pieces known as the "Parthenon Marbles," a/k/a the "Elgin Marbles," that were looted by Lord Elgin in the early 20th Century and remain in London under lock and key at the British Museum.¹²⁰

112. Verity Murphy, *Obelisk Points To Ancient Ethiopian Glory*, BBC NEWS, Apr. 11, 2005, <http://news.bbc.co.uk/2/hi/africa/4376627.stm>.

113. *Id.*

114. *Final Obelisk Section in Ethiopia*, *supra* note 110.

115. See Murphy, *supra* note 112. Murphy notes that another significant voluntary return of a historic relic, a 400 year-old replica of the Ark of the Covenant (known as a "tabot"), was returned to Ethiopia in 2002 after having been pillaged by British forces in the early 19th Century along with scores of other treasures (including ten other tabots, 500 ancient parchment manuscripts, gold crowns, crosses, *inter alia*) from the Ethiopian fortress of Maqdala. Scotland voluntarily returned the historic relic; the remainder of the looted artifacts remain spread out in museums throughout England. *Id.*

116. Press Release, Univ. of Heidelberg, University of Heidelberg Returns Fragment of Parthenon Sculptures to Greece Permanently (Jan. 11, 2006), http://www.uni-heidelberg.de/press/news/news06/2601par_e.html.

117. *Id.*

118. Christy Papadopoulou, *Parthenon Fragment Returns Home*, ATHENS NEWS, Sept. 8, 2006, at A29, [available at http://www.athensnews.gr/athweb/nathens.print_unique?e=C&f=13199&m=A29&aa=1&eidos=A](http://www.athensnews.gr/athweb/nathens.print_unique?e=C&f=13199&m=A29&aa=1&eidos=A).

119. See *infra* § III, part C(1).

120. Greece's claims for the return of the Parthenon Marbles from England are the *cause celebre* of the repatriation movement, and, arguably, the most significant of all claims by countries of origin for their looted cultural treasures, because if Greece is successful in her efforts, it is believed that the precedent would be set and the domino effect would follow causing International Museums to empty

2. Ramses I Mummy Returned to Egypt

The tomb of Ramses I, a pharaoh who ruled in the 14th Century BC, was looted from Egypt in the early 1860s and was thereafter purchased by a Canadian Niagara Falls Museum.¹²¹ The mummy was later sold to the Michael C. Carlos Museum at Emory University in Atlanta in 1999.¹²² The identity of the mummy was unknown up to this point. After determining that the relic might be royal, the Michael C. Carlos Museum worked with the Egyptian Supreme Council of Antiquities, eventually confirming (with 95% certainty) that the mummy was, indeed, Ramses I.¹²³ After same was authenticated, the Museum voluntarily returned the mummy to Egypt.¹²⁴ The return to Egypt of this cultural treasure was quite significant and was an event that internationally recognized the continued right of the artifact-rich country to reclaim its looted history.

3. 9th Century Koran Returned to Turkey

A section from a rare ninth century Koran, appraised at \$2.9 million, was donated to Johns Hopkins University in 1942.¹²⁵ The section, 18 chapters in total, disappeared from Turkey sometime after 1756; the remainder of the Koran remained in Istanbul.¹²⁶ The Turkish Government officially requested the return of the missing sections in June of 1999.¹²⁷ After acknowledging that the University had no role in the disappearance, Johns Hopkins voluntarily returned the chapters in February 2000.¹²⁸ The missing pages are presently on display with the rest of the holy book at an Istanbul museum.¹²⁹ The voluntary reunification of the holy book marks another achievement for cultural nationalists.

C. Voluntary Repatriation by Private Individuals

1. Piece of Erechtheion Returned to Greece

In November 2006, a Swedish woman voluntarily returned a piece of the Erechtheion to Greece that was taken from the Acropolis in Athens by her uncle, a

their trophy cases. See Michael J. Reppas II, *supra* note 3, at 915-17.

121. Dawn Walton, *Mummy of Pharaoh Headed Back to Egypt*, CHI. SUN TIMES, July 12, 2002, at 4.

122. *Egypt's Mummy Returns To Home*, AUGUSTA CHRON (AP), Oct. 28, 2003, at B05.

