

## NOTE

### THE LOOTING OF IRAQI ARCHAEOLOGICAL SITES: GLOBAL IMPLICATIONS AND SUPPORT FOR AN INTERNATIONAL APPROACH TO REGULATING THE ANTIQUITIES MARKET†

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#### I. INTRODUCTION

Professor Ahmed Abdullah Faddam, professor of Sculpture at Baghdad's College of Fine Arts, asserted the importance of culture and stated the following: "What can you do with a man who is ignorant and doesn't have any culture? He is just like a dead man."<sup>1</sup> Professor John Malcolm Russell, professor of Art History at the Massachusetts College of Art, articulated the implications of this "dead man" as follows:

He is also a very dangerous man, this empty vessel waiting to be filled with dross. Having a past, having a sense of who we are, allows us to measure ourselves against what political demagogues or market forces say we should be. These are the ones with no use for the past. That's why they burn books, either literally as in Nazi bonfires or figuratively in the blinding glow of the television screen. Without a sense of our past as the core of who we are, we risk being whatever we're told we are.<sup>2</sup>

The key to preventing a world of empty vessels is the archaeological process and the study of items of the past.<sup>3</sup> The skeletons of previous civilizations, the antiquities and artifacts found during archaeological excavations, are testimonies of history and culture.<sup>4</sup> These objects connect the past with the present.<sup>5</sup> Without these objects, mankind is devoid of history and culture, and thus risks becoming a "dead man."<sup>6</sup>

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1. John Malcolm Russell, *Why Should We Care?*, ART J., Winter 2003, at 22, 29.

2. *Id.* at 29.

3. *See generally id.*

4. *See id.* at 27.

5. *See id.* at 29.

6. *Id.*

With over ten thousand officially registered archaeological sites<sup>7</sup> and an unknown amount of sites yet to be discovered,<sup>8</sup> Iraq is a nation with rich archaeological inheritance. Its inheritance is significant not only in quantity but also in quality.<sup>9</sup> Many commonly perceive Iraq as the “Cradle of Civilization”<sup>10</sup> and home to “the obligatory list of ‘firsts’ (the first cities, the first monumental architecture, the first writing . . .).”<sup>11</sup> Iraq has great potential to give meaning to the history and culture of mankind.<sup>12</sup>

This potential is at risk amidst the turmoil in Iraq.<sup>13</sup> Looters unlawfully extract and steal artifacts from Iraq’s archaeological sites and sell them on an illegitimate market.<sup>14</sup> The looters are motivated by the opportunity for quick cash<sup>15</sup> and “value the past solely as a source of collectible commodities.”<sup>16</sup> They undervalue history and culture, disrupt the archaeological process, and put society at risk of becoming empty vessels.<sup>17</sup>

This Note addresses the current nation-wide looting of Iraq’s numerous archaeological sites and the domestic legislative steps to be taken in response to the recent upsurge in looting. Current laws prohibit unauthorized export of antiquities and vest ownership of all antiquities in the Iraqi government.<sup>18</sup> The long-term effects of these laws on the illicit antiquities market and the looting of archaeological sites are limited.<sup>19</sup> Part II of this Note discusses the antiquities market, the looting to supply the market, and cur-

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7. Edmund L. Andrews, *Iraqi Looters Tearing up Archaeological Sites*, N.Y. TIMES, May 23, 2003, at A1.

8. Zainab Bahrani, *Lawless in Mesopotamia*, NAT. HIST., Mar. 2004, at 44, 47 (stating that “much of Iraq’s cultural heritage is still undiscovered, and thus not yet excavated”).

9. See John Malcolm Russell, *Robbing the Archaeological Cradle*, NAT. HIST., Feb. 28, 2001, at 45 (asserting that Iraq’s antiquities are important to world heritage); Russell, *supra* note 1, at 23 (describing the international significance of Iraq’s antiquities).

10. Russell, *supra* note 9, at 44 (asserting that complex communities began in Iraq).

11. Russell, *supra* note 1, at 23.

12. See *id.* at 23, 27, 29.

13. See David Johnston, *Picking Up the Stolen Pieces of Iraq’s Cultural Heritage*, N.Y. TIMES, Feb. 14, 2005, at A10.

14. See *id.*

15. See *id.*

16. Russell, *supra* note 1, at 27.

17. *Id.* at 27, 29.

18. See Antiquities Law No. 59 of 1936, amended 1974 and 1975 (Iraq), available at <http://old.developmentgateway.org/download/181160/Iraq-Antiquities-Law.rtf/rtf>; see also Lindsay E. Willis, *Looting in Ancient Mesopotamia: A Legislative Scheme for the Protection of Iraq’s Cultural Heritage*, 34 GA J. INT’L & COMP. L. 221, 235-40 (2005).

19. See Sue J. Park, *The Cultural Property Regime in Italy: An Industrialized Source Nation’s Difficulties in Retaining and Recovering Its Antiquities*, 23 U. PA. J. INT’L ECON. L. 931, 939-41 (2002) (discussing the ineffectiveness of laws prohibiting unauthorized exports in the context of Italy).

rent legislative attempts at controlling the market. It begins with an overview of the international antiquities market and then highlights Iraq's significant role in the market due to the quantity and quality of its antiquities. Subsequently, Part II addresses the evolution of looting from a custom of war and colonialism to the source of supply for the illicit antiquities market. Today, economic strife and political unrest exacerbate the profit-driven looting market.<sup>20</sup> These effects can specifically be seen in the current socio-political state of Iraq.<sup>21</sup> Part II further discusses domestic legislative attempts to control the market and reduce looting. It illustrates the global public interest in structuring effective regulations and distinguishes the two contrasting theories that underpin cultural-property laws: cultural internationalism and cultural nationalism. Cultural internationalism promotes international ownership of antiquities and upholds the international value of antiquities.<sup>22</sup> In contrast, cultural nationalism protects national ownership of antiquities and the values associated with national ownership.<sup>23</sup> This Note argues that the current Iraqi legal regime based on cultural nationalism fails to control the antiquities market and fails to have a deterrent effect on looting. In light of these considerations, Part III proposes a new Iraqi cultural-property legal regime based on cultural internationalism. The abundance of antiquities in Iraq having global value justifies an international approach to Iraqi antiquities.<sup>24</sup> Part III argues that an international approach will not only elicit international support to control the looting but also allow Iraq to stimulate its currently weak economy, so it can build resources to better protect its cultural property. This Note ultimately concludes that in order to stop the looting of its archaeological sites, Iraq may need to adopt domestic legislation with a more international approach.

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20. Karin E. Borke, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCA J. ART & ENT. L. 381, 388-89 (2003).

21. *Id.*

22. See John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1916-21 (1985).

23. See *id.* at 1911-13.

24. See generally Russell, *supra* note 9 (detailing the many historical artifacts in Iraq and their significance).

## II. THE CURRENT STATE OF LOOTING AND ATTEMPTS TO CONTROL LOOTING

### A. *The Antiquities Market*

Despite its well-established history,<sup>25</sup> the trade in antiquities has experienced an upsurge since World War II and has become more illicit, profitable, and abundant.<sup>26</sup> The surreptitious nature of the trade makes it difficult to ascertain the extent of this rise.<sup>27</sup> Experts, however, speculate that the illegal trade in antiquities is the third largest contributor to international crime<sup>28</sup> and the second most profitable illegal trade<sup>29</sup> with an estimated value of \$2 billion to \$6 billion per year.<sup>30</sup> The greater interest of museums in ancient works combined with the attractiveness of antiquities as a personal investment and tax-saving vehicle stimulated a growth in demand.<sup>31</sup> In meeting this demand, buyers exercised minimal due diligence in assuring the legality of their acquisitions and thus encouraged the development of a black market.<sup>32</sup>

#### 1. The World Market for Antiquities

By law some nations broadly define antiquities as “[m]ovable and [i]mmovable possessions which were erected, made, pro-

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25. Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 277-78 (1982) (commenting that “amateurs of the arts” and archaeologists have always known about the illegal trade of art and antiquities); Craig Forrest, *Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage*, 4 MELBOURNE J. INT’L L. 592, 594 (2003) (“The illicit trade in cultural heritage is certainly not a new phenomenon.”).

