

LOOTING IN ANCIENT MESOPOTAMIA: A LEGISLATION SCHEME FOR THE PROTECTION OF IRAQ’S CULTURAL HERITAGE

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I. INTRODUCTION AND OVERVIEW

On the morning of April 8, 2003, Jaber Khalil, chair of the Iraqi State Board of Antiquities, and Donny George, the Iraqi National Museum's Director of Research, were preparing to protect the Iraqi National Museum in Baghdad against the threat of looters.¹ They were gathering supplies of food and water when Khalil saw the Iraqi militia.² It was then that they decided to leave the museum for their own safety.³

In the following days, the museum would be invaded by many groups of people.⁴ First, came the Iraqi militia with its rocket-propelled grenades.⁵ Then came the looters, some with keys to safes, displays and store rooms.⁶ Then, finally, came the United States military, with tanks and armed troops to protect the museum against other unwanted visitors.⁷

Eventually, the museum staffers returned to find an unimaginable mess.⁸ Artifacts and antiquities from Iraq's rich cultural heritage had disappeared and records were destroyed.⁹ Stolen were not only pieces of Iraq's cultural heritage, but artifacts from the world's collective cultural heritage. " 'This is a crime, not just against the Iraqi people,' Donny George . . . said on April 29th, 'but against mankind.' " ¹⁰

This Note describes the destruction of the Iraqi cultural heritage during the 2003 United States invasion. Part II details the looting in Iraq, both in the initial days of the invasion in Baghdad, as well as the continued looting throughout the country. Part III discusses the theories of cultural internationalism and cultural nationalism, with respect to options for domestic legislation regarding the protection of cultural property. Part IV reviews current cultural property legislation in various source countries that, like Iraq, have a substantial amount of cultural property in need of protection. Part V

¹ Andrew Lawler, *Mayhem in Mesopotamia: From Catastrophe to Exaggeration, and from Blunder to Bluster, the Looting of the Iraq Museum Turned a Scientific and Cultural Tragedy into a Media Event and Political Free-for-all*, 301 SCIENCE 582, 583 (2003) [hereinafter Lawler, *Mayhem*].

² *Id.* at 584.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (noting that the looters had not even left chairs for the returning museum staff).

¹⁰ *Heavy History, Light Fingers*, ECONOMIST, May 3, 2003.

discusses the previous Iraqi legislation, with respect to the general provisions, the obligations of the citizens and the regulation of archeological sites by the state. Part VI argues that Iraq's previous antiquities legislation should be enacted by the new Iraqi government.

This legislation reflects an ideology of cultural nationalism and would, therefore, be the best method to protect Iraqi cultural property. Ultimately, this Note asserts that the previous Iraqi legislation should be adopted in conjunction with other economic and social policies, which address the concerns of the cultural internationalists, and which will aid in the protection of Iraqi cultural heritage and property.

II. LOOTING THE WORLD'S CULTURAL HERITAGE

A. *The History of Iraq*

"Called Mesopotamia by the Greeks and variously Sumer, Akkad, Babylonia, and Assyria by its own ancient inhabitants, Iraq has an excellent claim to be the cradle of Western civilization."¹¹ Among the many credits to these ancient civilizations are the wheel, writing, agricultural irrigation, the first code of written laws, expensive trade, and the development of complex communities.¹² In addition, scholars believe that Iraq is also biblical land, including Eden, Babel and Nineveh among its ancient cities.¹³

Over many centuries, archeologists have slowly uncovered the many wonders of this ancient land.¹⁴ During the mid-nineteenth century, one of the first archeologists to explore Iraq discovered the Sennacherib palace in Nineveh.¹⁵ Among the sculpted stone slabs discovered there was the first known independent account similar to a story in the Bible.¹⁶ At the beginning of the twentieth century, three major excavations began on the sites of Babylon, Ashur, and Uruk.¹⁷ Babylon, the capital of both Hammurabi and Nebuchadnezzar's empires, dates from approximately 1750 B.C.¹⁸ At this site, remains of the Tower of Babel, as well as the city's famous wall, were

¹¹ John Malcolm Russell, *Robbing the Archaeological Cradle*, 110 NAT. HIST. 44 (2001).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 46.

¹⁵ *Id.*

¹⁶ *Id.* at 47.

¹⁷ *Id.*

¹⁸ *Id.*

discovered.¹⁹ Archeologists at Ashur discovered monuments and artifacts from the Assyrian empire, which date to the second millennium B.C.²⁰ Uruk, where writing first emerged and where the oldest known story, The Epic of Gilgamesh, was created, flourished from 3500 to 3000 B.C.²¹ "Over the course of a century of excavations there, [archeologists] ha[ve] recovered more evidence for the rise of Mesopotamian civilization than is available from any other site."²²

Iraq's cultural heritage is the world's cultural heritage. This shared past is reflected not only in the interest of archeologists, historians and other scholars in excavating in Iraq, but also, as this Note will show, in the interest they have taken in protecting Iraq's antiquities from the devastation posed by war, looters and ignorance about the connection this ancient country has with the world.

B. Looting During the United States' Invasion

Prior to the 2003 United States' invasion of Iraq, scholars on both sides of the Atlantic attempted to warn U.S. officials of the possible destruction and looting of museums and archeological sites.²³ Although one government official stated, "I don't think that anyone anticipated that the riches of Iraq would be looted by the Iraqi people,"²⁴ many critics and scholars realized that, to foresee such looting, all one had to do was to look at the aftermath of the 1991 Gulf War.²⁵ After the first Gulf War, a series of civil uprisings resulted in the looting of nine of the thirteen regional museums in Iraq.²⁶ Accounts vary, but between two thousand and four thousand artifacts disappeared from the museums during the 1991 war. Less than sixty have been recovered.²⁷

¹⁹ *Id.*

²⁰ *Id.* at 48.

²¹ *Id.*

²² *Id.* at 49.

²³ Lawler, *Mayhem*, *supra* note 1, at 582; Douglas Jehl & Elizabeth Becker, *A Nation at War; The Looting: Experts' Pleas to Pentagon Didn't Save Museum*, N.Y. TIMES, Apr. 16, 2003, at B5, available at 2003 WLNR 5189493.

²⁴ Frank Rich, *And Now: 'Operation Iraqi Looting'*, N.Y. TIMES, Apr. 27, 2003, at 2(1), available at 2003 WLNR 5691295.

²⁵ *See id.*; Jehl & Becker, *supra* note 23.

²⁶ Jehl & Becker, *supra* note 23.

²⁷ *At Press Time, American Investigators who Compiled an Inventory of the Ransacked Galleries at the Iraq National Museum Have Concluded that 38 Pieces of Art are Missing from the Museum, Not the 170,000 that Had Been Reported Stolen or Broken*, ART BUS. NEWS, June 1, 2003, http://www.findarticles.com/p/articles/mi_m0HMU/is_6_30/ai_102840466; Andrew

There were a number of meetings between scholars and various U.S. government officials in the months prior to the actual invasion.²⁸ Many scholars stated that “they believed that the military had understood the need to protect the buildings against looting as well as bombing.”²⁹ Indeed, an internal Pentagon memo, dated March 26, 2003, two weeks prior to the invasion of Baghdad, listed sixteen sites in need of protection in Baghdad, with the National Museum listed second, behind the Central Bank.³⁰ In this memo,

the Pentagon’s civilian office in charge of overseeing postwar Iraq drew up guidance for U.S. land forces to secure key Baghdad institutions “as soon as possible to prevent further damage, destruction, and/or pilferage.” . . . “Baghdad contains one of the largest archaeological museums in the world,” the document states. “It contains literally thousands of priceless historical objects” covering “over 5000 years of recorded history and presents the fruits of 200 years of scientific investigation.” Presciently, it warned that the museum “will be a prime target for looters.”³¹

Despite this internal memo and the many warnings from experts stating the gravity of the situation, no order was issued.³²

On April 8, 2003, after the staff of the Iraqi National Museum were forced to abandon the building, Iraqi troops began to use the museum, with its prime location in central Baghdad, as a stronghold to fight the invasion of U.S. military.³³ It was not until the Iraqi troops retreated a few days later that the looters invaded the museum.³⁴

Lawler, *Picking Up the Pieces of Iraqi Antiquities*, 300 SCIENCE 559, 559 (2003) [hereinafter Lawler, *Picking Up the Pieces*].