123. *Id.* The Egyptian authorities confirmed the authenticity through the following techniques: confirming that the mummification technique was consistent with the era of Ramses I; confirming that the body was wrapped with its arms crossed, a sign of royalty; comparing the skull of the mummy to that of the son of Ramses I (whose remains were previously authenticated) and confirming the likeness of the two; by confirming through radiocarbon dating that same was from the time of Ramses I; and finally, by confirming that the location where the mummy should have been found in Egypt, had been looted in the past. See Walton, *supra* note 121, at 4.

124. See Walton, *supra* note 121, at 4.

125. Stephen Manning, *Johns Hopkins Returns Ninth-Century Koran to Turkey*, ASSOCIATED PRESS ARCHIVE, Feb. 28, 2000, <http://nl.newsbank.com> (enter "Hopkins Returns Ninth-Century Koran" in search box to access text of full article).

126. *Id.*

127. See John Bacon & Deborah Sharp, *Gold Koran*, USA TODAY, Feb. 29, 2000, at 03A.

128. *Id.*; see also Manning, *supra* note 125.

129. Manning, *supra* note 125.

Swedish naval officer, in 1895.¹³⁰ The benefactor stated that she returned the fragment because "she could not... keep 'what rightly belonged to the Greek people' [in good conscience]."¹³¹ The Greek Minister of Culture hailed the voluntary return and stated that "[t]he restitution of even the smallest fragment from the Parthenon and the Acropolis in general is of the highest value to us."¹³² The return signified another step in Greece's world-wide efforts to reunify the Parthenon Sculptures.¹³³

2. Nazi Looted Sculpture Returned to Greece

In 2005 a British ancient art dealer purchased a collection of antiquities from the widow of a Greek collector in Switzerland.¹³⁴ Shortly thereafter, the dealer learned that one of the pieces was stolen from the Samos Museum by the Nazi's in the Second World War.¹³⁵ The dealer immediately notified Greek officials and promptly arranged for the return of the sculpture.¹³⁶ The subsequent reward that was offered by the Greek government was politely refused;¹³⁷ an act that embodies the moral and ethical obligations of keepers of looted artifacts to repatriate illicitly removed treasures to their country of origin irrespective of any economic gain such individual might receive.

3. Greek Citizens Donate Found Antiquities to Greek Government

In March 2001, a group of Greek farmers accidentally unearthed a group of 37 marble statues and fragments of statues, dated at 2,300 years-old, on the island of Kalymnos.¹³⁸ The artifacts were valued at €1.2 million.¹³⁹ Upon receipt of the voluntary return, the Greek Government provided the farmers with a €300,000 reward for their prompt and honest acts.¹⁴⁰

In 1994, a Greek fisherman found a two meter bronze statue of a woman, believed to be an unknown work of the famed 4th Century BC sculptor Praxiteles.¹⁴¹ Just as with the goat herder, the fisherman donated the sculpture to

130. *Sweden to Return Acropolis Frieze to Greece*, AGENCE FRANCE PRESSE, Nov. 6, 2006, http://www.artinfo.com/articles/story/24431/Sweden_to_Return_Acropolis_Frieze_to_Greece.

131. Helena Smith, *Missing Their Marbles*, NEW STATESMAN, Oct. 23, 2006, <http://www.newstatesman.com/200610230026>.

132. Nicholas Paphitis, *Swedish Woman Returns Acropolis Heirloom to Greece*, ATHENS NEWS, Nov. 17, 2006, at A28, available at http://www.athensnews.gr/athweb/nathens.print_unique?e=C&f=13209&m=A28&aa=2&eidos=S..

133. See discussion *supra* § III, part B(1) and accompanying notes.

134. Helena Smith, *Return of Statue Raises Hopes in Greece*, THE GUARDIAN, June 17, 2005, http://www.guardian.co.uk/uk_news/story/0,3604,1508327,00.html.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Greek Farmers Share Relics Reward*, BBC NEWS, Feb. 17, 2002, <http://news.bbc.co.uk/2/hi/entertainment/1822681.stm>.