26. Bator, *supra* note 25, at 291 & n.41.

27. *Id.* at 289-90.

28. See Charles A. Palmer, *Recovering Stolen Art: Avoiding the Pitfalls*, MICH. B.J., June 2003, at 20, 21.

29. Park, *supra* note 19, at 936.

30. James Walsh, *It’s a Steal*, TIME, Nov. 25, 1991, at 86, 86-87; see also David N. Chang, Comment, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 HOUS. J. INT’L L. 829, 832 (2006) (estimating that the income generated by illicit trade in art can be as high as \$6 billion). While Interpol does not confirm these statistics because of the inherent difficulty in measuring an illicit market, it does, however, recognize the general acceptance of these rankings and notes that they are “frequently mentioned at international conferences and in the media.” Interpol, *Frequently Asked Questions*, <http://www.interpol.int/Public/WorkOfArt/woafaq.asp> (last visited Apr. 4, 2009).

31. A lack of confidence in the U.S. stock market also created an interest in other investment opportunities. See Jamison K. Shedwill, *Is the “Lost Civilization” of the Maya Lost Forever?: The U.S. and Illicit Trade in Pre-Columbian Artifacts*, 23 CAL. W. INT’L L.J. 227, 227-28 & n.8 (1992). The holders of antiquities also sought to gain tax benefits associated with museum donations. *Id.* at n.8; Leah K. Antonio, *The Current Status of the International Art Trade*, 10 SUFFOLK TRANSNAT’L L.J. 51, 58-59 (1986) (asserting that the availability of tax shelters increased the use of art as investments).

32. See Shedwill, *supra* note 31, at 227-28.

duced, sculptured, written, drawn or photographed by man[,] if they are two hundred years old or more.”<sup>33</sup> In the field of archaeology, antiquities are objects produced by past civilizations.<sup>34</sup> Regardless of the difference in definition between law and archaeology, there is an illicit antiquities market saturated by acroliths,<sup>35</sup> silver vessels and utensils,<sup>36</sup> stone slab tablets of temple records,<sup>37</sup> alabaster, gold, and vases.<sup>38</sup>

Antiquities have scholarly value in their cultural, historical, or scientific significance.<sup>39</sup> For example, the complex imagery of an alabaster cult vase from an archaeological site in Iraq, in addition to its artistic value, reveals knowledge about the religious rituals, social hierarchy, and urban economy of the society to which it belonged.<sup>40</sup> The scholarly value of an antiquity may exist in a primary or secondary manner.<sup>41</sup> Items with primary value derive significance from their principal function in the past.<sup>42</sup> For example, a painting has primary value because it was created for aesthetic reasons and continues to be important for those reasons.<sup>43</sup> In contrast, items with secondary value have indirect significance because of what they reveal about the past rather than their function in the past.<sup>44</sup> Items with secondary value typically had a utilitarian func-

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33. Antiquities Law No. 59 of 1936, amended 1974 and 1975, art. 1(e) (Iraq), *available at* <http://old.developmentgateway.org/download/181160/Iraq-Antiquities-Law.rtf/rtf>.

34. Borke, *supra* note 20, at 386.

35. Walter V. Robinson, *Claims to Greek Goddesses*, BOSTON GLOBE, Apr. 4, 1998, at A1 (finding that acroliths, or fragments of statutes, that were sold to a collector were illegally excavated from the Greek ruins of Morgantina).

36. See Marylynn Pitz, *Scandal at the Getty Has Far-Reaching Implications for Museums Acquiring New Works*, PITTSBURGH POST-GAZETTE, Apr. 5, 2006, <http://www.pittsburghpostgazette.com/pg/06095/679356-42.stm> (reporting that the Metropolitan Museum of Art would return pieces of Hellenistic silver to Italy because although they were acquired in good faith, they were stolen and illegally exported); Walter V. Robinson, *Italy Calls N.Y. Museum's Prized Collection Stolen*, BOSTON GLOBE, Apr. 17, 1998, at A1 (finding that silver vessels and utensils from the Hellenistic period were illegally excavated and sold to the Metropolitan Museum of Art in New York).

37. Russell, *supra* note 9, at 54 (finding that stone temple records often appear for sale on the internet).

38. *Italy's Tombs at Mercy of Raiders*, AUSTRALIAN, Dec. 10, 2005, *available at* 2005 WLNR 19807276 (finding that criminal gangs rob tombs for gold, alabaster, and vases to sell to collectors and dealers).

39. Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 197-98 (2001) (describing the different ways to classify antiquities).

40. Russell, *supra* note 1, at 27.

41. See Gerstenblith, *supra* note 39, at 197-98.

42. See *id.* at 197.

43. See *id.*

44. *Id.* at 197-98.

tion in the past.<sup>45</sup> Yet value today does not derive from this utilitarian function and instead derives from what the item tells us about a previous civilization.<sup>46</sup> Eating utensils have secondary value because they were created for utilitarian functions in the past, but today they have cultural significance because they reveal how previous civilizations enjoyed meals.<sup>47</sup>

The market for antiquities transcends national borders<sup>48</sup> and forms "[a]n international chain of corruption . . . [that] facilitate[s] the smuggling of antiquities from where they originate and into the hands of buyers in major market nations."<sup>49</sup> Antiquities travel from countries that are rich with antiquities to market economies, such as New York, London, Geneva, and Tokyo, that have demand for the antiquities.<sup>50</sup> As such, countries involved in the antiquities market can be classified according to their role in the economic relationship of the trade; nations are either creators of the demand for antiquities or suppliers of the market.<sup>51</sup> Nations who purchase antiquities and contribute to demand are known as "purchaser nations," "collector nations," "market nations," "artifact-poor nations," or "demand nations."<sup>52</sup> They seek to build their collections of antiquities by purchasing them on the market because they lack an original supply of antiquities.<sup>53</sup>

In contrast, those nations that are rich with antiquities provide the original supply for the market.<sup>54</sup> The abundance of antiquities makes these nations prime suppliers for the antiquities trade.<sup>55</sup> These nations are often referred to as "source nations," "artifact-

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45. *Id.* at 198.

46. *See id.*

47. *See id.* at 198 & n.3.

48. *See* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 382 (1995) ("International antiquities smuggling has become an epidemic, affecting . . . virtually every nation.").

49. Park, *supra* note 19, at 937.

50. Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 468-69 (1988); *see also* Gerstenblith, *supra* note 39, at 201-02 (asserting that illegally traded antiquities end up in Western Europe, North America, and Asia); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986) (citing France, Germany, Japan, the Scandinavian countries, Switzerland, and the United States as examples of market nations).

51. *See* Borodkin, *supra* note 48, at 385 ("The nations that participate in the international antiquities trade can be classified into two broad categories based on the archaeological wealth they possess and the objects they desire."); Merryman, *supra* note 50, at 832 ("[T]he world divides itself into source nations and market nations.").

52. Borodkin, *supra* note 48, at 385.

53. *See id.*; Borke, *supra* note 20, at 386.

54. Borodkin, *supra* note 48, at 385; *see* Merryman, *supra* note 50, at 832.

55. *See* Borodkin, *supra* note 48, at 385; Merryman, *supra* note 50, at 832.

rich nations,” “nations of origin,” or “supply nations.”<sup>56</sup> Leading source nations include Italy, Turkey, and Iraq.<sup>57</sup>

## 2. Iraq as a Source Nation

A nation rich with antiquities, Iraq is a “source nation” that supplies the international antiquities market.<sup>58</sup> The end of the first Gulf War marked the beginning of an international market for Iraqi antiquities and the development of the necessary smuggling routes to supply that market.<sup>59</sup> Since then, the supply of antiquities from Iraq has increased, particularly after the United States–led invasion in 2003.<sup>60</sup> In the two years following the invasion, an estimated 400,000 to 600,000 Iraqi cultural artifacts, valued at roughly \$10 million to \$20 million a year, entered the international antiquities market.<sup>61</sup>

The quantity and quality of Iraqi antiquities allow for their abundance and greater presence in the market.<sup>62</sup> Archaeological sites take up much of Iraq to the extent that “virtually all of Iraq is an archaeological site.”<sup>63</sup> Beyond the sheer number of archaeological sites, many of these sites have not been excavated, leaving many prized antiquities undiscovered by archaeologists who “were relatively slow to tackle the region’s countless tells, the earth mounds

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56. Borodkin, *supra* note 48, at 385.

