

EVENTS AND CONFERENCES

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Conversations on Hard Topics 9th Annual Conference of the Lawyers' Committee for Cultural Heritage Preservation Washington, DC, 13 April 2018

On 13 April 2018, the Lawyers' Committee for Cultural Heritage Preservation hosted its 9th annual conference at Georgetown University Law Center, Washington, DC, "Conversations on Hard Topics". The panels addressed issues ranging from the Ukraine and related cultural heritage cases, the rights of religious and ethnic minorities in the Middle East, to the laws protecting Native American cultural heritage and the provenance of objects in museum collections. The prevalent spirit of the conference was that strictly following the law does not always lead to the best results for the cultural heritage of the peoples involved. Creative solutions and negotiated compromises based on mutual respect, transparency, and personal relationships prove to be more effective tools in achieving "moral" solutions. In this regard, most of the panellists challenged the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention") as a model for

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the international protection of cultural heritage. They argued that excessive deference to states-oriented claims for exclusive control over cultural heritage usually benefits states' political and proprietary interests at the expense of the human and property rights of individuals and groups.

The first panel – “Claiming and Disclaiming Ownership: Russian, Ukrainian, Both or Neither” – focused on the Ukrainian museums' possessions and claims, both in the context of the Second World War displacements and the recent annexation of Crimea by the Russian Federation. Irina Tarsis (Esq., Founding Director, Center for Art Law) outlined the rationales of the decision rendered by the Amsterdam District Court in the matter of the objects which had been loaned from five Ukrainian institutions – four of which are located in Crimea – for a temporary exhibition to the Allard Pierson Museum in Amsterdam (“AP Museum”) in 2014.¹ On 14 December 2016 the court rendered a verdict, ruling that the AP Museum shall transfer the loaned objects to the custodian of the Crimean artefacts – the National Historical Museum of Ukraine in Kyiv,² not the Crimean museums. As the Amsterdam Court's verdict implicitly gave precedence to the Ukrainian legislation implementing the 1970 UNESCO Convention,³ Tarsis cited the applicable provisions of the Law of Ukraine on exportation, importation and restitution of cultural values (1999). The law states that “[t]hose cultural values, which were temporarily exported from Ukraine and were not returned in the period provided by the contract, are considered unlawfully exported”.⁴ Since the export licenses had expired and the loaned objects were not returned, and the Dutch Heritage Act tracking the 1970 UNESCO Convention prescribes the return of cultural objects upon determination of their illicit importation, the Amsterdam Court adopted a broad interpretation deeming the non-return after expiration of the loan contract or export licenses to be an illegal importation. Next, Tarsis argued that the court took the position that only states can claim the return of cultural objects, disregarding the provisions of the Dutch Heritage Act on return to non-state parties.⁵ Crimea is not a sovereign state and cannot claim any rights to the artefacts, and the secession of Crimea is

¹ The parties were comprised of the four Crimean museums, the State of Ukraine, and the University of Amsterdam acting on behalf of the AP Museum. When the exhibition in Amsterdam had come to an end in August 2014, 19 out of 500 borrowed artefacts were returned uncontested to the museum in Kyiv.

² Amsterdam District Court, *Tavrida Central Museum et al. v. University of Amsterdam*, Verdict of 14 December 2016, ECLI:NL:RBAMS:2016:8264, paras. 4.20 and 5.

³ *Zakon Ukrainy pro vyvezennya, vvezennya ta povnennya kul'turnykh tsinnostey* [Law of Ukraine on exportation, importation and restitution of cultural values], 21 September 1999, Official Bulletin of the Verkhovna Rada of Ukraine, 1999, No. 48, p. 405.

⁴ *Ibidem*, Article 23.

⁵ *Wet houdende bundeling en aanpassing van regels op het terrein van cultureel erfgoed (Erfgoedwet)* [Act relating to the combining and amendment of rules regarding cultural heritage (Heritage Act)], 9 December 2015, Article 6(7).

irrelevant to the legal status of Ukrainian-registered cultural objects.⁶ The decision addressed only Ukraine's claim for the return of the objects, leaving aside the ownership determination. In this regard, Tarsis underlined, the court underscored that the system created by the 1970 UNESCO Convention "is an interstate affair based on cooperation between national authorities and aimed at the protection of *national collections*",⁷ where the state's interest prevails over other interests that might be at stake; in particular, the interests of the local population of Crimea to protect and preserve the integrity of its cultural heritage. The Amsterdam court ignored the fact that the Scythian artefacts in question had been discovered and preserved in Crimea, and disregarded the principle of the integrity of a collection which accentuates that the value of the artefacts is in fact dependent on cross-referencing them with other items in the collection.⁸ Tarsis concluded that these shortcomings should be addressed by soft-law instruments, with regard to both the acknowledgement of the cultural integrity of the territory (comprising cultural rights of its inhabitants) and to the fair and just settlement of disputes.⁹

As the 1970 UNESCO Convention does not deal with cultural property removed during the times of colonialism and the Second World War,¹⁰ and adversarial proceedings do not bring about ethical solutions, other avenues could come into play, such as long-term loans, joint custody agreements, and exchanges. The panellists brought up these strategies in the context of cultural objects seized by the Soviet Trophy Brigades at the end of the Second World War as a restitution-in-kind or repatriation for the massive losses caused by the Nazis.¹¹ The recorded interview which David D'Arcy (arts journalist, producer) conducted with the absent Peter van den Brink (Director of the Aachen City Museums, Suermondt-Ludwig Museum in Aachen, Germany) laid out the details of a never materialized deal between the Aachen Museum and the Simferopol Art Museum (Ukraine). The Ukrainian museum, which before the Second World War housed one of the

⁶ Ukraine invoked laws vesting ownership of all archaeological finds in the state: *Zakon Ukrainy pro okhoronu arkhеолоhichnoyi spadshchyny* [Law of Ukraine on protection of archaeological heritage], 18 March 2004, Official Bulletin of the Verkhovna Rada of Ukraine, 2004, No. 26, p. 361.