139. *Id.*

140. *Id.*

141. *Greece: Fisherman Nets Unusual Catch Near Kalymnos*, ARCHAEOLOGY NEWS, May 9, 2006, available at <http://www.archaeologynews.org/link.asp?ID=83246&Title=%C2%BB%20Greece:%20Fisherman%20>

the National Archaeological Museum in Athens and received a €440,000 reward from the Greek Ministry of Culture for his prompt and honest action as well as an award from the Athens Academy.¹⁴²

There are many such examples from Greece similar to those presented above, in part, because the Greek Government has made a concerted effort to call on the nationalistic sentiments of its citizens to voluntarily return unearthed treasures and her citizens continue to respond. The Government's strategy of rewarding its citizens for their good acts, along with the celebrity status that many of the individuals obtain through the media and elsewhere after their donations are made public, have reaped huge rewards for the Government, the national museums that house these discoveries, the academic students and scholars who study such artifacts, as well as the world-wide community of museum goers who view same.

D. Restitution Through Theft? Reflection of the Case of the Mayan Codex – Stolen, Re-stolen and Ultimately Returned to Mexico

The theft of a Mayan Codex¹⁴³ from the French National Library in Paris is one of the most interesting cases of Robin Hood repatriation that the antiquities world has ever produced. The Codex had been held in the possession of the French National Library for 150 years prior to its theft by a Mexican journalist in 1982.¹⁴⁴ The Codex was then donated by the thief to the National Institute of Anthropology and History in Mexico City.¹⁴⁵ This well publicized "international theft" quickly prompted the French Embassy in Mexico City to formally request the return of the Codex,¹⁴⁶ however, the Mexican government was "all too happy to be pressured by public opinion to retain [the Codex],"¹⁴⁷ especially when public opinion in Mexico overwhelmingly supported the thief, who became a Quixotic hero by making public statements such as "[i]t was stolen from Mexico... and now we have recovered stolen property."¹⁴⁸ Nearly twenty-five years after its return, the Codex remains in Mexico; the Mexican government claiming that it was stolen from Mexico in the 19th Century and stating, accordingly, that it would not be returned to Paris.¹⁴⁹ "[S]uch outright illegal act was possible only because it

nets%20unusual%20catch%20near%20Kalymnos. It is interesting to note that in addition to the significant monetary reward he received, the fisherman also received one of the highest awards from the Athens Academy for his prompt and honest act. See *Athens Academy Ceremony Honors Outstanding Contributions*, ATHENS NEWS AGENCY, Dec. 31, 1996, available at <http://www.hri.org/news/greek/ana/1996/96-12-31.ana.html>.

142. See *Greece: Fisherman Nets Unusual Catch Near Kalymnos*, *supra* note 141; *Athens Academy Ceremony Honors Outstanding Contributions*, *supra* note 141.

143. The codex, known as "Tonalamatli Aubin," was an 18-sheet document believed to have come from the Tlaxcala region in Mexico in the 15th Century, and consists of colored drawings that served as a horoscope. Alan Riding, *A Stolen Relic Is A Big Problem For Mexicans*, N.Y. TIMES, August 29, 1982, Section 1, p. 19.

144. *Id.*

145. Barkan, *supra* note 6, at 30.

146. Riding, *supra* note 143.

147. Barkan, *supra* note 6.

148. Riding, *supra* note 143.

149. Merryman, 80 AM.J. INT'L L. at 846, n. 53 (citing Alan Riding, *Between France and Mexico, a Cultural Crisis*, INT'L HERALD TRIB., Aug. 31, 1982, at 1.).

carried a justification that, at a fundamental level, both parties accepted. While the French could not publicly admit that they condoned restitution through theft, their relatively insignificant diplomatic protest suggested a deeper, moral agreement."¹⁵⁰ It appears that there is honor among thieves after all.