²⁸ In January 2003, Pentagon officials and antiquities experts discussed Iraq’s archeological sites and artifacts and the dire effect the war could have on them. Officials also met with representatives from the American Council for Cultural Policy, a group of art collectors and museum officials in the months preceding the war. Jehl & Becker, *supra* note 23.

²⁹ *Id.*

³⁰ Lawler, *Mayhem*, *supra* note 1, at 583; Rich, *supra* note 24.

³¹ Lawler, *Mayhem*, *supra* note 1, at 583.

³² *Id.*

³³ *Id.* at 584; Vince Crawley, *Tracking Down Missing Iraq Artifacts to ‘Likely Take Years,’* ARMY TIMES, Oct. 6, 2003, at 34.

³⁴ Lawler, *Mayhem*, *supra* note 1, at 584; Crawley, *supra* note 33.

Some Iraqi officials complained that the U.S. military did not take sufficient measures to prevent the looting or to stop it once it had begun.³⁵ Donny George stated that one of his employees approached one of the U.S. tanks stationed near the museum and begged the soldiers to protect the museum.³⁶ The soldiers responded that they did not have orders to do so, and therefore, nothing could be done.³⁷ Iraqi officials have also pointed out that the U.S. military was able to protect the Ministry of Oil and some of Saddam Hussein's palaces, but did not protect the museum.³⁸ This setting of priorities led many to believe that the United States' concern for Iraq's antiquities was disingenuous.³⁹

From information gathered after the looting of the Iraqi National Museum, the looters appeared to be both professional antiquities thieves and ordinary Iraqi citizens.⁴⁰

The pattern of destruction made it immediately clear . . . that this was not a case of random desecration by an oppressed population taking revenge on a hated regime. . . . [T]he looting of the museum involved a faction of professional antiquities thieves who knew exactly what kinds of objects to take, where to find them in the museum, and which ones would fetch the highest prices.⁴¹

U.S. forces did not gain control of the National Museum and its grounds until April 16, 2003.⁴² Some museum officials and staff had already returned

³⁵ Dan McDougall, *Coalition Blamed for Failing to Protect Priceless Artefacts in Iraq*, SCOTSMAN, Apr. 30, 2003, at 13.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Howard LaFranchi, *Iraq's Looted Heritage Makes a Steady - if Slow - Comeback*, CHRISTIAN SCI. MONITOR, Oct. 14, 2004, at 1, available at 2004 WLNR 1636057; McDougall, *supra* note 35. See Jehl & Becker, *supra* note 23; Rich, *supra* note 24.

³⁹ See Jehl & Becker, *supra* note 23; LaFranchi, *supra* note 38; McDougall, *supra* note 35; Rich, *supra* note 24.

⁴⁰ Zainab Bahrani, *Lawless in Mesopotamia*, 113 NAT. HIST. 46 (2004) [hereinafter Bahrani, *Lawless*]. See Andrew Lawler, *Antiquity Experts Endorse Plans to Restore Shattered Collection: The Rubble in Bagdad's National Museum and Unsecured Iraqi Borders Pose Long-Term Challenges to Any Recovery Effort*, 300 SCIENCE 889, 890 (2003) [hereinafter Lawler, *Antiquity Experts Endorse Plans*].

⁴¹ Bahrani, *Lawless*, *supra* note 40, at 46.

⁴² Lawler, *Mayhem*, *supra* note 1, at 583.

to work to assess the damage.⁴³ The media initially reported that one hundred seventy thousand artifacts were stolen as a result of the massive looting.⁴⁴ In the coming weeks and months, these reports would be disproved by the discovery of preventative measures taken by the museum staff to ensure the safety of much of the collection.⁴⁵ Corrective reports eventually estimated the number of stolen artifacts to be between fifteen thousand and seventeen thousand.⁴⁶ Current estimates state that about five thousand of these have been recovered, with ten thousand still missing.⁴⁷ The scope of the destruction to the cultural heritage of Iraq due to the looting of the National Museum in Baghdad has yet to be fully determined.⁴⁸

Upon hearing about the extent of the looting at the National Museum, the international antiquities community responded with a sense of urgency.⁴⁹ The United Nations Educational, Scientific, and Cultural Organization (UNESCO) held an emergency meeting in Paris and the director of the British Museum⁵⁰ called another meeting.⁵¹ These meetings were “to develop plans for taking inventories, [to] undertak[e] the emergency conservation of objects, and [to] provid[e] equipment and supplies to the national department of antiquities.”⁵² Once it became safe for experts to enter Iraq and the National Museum, inventories, restoration and conservation began.⁵³

⁴³ *Id.* Museum officials warned that to take a sufficient inventory would take a good amount of time, particularly since fighting continued in Baghdad. Lawler, *Antiquity Experts Endorse Plans*, *supra* note 40, at 889.

⁴⁴ Lawler, *Mayhem*, *supra* note 1, at 585.

⁴⁵ *Id.* at 582. In early March 2003, five museum staffers removed 8,366 artifacts, worth millions of dollars, to a secret location, swearing not to reveal the location of the museum's artifacts to anyone until a stable government existed in Iraq. Indeed, it was not until July 6, 2003, that U.S. officials were informed of the location. *Id.* at 583.

⁴⁶ Bahrani, *Lawless*, *supra* note 40, at 46; LaFranchi, *supra* note 38. For an analysis of how the U.S. media made light of the looting because of the conflicting reports of the losses, see Lawler, *Mayhem*, *supra* note 1, at 582.

⁴⁷ Sebastian Smee, *The Tragedy of History Lost*, AUSTRALIAN, Oct. 1, 2005, at 81, available at 2005 WLNR 15433256.

⁴⁸ For an assessment of the scope of the damage at another of Iraq's cultural heritage sites, the National Library, see LaFranchi, *supra* note 38. For an account of the international efforts to rebuild the National Museum, see McDougall, *supra* note 35.

⁴⁹ Bahrani, *Lawless*, *supra* note 40, at 45.

⁵⁰ The British Museum, historically, has ties to Iraqi archeology and antiquities. After World War I, Britain governed Iraq as a separate state, and in 1923, the Iraq National Museum in Baghdad was founded by British pioneer Gertrude Bell. Russell, *supra* note 11, at 52.

⁵¹ Bahrani, *Lawless*, *supra* note 40.

⁵² *Id.*

⁵³ See *id.* at 46.

C. The Continued Looting of Iraqi Cultural Heritage

Despite the securing of the Iraqi National Museum by U.S. forces, archeological pillaging continues throughout Iraq.⁵⁴ "Virtually all of Iraq is an archaeological site."⁵⁵ Experts estimate that between twenty thousand and one hundred thousand ancient archeological sites exist in Iraq.⁵⁶ These sites vary from simple mounds to cities, such as Nineveh and Babylon.⁵⁷ "Far more material than what has been reported missing from the Iraq Museum in Baghdad is being ripped from the ground and leaving the country," Henry Wright said.⁵⁸ "Extraordinary damage is being wreaked on this irreplaceable archaeological record."⁵⁹

An independent cultural assessment of Iraq's archeological sites, conducted by the National Geographic Society in May 2003,⁶⁰ confirmed the fears of many scholars and antiquities experts around the world: Iraq's sites had fallen victim to looters.⁶¹ The National Geographic Society sent two teams into Iraq, one for the northern portion of the country and one for the southern portion of the country.⁶² Each team included experts and photojournalists to document the findings.⁶³ Particularly in the southern portion of the country, there was evidence of ongoing widespread looting.⁶⁴ A team in a helicopter found, on two separate occasions at two different sites, around two hundred people

⁵⁴ James Randerson & Bob Holmes, *Will Iraq Ever Get Its Treasures Back? Archaeologists and Art Dealers Clash Over How Best to Retrieve the Antiquities Stolen as Baghdad Fell*, NEW SCIENTIST, May 10, 2003, at 6.

⁵⁵ Russell, *supra* note 11, at 44.

⁵⁶ *Ancient Iraqi Sites Show Theft, Destruction*, NAT'L GEOGRAPHIC NEWS, June 11, 2003, http://news.nationalgeographic.com/news/2003/06/0611_030611_iraqlooting.html.

⁵⁷ *Id.*

⁵⁸ *Id.* Henry Wright was the leader of the National Geographic Society's expedition to uncover the damage to Iraqi archeological sites in May 2003.