57. Borke, *supra* note 20, at 385 (citing Iraq as “one of the great source countries on the international antiquities market”). See generally Park, *supra* note 19 (discussing the experiences of Italy and Turkey, as nations that are often pillaged for antiquities, in controlling the illicit market for their antiquities).

58. See, e.g., Borke, *supra* note 20, at 385; Catherine Phuong, *The Protection of Iraqi Cultural Property*, 53 INT’L & COMP. L.Q. 985, 989 (2004); Russell, *supra* note 9, at 45; Johnston, *supra* note 13.

59. See Phuong, *supra* note 58, at 989; Andrews, *supra* note 7. Joanne Farchakh, an archaeologist and journalist, has studied the looting of Iraqi sites throughout the past decade and reports that the networks go through Saudi Arabia, Kuwait, and Jordan. Edmund L. Andrews, *Global Network Aids Theft of Iraqi Artifacts*, N.Y. TIMES, May 28, 2003, <http://www.nytimes.com/2003/05/28/international/worldspecial/28BARG.html>.

60. See Johnston, *supra* note 13.

61. *Id.* (quoting John Malcolm Russell, Professor of Art History and Archaeology, Massachusetts College of Art). The estimates were determined as follows:

Mr. Russell based his estimates on seizures like one last year in which Iraqi authorities stopped a smuggler with about 3,000 cultural objects, mainly cuneiform tablets containing early examples of writing. The smuggler told authorities that he made two or three such shipments a week—a statement Mr. Russell used to develop his assessment of losses. The total, he said, was supported in part by satellite photographs taken in 2003 and 2004 that show a proliferation of new excavation holes.

*Id.*

62. Borke, *supra* note 20, at 385.

63. Russell, *supra* note 9, at 45.

that mark the sites of ancient settlements.”<sup>64</sup> The treasures of Iraq, hidden in dirt, were less visible than the antiquities in the “standing stone ruins of ancient Egypt, Greece, and Rome.”<sup>65</sup> A wealth of antiquities remains in Iraq and thus puts Iraq in prime position as a source nation of today’s trade.<sup>66</sup>

In addition to the quantity of its antiquities, Iraq’s unique history makes it a particularly important source nation.<sup>67</sup> The artifacts found in Iraq are of high regard within the archaeological community and thus of high demand in the international antiquities market.<sup>68</sup> The former home to countless ancient civilizations, Iraq is considered to be the birthplace of Western civilization.<sup>69</sup> Many customs, traditions, and elements of current society originate from communities whose relics lie within the national borders of Iraq.<sup>70</sup> Many “firsts” can be traced to Iraq, including “writing, the wheel, irrigation agriculture, cities, monumental architecture, state-sponsored warfare, organized religion, written laws, kingship, a wealthy class, imperialism, centrally organized production of hand-crafted goods, and large-scale trade.”<sup>71</sup> Antiquities found in Iraq are not only items of Iraq’s cultural heritage but also the world’s cultural heritage.

#### B. *Supplying the Antiquities Market: Nationwide Pillaging of Archaeological Sites*

In order to supply the illicit antiquities market, archaeological sites in source nations are pillaged for their antiquities.<sup>72</sup> Looting began as a prize of war and a byproduct of colonialism but continues today to meet market nations’ demand for collections of antiq-

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64. *Id.* at 46.

65. *Id.*

66. *See* Borke, *supra* note 20, at 385.

67. Borke, *supra* note 20, at 385 (“Due to the great . . . quality of Iraq’s cultural resources, it is known as one of the great source countries on the international antiquities market.”). *See generally* Russell, *supra* note 9 (asserting that world heritage coincides with Iraqi artifacts and Iraqi heritage).

68. *See* Borke, *supra* note 20, at 385.

69. Russell, *supra* note 9, at 45 (“Called Mesopotamia by the Greek and variously Sumer, Akkad, Babylonia, and Assyria by its own ancient inhabitants, Iraq has an excellent claim to be the cradle of Western civilization.”).

70. *See id.*

71. *Id.*

72. *See* Gerstenblith, *supra* note 39, at 202-03.

uities.<sup>73</sup> As can be seen in Iraq, the degree of looting in a source nation directly relates to its sociopolitical state.<sup>74</sup>

### 1. The Evolution of Looting

Like the trade of antiquities, the pillaging of antiquities is well grounded in history.<sup>75</sup> Sometimes referred to as the second oldest profession, looting of antiquities dates as far back as the antiquities themselves.<sup>76</sup> Items considered to be antiquities today were seen as prizes of civil strife, and “the taking of war booty was considered a normal aspect of the conduct of war.”<sup>77</sup> For example, Egyptian obelisks were trophies of Roman expansion, the Venetians took the *Horses of St. Mark* during the Fourth Crusade, and King Gustav Adolf of Sweden returned with literary works after capturing Prague.<sup>78</sup> In the past, conflict between different cultures and nations would result in the robbing of tombs, dismantling of temples, and looting of palaces.<sup>79</sup>

During the Napoleonic era, the looting of cultural objects was justified by colonialism.<sup>80</sup> The objects, previously seen as simply trophies of war, now manifested a country’s self-proclaimed superiority, which fostered a sense of entitlement.<sup>81</sup> From this superiority, colonizing nations concluded that they could provide greater care for the objects and should thus retain possession.<sup>82</sup> These theories, for example, prompted Napoleon to relocate paintings, natural history collections, and manuscripts from their original location to museums in Paris.<sup>83</sup>

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73. See John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL’Y J. 1, 4-7 (2004). “Substantial portions of the collections of the world’s great museums are the product of looting during time of war or colonial occupation, such as the Napoleonic occupation of Egypt and Britain’s colonial period in India.” *Id.* at 4-5.

74. See Borke, *supra* note 20, at 388-89.

75. Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245, 249 (2006).

76. *Id.*; Michael Jansen, *Tomb Raiders on Trial*, IRISH TIMES, May 6, 2006, at 9.

77. Gerstenblith, *supra* note 75, at 249.

78. Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT’L L. 1067, 1070 (2005).

79. See *id.* at 1070-71; Gerstenblith, *supra* note 75, at 249-50.

80. See Gerstenblith, *supra* note 75, at 251-53.

81. *Id.* at 251.

82. *Id.* at 251 & n.29.

83. See Gerstenblith, *supra* note 75, at 251.

## 2. Looting and the Growth of the Antiquities Market

In recent years, looting has become more widespread, occurring even at times outside of war, conflict, or invasion.<sup>84</sup> While the prize-value of antiquities motivated earlier looting, the antiquities market and the demand for antiquities drive today's pillaging.<sup>85</sup> Looting of archaeological sites is the supply source for the antiquities market.<sup>86</sup> Looters recognize that the strong demand and abundance of buyers mean an opportunity for profit.<sup>87</sup> They conduct widespread looting of archaeological sites to find items that they can sell on the antiquities market.<sup>88</sup>

The antiquities trade is a demand-driven market, and the extent of the pillaging in source nations depends heavily on the demand of market nations.<sup>89</sup> Archaeologists attribute the looting of sites to the antiquities market and the search for items to supply the growing market.<sup>90</sup> Donny George, former president of Iraq's State Board of Antiquities and Heritage,<sup>91</sup> noted that the network of international buyers has encouraged the massive looting that has been occurring in Iraq over the past few years.<sup>92</sup> As long as demand for the antiquities exists, looters have an economic incentive to pillage archaeological sites.<sup>93</sup>

## 3. The Exacerbating Effect of War on Looting

While the international market for antiquities creates the initial incentive to loot archaeological sites, the degree of looting in a particular source nation worsens in the aftermath of war.<sup>94</sup> A his-

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84. See Gerstenblith, *supra* note 39, at 201-04.