E. Recent International Laws Regarding Repatriation of Cultural Property

The November 2006 passage of the United Nations Resolution titled the *Return or Restitution of Cultural Property to the Countries of Origin*,¹⁵¹ is the most recent in a long string of international laws favoring cultural nationalism and demanding repatriation of looted artifacts to source nations. The Resolution, the tenth international agreement of its kind, recalled and reaffirmed nine international treaties¹⁵² which supported the return of cultural property to their countries of origin, and specifically called for continued cooperation between members of the United Nations and UNESCO to preserve the cultural heritage of mankind by providing for the return and restitution of cultural treasures illegally removed from their place of origin.¹⁵³ "The adoption by consensus, and the co-sponsorship of... [the] resolution by a great number of delegations,¹⁵⁴ clearly manifests its importance to the international community and the clear intentions of all of... [nations] to promote bilateral and multilateral cooperation for resolving all outstanding issues [regarding repatriation claims by countries of origin]."¹⁵⁵ Being the tenth international convention to call for the return of looted treasures, one can clearly observe the customary international law that has emerged and the overwhelming peremptory norm that exists favoring the return of illegally acquired cultural property – regardless of the time of taking.¹⁵⁶ This latter point is

150. Barkan, *supra* note 6.

151. See *Return or Restitution of Cultural Property to the Countries of Origin*, *supra* note 100.

152. Including: The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1972 Convention concerning the Protection of the World Cultural and National Heritage; the 1995 Convention on Stolen or Illegally Exported Cultural Objects; the 1997 Convention for Cultural Diversity and Tolerance; the 2001 Universal Declaration on Cultural Diversity the 2001 Convention on the Protection of the Underwater Cultural Heritage; the 2004 Convention on Jurisdictional Immunities of States and Their Property; and the 2005 Convention for the Safeguarding of the Intangible Cultural Heritage. *Id.* at 3.

153. *Id.* at 3.

154. Co-sponsors of the Resolution include: Afghanistan, Albania, Argentina, Armenia, Benin, Bosnia and Herzegovina, Cambodia, Cape Verde, Colombia, Congo, Cyprus, Czech Republic, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, Ghana, Greece, Guatemala, Islamic Republic of Iran, Iraq, Italy, Lebanon, Lithuania, Madagascar, Malta, Mongolia, Myanmar, Nigeria, Paraguay, Peru, Portugal, Romania, Samoa, Slovakia, Slovenia, Suriname, Syrian Arab Republic and Timor-Leste. G.A. Draft Res. 61/L.15/Rev.1, U.N. Doc. A/61/L.15/Rev.1 (Nov. 30, 2006) (note that the three countries upon which the bulk of this article is focused, *i.e.*, The United Kingdom, France and the United States, neither co-sponsored nor have signed the Resolution).

155. "Return or restitution of cultural property to the countries of origin," – *Statement by the Minister of Culture of Greece*, Dec. 4, 2006, <http://www.greekembassy.org/Embassy/content/en/Article.aspx?office=1&folder=24&article=19189>.

156. "Collectively, these treaties, in conjunction with other international agreements, establish a peremptory norm in contemporary international law which cannot be ignored by any country, irrespective of whether or not they are a party to these agreements." Reppas, *supra* note 3, at 962,

significant in as much as the older International Museums filled their collections largely from 19th Century colonial acquisitions which, as discussed in the previous section of this article, they claim was permissible under the international law that existed at the time of the takings and according to this line of thought, allowed for looted artifacts to be legally acquired by the museums.

The continued development of international laws addressing the present, future and *past* practices of countries, museums and individuals in acquiring and keeping looted artifacts, however, demonstrates a willingness and desire of contemporary society to right the wrongs of the past and to return all looted treasure to their countries of origin, regardless of the time of taking. According to the Vienna Convention, norms expressed in conventional treaties which ripen into custom apply to both parties and non-parties in a dispute, irrespective of their original instrument, *i.e.*, irrespective of whether or not a particular country has ratified any of the individual international agreements aforementioned.¹⁵⁷ Thus, when a norm exists, based on ethical and moral grounds which the international community recognizes, and that norm has become a common practice among nations (and institutions and individuals), then customary international law has been established and that law is binding upon all nations.¹⁵⁸