⁵⁹ *Id.*

⁶⁰ Henry T. Wright et al., *The National Geographic Society's Cultural Assessment of Iraq: Introduction*, NAT'L GEOGRAPHIC NEWS, May 2003, http://news.nationalgeographic.com/news/2003/06/0611_030611_iraqlootingreport.html.

⁶¹ T.J. Wilkinson, *Cultural Assessment of Iraq: The State of Sites and Museums in Northern Iraq*, NAT'L GEOGRAPHIC NEWS, May 2003, http://news.nationalgeographic.com/news/2003/06/0611_030611_iraqlootingreport2.html; Elizabeth C. Stone, *Cultural Assessment of Iraq: The State of Sites and Museums in Southern Iraq*, NAT'L GEOGRAPHIC NEWS, May 2003, http://news.nationalgeographic.com/news/2003/06/0611_030611_iraqlootingreport3.html.

⁶² Wright et al., *supra* note 60.

⁶³ *Id.*

⁶⁴ Stone, *supra* note 61.

looting these sites.⁶⁵ In contrast, the ancient city of Ur, which dates from 2100 B.C., was not ransacked because it was well protected by U.S. forces.⁶⁶ It was clear to the National Geographic Society team that the key to protecting these archeological sites is by the use of armed guards.⁶⁷

Donny George has pled with U.S. forces to protect Iraq's archeological sites, particularly those being systematically looted.⁶⁸ "We have guards on these sites, but they are so few in number, they are overwhelmed when they are attacked by 300 to 400 people, all armed."⁶⁹ Looting continues in Iraq, and it is imperative that the Iraqi government and the U.S. forces address this issue before more valuable artifacts are lost.

III. CULTURAL NATIONALISM AND CULTURAL INTERNATIONALISM

Professor John Merryman⁷⁰ identifies two theories of cultural property: cultural nationalism and cultural internationalism.⁷¹ Cultural nationalism emphasizes the national origin of the cultural objects, with the goal of retaining all objects in their home country.⁷² "This gives nations a special interest, implies the attribution of national character to objects, independently of their

⁶⁵ McGuire Gibson, *Cultural Assessment of Iraq: A Helicopter Inspection of Endangered Southern Sites*, NAT'L GEOGRAPHIC NEWS, May 2003, http://news.nationalgeographic.com/news/2003/06/0611_030611_iraqlootingreport4.html.

⁶⁶ Stone, *supra* note 61. The United States has an outpost at Talil, an air base near Ur.

⁶⁷ See *Ancient Iraqi Sites Show Theft, Destruction*, *supra* note 56. For an account of the physical damage that military camps are doing to archeological sites, see Zainab Bahrani, *Days of Plunder: Coalition Forces Are Doing Little to Prevent the Widespread Looting and Destruction of Iraq's World-Famous Historical Sites*, GUARDIAN (U.K.), Aug. 31, 2004, at 13, available at 2004 WLNR 4636528.

⁶⁸ William Mullen, *Iraq Issues Plea to Protect its Treasures*, CHI. TRIB., Sept. 30, 2003, at C7.

⁶⁹ *Id.*

⁷⁰ For a curriculum vitae of Professor Merryman, see <http://www.law.stanford.edu/faculty/merryman/merryman-cv.pdf> (last visited Oct. 2, 2005).

⁷¹ John Henry Merryman, *Thinking About the Elgin Marbles*, 38 MICH. L. REV. 1880 (1985), reprinted in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 24 (John Henry Merryman, ed., 2000) [hereinafter Merryman, *Elgin Marbles*]; John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986), reprinted in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 66 (John Henry Merryman ed., 2000) [hereinafter Merryman, *Two Ways*]; see generally Catherine Phvong, *The Protection of Iraqi Cultural Property*, 53 INT'L & COMP. L.Q. 985 (2004).

⁷² See Merryman, *Elgin Marbles*, *supra* note 71, at 53.

location or ownership, and legitimizes national export controls and demands for the 'repatriation' of cultural property."⁷³

On the other hand, cultural internationalism focuses on the proposition that " 'cultural property belonging to any people whatsoever' is 'the cultural heritage of all mankind.' "⁷⁴ Under cultural internationalism, "everyone has an interest in the preservation and enjoyment of all cultural property, wherever it is situated, from whatever cultural or geographic source."⁷⁵ Therefore, the interest in protecting and preserving the object is placed above the interest of the nation of origin in retaining that object.⁷⁶

Merryman identifies three core reasons given in support of legislation that reflects cultural nationalism.⁷⁷ The primary argument is that, by retaining the nation's cultural objects, cultural nationalism supports the cultural growth and understanding of the nation's people.⁷⁸ "For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community. They tell people who they are and where they come from."⁷⁹ It has also been shown that artifacts engender the creation of more art and increase the desire for education.⁸⁰

The second reason for engaging in cultural nationalism is economic in nature.⁸¹ The main consideration of this argument is the value inherent in the possession of the antiquities.⁸² The presence of the objects in their home nation would lure archeologists, scientists, and historians in the nation and from abroad, and might also encourage tourism.⁸³

The final reason identified by Merryman is a political argument.⁸⁴ It is based on the belief that there "is an offense" to the country of origin if the

⁷³ Merryman, *Two Ways*, *supra* note 71, at 67.

⁷⁴ Merryman, *Elgin Marbles* (quoting The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240) [hereinafter The Hague Convention].

⁷⁵ Merryman, *Elgin Marbles*, *supra* note 71, at 57.

⁷⁶ *See id.*

⁷⁷ MERRYMAN, *Elgin Marbles*, *supra* note 71, at 52-56.

⁷⁸ *Id.* at 53.

⁷⁹ *Id.*

⁸⁰ *Id.* *See* 1 LYNDAL V. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE: DISCOVERY AND EXCAVATION* 8-9 (1984).

⁸¹ Merryman, *Elgin Marbles*, *supra* note 71, at 55.

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *Id.*

objects reside in any country other than the originating country.⁸⁵ Although this argument seems to be much like the primary argument for cultural nationalism, it differs in that it is based on deep-rooted nationalistic favor that may amount to threats toward other countries.⁸⁶ On the other hand, the primary argument for cultural nationalism rests on the cultural and historical loss sustained by the nation of origin.⁸⁷

The political argument can be criticized as arrogant and as an “important overestimation of one’s own nation.”⁸⁸ To the extent that this argument is viewed in that manner, it will have little weight in advancing the cause of cultural nationalism.⁸⁹ Unwavering nationalism, if not controlled, may distract from the cultural and historical importance of the objects.

Another reason for enacting legislation reflecting the theory of cultural nationalism is that policing the looters and archeological sites, themselves, is much more difficult than policing the buyers.⁹⁰ To address this difficulty, states have passed “umbrella statutes,” that nationalize all artifacts.⁹¹ Under these statutes, the states retain the right to obtain the return of artifacts that have been smuggled out of the country or illegally exported.⁹² States have enacted criminal sanctions, as well. For example, “source countries subject purchasers of these artifacts in the United States to prosecution under criminal statutes that prohibit the importation of stolen property.”⁹³

By enabling the state to police the illicit trade on the buying end, these statutes attempt to relieve the state of the seemingly insurmountable burden of policing the initial smuggling and looting.⁹⁴ In many source nations, as in Iraq, there are thousands of archeological sites, many of which have not been discovered, much less fully excavated. It would be impossible for any government to organize an extensive protection system that would fully protect the sites. As the number of buyers in the antiquities market is far less than the

⁸⁵ *Id.*

⁸⁶ *Id.* at 55-56.

⁸⁷ *Id.* at 54-55.

⁸⁸ *Id.* at 56 (quoting Max H. Boehm, *Nationalism*, in 11 *Encyclopedia of the Social Sciences* 231, 231 (Edwin R.A. Seligman, ed., 1933)).

⁸⁹ *See id.*

⁹⁰ *See* Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 *YALE L.J.* 466, 470 (1988).

⁹¹ *Id.* at 466-67.

⁹² *Id.*

⁹³ *Id.* at 467 (noting that “[w]hether these umbrella statutes constitute valid declarations of ownership, however, remains a subject of considerable debate in the United States”).