⁷ E. Campfens, I. Tarsis, *Cri-me-a-river! Crimean Gold in the Crosshairs of Geopolitics*, "IFAR Journal" 2017, Vol. 18(1), p. 45 (emphasis added).

⁸ B. Schönenberger, *The Restitution of Cultural Assets: Causes of Action, Obstacles to Restitution, Developments*, Eleven International Publishing, Berne 2009, pp. 49-50.

⁹ Tarsis mentioned the proposal for "Guiding Principles Relating to the Succession of States in Respect of Tangible Cultural Heritage" found in the Annex of A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford 2015, pp. 335-339.

¹⁰ P.J. O'Keefe, *Commentary on the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 2nd ed., Institute of Art and Law, Leicester 2007, pp. 80-81.

¹¹ For a discussion on rectification justice in case of Poland, see A. Jakubowski, *Territoriality and State Succession in Cultural Heritage*, "International Journal of Cultural Property" 2014, Vol. 21(4), p. 387.

largest Western art collections in the Soviet Union,¹² is now home to 77 paintings from the Suermondt-Ludwig Museum. Until 2008 the paintings had been kept in the Crimean Museum unbeknownst to the Germans, as a certain “compensation-in-kind” for about 4,000 paintings destroyed by Nazi bombs.¹³ Upon their discovery by German tourists, the two museums initiated negotiations over the paintings. The plan, which fell through after Russia’s annexation of Crimea in 2014, stipulated that the museums could choose five paintings from each other’s storage and retain them as a gift. The remaining 71 paintings would stay in Simferopol on a long-term loan (50 years), with the acknowledgement that they formally belonged to Germany. Every five to ten years a different group of about 20 to 25 paintings would travel to Aachen to be presented at an exhibition in the Suermondt-Ludwig Museum and then return to Simferopol. The deal was supposed to set a precedent in German-Ukrainian relations and, as van den Brink underscored, pave the way for the German museums to ultimately learn the whereabouts of the Soviet Trophy Brigades’ loot, especially in the Bogdan and Varvara Khanenko Museum of Art in Kyiv. He also stressed that the best way to access the unknown materials is to establish good relations with individuals who hold important positions in museums, as official delegation meetings do not always bring satisfactory results.

Carole Basri (Fordham University School of Law) took the audience on a journey to Iraq, former home to the oldest and the second largest Jewish community in the Arab world.¹⁴ She briefly explained how the Jewish community – which resided in Iraq since the destruction of the first Jewish temple in 586 BC and numbered between 125,000 to 160,000 people in the first half of the 20th century – has been decimated to the extent of just four people in total in 2017. She outlined the actions taken by successive Iraqi governments to persecute, torture, eradicate, and expel the Iraqi Jewish community.¹⁵ The *dhimmitude*, i.e. a non-Muslim believer status the Jews had enjoyed since the Arab Conquest in 622 AD, required them to pay special taxes and forbade them, *inter alia*, from owning a home in exchange for the “protection” from death and conversion. Although not entirely enforced, this status facili-

¹² *Streit um Gemälde in der Ukraine*, “Spiegel Online”, 7.11.2018, <http://www.spiegel.de/kultur/gesellschaft/verschollene-beutekunst-streit-um-gemaelde-in-der-ukraine-a-589136.html> [accessed: 2.04.2019].

¹³ See, for example, J. Kucera, *Sidebar: WWII Tensions Continue in Crimean Museum*, Al Jazeera, 13 March 2014, <http://america.aljazeera.com/articles/2014/3/13/sidebar-wwii-tensionscontinueincrimeanmuseum.html> [accessed: 2.04.2019].

¹⁴ Y. Azrieli (ed.), *Annals of Iraqi Jewry*, Vol. I, Benzion Hadar, Jerusalem 1995. In 1945 there were about 900,000 Jews living in the Arab world. According to Ms. Basri there are less than 4,000 Jews living in the Arab countries now. The majority live in Morocco, and there are less than 50 in Egypt, Syria, and Yemen, with no Jews left in Libya. M. Hillel Shulewitz, R. Israeli, *Exchanges of Populations Worldwide: The First World War to the 1990s*, in: M. Hillel Shulewitz (ed.), *The Forgotten Millions: The Modern Jewish Exodus from Arab Lands*, Cassell, London 1999, pp. 126, 139, after: C. Basri, *The Jewish Refugees from Arab Countries: An Examination of Legal Rights – A Case Study of the Human Rights Violations of Iraqi Jews*, “Fordham International Law Journal” 2002, Vol. 26(3), p. 659.