The voluntary acts of repatriation by governments, museums and individuals throughout the world offer further confirmation of the global trend that has emerged demonstrating a world-wide consensus favoring the position of the cultural nationalist and supporting the continued development of international laws which mandate the return of illicitly removed cultural property to source nations. The Greek Minister of Culture stated in his address of the General Assembly after the passage of the November 2006 United Nations Resolution, "over recent years, a new wind of optimism has appeared on the horizon. Increasingly, museums recognize the moral obligation to conform with ethical codes in their acquisition policies."¹⁵⁹ To one considering this most recent international law and its progeny, it is undeniable that the position of the cultural nationalist continues to gain world wide support and that a customary international law has been established that

(citing Vienna Convention on the Law of Treaties, 1969, art. 53, U.N. Doc. A/CONF 39/27 reprinted in Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* 70 (1995)).

"As detailed in Article 53 of the Vienna Convention, the principle of *Jus Cogens* states that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* at n. 279.

157. *Id.* at n. 280 "Article 38 of the Vienna Convention states that nothing 'precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.'" *Id.* (citing Vienna convention on the Law of Treaties, 1969, art. 38, U.N. Doc A/CONF. 39/27 reprinted in Barry E. Carter & Phillip R. Trimble, *International Law, Selected Documents* 70 (1995)).

158. *Id.*

159. "Return or restitution of cultural property to the countries of origin" – Statement by the Minister of Culture of Greece, *supra* note 155.

overwhelmingly favors repatriation of looted artifacts to their countries of origin – regardless of the time of the initial acquisition.

It is imperative also for one to consider the incredible success of the reward-based practice of certain governments, most notably that of Greece, to provide monetary rewards and exclusive loan agreements in exchange for voluntary returns. This success provides an excellent model for source nations around the world to follow. Further, as these acts of voluntary repatriation continue to grow in number along with the continued passage of new laws from individual nations and the global community, disputed ownership of cultural property will force the keepers of looted treasures to find ways of resolving the disputes and returning the property to their countries of origin extrajudicially. If they do not, and the international laws continue to expand as they have, the holders of these treasures will likely face civil (and perhaps even criminal) lawsuits to compel their return.

IV. CONCLUSION

The main question posed by this article is whether international museums should be emptied of all their looted treasures, irrespective of the circumstances of each acquisition. To the oldest, most insulated and governmentally protected institutions, such as the British Museum, to deny the return of undisputedly looted Nazi art to the heirs of a Holocaust victim is a morally bankrupt position to defend, and one that so offends the international community that it is a shocking fact that the current British Parliament has not corrected the errors of its predecessors – which it certainly can do, because it is supreme and sovereign to all other branches of the British Government.¹⁶⁰ The moral and ethical determination as to the legitimacy of such conduct, however, will remain confined to the classroom unless litigation continues and the International Museums (and their respective countries) are compelled to address their conduct. Such growth will ensure that the keepers of looted treasure cannot continue to simply ignore or brush these matters under the mat any further.

The world-wide consensus seems clearly to be shifting toward mandatory return of looted treasures. National and international laws continue to increase in number and in scope and all require the return of looted treasures. Governments, museums and individuals are conforming to contemporary morality regarding the sense of obligation to voluntarily return looted treasures. In short, customary international law has been established by the international trend of voluntary return of looted art and artifacts and such conduct has become a peremptory norm, rather than an exception.

But will this trend continue? It is this author's opinion that the answer is a *qualified* "yes." Qualified, because as a litigator, this author is of the opinion that unless the litigation trend continues and museums are forced to defend the provenance of their collections, forced to defend their past and present acquisition practices, and forced to wait for a *final* determination from a jury of their peers as to whether they must open the doors of their trophy collections, the museums will

160. See discussion *supra* § I.

never voluntarily return any part of their collections, and stalemate diplomacy will reign once again.