⁹⁴ *Id.* at 469-71.

number of sites, the policing of buyers is the most effective way to reduce the illicit trade.⁹⁵

This form of culturally nationalistic legislation aims to curb the trade by enabling the state to reduce the demand for the antiquities.⁹⁶ As long as there is demand for ill-gotten antiquities, there will be theft and looting. In many source nations, scarce economic resources make it difficult to fully protect the objects from looting and entrance into the illicit trade.⁹⁷ The antiquities are valuable on the international market, creating incentives for theft.⁹⁸ Some source nations are at lower levels of economic development, and simply cannot fund adequate protection, particularly considering the vastness of protection needed. Simply posting guards at existing archeological sites would not be adequate, as there are many sites that have yet to be discovered that contain valuable cultural heritage.⁹⁹

The arguments against adopting culturally nationalistic legislation stem from its antithesis, the theory of cultural internationalism. Cultural internationalism argues that cultural property is the property of all humankind, and therefore, should not be limited to residing in the source nation alone.¹⁰⁰ Merryman identifies three primary considerations when determining whether objects should be controlled by legislation based on cultural internationalism.¹⁰¹ First, preservation of the objects is a major concern.¹⁰² Often, source nations do not have the resources to fully preserve the objects for future study and exhibition.¹⁰³ This concern addresses not only preservation in museums and at archeological sites, but also the protection of artifacts or sites that could be damaged by natural disaster, looting, theft or war.¹⁰⁴

The second consideration identified by Merryman is the integrity of the artifacts.¹⁰⁵ Integrity refers to the need to have all pieces of particular artifacts together, to enhance their cultural, aesthetic, and educational values.¹⁰⁶

⁹⁵ *Id.* at 479.

⁹⁶ *Id.* at 478-79.

⁹⁷ *See id.* at 466; PROTTE & O'KEEFE, *supra* note 80, at 18-19.

⁹⁸ Moore, *supra* note 90, at 479. *See* PROTTE & O'KEEFE, *supra* note 80, at 18.

⁹⁹ Moore, *supra* note 90, at 479.

¹⁰⁰ Merryman, *Elgin Marbles*, *supra* note 71, at 56-57.

¹⁰¹ *Id.* at 57.

¹⁰² *Id.*

¹⁰³ *See id.* at 56-59.

¹⁰⁴ *Id.* at 57. *See* PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART, MIDWAY REPRINT EDITION 21-22 (Midway Reprint 1988) (1981).*

¹⁰⁵ Merryman, *Elgin Marbles*, *supra* note 71, at 57, 59. *See* BATOR, *supra* note 104, at 22-23.

¹⁰⁶ Merryman, *Elgin Marbles*, *supra* note 71, at 59.

Although integrity is generally thought to refer to a specific work, the issue can be of particular concern when discussing the looting of archeological sites.¹⁰⁷ The cultural and historical value of a site and an artifact may be lost when the artifact is removed, particularly the historic information regarding the place and manner of the artifact's discovery.¹⁰⁸ Therefore, the integrity concern may be a compelling argument, although integrity will generally be viewed as secondary to the preservation of the artifact.¹⁰⁹

Finally, Merryman identifies the distribution of artifacts as an important consideration in determining whether a policy of cultural internationalism should be enacted.¹¹⁰ The goal is "an appropriate international distribution of the common cultural heritage, so that all of mankind has a reasonable opportunity for access to its own and other people's cultural achievements."¹¹¹ Furthermore, if more artifacts are distributed throughout various nations, then the illicit antiquities trade would diminish, as the demand for these objects would be lessened.¹¹² The distribution of objects of great cultural value would not only benefit the world culture immensely, but would also benefit the nation of origin, by inspiring interest in its history and cultural heritage.¹¹³

Related to this distribution argument is the concern that cultural nationalism may lead to "destructive retention," "covetous neglect," or the hoarding of artifacts.¹¹⁴ Fears of destructive retention and covetous neglect arise when a state is unable to adequately care for the artifacts, yet continues to have policies that are culturally nationalistic, thereby preventing the artifacts from

¹⁰⁷ See *id.* at 57-58 (discussing damage to artifacts on display at sites in Athens, Greece).

¹⁰⁸ *Id.* at 58 (noting the importance of accurately documenting the removal of artifacts from sites to preserve both the artifact's and the site's historical values). See BATOR, *supra* note 104, at 25.

¹⁰⁹ See Merryman, *Elgin Marbles*, *supra* note 71, at 59.

¹¹⁰ *Id.* at 57, 59.

¹¹¹ Merryman, *Elgin Marbles*, *supra* note 71, at 59-60. But see BATOR, *supra* note 104, at 28-31 (stating that "[t]he internationalization of culture may produce great benefits, but there is also a general human interest in retaining differences").

¹¹² *Id.* John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477 (1988), reprinted in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 122, 152 (John Henry Merryman, ed., 2000).

¹¹³ See Merryman, *Elgin Marbles*, *supra* note 71, at 61.

¹¹⁴ Merryman, *Two Ways*, *supra* note 71, at 83-84. See also SHARON A. WILLIAMS, THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY 126 (1978) (noting that some nations have developed strict exportation laws due to "a severe depletion of their cultural coffers").

being properly preserved elsewhere.¹¹⁵ Cultural internationalists argue that this policy is extremely damaging to the world's cultural heritage.¹¹⁶

Hoarding cultural objects, also threatens the cultural heritage of all humankind.¹¹⁷ Hoarding is "a practice that, while not necessarily damaging to the articles retained, serves no discernible domestic purpose other than asserting the right to keep them."¹¹⁸ This practice inhibits the distribution of the objects, without concern for other nations or for the objects themselves.¹¹⁹

Another "criticism of . . . cultural nationalism is that by prohibiting or unduly restricting a licit trade in cultural property, source nations assure the existence of an active, profitable and corrupting black market."¹²⁰ Restrictive export controls and culturally nationalistic policies that are overly restrictive and broad may encourage an illicit trade, since it would be the only method of exporting objects out of the country.¹²¹

An overbroad export regulation may inadvertently result in the emergence of illicit trade because "(a) its structure creates irresistible pressure against itself; and (b) it is administratively unenforceable."¹²² The first reason relates to the forcing of the exportation of objects underground, through the black market.¹²³ Because there is no legal trade in the antiquities, all exportation and trade will be relegated to the illegal market, creating an even larger black market system that is much more difficult to police and prevent.¹²⁴ However, "[t]he attempt to embargo the flow of art to other countries suffers from another vice: The broader and more inclusive the embargo, the more difficult it is, physically and economically and politically, to enforce effectively."¹²⁵

¹¹⁵ See Merryman, *Two Ways*, *supra* note 71, at 84 (discussing Peru's policy of retaining its cultural artifacts).

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 84-85.

¹²⁰ *Id.* at 85. *See also* WILLIAMS, *supra* note 114, at 126-28.

¹²¹ *See* Merryman, *Two Ways*, *supra* note 71, at 85.

¹²² Bator, *supra* note 104, at 42.

¹²³ *See id.*

¹²⁴ *See id.* at 42-43.

¹²⁵ *Id.* at 43.

IV. OVERVIEW OF SOURCE NATION LEGISLATION

"The need for national legislation for the protection of cultural property has long been felt and relevant laws have been adopted in many countries."¹²⁶ The culturally nationalistic legislative scheme has been adopted by most countries, as "[a]lmost every national government . . . treats cultural objects within its jurisdiction as parts of a 'national cultural heritage.'"¹²⁷ The countries that have adopted laws reflecting state ownership of all antiquities are varied and not confined to "one social or political system."¹²⁸

The Papacy was the earliest jurisdiction to enact legislation to protect cultural heritage.¹²⁹ In 1462, Pope Pius II restricted the exportation of antiquities from the Papal states.¹³⁰ In 1820 the Pacca Edict allowed the state to either purchase the excavated objects, issue a permit for sale or return them to the owner.¹³¹ The Doria Edict, issued in October 1802, had "made it illegal to export any cultural property from Italy without authorization, and subjected persons engaged in illegal export or accessories thereto to severe punishment."¹³²

Greece, a nation rich in artifacts, developed national legislation reflecting state ownership of antiquities.¹³³ These policies date to 1874, when Greece entered into an agreement with Germany regarding artifacts found at Olympia.¹³⁴ These policies were incorporated into successive legislation, resulting in the current applicable law, dating from 1932.¹³⁵ The "law vests all

¹²⁶ KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 126 (1994).

¹²⁷ Merryman, *Two Ways*, *supra* note 71, at 68. The United States is an exception to this general rule, although the United States has enacted legislation nationalizing cultural property found on public land. This is in contrast to countries with legislation that nationalizes property on public and private lands. *Id.* at 89, n.74. See 1 UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, THE PROTECTION OF MOVEABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS 30-31 (1984).