¹⁵ C. Basri, *op. cit.*, p. 693.

tated implementation of Nazi propaganda in Iraq in the 1930s and 1940s and contributed to major deterioration of conditions of the Jews in the wake of the 1948 Arab-Israeli War. The Nazi propaganda culminated in a two-day pogrom in 1941 known as *Farhud*, during which 200 Jews were murdered and 2,000 wounded.¹⁶ The anti-Zionist sentiment provoked the enactment of further severely discriminatory laws towards Iraqi Jews, all of which led to an orchestrated series of show trials.¹⁷ A law permitting the Jews to emigrate from Iraq upon divestment of their citizenship was enacted in 1950.¹⁸ Subsequently a law depriving the denationalized Jews of their property was enacted, forcing them to leave almost everything they owned behind.¹⁹ The government did not even allow them to take personal property of virtually no market value, like prayer books, photographs, and other family heirlooms.²⁰ By January 1952 a total of 120,000 Jewish refugees were airlifted to Israel in Operation Ezra and Nehemiah.²¹ The remaining Jewish community endured further violence with the uprising of the Baath Party in 1963,²² and after the Six Day War (1967) the restrictions included blocking Jewish savings in all banks and blocking of all Jewish property, putting the Jews out of employment, and leading to their semi-house arrest and restricting their communication.²³ Among the institutions targeted was the last Jewish school of Baghdad, founded by Frank Iny, Ms. Basri's grandfather, right after *Farhud*, when Jews were no longer welcome in the state-run schools. Records from that school are among the tens of thousands of holy and secular Jewish books, documents, and objects forcibly left behind by the fleeing community. These "archives" were later put in the only remaining and functioning synagogue in Baghdad by the handful of the Jews who had stayed behind. Stolen by Saddam Hussein's police under the guise of night in the early 1980s, they were discovered in May 2003 by the US Army team in the basement of Saddam Hussein's intelligence headquarters in Baghdad. The archives were subsequently moved to the USA, and have undergone a \$3 million restoration and digitization by the National Archives and Records Administration²⁴ in Washington, DC. Pursuant

¹⁶ *Ibidem*, p. 672.

¹⁷ *Ibidem*, p. 677.

¹⁸ *Ibidem*, p. 680.

¹⁹ *Ibidem*, p. 684.

²⁰ I. Levin, *Locked Doors. The Seizure of Jewish Property in Arab Countries*, Praeger, Westport, CT 2001, after: C. Basri, *op. cit.*, p. 684.

²¹ G.C. Bekhor, *Fascinating Life and Sensational Death. The Conditions in Iraq Before and After the Six-Day War*, 1990, p. 110, after: C. Basri, *op. cit.*, p. 684.

²² S. Horesh, *The Jews of Iraq Between 1920 and 1970*, "The Scribe" 1987, Vol. 21, p. 6, after: C. Basri, *op. cit.*, p. 685.

²³ C. Basri, *op. cit.*, p. 686.

²⁴ *Agreement between the Coalition Provisional Authority and the National Archives and Records Administration*, 19 August 2003, https://www.ija.archives.gov/sites/default/files/page-images/content/1.0/MOA_CPA_NARA.pdf [accessed: 6.03.2019].

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to a Department of State backed agreement between the Coalition Provisional Authority in Baghdad, after restoring, digitizing, and exhibiting the items in the United States, the USA will return them to Iraq.

As noted by Kate Fitz Gibbon (Fitz Gibbon Law, LLC), while the archives are to be returned pursuant to an isolated agreement signed already after the items had been taken to the United States from Iraq, the agreement reflects the State Department's longstanding tendency to ignore Congress's statutory criteria for the enactment of cultural property import restrictions under the Convention on Cultural Property Implementation Act (CPIA).²⁵ The United States may place import restrictions on cultural property from a requesting state only if four criteria are met: (1) the cultural patrimony of the State Party to the 1970 UNESCO Convention is in jeopardy of pillage; (2) the State Party has taken measures to protect its cultural patrimony; (3) implementation of the restrictions is in concert with similar restrictions implemented or to be implemented by the nations that have significant import trade in such material; and (4) the application of such restrictions must be consistent with the general interest of the international community in the interchange of cultural property among nations.²⁶ In the wake of the socio-political unrest in the Middle East and North Africa (MENA) states, in response to requests for import restrictions from four Arab states the United States has enacted bilateral MOUs or other emergency import restrictions with Iraq (2004 and 2007),²⁷ Egypt (2016),²⁸ Syria (2016),²⁹ and Libya (2017).³⁰ All of these states have similar histories of persecution, forcible expulsion, and expropriation of their Jewish citizens.³¹ All of the requested import restrictions include virtually any object of cultural value, irrespective of its relevancy to the country of origin, and the existence of effective government ownership. Spanning from "antiquities to ephemera",³² they

²⁵ 19 USC § 2601-2613.

²⁶ 19 USC § 2602(a)(1)(A)-(D).

²⁷ President of the United States, Executive Order 13350, 29 July 2004, 69 FR 46055; Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq, 30 April 2008, 73 FR 23334 (19 CFR 12).

²⁸ Import Restrictions Imposed on Certain Archaeological Material from Egypt, 6 December 2016, 81 FR 87805 (to be codified at 19 CFR 12).

²⁹ In the case of Syria, these restrictions were enacted pursuant to a recent piece of legislation, i.e. the Protect and Preserve International Cultural Property Act, 9 May 2016, PL 114-115 (19 USC 2602), which permits the President to impose emergency import restrictions and emergency protection for Syrian cultural property and bypass the minimal requirements of the CPIA, including the protection of Syria's own monuments; Import Restrictions Imposed on Archaeological and Ethnological Material of Syria, 15 August 2016, 81 FR 53916 (19 CFR 12).