85. See *id.* at 202-03 (asserting that archaeological sites are looted in order to supply the art market).

86. See *id.*

87. For discussion on the general economics of the antiquities trade, see Borke, *supra* note 20, at 385-87.

88. Johnston, *supra* note 13.

89. See Borke, *supra* note 20, at 385-87.

90. Martin Gottlieb, *Looters Swarm over Remote Sites, Study Finds*, N.Y. TIMES, June 12, 2003, at A18 (quoting Henry T. Wright, Professor of Anthropology at the Department of Anthropology and Curator of Near Eastern Archaeology at the Museum of Anthropology, University of Michigan).

91. Mr. George resigned from his position in 2006 due to frustration with the slow government response to the looting problem. See Lucian Harris, *Iraq's Top Cultural Official Resigns*, ART NEWSPAPER, Aug. 26, 2006, [www.theartnewspaper.com/article01.asp?id=407](http://www.theartnewspaper.com/article01.asp?id=407).

92. Andrews, *supra* note 59.

93. See *id.*

94. Roger Atwood, *Day of the Vulture: Why the Looting of Iraq's Ancient Sites Shouldn't Have Surprised Anyone—Least of All the Pentagon*, MOTHER JONES, Sept./Oct. 2003, at 20, 21-22 ("Around the globe, the aftermath of war in recent decades has come to mean the onset of looting.")

torical account of war in the past century demonstrates that looting immediately follows fighting. Following the Gulf War, the civil war in Cambodia, the U.S. invasion of Afghanistan, and civil strife in Bosnia, looters beheaded statues, dug archaeological sites, and robbed churches.<sup>95</sup> One journalist notes that “the systematic removal of artifacts by teams of pillagers has become as much a part of the aftermath of modern warfare as blue-helmeted peacekeepers and CNN.”<sup>96</sup>

Economic strife and political unrest serve as common elements among post-war source nations that experience a rise in looting.<sup>97</sup> People in economically poor source countries are desperate to take advantage of the financial incentive in supplying the antiquities market.<sup>98</sup> With a market of willing buyers and quick profits, looting is an attractive source of income in a state of widespread unemployment and impoverishment.<sup>99</sup>

The political unrest typical in a post-war country renders the country unable to deter looting and criminal activity.<sup>100</sup> Post-war countries that are left in political unrest must often rebuild their government, restructure their law, and refinance their police force.<sup>101</sup> During the interim period, the lack of law, government to make law, and police force to enforce law creates a society where few criminal consequences exist.<sup>102</sup>

Additionally, sanctions placed on some post-war source nations isolate them from foreign assistance.<sup>103</sup> Sanctions imposed against post-war source nations often restrict foreign archaeological teams from preserving archaeological sites and protecting them from unauthorized digs as they once did.<sup>104</sup> Archaeological sites remain

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95. *Id.*

96. *Id.* at 22.

97. Borke, *supra* note 20, at 388.

98. Andrews, *supra* note 7; *see* Borke, *supra* note 20, at 388.

99. Russell, *supra* note 9, at 54 (attributing Iraqi pillaging to inflation and a shortage of necessities); Robert McC. Adams, *Iraq's Cultural Heritage: Collateral Damage*, SCIENCE, July 6, 2001, at 13, 13 (asserting that unemployment and impoverishment cause looting).

100. Borke, *supra* note 20, at 388-89; *see* Andrews, *supra* note 7; Russell, *supra* note 9, at 54 (describing increased post-war looting in Iraq).

101. *See* Borke, *supra* note 20, at 388-89; Marion Forsyth, *Casualties of War: The Destruction of Iraq's Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 73, 78-85 (2004); *see* Andrews, *supra* note 7.

102. *See* Forsyth, *supra* note 101, at 80; Andrews, *supra* note 7.

103. *See* Forsyth, *supra* note 101, at 79; Russell, *supra* note 9, at 53.

104. *See* Forsyth, *supra* note 101, at 79.

unprotected, pillaging runs rampant, and looters are seemingly invincible in a post-war nation.<sup>105</sup>

#### 4. The Looting of Iraqi Archaeological Sites

Coinciding with Iraq's greater presence in the antiquities market,<sup>106</sup> Iraqi archaeological sites are being pillaged<sup>107</sup> at an unprecedented rate.<sup>108</sup> The massive looting in Iraq demonstrates the forces of market demand and after-war state of affairs.<sup>109</sup> Under previous conditions, Iraqi archaeological sites were not prone to massive looting in spite of its archaeological wealth.<sup>110</sup> The government actively punished looters, creating the necessary deterrence.<sup>111</sup> Countless foreign and Iraqi teams conducted excavations, occupied the archaeological sites, and thus thwarted the opportunity for looting.<sup>112</sup> The recent growth in demand and multiple conflicts in Iraq, however, have changed the fate of Iraq's archaeological sites.<sup>113</sup>

As with any other source nation, looting in Iraq is a function of demand.<sup>114</sup> Iraq's state of economic strife and political unrest, however, makes it particularly prone to looting.<sup>115</sup> Looting has increased since the United States-led occupation in 2003 to the level of a "cultural disaster of massive proportions."<sup>116</sup> Archaeologists surveying Iraq reported seeing two hundred or more scavengers pillaging a single archaeological site.<sup>117</sup> Ambassador Pietro

105. See Borke, *supra* note 20, at 389; Forsynth, *supra* note 101, at 78-79; see also Andrews, *supra* note 7.

106. See *supra* Part II.A.2.

107. E.g., Edmund L. Andrews, *Global Network Speeds Plunder of Iraqi Antiquities*, N.Y. TIMES, May 28, 2003, at A12. See generally Andrews, *supra* note 7; Bahrani, *supra* note 8; Johnston, *supra* note 13. Professor Zainab Bahrani, Associate Professor of Ancient Near Eastern Art and Archaeology at Columbia University, named specific archaeological sites that had been destroyed, including "the ancient cities of Isin, Larsa, and Mashkan Shapir, for instance, and perhaps the ancient city of Nippur, in southern Iraq." Bahrani, *supra* note 8, at 48.

108. See Andrews, *supra* note 107.

109. See Borke, *supra* note 20, at 385-89.

110. See Gerstenblith, *supra* note 75, at 278. See generally Atwood, *supra* note 94 (discussing the conditions under Saddam Hussein).

111. See Atwood, *supra* note 94, at 21.

112. See Gerstenblith, *supra* note 75, at 278-79.

113. See James Glanz, *Looters of Hussein's Bunker and Palace Threaten Iraq's Heritage, Lawmakers Warn*, N.Y. TIMES, May 29, 2006, at A8; see also Daniel W. Eck & Patty Gerstenblith, *Cultural Property*, 38 INT'L LAW. 469, 469-70; Johnston, *supra* note 13.

114. Borke, *supra* note 20, at 385; see Andrews, *supra* note 107; Gottlieb, *supra* note 90.

115. See Borke, *supra* note 20, at 388-89; Glanz, *supra* note 113; Johnston, *supra* note 13.

116. Johnston, *supra* note 13 (quoting Professor Zainab Bahrani, Professor of Archaeology, Columbia University).

117. Gottlieb, *supra* note 90.

Cordone, senior adviser to the Iraqi Ministry of Culture, had a similar report following a helicopter tour of southern Iraq.<sup>118</sup> Looters, equipped with shovels, picks, knives, and AK-47s,<sup>119</sup> extract more antiquities in two weeks than archaeologists have accomplished in two decades.<sup>120</sup> In Iraq, international demand and domestic economic strife prompts looting,<sup>121</sup> and a lack of archaeologists to occupy the sites creates prime conditions for looting.<sup>122</sup> A lack of criminal consequences leaves looters free to take advantage of these conditions.<sup>123</sup>

### C. *Global Interest in Controlling the Looting of Iraqi Archaeological Sites*

The damage incurred through looting of Iraqi archaeological sites extends beyond the source nation and affects the world, creating a global public interest in protecting Iraqi archaeological sites.<sup>124</sup> Iraq is the birthplace of civilization, and its antiquities represent the culture and history of the world.<sup>125</sup> Pillaging adversely affects the international archaeological process that seeks to preserve this world culture and history.<sup>126</sup> Professor Patty Gerstenblith describes the harm as follows:

[I]n addition to the theft itself, [the theft and looting of antiquities] involve an essential loss of context. The archaeological heritage consists of the fragile and non-renewable physical evidence of humankind's origins and behavior. Only carefully preserved, original contexts can furnish the data upon which the reconstruction of our past depends. Once this context is lost, the inherent value, that is the historic, cultural and scientific information that informs us about the object, is irreparably injured.<sup>127</sup>

The location of extracted items in relation to the archaeological site reveals valuable information regarding the civilization that

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118. John Malcolm Russell, *Even a Little Looting Is Too Much*, PITTSBURGH POST-GAZETTE, June 22, 2003, at B1.