¹²⁸ PROTT & O'KEEFE, *supra* note 80, at 191 (listing Belize, China, Hong Kong, New Zealand, Sri Lanka, and Turkey among others and noting that "[t]he major exceptions are France, those jurisdictions under French influence, certain other continental European countries and some Common Law jurisdictions").

¹²⁹ *Id.* at 34.

¹³⁰ JOTE, *supra* note 126, at 126.

¹³¹ *Id.*

¹³² *Id.*

¹³³ PROTT & O'KEEFE, *supra* note 80, at 36-37.

¹³⁴ *Id.* at 36.

¹³⁵ *Id.* at 37.

antiquities found in Greece in the state and gives the state exclusive rights over all excavations."¹³⁶

Chinese law also provides for state ownership of all cultural objects.¹³⁷ The current law, adopted in 1982, requires government approval for all excavations; foreign researchers must obtain special approval.¹³⁸ The laws also provide for " 'spiritual or material reward' for those who have contributed to the preservation of the cultural heritage."¹³⁹

Mexico, another country whose cultural heritage has been of much interest to collectors, has also established legislation regarding the protection of their antiquities.¹⁴⁰ Mexican legislation "passed in 1972 . . . create[s] a presumption that all movable objects which were not registered and were part of the cultural patrimony are the property of the nation."¹⁴¹ It is also illegal to export objects from Mexico, unless they are classified as donations or the Mexican president has consented to the exportation.¹⁴² Critics of the Mexican legislation argue that, due to such a severe ban on exports, a black market is inevitable.¹⁴³ However, "[t]he application of the 1972 law in fact shows great success in protecting cultural property."¹⁴⁴ The success results from both the reduction in illegally exported items and the ability of Mexico to reclaim their cultural objects.¹⁴⁵

The legislative schemes of these source nations reflect a policy that is culturally nationalistic in nature. As this Note will show, Iraq's previous legislation also subscribed to an ideology of cultural nationalism.

¹³⁶ *Id.*

¹³⁷ *Id.* at 53.

¹³⁸ *Id.*

¹³⁹ *Id.* at 54.

¹⁴⁰ *Id.* at 56. See also WILLIAMS, *supra* note 114, at 113.

¹⁴¹ PROTTE & O'KEEFE, *supra* note 80, at 56.

¹⁴² JOTE, *supra* note 126, at 154.

¹⁴³ *Id.* at 155.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

V. PREVIOUS IRAQI LEGISLATION ON THE PROTECTION OF CULTURAL PROPERTY

A. General Provisions

The Antiquities Law of 1936 (1936 Law) is the main body of legislation regarding protection of Iraqi cultural heritage.¹⁴⁶ The Antiquities and Heritage Law of 2002 increased criminal sanctions regarding trading and trafficking in antiquities.¹⁴⁷

The Iraqi laws are patrimony laws, declaring that all antiquities belong to the state.¹⁴⁸ The rationale for this decision is stated in the preamble to the 1936 Law:

Since the antiquities [l]aw . . . has permitted persons whether *de facto* or *de jure* to possess antiquities registered in the Directorate General of Antiquities,¹⁴⁹ and trading with them, as result [sic], some of the acquisitions possess a great number of antiquities, most of them are collected by illegal procedures. This encouraged dealing in antiquities and smuggling of unregistered antiquities and harmed the cultural heritage of the country.

For the public interest, it is hereby prohibited to possess antiquities and trade in them and compensation is to be paid to the possessors equivalent to the value of the antiquities in their possession, in order to prevent dealing in and smuggling on [sic] antiquities and to avoid the other defects which have appeared as a result of the enforcement of the Law during the long period since its issuance.¹⁵⁰

¹⁴⁶ 2 UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, THE PROTECTION OF MOVEABLE CULTURAL PROPERTY: COMPENDIUM & LEGISLATIVE TEXTS 99 (1984).

¹⁴⁷ See Andrew Lawler, *Destruction in Mesopotamia*, 293 SCIENCE 32, 37 (2001).

¹⁴⁸ Antiquities Law, No. 59, art. 3 (1936) (Iraq), *amended by* Law No. 120 (1974)(Iraq) and Law No. 164 (1975)(Iraq) [hereinafter 1936 Law].

¹⁴⁹ The Directorate General of Antiquities is the division of the Ministers of Information and Justice charged with the enforcement of these laws. *Id.* art. 73.

¹⁵⁰ *Id.* at pmb1.

Iraq's system of ownership for antiquities is fairly straightforward. Iraq defines antiquities as "[m]ovable and immovable possessions which were erected, made, produced, sculptured, written, drawn or photographed by man, if they are two hundred years old or more."¹⁵¹ "All antiquities in Iraq whether movable or immovable that are now on or under the surface of the soil shall be considered to be the common property of the State."¹⁵² The Law does not allow anyone to dispose of the antiquities or claim ownership of the antiquities unless done so within the ambit of the 1936 Law.¹⁵³ In addition, ownership of land on which the antiquities are found does not entitle the owner to the right to possess the antiquities or to the right to excavate for them.¹⁵⁴

There are two exceptions to this system of state ownership: (1) "the ancient manuscripts in possession of persons whether *de facto* or *de jure*,"¹⁵⁵ and (2) "the antiquities existing in the places mentioned in article seven of this law."¹⁵⁶ Article seven refers to "[m]osques, masjids, synagogues, churches, convents, monasteries and other ancient buildings, owned or constituted in Waqf."¹⁵⁷ However, these exceptions under article sixteen trigger responsibilities and conditions on the use of the antiquities. The possessor of the antiquities or manuscripts must register the possessions with the Directorate's registers.¹⁵⁸ The possessor must also "conserve the antiquities, and notify the Directorate . . . about any risk of loss or mutilation to enable the necessary steps to be taken to preserve them and to limit the responsibility of the negligent"¹⁵⁹ Advance approval from the Directorate is required prior to the transfer or acquisition of ownership.¹⁶⁰ The Iraqi government also retains

¹⁵¹ *Id.* art. 1(e). The 1936 Law then defines the two groups of antiquities: movable and immovable. " 'Immovable [a]ntiquities' include all antiquities erected on and attached to the soil such as buildings, mounds, caves and any objects usually attached to buildings and thus constituting a part thereof." *Id.* art. 2. " 'Movable [a]ntiquities' include all antiquities detached from the soil or from buildings and easily removed therefrom and transported to any other place." *Id.*

¹⁵² *Id.* art. 3.

¹⁵³ *Id.*

¹⁵⁴ *See id.* art. 4.

¹⁵⁵ *Id.* art. 16(2)(b).

¹⁵⁶ *Id.* art. 16(2)(a).

¹⁵⁷ *Id.* art. 7.

¹⁵⁸ *Id.* art. 16(3)(a).

¹⁵⁹ *Id.* art. 16(3)(b).

¹⁶⁰ *Id.* art. 16(3)(c).

the right to request an object for "study, photography and display purposes for the public interest" ¹⁶¹

Furthermore, the 1936 Law provides for the governmental acquisition of the excepted antiquities under certain circumstances. ¹⁶² The government has the right to acquire any movable antiquity or ancient manuscript provided that they award just compensation as determined by an impartial committee. ¹⁶³ In addition, "[t]he Government may acquire any ancient building or historical site as a matter of public utility" ¹⁶⁴ The government also retains the right to "control and confiscate all ancient manuscripts if the acquirer has lost or mutilated one or part of one by negligence or with bad intent." ¹⁶⁵ Criminal sanctions for violations of article sixteen include the imprisonment of up to two years and confiscation of the objects. ¹⁶⁶

B. Obligations of Citizens

The 1936 Law also puts general obligations on all persons regarding the treatment of antiquities. "It is forbidden to break, mutilate, destroy or damage antiquities whether movable or immovable." ¹⁶⁷ Violations of this provision carry a maximum sentence of one year, a maximum fine of two hundred dinars, or both. ¹⁶⁸ In addition, the 1936 Law states that "[n]o person shall, without special permission, render any immovable antiquity or dispose of any of its constructional materials or utilize such antiquity in a manner which is likely to injure or destroy it or alter its character." ¹⁶⁹ Violations of this provision are punishable by up to three years imprisonment, a fine up to five hundred dinars, or both. ¹⁷⁰

The removal of any antiquity outside of Iraq is also prohibited. ¹⁷¹ Punishment for violation of this provision is imprisonment for up to five years

¹⁶¹ *Id.* art. 16(3)(d). Objects mentioned in part 2(a) of article sixteen, which references the religious sites named in article seven, are excepted from this provision.