³⁰ Emergency Import Restrictions Imposed on Archaeological and Ethnological Materials from Libya, 5 December 2017, 82 FR 57346 (to be codified at 19 CFR 12).

³¹ See generally, among others, M.R. Fischbach, *Jewish Property Claims Against Arab Countries*, Columbia University Press, New York 2008.

³² See K. Brennan, K. Fitz Gibbon, *Cultural Property: Rights of Jewish and Christian Minorities*, "Cultural Property News", 9 April 2018, <https://culturalpropertynews.org/cultural-property-agreements-and-the-rights-of-ethnic-minorities-in-the-middle-east> [accessed: 2.04.2019].

either explicitly mention “crosses, chalices, Kiddush cups, candelabra and Torah pointers”³³ or cover community objects by implication. The US restrictions effectively sanction the national patrimony laws of those countries, recognizing their oppressive regimes’ ownership over Jewish and other minorities’ cultural objects. Notwithstanding recent news reports about the Iraqi leadership’s outreach toward the exiled Jewish community,³⁴ Jews have been generally denied admission to enter these MENA States.³⁵ Fitz Gibbon argued that the prioritization of states’ rights over the entitlement to the “realization of cultural rights” expressed in Article 22 of the Universal Declaration of Human Rights,³⁶ and to “every people’s right and duty to develop its culture”, as vocalized by the UNESCO Declaration of Principles of International Cultural Co-operation,³⁷ is in stark contrast with the “general interest of the international community in the interchange of cultural property” – which has to be taken into consideration when imposing import restrictions. Other CPIA mandated parameters, such as self-help provisions, have been ignored as well. For example, Libya, with its rival governments and militia groups³⁸ in the post-Gaddafi political vacuum, is powerless to monitor and stop the looting and has hardly ever demonstrated any efforts to do so.³⁹ Therefore, while Ms. Basri suggested a carve-out in the law, Kate Fitz Gibbon said the simplest solution is to start holding the US administration to the plain language of the CPIA. She also underlined that available ameliorative actions – such as safe harbors offered by the US museums – are not utilized due to “zombie” claims of major markets for looted antiquities spread overwhelmingly by the media outlets and self-styled antiquities hunters.

Numerous commentators have noted that the parameters prescribed by the CPIA had been ignored ever since the Department of State overtook the

³³ Import Restrictions... Iraq, Article G(6).

³⁴ C. Maza, *Jews Can Return to Iraq Under New Leadership, Shiite Cleric Muqtada Al-Sadr Says*, “Newsweek”, 6 December 2018, <https://www.newsweek.com/shiite-cleric-muqtada-al-sadr-says-jews-can-return-iraq-under-new-leadership-973451> [accessed: 2.04.2019].

³⁵ See, for example, J. Kirchick, *Right of Return*, “Tablet”, 2 September 2011, <https://www.tabletmag.com/jewish-news-and-politics/76721/right-of-return> [accessed: 2.04.2019].

³⁶ “Everyone, as a member of society [...] is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. Universal Declaration of Human Rights, 10 December 1948, UNGA Res 217 A(III), Article 22.

³⁷ 4 November 1966, Article I(2).

³⁸ European Council on Foreign Relations, *A Quick Guide to Libya’s Main Players*, https://www.ecfr.eu/mena/mapping_libya_conflict [accessed: 2.04.2019].

³⁹ T. Cornwell, *Looters Exploit the Political Chaos in Libya. Illicitly Excavated Artefacts Are “Gushing Out” of the Country, Experts Warn*, “The Art Newspaper”, 20 October 2016, <https://web.archive.org/web/20161020212950/http://theartnewspaper.com/news/looters-exploit-the-political-chaos-in-libya> [accessed: 2.04.2019]. In the case of Syria, experts point out that Assad’s forces were involved in antiquities looting long before ISIS was in control of much of its territory. M. Press, *How Antiquities Have Been Weaponized in the Struggle to Preserve Culture*, “Hyperallergic”, 7 December 2017, <https://hyperallergic.com/415471/how-antiquities-have-been-weaponized-in-the-struggle-to-preserve-culture> [accessed: 2.04.2019].

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US Information Agency's oversight of the Cultural Property Advisory Committee (CPAC). They claim that the MOU process has become a diplomatic bargain, "risking US access to art being negotiated away in exchange for more pressing US diplomatic, economic, and security interests".⁴⁰ Some also point that the US government is using concern for cultural heritage as a justification for military actions in the same way it has historically utilized concern for human rights.⁴¹

Perhaps this is why a specialist in government relations, Marcus Lubin (Principal with DLM Group), did not add much to the discussion.