119. Andrews, *supra* note 7.

120. Andrews, *supra* note 107.

121. Borke, *supra* note 20, at 385-89.

122. See Forsyth, *supra* note 101, at 80.

123. See Andrews, *supra* note 7.

124. See generally Russell, *supra* note 1 (discussing what is at stake for the world if the antiquities in Iraq are lost).

125. See Russell, *supra* note 9, at 45.

126. See Borodkin, *supra* note 48, at 382-83; Gerstenblith, *supra* note 39, at 198-99. See generally Clemency Coggins, *Archaeology and the Art Market*, 175 SCIENCE 263 (1972).

127. Gerstenblith, *supra* note 39, at 198-99.

once inhabited the site.<sup>128</sup> Looters, however, do not respect the precision and documentation necessary to preserve this information.<sup>129</sup> An item without documented context loses 80 percent of its value to archaeologists studying the item.<sup>130</sup> Without documentation, an archaeologist does not know the location of the item with respect to the rest of the archaeological site.<sup>131</sup> The hypothesis about the item's function or importance is thus based on incomplete information, and the item's ability to reveal information about the previous civilization becomes limited.<sup>132</sup>

Furthermore, in a haste to unearth antiquities, looters inadvertently damage items and thus destroy their scientific and archaeological value.<sup>133</sup> Seemingly minor cuts can ruin an item's archaeological value.<sup>134</sup> Looters ignore the inherent cultural and scientific value of an archaeological site and its artifacts in their search for quick profit.<sup>135</sup> The damage done by looters to both the sites and the antiquities frustrate opportunities to study human history at its earliest stages.<sup>136</sup>

The recent link to terrorism creates even greater worldwide public interest.<sup>137</sup> Acting as middlemen between looters and art collectors, Iraqi insurgents use antiquities as a source of financing.<sup>138</sup> Looters sell antiquities on the black market "for weapons that wind up in the hands of insurgents in Iraq."<sup>139</sup> In a raid of terrorist bunkers in northwest Iraq, U.S. Marines found stolen antiqui-

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128. See *id.*; Borodkin, *supra* note 48, at 382-83. See generally BENJAMIN R. FOSTER, KAREN POLINGER FOSTER & PATTY GERSTENBLITH, *IRAQ BEYOND THE HEADLINES: HISTORY, ARCHAEOLOGY, AND WAR 1-4* (2005) (highlighting the importance of Iraqi artifacts by outlining Iraq's geography).

129. See Russell, *supra* note 9, at 55.

130. Jansen, *supra* note 76 (quoting Donny George, former president of Iraq's State Board of Antiquities and Heritage).

131. See Russell, *supra* note 1, at 27.

132. See *id.*

133. See Andrews, *supra* note 7.

134. *Id.* On a trip to an Iraqi archaeological site, German archaeologist Susanne Osthoff identified a discarded item to be an animal bone and noted that the cuts made by looters had destroyed the item. *Id.*

135. See Gerstenblith, *supra* note 39, at 198-99; Russell, *supra* note 1.

136. See Russell, *supra* note 1, at 27.

137. See Matthew Bogdanos, *Fighting for Iraq's Culture*, N.Y. TIMES, Mar. 6, 2007, at A21; Matthew Bogdanos, *The Terrorist in the Art Gallery*, N.Y. TIMES, Dec. 10, 2005, at A15; Johnston, *supra* note 13.

138. See Bogdanos, *Fighting for Iraq's Culture*, *supra* note 137; Bogdanos, *The Terrorist in the Art Gallery*, *supra* note 137; Johnston, *supra* note 13.

139. Johnston, *supra* note 13.

ties,<sup>140</sup> confirming fears of the Federal Bureau of Investigation and British authorities.<sup>141</sup>

The looting in Iraq is of public concern due to its worldwide effect.<sup>142</sup> Looting of archaeological sites causes damage to both the archaeological process and the antiquities themselves and thus threatens the preservation of world culture and history.<sup>143</sup> Further, the use of the antiquities market to finance terrorism implicates worldwide concern.<sup>144</sup> As such, legislative measures must be taken to control the antiquities trade and the looting in Iraq.<sup>145</sup>

#### D. *Regulating the Trade: Cultural Internationalism Versus Cultural Nationalism*

The main concerns in regulating the international antiquities market and the looting of antiquities are who owns the antiquity and where should the antiquity reside.<sup>146</sup> The two contrasting theories on cultural property that shape the governing law address these concerns in different ways.<sup>147</sup> Cultural internationalism views antiquities as belonging to all humankind and promotes the free movement of antiquities in a less-regulated market.<sup>148</sup> Cultural nationalism, in contrast, provides that antiquities belong to the nation in which they are found and aims to protect the national interest in antiquities through strict antiquity-retention-based laws.<sup>149</sup>

##### 1. Cultural Internationalism

According to cultural internationalism, there is a global interest in “the preservation and enjoyment of all cultural property, wherever it is situated, from whatever cultural or geographic source.”<sup>150</sup> This theory overlooks the value of antiquities to their source nation

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140. Bogdanos, *The Terrorist in the Art Gallery*, *supra* note 137.

141. *See* Johnston, *supra* note 13.

142. *See* Russell, *supra* note 1, at 29.

143. *See* Borodkin, *supra* note 48, at 382-83; Gerstenblith, *supra* note 39, at 198-99; Russell, *supra* note 1, at 27.

144. *See* Bogdanos, *Fighting for Iraq’s Culture*, *supra* note 137; Bogdanos, *The Terrorist in the Art Gallery*, *supra* note 137; Johnston, *supra* note 13.

145. *See* Bogdanos, *The Terrorist in the Art Gallery*, *supra* note 137; *cf.* Bogdanos, *Fighting for Iraq’s Culture*, *supra* note 137 (proposing a system by which other countries provide coordinated security over the archaeological sites).

146. *See* Merryman, *supra* note 22, at 1910-21.

147. *See id.*

148. *See id.* at 1916-21.

149. *See id.* at 1911-16.

150. *Id.* at 1916 (referencing the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (1956)).

and instead highlights the value to the international community.<sup>151</sup> Specifically, laws based on cultural internationalism uphold three values—preservation, integrity, and distribution—at the cost of removing the object from a source nation.<sup>152</sup> First, cultural internationalism places emphasis on preserving the human heritage inherent in antiquities.<sup>153</sup> Physical destruction harms the human heritage because it limits the study of the antiquity and thus erases part of humanity.<sup>154</sup> Cultural internationalism therefore leads to the conclusion that laws should ensure that antiquities are not destroyed.<sup>155</sup> For example, foreign excavations should be allowed where a source nation cannot conduct all the necessary excavations.<sup>156</sup> On the belief that nations other than the source nation may be best able to provide adequate care for antiquities, cultural internationalism supports international movement of antiquities.<sup>157</sup>

Secondly, cultural-internationalism-based laws allow unrestricted movement of antiquities to prevent harm to an antiquity's integrity.<sup>158</sup> The integrity, or the aesthetic value of an object's completeness, takes priority over a source nation's retention of the object.<sup>159</sup> A complete item has "more beauty and significance than the sum of the dismembered pieces."<sup>160</sup> Laws limiting international movement often result in destruction of antiquities to evade laws.<sup>161</sup> Looters intentionally destroy artifacts to hide their true nature as an illegally extracted and exported antiquity and to avoid detection by law enforcement.<sup>162</sup> As such, cultural internationalism promotes a less-regulated scheme to avoid destruction of the antiquity and its aesthetic integrity.<sup>163</sup>

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151. See *id.* at 1916-17.