¹⁶² *See id.* arts. 16(5)-(6), 58(1).

¹⁶³ *Id.* art. 16(6).

¹⁶⁴ *Id.* art. 9.

¹⁶⁵ *Id.* art. 16(5)(b).

¹⁶⁶ *Id.* art. 58(1). The sections apply to violations of articles 16(1) and (3).

¹⁶⁷ *Id.* art. 5.

¹⁶⁸ *Id.* art. 55.

¹⁶⁹ *Id.* art. 13.

¹⁷⁰ *Id.* art. 57.

¹⁷¹ *Id.* art. 26. There is an exception granted to the Directorate "for scientific studies, exchange and exhibitions."

and the confiscation of all of the possessor's antiquities, whether involved in the commission of this violation or not.¹⁷²

The 1936 Law also has provisions for fortuitous discoveries of antiquities. Any person who accidentally discovers a movable antiquity is to notify a government authority within seven days.¹⁷³ The governmental authority is to notify the Directorate immediately.¹⁷⁴ The discoverer may receive a "reward of not less than the material value of the object, whether it is of silver, gold or precious stones, regardless of antiquity, technique manufacture and its artistic and historical value."¹⁷⁵ Violations of this provision carry a sentence of imprisonment for not more than one year, a fine of not more than one hundred Dinars, or both, and confiscation of the antiquities.¹⁷⁶ A person reports a discovery of moveable antiquities to the Department of Antiquities may be entitled to a reward at the Department's discretion.¹⁷⁷

The discovery of immovable antiquities must also be reported to the local administration within ten days.¹⁷⁸ Failure to comply with the reporting provisions carries a punishment of imprisonment for up to six months, a fine of not more than one hundred dinars, or both.¹⁷⁹

C. Regulation of Archeological Sites

The 1936 Law has extensive procedures and regulations for the excavation of antiquities and the possession of the antiquities after excavation.¹⁸⁰ "Only the Government and groups or individuals authorized by the Government under this Law shall be entitled to excavate for antiquities. No one is, therefore, entitled to excavate for antiquities, even in his own land, unless he obtains an official permit."¹⁸¹ Violations of this provision are punishable by imprisonment for up to one year, a fine of one hundred dinars, or both, and the confiscation of all tools and antiquities found.¹⁸² Furthermore, if the violation

¹⁷² *Id.* art. 60(1).

¹⁷³ *Id.* art. 17.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* art. 58(2).

¹⁷⁷ *Id.* art. 19.

¹⁷⁸ *Id.* art. 11.

¹⁷⁹ *Id.* art. 56.

¹⁸⁰ *See id.* arts. 40-51, 54.

¹⁸¹ *Id.* art. 40.

¹⁸² *Id.* art. 63.

occurs on a site already determined to be a historical site, the punishment increases to imprisonment for up to three years or a fine of up to five hundred dinars and confiscation of all tools and antiquities.¹⁸³

The 1936 Law describes who is able to obtain permits, the process of obtaining permits and what details about the excavation the permit should contain.¹⁸⁴ Only “scientific societies and institutions and . . . qualified scholars of established archaeological capacity from the scientific and financial points of view” are able to obtain permits to conduct excavations in Iraq.¹⁸⁵

Once a permit has been granted, the excavation team must comply with provisions specifying the composition of the team, as well as other conditions.¹⁸⁶ The conditions for the excavation are described in article forty-four. Among the requirements, the permit holder agrees to “not demolish or remove any part of the buildings except after the fulfillment of the conditions . . . of the Directorate of Antiquities,”¹⁸⁷ post guards, at his expense, during and after the excavation at the site,¹⁸⁸ and take steps to preserve the site and its antiquities from damage.¹⁸⁹ If the permit holder does not comply with any of these provisions, the Directorate is entitled to revoke the permit.¹⁹⁰ Antiquities discovered in the course of an approved excavation are the property of the state; a reward is given to the excavator.¹⁹¹

The government retains a large degree of oversight and interest in the excavation. The government may consider a permit cancelled if digging ceases for more than one season.¹⁹² The 1936 Law also requires that the site and antiquities be made available for inspection by representatives of the Directorate at all times.¹⁹³ The government also retains the right to require the

¹⁸³ *Id.*

¹⁸⁴ *Id.* arts. 41-42.

¹⁸⁵ *Id.* art. 41.

¹⁸⁶ *Id.* arts. 43-44.

¹⁸⁷ *Id.* art. 44(f).

¹⁸⁸ *Id.* art. 44(i).

¹⁸⁹ *Id.* art. 44(j).

¹⁹⁰ *Id.* art. 48.

¹⁹¹ *Id.* art. 49. The excavator is permitted to obtain: (1) “casts, photographs, plans and maps of the antiquities discovered,” (2) “[c]ollections of potsherds and organic matters for the purpose of study and analysis, on condition that the results . . . be given to the Directorate within . . . one year . . .,” and (3) “[e]xport license(s) for such casts, photographs, plans, maps, potsherds, organic matters and soil which are given to the excavator to export from Iraq . . .” *Id.* art. 49(1)(a)-(c).

¹⁹² *Id.* art. 51.

¹⁹³ *Id.* art. 46.

permit holder to "pack up and dispatch to the Iraq Museum all movable antiquities."¹⁹⁴

The 1936 Law does allow some interests to remain in the excavator. "The excavating expeditions shall have the right of priority in the publication of antiquities discovered through excavations."¹⁹⁵ However, this right depends "firstly, on the necessity of making known to the Iraqi public the important results of the excavations as soon as possible; and, secondly it depends on the necessity of informing the scientific circles of such results without any delay."¹⁹⁶

The 1936 Law provides publication requirements for the permit holder. He must submit a summary report to the Department of Antiquities, stating the results of the excavation in publishable form, no later than six months following the close of the digging season.¹⁹⁷ Within two years after completion of the excavation, he must produce "a detailed scientific publication recording the general results of the excavations with a mention of the provenance of the antiquities found and a record of their respective locations."¹⁹⁸ The permit holder is also required to submit "one copy of every book, publication or article he publishes on his excavations and their results."¹⁹⁹

The 1936 Law imposes the harshest penalties on those who steal from the Directorate.²⁰⁰ The punishment for such an offense is "imprisonment for a period not less than six years and a fine of a sum which is six times the value of the stolen antiquity. Intending to commit such crime will be considered as the complete action. The sharer, accomplice or instigator are considered as the original doer."²⁰¹ If the crime is committed by someone "entrusted with the administration or keeping, preserving or guarding antiquities," the punishment is doubled.²⁰²

¹⁹⁴ *Id.* art. 50.

¹⁹⁵ *Id.* art. 54.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* art. 47(a).

¹⁹⁸ *Id.* art. 47(b).

¹⁹⁹ *Id.* art. 47(c).

²⁰⁰ *See id.* art. 60(2).

²⁰¹ *Id.*

²⁰² *Id.*

VI. PROPOSAL FOR IRAQI LEGISLATION

A. Should the Previous Iraqi Legislation Be Adopted?

Iraq's previous national legislation falls under the category of legislation that is based on a cultural nationalism ideology, as the emphasis is on the state's retention of the objects and the state's control over the discovery and disposition of the objects.²⁰³ In determining whether the new Iraqi government should adopt the previous regime's legislation, it is important to consider the arguments supporting both the cultural nationalism and cultural internationalism theories.

Cultural nationalism encourages a national interest in the history and culture of the nation and, therefore, increases a people's pride in their nation.²⁰⁴ An emphasis on the unity and history of the people of Iraq would be extremely beneficial to the Iraqi population. In a state of upheaval and new beginnings, the Iraqi people would benefit from the retention and proud display of their cultural property. UNESCO Director-General Koichiro Matsuura opened the First Cultural Forum for Iraq by stressing that

when cultural policy is based on the real aspirations of a people, and when it embodies the values of diversity and pluralism, it can be a powerful force for the reconstruction of a state and a society It is my conviction that if Iraq is to maximize its chances of reconciling past, present and future, and take a decisive step towards reconstruction, it must treat culture as a matter or [sic] urgency, on equal footing with humanitarian aid, sanitation and education.²⁰⁵

Iraq undoubtedly and justifiably considers its cultural heritage to be of great importance, as evidenced by the extensive legislation passed under the previous regime.²⁰⁶ The preservation of their cultural heritage would allow the

²⁰³ See discussion *supra* Part III.