The third session, "Protecting Native American Cultural Heritage", opened with a poignant call from the Governor of the Pueblo of Acoma to recognize the vital role Native American cultural items play in maintaining the tribe's identity and cultural survival. They are used for sacred and ceremonial purposes and their sale or removal is strictly prohibited by the traditional law of the Pueblo. Shannon Keller O'Loughlin (Attorney and Executive Director of the Association on American Indian Affairs) and Greg Smith (Partner, Hobbs, Straus, Dean & Walker, LLP) evaluated the US laws pertaining to the Native American cultural heritage and laid out a desired strategy for the future. While O'Loughlin navigated the audience through the existing web of laws comprising the Antiquities Act,⁴² the Native American Graves Protection and Repatriation Act (NAGRPA),⁴³ the Archaeological Resources Protection Act (ARPA)⁴⁴, and the National Historic Preservation Act (NHPA)⁴⁵ – Greg Smith focused on the proposed Safeguard Tribal Objects of Patrimony (STOP) Act of 2016.⁴⁶ O'Loughlin stressed that apart from NAGPRA, these laws had never been enacted to protect or support tribal sovereignty but rather to stop the looting and protect the archaeological sites for scientific research and display in museums. In fact, it may well be argued that the US Government had encouraged removal up until the enactment of NAGPRA.⁴⁷ The existing patchwork of legislation offers only a selective protection tied to the status of the land or the type of funding, i.e. the land must be public,⁴⁸ federal,⁴⁹

⁴⁰ J.F. Fitzpatrick, *Falling Short – Profound Failures in the Administration of the 1983 Cultural Property Law*, "Art & Cultural Heritage Law Newsletter" 2010, Vol. 2(1), p. 24, after: K. Fitz Gibbon, CPAC...

⁴¹ M. Press, op. cit.; see generally: J. Peck, *Ideal Illusions. How the U.S. Government Co-opted Human Rights*, Metropolitan Books, New York 2010.

⁴² 16 USC §§ 431-433 repealed and re-codified at 54 USC §§ 320301-320303, 18 USC § 1866.

⁴³ 25 USC §§ 3001-3013, 18 USC § 1170.

⁴⁴ 16 USC §§ 470aa-470mm.

⁴⁵ 16 USC §§ 470-470h3.

⁴⁶ S. 1400, 115th Cong. (2017).

⁴⁷ B. Povolny, K. Fitz Gibbon, *Paradigm Shift as Dealers Partner with Tribes*, "Cultural Property News", 24 May 2017, <https://culturalpropertynews.org/paradigm-shift-art-dealers-partner-with-tribes-on-returning-sacred-objects> [accessed: 2.04.2019].

⁴⁸ 16 USC §470bb (3) (ARPA).

⁴⁹ 43 CFR §10.2 (f)(1) (NAGRPA).

“tribal”,⁵⁰ or “Indian”,⁵¹ or the undertaking on the land in any state must be funded in whole or in part under the direct or indirect jurisdiction of a federal agency.⁵² O’Loughlin expressed the need for laws that would grant absolute protection to the Native American cultural items and mentioned the Bald and Golden Eagle Protection Act⁵³ and foreign patrimony laws nationalizing virtually anything found underground as model laws.

The STOP Act, reintroduced in the Senate in June 2017, changes the federal law to create an explicit export ban on Native American items obtained illegally under NAGPRA, ARPA, and the Antiquities Act. While some scholars are concerned that the bill could violate the Fifth Amendment’s protections against the taking of private property without due process of law by confusingly conflating the definitions of cultural objects from all the three laws, without reference to the specific limitations and restrictions in those laws,⁵⁴ Smith stressed the Act’s importance in negotiations with foreign nations for return of those items that have already been stolen. In the case of the Acoma Shield,⁵⁵ France pointed to the absence of explicit exportation prohibitions on cultural objects and initially refused to halt the auction. The STOP Act also contributes to achieve another, far more important goal; which is to bring about a paradigm shift in the way of seeing the communal value of Native American cultural objects, rather than viewing them only through the lens of their monetary and artistic value. The market should recognize the distinction between ceremonial objects that might have some intrinsic artistic value and the actual works of art made for sale by the tribal artists.

Smith reminded the audience that the Declaration of Independence contains a phrase “merciless Indian Savages”, and historically the native peoples’ property had been perceived as spoils of war and its exploitation had been romanticized in popular culture until this day. Smith, who represents the Pueblo of Acoma in its efforts to recover the Acoma Shield from France, laid out the strategy that emerged from the Pueblo’s actions and led to the drafting of the STOP Act. First, they sent out a statement of values in this area to the Congress, which resulted in a joint House-Senate resolution called the PROTECT Patrimony Resolution,⁵⁶ condemning illegal trafficking in tribal cultural patrimony. While it is not possible to sue based on this resolution, it is a very strong proclamation recognizing, *inter alia*,

⁵⁰ 43 CFR §10.2 (f)(2) (NAGPRA).

⁵¹ 16 USC §470bb (4) (ARPA).

⁵² 16 USC §470w (7) (NHPA).

⁵³ 16 USC §§ 668-668d.

⁵⁴ B. Povolny, K. Fitz Gibbon, *op. cit.*

⁵⁵ The Acoma Shield is a ceremonial shield the Pueblo of Acoma believes to be stolen from the shield’s caretaker in the 1970s. In May 2016, it appeared for sale in a Paris auction house, the EVE.

⁵⁶ Protection of the Right of Tribes to Stop the Export of Cultural and Traditional Patrimony Resolution, introduced 2 March 2016, agreed to 1 December 2016, <https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/122/text> [accessed: 2.04.2018].