152. See *id.* at 1917 (asserting that preservation, integrity, and distribution can be key considerations in allocating cultural property); see also Merryman, *supra* note 50, at 846 (promoting international trade if "[antiquities] might be better preserved, studied and displayed" in another nation).

153. See Merryman, *supra* note 22, at 1917-18.

154. See *id.* at 1917.

155. See *id.* at 1917-18.

156. Cf. Peter T. Wendel, *Protecting Newly Discovered Antiquities: Thinking Outside the "Fee Simple" Box*, 76 *FORDHAM L. REV.* 1015, 1054 (2007) ("[M]ost parties agree that the best protection for an antiquity is not in the ground subject to the elements but rather in protective custody where it can be preserved and studied.").

157. Merryman, *supra* note 50, at 846.

158. See Merryman, *supra* note 22, at 1918-19.

159. See *id.*

160. *Id.* at 1918; see also Bator, *supra* note 25, at 296.

161. Wendel, *supra* note 156, at 1043; see also Borodkin, *supra* note 48, at 383.

162. See Borodkin, *supra* note 48, at 383.

163. See Merryman, *supra* note 22, at 1918-19.

Lastly, cultural internationalism holds that because antiquities belong to all humankind, laws must provide for international distribution of antiquities.<sup>164</sup> Antiquities must be visible and accessible to a wide audience.<sup>165</sup> Failure to distribute antiquities results in concentration of antiquities in source nations while leaving artifact-poor nations culturally impoverished.<sup>166</sup> International distribution gives all mankind “reasonable opportunity for access to . . . cultural achievements” and is thus supported by cultural internationalism.<sup>167</sup>

## 2. Cultural Nationalism

Cultural nationalism emphasizes the interests of the source nation and finds significance in the national origin of the antiquity.<sup>168</sup> Because antiquities comprise part of a nation’s wealth, the value deriving from an antiquity belongs to the source nation.<sup>169</sup> Laws justified by cultural nationalism protect the source nation’s interests, regardless of the effect on other nations.<sup>170</sup> Cultural-nationalism-based laws prevent the removal of antiquities to protect three key interests: national culture, value of possession, and political implications.<sup>171</sup> According to cultural nationalism, antiquities primarily represent the culture of the source nation’s citizens rather than the culture of the world.<sup>172</sup> Antiquities create shared national identity and a sense of national community.<sup>173</sup> Cultural nationalism supports retention laws, rather than free export,

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164. See Merryman, *supra* note 50, at 847-49.

165. Cf. Bator, *supra* note 25, at 299-300 (weighing the pros and cons of efforts to make art as visible and accessible as possible).

166. See Merryman, *supra* note 22, at 1920-21; Wendel, *supra* note 156, at 1054 (“Directors of many of the leading consuming country museums have gone on record as opposing cultural nationalism because it restricts the flow of antiquities to consuming country museums.”).

167. Merryman, *supra* note 22, at 1919.

168. Willis, *supra* note 18, at 229-30.

169. See Merryman, *supra* note 22, at 1914.

170. See *id.* at 1911-15.

171. Willis, *supra* note 18, at 230-31.

172. See Merryman, *supra* note 22, at 1911-13.

173. See Bator, *supra* note 25, at 304-05 (discussing the effect of art on community and ultimately “asserting that the existence and awareness of a common artistic heritage can make a powerful contribution to the consciousness of relationship between self and community”). Throughout his Article, Professor Bator uses the term “art” loosely and includes within his definition “all objects that are . . . prized and collected, whether or not they were originally designed to be useful, and whether or not they possess ‘scientific’ as well as aesthetic value.” *Id.* at 285. His reference to “art” thus includes antiquities as discussed in this Note.

because removal from the source nation would deprive a source nation's citizens of their national culture.<sup>174</sup>

Additionally, value derives from possession.<sup>175</sup> Antiquities can inspire scholarly thought and create an intellectual society within the possessing nation.<sup>176</sup> Further, a collection of antiquities results in robust museums and tourism, which then provide economic benefits to the source nation.<sup>177</sup> Laws based in cultural nationalism provide for retention to allow a source nation to extract scholarly and economic value from its antiquities.<sup>178</sup>

Lastly, cultural nationalism allows for retention-based laws because the removal of antiquities is a political statement against the source nation.<sup>179</sup> Under ideas of cultural nationalism, removal of an antiquity constitutes theft and produces political concerns of market nations stealing from source nations.<sup>180</sup> Laws based in cultural nationalism seek to prevent this political tension by preventing removal of antiquities.

### 3. Existing Legal Regimes: Trends of Cultural Nationalism

Most source nations, including Iraq, have enacted cultural-property laws that incorporate ideas of cultural nationalism.<sup>181</sup> The two common types of cultural-property laws focus on national retention.<sup>182</sup> First, export regulations attempt to keep antiquities within the source nation by prohibiting unlicensed exportation of antiquities.<sup>183</sup> Second, national-ownership laws vest ownership in the source nation's government.<sup>184</sup> In theory, national-ownership laws provide for repatriation of illegally exported antiquities and criminalize the unauthorized excavation and possession of antiquities.

Export regulations make it illegal to remove an antiquity from its country of origin.<sup>185</sup> By closing its borders, a source nation

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174. See *id.* at 305; see Merryman, *supra* note 22, at 1912-13.

175. Willis, *supra* note 18, at 230; see also Bator, *supra* note 25, at 304-07.

176. See Bator, *supra* note 25, at 305-06 (“[A]rt is a necessary constituent of a rich and intense intellectual life.”).

177. Borke, *supra* note 20, at 395.

178. See Merryman, *supra* note 22, at 1912.

179. See Willis, *supra* note 18, at 230-31.

180. See *id.*

181. Willis, *supra* note 18, at 235-40; see also Borodkin, *supra* note 48, at 391-93; Park, *supra* note 19, at 939-41; Shedwill, *supra* note 31, at 241-42; Siehr, *supra* note 78, at 1075.

182. See Borodkin, *supra* note 48, at 391-93.

183. See *id.*

184. See *id.*

185. See *id.* at 391-92.

attempts to stop international movement of antiquities.<sup>186</sup> By law, antiquities must stay within the source nation.<sup>187</sup> Theoretically, the inability to reach the international demand should decrease the financial value of antiquities.<sup>188</sup> Without an inflated financial value, there is less incentive to loot and smuggle antiquities.<sup>189</sup> Export prohibitions block trade to reduce the effect of demand on the looting of archaeological sites.<sup>190</sup>

The Antiquities Law of 1936 (1936 Law) of Iraq prohibits exportation of Iraqi antiquities.<sup>191</sup> The 1936 Law defines antiquities as “[m]ovable and [i]mmovable possessions which were erected, made, produced, sculpted, written, drawn or photographed by man[,] if they are two hundred years old or more.”<sup>192</sup> The 1936 Law provides that “[n]o individuals or groups are allowed to dispose of . . . or claim the ownership [of antiquities].”<sup>193</sup> The preamble to the 1936 Law extends prohibitions on activity concerning antiquities to the extent that the law prevents “dealing in antiquities and smuggling of unregistered antiquities.”<sup>194</sup>

Source nations have also established national-ownership laws declaring blanket ownership of all antiquities found within national borders.<sup>195</sup> In theory, because the state owns the antiquity, an individual, knowing he would be unable to claim legal title to the item, has no incentive to extract the item.<sup>196</sup> Since the government owns all antiquities in these nations, unauthorized excava-

186. See John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1, 4 (1998); cf. Park, *supra* note 19, at 940 (discussing Italy's export control scheme).

187. See Borodkin, *supra* note 48, at 391 & n.97.

188. Siehr, *supra* note 78, at 1079-80.

189. See Johnston, *supra* note 13.

190. Siehr, *supra* note 78, at 1076.

191. Antiquities Law No. 59 of 1936, amended 1974 and 1975, art. 26 (Iraq), available at <http://old.developmentgateway.org/download/181160/Iraq-Antiquities-Law.rtf/rtf>; see Willis, *supra* note 18, at 237-40.

192. Antiquities Law No. 59, art. 1(e). The 1936 Law further divides antiquities into two categories, movable and immovable, and provides as follows:

“Immovable Antiquities” include all antiquities erected on and attached to the soil such as buildings, mounds, caves and any objects usually attached to buildings and [*sic*] thus constituting a part thereof.