²⁰⁴ See Merryman, *Elgin Marbles*, *supra* note 71, at 53.

²⁰⁵ *Iraqi Intellectuals Meeting at Unesco Outline a New Cultural Policy for Iraq*, UNESCO Press, May 29, 2004, http://portal.unesco.org/en/ev.php-URL_ID=20805&URL_DO=DO_TOPIC&URL_SECTION=201.html.

²⁰⁶ See discussion *supra* Part V.A-C.

Iraqi people to unite under a common goal and would reinforce their nation's importance, not only in history, but also in the current world community.²⁰⁷

Merryman's economic and political arguments for policies of cultural nationalism are also important when considering whether to adopt the previous legislation.²⁰⁸ The economic argument, that possessing the antiquities would bring great wealth to the nation,²⁰⁹ is extremely relevant in Iraq, especially for the more distant future. Iraq has a vast number of artifacts and historical monuments that, eventually, could result in a large tourism industry. When Iraq's new government is fully established and Iraq begins to become a more stable region, tourism could have a substantial effect on an otherwise nascent economy. The value of these objects would be retained in Iraq, allowing Iraq to thrive on its historical and cultural heritage.

Despite the less persuasive character of the political argument,²¹⁰ it is also useful to show how legislation based on cultural nationalism would be beneficial to Iraq. If this view is tempered, so as not to be extreme, it advances the Iraqi people's cause of keeping objects of Iraqi cultural heritage be located in Iraq because to keep them anywhere else would be "an offense to . . . [the] nation."²¹¹

A legislative scheme that reflects the theory of cultural nationalism would be most protective of Iraq's antiquities. Since there are thousands of archeological sites in Iraq, it would be impossible for the government to fully protect all of the sites. And since the number of buyers in the antiquities market is far less than the number of sites, regulating the buyers is the most efficient way to reduce the illicit trade.²¹² Culturally nationalistic legislation that would aim to curb trade in this manner, would enable the state to reduce the demand for the antiquities on the black market.²¹³

Iraq's previous protective legislation should be adopted to address the looting of Iraq's cultural heritage. As evidenced by the overwhelming number of nations that have enacted these cultural patrimony statutes,²¹⁴ the theory of

²⁰⁷ See PROTTE & O'KEEFE, *supra* note 80, at 8-9.

²⁰⁸ See Merryman, *Elgin Marbles*, *supra* note 71, at 55.

²⁰⁹ *Id.*

²¹⁰ See discussion *supra* Part III.

²¹¹ Merryman, *Elgin Marbles*, *supra* note 71, at 55.

²¹² Moore, *supra* note 90, at 479.

²¹³ *Id.* at 478-79.

²¹⁴ See discussion *supra* Part IV.

cultural nationalism is prevalent in the international community. Thus Iraq's laws that derive from the same theory would likely be accepted.²¹⁵

Moreover, the position taken by the United States, during the invasion and its aftermath, supports the previous Iraqi legislation in that it recognized that Iraq has indeed nationalized the artifacts and antiquities that are of Iraqi origin. A representative of the State Department, at the meeting of the International Conference on Cultural Property Stolen in Iraq, stated that "objects and documents taken from Iraqi museums, archives, libraries, monuments and archaeological sites were the property of the Iraqi nation under Iraqi and international law."²¹⁶ Also, in his report on the investigation of the looting of the Iraq National Museum, a Colonel from the United States Marine Corps stated, "[t]he missing artifacts are indeed the property of the Iraqi people. . . ."²¹⁷

Still, the arguments for adopting legislation based on cultural internationalism seem valid in modern-day Iraq. Cultural internationalism emphasizes the concern for the preservation of the artifacts. This concern is especially relevant in Iraq, where resources have been, and are currently being, diverted to the pressing problems of the population and the economy. However, previous Iraqi regimes were committed to preserving artifacts.²¹⁸ If these commitments are reinforced by the current regime, Iraq may make a strong case for retaining much of its cultural property.

Preservation encompasses not only artistic preservation and restoration, but also the simple physical safety of the artifacts.²¹⁹ In this respect, it may be difficult for Iraq to assert that artifacts should remain in the country, while it is still in a state of instability. However, if Iraq could show that a plan is in place to ensure the protection of artifacts, Iraq would have a better claim for retaining its cultural property.

Cultural internationalism also argues that the artifacts should be distributed throughout the world, so that everyone has a chance to view their "common

²¹⁵ For an evaluation of how foreign laws have fared in U.S. courts, see *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) (discussing Mexican law) and *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (discussing Guatemalan law).

²¹⁶ Bonnie Magness-Gardiner, Senior Cultural Property Analyst, United States Department of State, Presentation at the International Conference on Cultural Property Stolen in Iraq, May 5-6, 2003, <http://www.interpol.int/Public/WorkOfArt/Iraq/Minutes.asp?HM=1>.

²¹⁷ Colonel Matthew Bogdanos, *Iraq Museum Investigation: 22APR-8SEP03* (2003), <http://www.defenselink.mil/news/Sep2003/d20030922fr.pdf>.

²¹⁸ See generally 1936 Law.

²¹⁹ See Merryman, *Elgin Marbles*, *supra* note 71, at 57.

cultural heritage.”²²⁰ Iraq would benefit greatly from the distribution of its artifacts, as it would allow other cultures and nations the opportunity to study and appreciate the Iraqi cultural heritage. It could be argued that, since Iraq’s heritage is essential to the common history of humankind, it could be argued that, since Iraq’s heritage is essential to the common history of humankind,²²¹ Iraq could gain the support of many peoples by exposing them to Iraq’s artifacts and history. Iraq could gain the support of many peoples by exposing them to Iraq’s artifacts and history. However, the connectedness of the Iraqi people, themselves, should be the priority in deciding where to display Iraq’s artifacts. If Iraq retains its cultural property, it would greatly uplift the spirits of the Iraqi people and aid them in forming a greater sense of national unity.²²²

Another concern of cultural internationalists is that Iraq would engage in destructive retention or hoarding. Iraq must make a concerted effort to avoid enacting policies that would result in these types of behaviors. Otherwise, these policies will undoubtedly be viewed negatively by the international community.

Clearly, a balance must be achieved between the desired cultural protectionist policies and the realities of a legislative scheme that is too restrictive and overbroad. Achieving this balance will be the challenge for the new Iraqi government as it enacts and enforces legislation and policies designed to accomplish the overall goal, to protect the Iraqi cultural heritage.

B. Iraqi Legislation and Policies to Be Adopted

The legislation of Iraq’s previous regime was comprehensive and should be adopted under Iraq’s new government. This legislation embodies a culturally nationalistic framework, enabling the state to claim ownership of all national artifacts.²²³ This framework strengthens national unity by preserving Iraq’s common cultural heritage and history.

Perhaps the most important issue regarding Iraq’s cultural heritage legislation is the urgency of its adoption. Adoption has been hampered by “the problem of what legislation existed or was in force in Iraq. . . . [I]t was not clear what, if any, local laws existed or were valid.”²²⁴ Iraq must to quickly

²²⁰ *Id.* at 59-60.

²²¹ See discussion *supra* Part II.A.

²²² See discussion *supra* Part III.

²²³ See generally 1936 Law.

²²⁴ Commander Bernard Darties, Acting Head of the French Central Office for Combating Illicit Traffic in Cultural Property, France, Presentation at The International Conference on

resolve these issues regarding the questionable force of the previous legislation following Saddam Hussein's removal from power. Iraq should not only adopt the previous legislation, but should also take the position that the legislation was in effect during the transition of governments, and that violators of the law in the interim will be investigated to make clear prosecuted. This legislation should be adopted quickly to demonstrate that the country is concentrating on the removal and destruction of its cultural property.

By adopting the previous legislation, Iraq would gain not only domestic protection and regulation, but would also gain international recognition and protection through other countries' enforcement of Iraq's domestic legislation on the purchaser end of the trade.²²⁵ However, in order for Iraq to gain the willingness of other countries to enforce its laws, Iraq must engage in a system whereby the state does much to "possess, preserve, house, study, or display"²²⁶ the objects. By doing so, Iraq will demonstrate to other states that it is not relying only on the efforts of foreign nations to protect its cultural property, but that Iraq is taking domestic measures to protect cultural property. "The failure of the foreign sovereign to do more than enact a statute in the effort to halt the illegal flow of artifacts is a relevant consideration under both the UNESCO Convention and the Cultural Property Implementation Act."²²⁷ Therefore, it would be in Iraq's best interest, on both the domestic and international fronts, to establish other policies and programs to aid in the protection of Iraq's cultural property.