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the importance of the tribal cultural items to Native American groups or cultures, their inalienability, non-negotiability, and their confidential nature and description. In the words of Governor Riley, moving beyond the Western concept of property rights is an integral part of this much-needed paradigm shift. Another necessary step was to secure a statement from a federal court. Smith stressed the efforts of the Department of Justice to obtain a warrant from the federal court in New Mexico to arrest the shield. Although the item is not yet returned, it was taken off the auction in France. Third, several major committees' chairs, along with Acoma's congressman Steve Pearce, requested the Government Accountability Office⁵⁷ to review federal agencies' efforts to prevent, investigate, and prosecute cases of looting, theft, and trafficking in Native American cultural items. Although it was scheduled to be released in the summer of 2017, as of June 2018 the report is still not out. So far, \$1 million has been secured for training and raising the awareness of the Bureau of Indian Affairs (BIA) law enforcement. In the future, this might lead to the creation of a Cultural Items Unit within the BIA, which could be similar to the Federal Bureau of Investigation Art Crimes Unit. While the STOP Act will facilitate the return of the tribal items illegally exported from the US through legal channels, it also creates an amnesty window which will provide an opportunity to return tribal cultural items without fear of being prosecuted. This opportunity is crucial, as the Native American art market is predominantly centred in the USA and the need for conversations between the dealers and native peoples is constantly mentioned as the main drive of a possible shift of the paradigm in the future. Smith reiterated that the human process significantly outweighs the scientific legal means.

The last panel, "Best Practices in Acquiring and Collecting Cultural Property", focused primarily on the tainted collection of the newly-created Museum of the Bible (MOTB) in Washington, DC, which opened its door to the public in November 2017. A private museum, founded by the evangelical Christian Green family, owners of the arts and crafts chain store Hobby Lobby, houses 44,000 biblical texts and artefacts and is one of the largest of its kind in the world. Before the museum opened, in 2011 the US Customs had seized shipments of Iraqi cuneiform tablets and clay bullae imported by Hobby Lobby and labelled as "handcrafted clay tiles", with misstated values and countries of origin listed either as Israel, Turkey, or not indicated at all. In July 2017, the US government had filed a civil *in rem* action to forfeit the contents of the packages, alleging that their shipment had been contrary to law. As per the settlement reached, Hobby Lobby agreed to pay \$3 million to the US Department of Justice as substitute assets for other importations; to surrender 3,594 artefacts; and to adopt an internal compliance regime. Michael McCullough (Partner, Pearlstein, McCullough & Lederman LLP), who represented Hobby Lobby in the settlement, noted that trade in cultural property is complicated and not free

⁵⁷ The US Government Accountability Office is a legislative branch agency that conducts nonpartisan, independent research for the US Congress.

from the mistakes on the part of the governments who advocate for national retention and universal restitution. In fact, these government officials, as McCullough's practice shows, not infrequently participate in clandestine transactions in cultural property.⁵⁸ While this should not serve as an excuse for breaking the US laws, McCullough sees it as an extenuating circumstance for some unseasoned collectors. MOTB's Director of Collections Operations, Jeff Kloha, talked about the Museum's collections' review process and the implementation of internal policies and procedures governing the importation and purchases of cultural items,⁵⁹ adopted after the settlement had been reached. Oddly enough, Kloha opened with a statement that the Green collection had been formed originally as a private collection "without consideration for museum standards for cultural property and provenance", thus wrongly implying that different standards and laws applied to different types of collectors. He also insinuated that the Museum's exceptional situation, which makes provenance research especially challenging, stems from the fact that its whole collection comes from a secondary market, not directly from archaeological excavations. The provenance webpage the Museum put up before its opening details the research methods employed while reviewing the collection. Kloha noted that some items had been put on display despite acknowledged gaps in their ownership history. They are important enough to receive continued attention and research. He raised the issue of orphaned objects, which was further elaborated upon by the next speaker, Eric Meyers (Ph.D., Bernice and Morton Lerner Emeritus Professor in Judaic Studies and Archaeology, Duke University). Meyers provided an example of a black basalt 4th century BC lintel valued at around \$1.4 million, which currently adorns the entrance to the chapel at the Freeman Center for Jewish Life at Duke University. The lintel had originally been donated to the Museum of Jewish Heritage in New York City by Daniel M. Friedenberg. After doubts about its provenance had arisen, the Museum gave it back to Friedenberg who, having had already deducted its value for tax purposes, bestowed the lintel to the then newly-dedicated Center for Jewish Life, on the advice of his friend Meyers, at that time the Center's President. Meyers speculated that while the Israel Museum in Jerusalem would not have accepted the lintel, MOTB would most likely have done so. He also added an interesting wrinkle to the discussion about the Museum's collection of Torah scrolls,⁶⁰ and echoed the concerns penetrating the Native American community which had been expressed in the preceding panel. The Museum of the Bible holds approximately 2,000 Torah scrolls dating from the 16th through the 20th centuries, which

⁵⁸ D.L. Jacobs, *Stolen Dinosaur, Bought for \$1 Million at New York Auction, Will Be Returned to Mongolia*, "Forbes", 6 May 2013, <https://www.forbes.com/sites/deborahjacobs/2013/05/06/stolen-dinosaur-bought-for-1-million-at-new-york-auction-will-be-returned-to-mongolia/#91d01e346d9c> [accessed: 2.04.2019].

⁵⁹ This acquisitions policy is available at: <https://www.museumofthebible.org/acquisitions-policy> [accessed: 2.04.2019].

⁶⁰ The debatable authenticity of the parchment fragments the Museum displays, such as the "Dead Sea Scrolls", will not be addressed in this Review.