“Movable Antiquities” include all antiquities detached from the soil or from buildings and are easily removed therefrom and transported to any other place.

*Id.* art. 2.

193. *Id.* art. 3.

194. *Id.* pmbl.

195. See Borodkin, *supra* note 48, at 392 & nn.103-04 (mentioning the laws of dozens of source nations); Park, *supra* note 19, at 939-40 (discussing Italy); Shedwill, *supra* note 31, at 241-42 (discussing Latin America).

196. Wendel, *supra* note 156, at 1037.

tion and possession of antiquities constitute theft.<sup>197</sup> Further, by declaring ownership, a source nation can theoretically reclaim illegally exported antiquities found in other nations.<sup>198</sup>

The 1936 Law includes a national-ownership provision.<sup>199</sup> The 1936 Law provides that "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."<sup>200</sup> While the law provides that authorized foreign excavation teams can keep "casts, photographs, plans and maps of the antiquities discovered"<sup>201</sup> and have priority in the publication of findings,<sup>202</sup> the government retains ultimate ownership of all discoveries.<sup>203</sup>

### E. *Inadequacies of Cultural Nationalism-Based Law*

Theoretically, export regulations and national-ownership laws stop the illicit antiquities market and, consequently, looting.<sup>204</sup> When implemented, however, domestic cultural-property laws fail to effectively curb demand for antiquities or prevent looting of archaeological sites.<sup>205</sup> Because of the international aspect of the illicit antiquities trade, domestic export control is effective only with international recognition.<sup>206</sup> Market nations, however, generally refuse to enforce the export controls of source nations.<sup>207</sup> Additionally, market nations generally have not enacted laws that prohibit the importation of illegally exported antiquities.<sup>208</sup> Lack of antiquities regulation in the importing nation leaves half of the economic relationship unregulated.<sup>209</sup> Trade routes remain open

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197. See Park, *supra* note 19, at 939-40; Shedwill, *supra* note 31, at 241-42.

198. Park, *supra* note 19, at 940.

199. See Antiquities Law No. 59, art. 3.

200. *Id.*

201. *Id.* art. 49.

202. *Id.* art. 54.

203. *Id.* art. 3.

204. See *supra* Part II.D.3.

205. See Park, *supra* note 19, at 939-41, 951.

206. See *id.* at 940-41.

207. See Siehr, *supra* note 78, at 1076. The United States, for example, "will not enforce the laws of foreign states that prohibit the export of all cultural property." Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT'L L. & POL. 79, 80 (1998). Market nations are reluctant to recognize export prohibitions because they constitute foreign public law and courts "have declined to pay respect to foreign rules of cultural or business policy." Siehr, *supra* note 78, at 1076.

208. See Shedwill, *supra* note 31, at 242.

209. See Park, *supra* note 19, at 941.

and make it possible for supply to reach demand.<sup>210</sup> The incentive to loot is left intact and unaffected by export regulations.<sup>211</sup>

Further, export regulations are ineffective at controlling the market because of their breadth.<sup>212</sup> The 1936 Law, for example, broadly defines antiquities<sup>213</sup> and applies even to less-important antiquities. The over-inclusive structure of export regulations fuels rather than controls the illicit market.<sup>214</sup> Regulations create “irresistible pressure” because “[t]he harder it is to obtain objects . . . legally, the more intense the demand to acquire them on the black market.”<sup>215</sup> Therefore, more inclusive regulations increase the black market.<sup>216</sup> In addition to fueling rather than controlling the market, broad export regulations are “administratively unenforceable.”<sup>217</sup> Broader restrictions translate into more objects to police and thus make it physically and economically difficult to enforce the prohibitions.<sup>218</sup>

National-ownership laws are also ineffective at controlling the market.<sup>219</sup> Although they criminalize looting, national-ownership laws suffer from inadequate enforcement and thus result in a lack of criminal consequences to deter looting.<sup>220</sup> Looting has reached a degree that exceeds ability to police; looters outnumber guards.<sup>221</sup> Corruption and bribery of some guards make national-ownership laws further ineffective.<sup>222</sup>

Similar to export regulations, national-ownership laws face the difficulty of a lack of international recognition.<sup>223</sup> In a conflict of

210. *See id.*

211. *See id.* at 941. “The end purchasers – private collectors and museums – are the ones who create the demand that causes illicit looting . . . .” *Id.* at 952.

212. *See* Bator, *supra* note 25, at 318-19.

213. *See* Antiquities Law No. 59 of 1936, amended 1974 and 1975, art. 1-2 (Iraq), *available at* <http://old.developmentgateway.org/download/181160/Iraq-Antiquities-Law.rtf/rtf>.

214. Bator, *supra* note 25, at 318-19.

215. *Id.* at 318.

216. *See id.* at 318-19.

217. *Id.* at 318.

218. *Id.* at 318-19.

219. *See* Borodkin, *supra* note 48, at 405-11.

220. *See id.* at 393.

221. *See id.* The experience of an Iraqi guard at a site was described as follows:

A man who served for years as an armed guard at the site, and who would give only his first name, Jassim, still stands by with a loaded Kalashnikov. But he does not try to stop or even discourage the intruders, and often peers enthusiastically at their latest discoveries.

“What can I do?” Jassim said. “I alone cannot stop the whole village. Even if I try to arrest them, what do I do after that?”

Andrews, *supra* note 7.

222. Borodkin, *supra* note 48, at 393.

223. *See id.* at 392-93, 406-07.

law, market nations, claiming state sovereignty, often apply their law rather than the source nation's law.<sup>224</sup> Despite the vesting of ownership in the source nation, the good-faith-purchaser laws of some nations—pursuant to which a buyer receives good title and ownership to a stolen antiquity if there is no reasonable doubt to the good's validity—will negate national-ownership laws.<sup>225</sup> A market nation recognizing a good-faith-purchaser law over national-ownership laws effectively transfers ownership from the source nation to the buyer.<sup>226</sup> Without ownership, the source nation no longer has a claim for repatriation.<sup>227</sup> Repatriation loses its deterrent effect on the purchase of antiquities on the illicit antiquities market, and looting continues without regulation.<sup>228</sup>

Export regulations and national-ownership laws, two types of laws based on cultural nationalism, are not effective in practice. Both laws lack the international recognition necessary for their efficacy.<sup>229</sup> They do not address the reality of the antiquities market because they underestimate the breadth and attractiveness of the illicit market.<sup>230</sup> Cultural nationalism is not the optimal solution to the looting of Iraqi archaeological sites.

### III. A PROPOSED MOVE TOWARDS CULTURAL INTERNATIONALISM

Iraqi law governing cultural property should incorporate the theory of cultural internationalism. Domestic attempts grounded in cultural nationalism are ineffective at regulating the trade of Iraqi antiquities and the looting of Iraqi archaeological sites.<sup>231</sup> Domestic laws that are less restrictive and take a more international approach will preserve the value of Iraqi antiquities and archaeological sites.<sup>232</sup> To that end, this Note makes the following recommendations. First, more liberal export laws should replace current restrictive export laws. Iraq's current state of economic strife necessitates legitimate international trade in antiquities to stimu-

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224. See Borke, *supra* note 20, at 390 (using the Swiss good faith purchaser law as an example of a market nation law often applied over the law of a source nation).