The International Coordination Committee for the Safeguarding of the Cultural Heritage of Iraq (ICC), a committee created under the auspices of the Minister of Culture of Iraq and UNESCO, has established a list of objectives to protect Iraq's cultural heritage.²²⁸ The committee made their final

Cultural Property Stolen in Iraq (May 5-6, 2003), <http://www.interpol.int/Public/WorkOfArt/Iraq/Minutes.asp?HM=1> (discussing the policing of the illicit trade of Iraqi artifacts after the U.S. invasion).

²²⁵ See discussion *supra* Part III.

²²⁶ Merryman, *Elgin Marbles*, *supra* note 71, at 31.

²²⁷ Judith Church, Note, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 COLUM. J. TRANSNAT'L L. 179, 205. This statement stems from critiques of *United States v. McClain*, 593 F.2d 658 (5th Cir. 1976) and *Gov't of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), where U.S. courts analyzed foreign state ownership laws in determining the potential return of artifacts to the state. The Convention on Cultural Property Implementation Act effectuates the UNESCO Convention for the United States. 19 U.S.C.S. § 2602 (2005).

²²⁸ International Coordination Committee for the Safeguarding of the Cultural Heritage of Iraq, First Plenary Session, Final Recommendations, May 24-25, 2004, <http://portal.unesco.org/>

recommendations, including these objectives, at their First Plenary Session in May 2004.²²⁹

Regarding the adoption of legislation in Iraq, Objective 2 is to "assist the Iraqi Ministry of Culture to review, enforce and strengthen its national legislation on cultural heritage, libraries and archives."²³⁰ This objective includes examining the existing legislation, determining its effectiveness, and ensuring it complies with international standards.²³¹

The ICC lists six other objectives aimed at preserving Iraq's cultural heritage through the implementation of plans and policies.²³² Objective 1 consists of assessing the cultural institutions in Iraq to identify areas for improvement.²³³ Objective 3 concerns constructing a comprehensive museum plan for conservation, education, training and documentation of Iraq's cultural heritage and property.²³⁴ Objective 4 pertains to the National Library and archives; it recommends the compilation of an inventory of objects, an assessment of the situation and organization of an international effort to aid immediate and long-term measures.²³⁵ The ICC's fifth objective deals with the many archeological sites in Iraq, it includes documenting and protecting these sites, with the view of creating a national registry.²³⁶ Objective 6 devises a plan for the protection of the intangible cultural heritage of Iraq.²³⁷ The final objective, Objective 7, requests that the international community " earmark human and financial resources for the safeguarding of Iraqi cultural heritage."²³⁸

If Iraq implements and complies with these objectives, Iraq's cultural heritage will be protected. With the aid of the international community, Iraq will be able to preserve its cultural heritage for future generations, not only the

culture/en/file_download.php/974172960e827f35916e19586b7ef1acrecommendations_english.pdf [hereinafter Final Recommendations].

²²⁹ *Id.*

²³⁰ *Id.* at objective 2.

²³¹ *Id.* at objective 2.

²³² *Id.*

²³³ *Id.* at objective 1.

²³⁴ *Id.* at objective 3.

²³⁵ *Id.* at objective 4.

²³⁶ *Id.* at objective 5. For a report on the current efforts to inventory the country's ancient sites and monuments, see Owen Bowcott, *Archaeologists Fight to Save Iraqi Sites: British Experts Aid Computer Survey in Attempt to Protect Monuments from Looters and War Damage*, GUARDIAN (U.K.), June 20, 2005, at 12, available at 2005 WLNR 9717674.

²³⁷ Final Recommendations, objective 6.

²³⁸ *Id.* at objective 7, comments.

future generations of Iraq, but also future generations of the international community. Iraq should, therefore, implement and enforce the previous domestic legislation and cooperate with the ICC and its recommendations.

Though the previous domestic legislation and policies are drawn from the cultural nationalist ideology, Iraq should also enact policies reflecting the theory of cultural internationalism. This compromise will likely increase the protection of Iraqi cultural heritage. Iraq should consider the distribution of some Iraqi artifacts to nations around the world, addressing some of the concerns of the cultural internationalists. The distribution of artifacts would not only aid in their preservation and study, but would also help to garner international support for the preservation of Iraq's cultural heritage, as it is the cultural heritage of all humankind.²³⁹ These pieces will convince the international community that Iraq recognizes and appreciates international support for the protection of the country's cultural property. Moreover, in distributing some artifacts, the demand for Iraqi artifacts will potentially lessen, thereby aiding Iraq's goal of protecting its cultural property through a reduction in the illegal trade.²⁴⁰

Iraq should retain a number of important artifacts, so as to instill a notion of common heritage in the Iraqi people and to encourage the development of national unity.²⁴¹ To achieve these goals, artifacts should be distributed to regional museums throughout Iraq and not be housed solely at the National Museum in Baghdad. It is crucial that all Iraqis experience and appreciate their common heritage if Iraq is to become a stable, successful state under this new government.²⁴²

In addition to policies specific to the artifacts, themselves, Iraq must also create policies that restrict the illicit trade of its antiquities. In order for Iraq to prevent the looting of antiquities, Iraq should take a two-step approach to reducing the incentives to loot. First, Iraq must increase the threat to looters through the effective enactment and enforcement of domestic legislation.²⁴³ Secondly, Iraq must make strides toward achieving a better quality of life for its citizens, creating legitimate methods of wage earning and, thereby, lessening the economic incentive for looters.²⁴⁴ If Iraq enacts these social

²³⁹ See discussion *supra* Part II.A, III.

²⁴⁰ See discussion *supra* Part III.

²⁴¹ See discussion *supra* Part III.

²⁴² See Merryman, *Elgin Marbles*, *supra* note 71, at 53.

²⁴³ See discussion *supra* Part III.

²⁴⁴ See discussion *supra* Part III.

policies, in addition to the previous legislation and the ICC objectives, the country will be well on its way to protecting its cultural property.

There are three international treaties regarding the protection of cultural property: the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954,²⁴⁵ the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,²⁴⁶ and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.²⁴⁷ Though these treaties are not within the scope of this Note, Iraq should also consider the adoption of these international treaties.²⁴⁸

VII. CONCLUSION

Iraq has suffered massive damage to its cultural heritage as a result of the United States' invasion and the subsequent looting of the National Museum in Baghdad. Iraq continues to lose valuable cultural property through the ongoing looting at historical archeological sites. As Iraq's cultural heritage is of great importance to Iraq and to the rest of the world, quick action must be taken to prevent its further destruction.

The legislation protecting cultural property that existed during the previous regime was comprehensive and followed an ideology typical to many source nations, that of cultural nationalism. Under the previous legislation, Iraq declared that all cultural property was the property of the state. Iraq strictly

²⁴⁵ The Hague Convention, *supra* note 74.

²⁴⁶ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232.

²⁴⁷ The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322.

²⁴⁸ For analyses of these treaties, see Sasha P. Paroff, Comment, *Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property*, 53 EMORY L.J. 2021 (2004) (discussing the inadequacies of international law as evidenced by the looting in Iraq); Matthew D. Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153 (2005); Josh Stuart, *Is All "Pharaoh" in Love and War? The British Museum's Title to the Rosetta Stone and the Sphinx's Beard*, 52 KAN. L. REV. 667 (2004); Claudia Fox, Note, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U.J. INT'L L. & POL'Y 225 (1993); Brian Bengs, Note, *Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503 (1996).

controlled the discovery, acquisition and exporting of artifacts. This type of scheme best represents Iraq's interests in its cultural property.

The current Iraqi administration should reenact the previous legislation, in addition to establishing strong economic and social policies that would aid in the protection of Iraq's cultural property. These policies should address the concerns of cultural internationalists, by promoting the importance of Iraq's history and its role in the development of modern civilization.

It is imperative that the new Iraqi government act quickly, not only to enact the legislation, but also to establish the position that the legislation was still operative during the war and occupation. Doing so will ensure the maximum protection available to these very important cultural pieces, as it will proclaim that protection did not lapse and enable the prosecution of violators. Iraq's cultural heritage is not just of interest to the Iraqi people, but to the world, as it is our common cultural heritage.