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primarily originated in the European market from the decimated European Jewish population of the Second World War. While the Museum views its scroll collection as a proof of the Jewish commitment to preserve the Word of God, Meyers stated that Jews see the Word of God in dynamic and fluid terms – always in need of further explanation and elaboration. He expressed a wish that the scrolls should be given on long term loans to the needy Jewish congregations and college Hillels.⁶¹

It is somehow puzzling that the discussion on the acquisition and collection practices, revolved solely around one, rather unambiguous case of Hobby Lobby, i.e. one which concerned a quite recent seizure and was a result of a lack of basic forethought and experience. Furthermore, as the authenticity of the Dead Sea Scroll fragments in MOTB's possession has been largely debated,⁶² some part of the discussion inevitably touched on the topic of authentication methods, which unnecessarily diluted the focus of the debate. As a number of spectacular and controversial seizures of antiquities from well-known private and public collections made by the state of New York law enforcement authorities hit the headlines in the fall of 2017⁶³ and earlier this year,⁶⁴ one would have expected the panellists to address the methods employed by the Manhattan District Attorney's office. Throughout the year, numerous commentators noted that the seizures – which had been led by assistant District Attorney Matthew Bogdanos, a dedicated anti trade crusader and head of the antiquities-trafficking bureau formed in December 2017 – had been made from secret files unavailable to the public⁶⁵ and had been aimed at ob-

⁶¹ The Museum's website informs that the scrolls "have been appropriately retired from use ('decommissioned') and are preserved in abiding respect for their historical, cultural, and religious significance". See: <https://www.museumofthebible.org/collections/provenance> [accessed: 2.04.2019].

⁶² See, for example, M. Greshko, *Forgeries May Hide in Museum of the Bible's Dead Sea Scrolls*, "National Geographic", 19 November 2017, <https://www.nationalgeographic.com.au/history/forgeries-may-hide-in-museum-of-the-bibles-dead-sea-scrolls.aspx> [accessed: 2.04.2019].

⁶³ In October 2017 the Manhattan district attorney's office seized a limestone bas relief from Persepolis in Iran from the booth of English art dealer Rupert Wace at the European Fine Arts Fair (TEFAF) in the Park Avenue Armory: J.C. McKinley Jr., *Ancient Limestone Relief is Seized at European Art Fair*, "The New York Times", 29 October 2017, <https://www.nytimes.com/2017/10/29/arts/design/ancient-limestone-relief-seized-european-fine-art-fair.html> [accessed: 2.04.2019]. Another object, a fragment of 2,000 year old mosaic from one of Caligula's ceremonial ships, was also seized in October 2017 from the New York home of a European antiques dealer, Helen Fioratti: J.C. McKinley Jr., *A Remnant from Caligula's Ship, Once a Coffee Table, Heads Home*, "The New York Times", 19 October 2017, <https://www.nytimes.com/2017/10/19/arts/design/a-remnant-from-caligulas-ship-once-a-coffee-table-heads-home.html> [accessed: 2.04.2019].

⁶⁴ On 5 January 2018 investigators seized artefacts from the Manhattan office and home of a billionaire philanthropist and major supporter of the Metropolitan Museum, Michael H. Steinhardt, and Phoenix Ancient Art, an ancient art gallery co-owned by Hicham Aboutaam in New York City. J.C. McKinley Jr., *Looted Antiques Seized from Billionaire's Home, Prosecutors Say*, "The New York Times", 5 January 2018, <https://www.nytimes.com/2018/01/05/nyregion/antiques-seized-from-billionaire-michael-steinhardt-cyrus-vance.html> [accessed: 2.04.2019]; see also: H. Neuendorf, *In a Crackdown on "Illicit" Antiquities, the Manhattan DA Seizes 6 Statues from Phoenix Fine Art*, "Artnet News", 11 January 2018, <https://news.artnet.com/art-world/phenix-ancient-art-illicite-antiquities-1197380> [accessed: 2.04.2019].

⁶⁵ The analysts at the DA's office use collections of photographs and documents belonging to decades-old cases from Italy and the United Kingdom. Italian and UK police have been in the possession of the archives

jects circulating in the market and with a significant exhibition history dating back 20, 50, and even 70 years.⁶⁶ It is also symptomatic that no federal prosecutor has been involved in prosecuting these uncommonly old cases of objects which had left their source countries a long time ago. The District Attorney's office utilizes New York law intended to prosecute dealers in stolen property,⁶⁷ which, as Kate Fitz Gibbon points out, "were originally designed to deal with sales of ordinary commodities that were stolen, or 'fell off a truck'".⁶⁸ While these laws require full documentation of ownership transfer, such records were not required by the US Customs until around 2000.⁶⁹

Furthermore, limiting the panel to the Hobby Lobby case left a feeling of dissatisfaction inasmuch as it stripped the discussion from legal and factual nuances inherent to the Manhattan cases. The DA's office's seizures are blindly based on foreign ownership laws nationalizing artworks. However, as Kate Fitz Gibbon points out, they neglect concessions made subsequent to the enactment of these laws and sold daily by the source countries.⁷⁰ They also raise suspicious eyebrows among judges. In denying the DA's request to return the Iranian bas relief to Iran, Judge Melissa C. Jackson stated that the ownership of the relief should be determined by "a more appropriate forum, such as a court with civil jurisdiction".⁷¹ The New York cases also shed light on the rapidly growing issue of unmarketable orphans. With the prosecutors describing purchases made 50 or more years ago as "criminal", even 70% to 80% of the cultural material in private hands could be now disqualified for auction consignment, museum loans, or even gift.⁷² Not only does this threaten the once dominant New York market, but also the general access to knowledge.

of Giovanni Becchina, Giacomo Medici, Robert Hecht, and Robin Symes for the past 10-to-20 years. Despite years of requests, the police persistently withholds the information from museums and market participants, while at the same time providing access to "bloggers and self-styled sleuths". K. Fitz Gibbon, *New York District Attorney Goes After Art Collections*, "Cultural Property News", 11 February 2018, <https://culturalpropertynews.org/new-york-district-attorney-goes-after-art-collections> [accessed: 2.04.2019].