There are many possible compromises that can be reached, but all of these require the return of the looted treasures, at some point, to the individual or nation wrongly dispossessed. The most obvious are those that we have already observed herein, namely, the return of looted treasure(s), in exchange for exoneration of any alleged impropriety on the part of the museum *and* for exclusive, long-term loans (or gifts) of new finds of similar quality and/or worth. For major, celebrity pieces, return of the pieces to a state of the art facility in the source nation, coupled with a joint-trusteeship should be considered.¹⁶¹ Such resolution would certainly be a positive step in recognizing the rights of the source nation to its cultural property and would allow its citizens to reclaim their history and national pride, while simultaneously recognizing the past *and present* care that the foreign museum have given to the work. Greece made several proposals to the British in line with this type of agreement over the Parthenon Marbles,¹⁶² but none, quite predictably, have come to fruition, since Greece has not forced the British to negotiate by initiating litigation for repatriation of same.¹⁶³

The keepers of looted treasures will likely continue to use their best efforts to resolve these claims extrajudicially. They are on much better footing to negotiate a compromise that does not empty their collections. There are various extrajudicial dispute resolution theories involving the joint ownership of the treasures and the collaboration between museums of the acquiring nation and those of the source nations that should be considered. In this regard, it is this author's opinion, that a new type of museum and a new type of ownership of these cultural treasures

161. Under these circumstances, co-ownership of the collection and/or of the museum itself could be included; which would reap tremendous rewards in terms of good will (and perhaps even economic rewards) for the foreign museum. Further, when considering the discussion in § II, this is not something that the International Museums should casually dismiss.

162. For example, in June 2000, Greek foreign minister, George Papandreou, first called for a "partnership approach" with England. Papandreou suggested that Greece would consider a number of possibilities to resolve the dispute – including joint ownership – provided that the Marbles were returned to Greece. The result, quite predictably, was a refusal by the British Museum. *Greece May Share Elgin Marbles*, BBC NEWS, June 5, 2000, http://news.bbc.co.uk/1/hi/uk_politics/778059.stm.

More recently, it was reported that the Greek government was considering a treaty with London that would allow the two nations to share ownership of the Marbles under EU supervision. *Deal on the Marbles? Report Claims British Museum Considering Loan to Athens*, KATHIMERINI, April 8, 2003, available at <http://www.ekathimerini.com/4dcgi/news/content.asp?aid=32689>.

163. It must be stressed that the burden is on source nations and individuals to prove that their art or artifact(s) have been looted; and the standard of proof will vary according to the *lex loci* of the lawsuit, i.e., in one particular jurisdiction the standard might be "by a preponderance of the evidence," in others it may be higher or lower. Regardless, it is clear that there is a great distinction between "disputed" ownership of these treasures, versus a definitive ruling that such were looted. Each lawsuit, accordingly, will require a detailed factual determination as to the circumstances of the piece(s) removal from the source country as well as the acquiring nation's role in procuring same. Thus, in circumstances such as the Feldmann Master Paintings, where all parties agreed that art was looted, such factual determination was unnecessary. In other cases, most notably those Celebrity cases such as the Parthenon Marbles, Rosetta Stone, Sphynx's Beard, etc., the source nations must allege and be able to prove that the artifacts were looted.

should be pursued by all parties. Such ownership would involve the establishment of a joint trusteeship between source and acquiring museums who, together, would oversee, protect, and display these cultural treasures. It is the hope of this author that such an evolution in the traditional structure and operation of International Museums will resolve these conflicting claims in a way that not only satisfies both sides and protects the property itself, but also one that is more in line with contemporary notions of morality and justice. Such evolution would also more accurately reflect the overwhelming international trend and customary international law requiring the voluntary repatriation of disputed items to their countries of origin.

These suggestions for resolution, however, will likely not come to pass until the International Museums understand that the concept of cultural internationalism, in its truest form, is not mutually exclusive from cultural nationalism. Both camps desire the best conservation of the art and artifacts, both camps desire public access to the treasures, and both camps desire international scholarly study of the pieces. Celebrity pieces and collections, such as the Rosetta Stone and the Parthenon Marbles, would undeniably be impeccably cared for and displayed in state of the art museums in their countries of origin; the only real difference would be where the treasures were physically located. One would hope that voluntary returns and extrajudicial agreements involving repatriations continue to increase in number, but as a litigator, this author firmly believes that the International Museums will pry open their trophy cases only under the gun of litigation.