⁶⁶ The Iranian bas relief, for example, had been purchased by Wace from an insurance company, which had acquired it from the Montreal Museum of Fine Arts, where it had been exhibited for 50 years. It had been legally imported into Canada in 1951, and the Museum became a legal owner under Quebec's civil code after being in possession of the sculpture for three years. K. Fitz Gibbon, *New York District Attorney...*

⁶⁷ NY Penal Law 165.52 "Criminal Possession of Stolen Property in Second Degree".

⁶⁸ K. Fitz Gibbon, *New York District Attorney...*

⁶⁹ *Ibidem*.

⁷⁰ *NY Cops Seize Panel with 70 Years Provenance*, "Cultural Property News", 30 October 2017, <https://culturalpropertynews.org/ny-cops-seize-panel-with-70-years-provenance> [accessed: 2.04.2019].

⁷¹ Supreme Court of the State of New York, *Decision and Order in the Matter of Persian Guard Relief*, 18 December 2017, <https://culturalpropertynews.org/wp-content/uploads/2018/02/District-Attorneys-request-to-return.pdf> [accessed: 3.04.2019].

⁷² M. McCullough, W. Pearlstein, *Hobby Lobby, the Antiquities Mess and Need for Reform*, "Cultural Property News", 30 August 2017, <https://culturalpropertynews.org/commentary-hobby-lobby-the-antiquities-mess-and-the-need-for-reform> [accessed: 2.04.2019].

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While identifying the flaws of the state-centred UNESCO system for the protection of cultural heritage is certainly valid in the context of rights and interests of non-state stakeholders vis-à-vis the protection of the museum collections which are “repositories and stewards of the *public* cultural heritage”,⁷³ it is also true that certain solutions are often brought about by emphasizing politics over cultural significance.⁷⁴ In deciding the fate of the Scythian artefacts, for example, it is felt that the Dutch court was compelled to return the objects to Kyiv,⁷⁵ notwithstanding the significance of these objects for Crimea and its inhabitants, due to the internationally unrecognized annexation of this territory by Russia.⁷⁶ Diplomatic bargaining has also tainted the MOU process.

The discussion on weighing the human right to culture and property against the enforcement of state ownership of all cultural property was very timely in the light of the proposed renewal, until 2024, of an already ten-year-long ban on the importation of Chinese art into the USA. Notwithstanding that the situation in China does not call for the imposition of a US importation ban, the [MOU] agreement gives the Chinese government virtually absolute control over the non-Han cultural heritage of China’s Uyghur Islamic, Protestant Christian, and Tibetan Buddhist populations, often subject to assimilatory and discriminatory policies.⁷⁷ The proposed renewal also stands in stark contrast to the State Department’s designation of China as a Tier 1 “Country of Particular Concern” (CPC) under the International Religious Freedom Act of 1998, for systematically violating international norms of religious freedom.⁷⁸

As indicated by Patty Gerstenblith (DePaul University) in the concluding remarks, international law is what it is – it regulates relations among nations and is not suited to deal with the problems of groups located within recognized sovereign states. Recognition of the rights of minorities “should not come at the expense of tearing down of the international structure devised to prevent trade in looted and smuggled artefacts”. Creative “moving forward” implies, for example, considering ownership without possession, possession without ownership, loans, etc.

⁷³ E. Campfens, I. Tarsis, op. cit., p. 48 (emphasis added), citing the Code of Ethics of the International Council of Museums.

⁷⁴ See, for example L. Lixinski, F. Lusa Bordin, M. de Souza Schmitz, *Identity Beyond Borders: International Cultural Heritage Law and the Temple of Preah Vihear Dispute*, “ILSA Quarterly” 2011, Vol. 20(1), p. 35.

⁷⁵ M. Nudelman, *Who Owns the Scythian Gold? The Legal and Moral Implications of Ukraine and Crimea’s Cultural Dispute*, “Fordham International Law Journal” 2015, Vol. 38(4).

⁷⁶ Ibidem, p. 264, citing: UNGA Resolution 68/262, Territorial Integrity of Ukraine, 1 April 2014, UN Doc. A/RES/68/262.

⁷⁷ *Annual Report of the U.S. Commission on International Religious Freedom*, April 2018, http://www.uscirf.gov/sites/default/files/USCIRFAnnualReport2018_wlinks.pdf [accessed: 2.04.2019].

⁷⁸ CPCs are governments that engage in or tolerate systematic, ongoing, egregious violations of religious freedom. US Commission on International Religious Freedom (USCIRF) Tier 1 countries’ violations meet all three elements of the test, while in USCIRF Tier 2 countries the violations meet one or two of the elements.