225. See *id.*

226. See *id.*

227. See *id.*

228. See *id.*

229. See *supra* notes 206-211, 223-228 and accompanying text.

230. See *supra* notes 212-222 and accompanying text.

231. See *supra* Part II.E.

232. See Borodkin, *supra* note 48, at 411-16 (proposing free trade of antiquities in a state auction model); Park, *supra* note 19, at 953-54 (proposing a licit trade in antiquities and limited national ownership in antiquities to control the antiquities trade); Shedwill, *supra* note 31, at 253-54 (proposing a legitimate market for antiquities).

late its economy.<sup>233</sup> Second, the stringent national-ownership provisions of the 1936 Law should revert back to the shared-ownership laws that were in place when Iraq was under Ottoman rule. Shared ownership of Iraqi antiquities will create a combined international effort to combat the looting of Iraqi sites.<sup>234</sup>

### A. *Export Laws*

The first step to a more international-based approach is to enact more liberal export laws promoting free movement of antiquities. This Section argues that the 1936 Law regulating export of antiquities is too restrictive, does not allow for enough legitimate international movement of antiquities to meet demand, and thus encourages the illegitimate trade of antiquities.<sup>235</sup> Liberalization of current export laws will create a licit market while reducing the illicit market for antiquities.<sup>236</sup> Iraq will ultimately benefit because the liberal export laws will stimulate its weak economy, raise additional funds for the protection of its cultural wealth, and adequately focus resources.<sup>237</sup> The increased trade will not necessarily drain Iraq of its cultural wealth.<sup>238</sup> Despite the exportation of antiquities, Iraq will still be able to build a collection of antiquities.<sup>239</sup>

#### 1. Liberalization of the 1936 Law: Deregulating the Market

Deregulating the antiquities market by liberalizing current export laws will reduce the black market for antiquities and allow

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233. See Russell, *supra* note 9, at 53-54 (finding that economic strife in Iraq has led to pillaging); Bogdanos, *Fighting for Iraq's Culture*, *supra* note 137 (encouraging international help to protect Iraqi archaeological sites).

234. See Borodkin, *supra* note 48, at 414-15 (noting the success of international corroboration in conducting archaeological excavations); Wendel, *supra* note 156, at 1054 (suggesting that shared-ownership scheme "could be used to bring source countries and Western museums back together for the common goal of protecting . . . antiquities").

235. Cf. Shedwill, *supra* note 31, at 251 ("[D]espite these strict measures the large scale pillage of pre-Columbian sites throughout Latin America continues, and the fruits of these clandestine digs continue to be smuggled into the United States and Europe."); Siehr, *supra* note 78, at 1079-80 ("If goods can only be sold to local customers, the seller is precluded from selling his goods to foreigners who may pay higher prices.")

236. Cf. Borodkin, *supra* note 48, at 378 (stating that prohibitions on antiquities trades are unrealistic and create "ideal conditions for a black market"); Shedwill, *supra* note 31, at 251 (stating that the strict nature of the laws and agreements has resulted in the immense growth of an already existing black market).

237. See Shedwill, *supra* note 31, at 253-54 (predicting these results under a legitimate trade in pre-Columbian works).

238. See *id.* at 252.

239. See *id.*

for governmental oversight of the trade of antiquities.<sup>240</sup> The 1936 Law is too restrictive because it prohibits free international movement of antiquities and broadly applies to all antiquities.<sup>241</sup> The restrictive regime creates a black market,<sup>242</sup> making the law nearly impossible to enforce.<sup>243</sup> A less-restrictive legal regime regarding export of antiquities would allow a legitimate trade of Iraqi antiquities and subsequently the burgeoning of a licit market for Iraqi antiquities.<sup>244</sup> If given the opportunity, museums would rather bargain on the legitimate market to avoid the risk of ruining their reputation or losing ownership rights by trading on the illicit market.<sup>245</sup> The demand for Iraqi antiquities will thus be met on the legitimate market, effectively deflating the illicit market.<sup>246</sup>

Liberalization can be accomplished by structuring export restrictions to have a more limited reach and prohibit export only when "it is demonstrable that the national patrimony will be seriously impoverished by export."<sup>247</sup> Only highly important and unique items would be subject to export prohibitions.<sup>248</sup> Duplicates would be legally sold and traded on the international market.<sup>249</sup> With the birth of a licit market, the government, and not the participants of the illicit market, becomes the watchdog of the antiquities trade.<sup>250</sup>

## 2. Benefits of Liberal Export Laws

Iraq will benefit from liberal export laws because they will stimulate the economy, provide funds for preservation of cultural property, and efficiently allocate resources. A legitimate market for antiquities will reduce the looting of archaeological sites by alleviating the poor economic conditions of Iraq's current sociopolitical

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240. See *supra* note 236 and accompanying text.

241. See Bator, *supra* note 25, at 317-19 (discussing the ineffectiveness of export regulation generally).

242. See *id.*; Wendel, *supra* note 156, at 1062-63.

243. See Bator, *supra* note 25, at 318-19.

244. See Borodkin, *supra* note 48, at 378; *cf.* Shedwill, *supra* note 31, at 251 (discussing failed strict measures in Latin America).

245. See Wendel, *supra* note 156, at 1062; see also Borodkin, *supra* note 48, at 404.

246. See Bator, *supra* note 25, at 318-19 ("[I]f legal export were permitted, the illegal market would shrink."); Shedwill, *supra* note 31, at 253-54 (asserting that legal trade will lessen a black market demand for antiquities).

247. Bator, *supra* note 25, at 322.

248. See *id.*; Park, *supra* note 19, at 953.

249. See Park, *supra* note 19, at 953-54.

250. To increase the success of liberal export laws, finders must have the incentive to go public with their findings so that the government can adequately track newly discovered antiquities. See Wendel, *supra* note 156, at 1015 (proposing a "possessory estate and future interest approach" to encourage the reporting of discoveries).

state that make looting necessary.<sup>251</sup> A legitimate market will stimulate the Iraqi economy by allowing participation in a new market.<sup>252</sup> This new market will increase the revenue returning to Iraq, ultimately having a positive effect on the Iraqi economy.<sup>253</sup> A more stable economy would lessen looting by eradicating the economic strife that motivates looting.<sup>254</sup>

In addition to stimulating the economy, the revenue from the legitimate market can be used for protection of antiquities.<sup>255</sup> Currently, the government has limited funds, and the lack of funds to finance guards and excavation teams leaves Iraqi archaeological sites unguarded.<sup>256</sup> Assuming that the Iraqi government will trade in antiquities, a legitimate trade produces revenue to the government.<sup>257</sup> This revenue that the Iraqi government will directly receive from the legitimate trade of antiquities can be used to protect archaeological sites and antiquities.<sup>258</sup>

Lastly, the narrow scope of liberal export laws will allow Iraq to best allocate its limited resources.<sup>259</sup> Under the current 1936 Law, Iraq's limited resources are dispersed too broadly because they are being used to regulate all antiquities, even those with less importance.<sup>260</sup> Rather than focusing on all antiquities regardless of their marginal value to cultural patrimony, with the liberalization of the

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251. See *supra* Part II.B.3-4.

252. See Borodkin, *supra* note 48, at 413 (asserting that controlled markets would create wealth).

253. See *id.* (describing the use of government-run state auctions of antiquities that would raise revenue); Shedwill, *supra* note 31, at 252-54 (finding that a legitimate trade will allow "the exporting state [to] reap the rewards of increased interests in and travel to their country" and to realize a new source of revenue).

254. See *supra* Part II.B.3-4.

255. See Borodkin, *supra* note 48, at 413 (suggesting that the "excess revenue generated by a legitimate trade in antiquities [could be used] to conserve state art collections and to preserve important sites"); Park, *supra* note 19, at 953 (asserting that a market in surplus antiquities will benefit source nations that lack resources to preserve cultural property); Shedwill, *supra* note 31, at 252 (stating the a legitimate market will result in revenue that can "be funneled back into excavating new sites and protecting and preserving existing artifacts and sites").

256. See Johnston, *supra* note 13; *cf.* Forsyth, *supra* note 101, at 78-79 (discussing the effect of the Gulf War on antiquities funding).

257. See Borodkin, *supra* note 48, at 413; Park, *supra* note 19, at 953; Shedwill, *supra* note 31, at 252.

258. See Borodkin, *supra* note 48, at 413; Park, *supra* note 19, at 953; Shedwill, *supra* note 31, at 252.

259. See Bator, *supra* note 25, at 326 ("Financial, political, and psychological resources should be focused on material that is truly important and whose protection is reasonably feasible.").

260. See *id.*

1936 Law, Iraq can concentrate its scarce resources on items of high importance.<sup>261</sup>

### 3. Effect on Iraq's National Patrimony

Proponents of cultural nationalism criticize liberal export laws for unfairly depleting a source nation of its national patrimony and depriving a source nation of the cultural and economic benefits of ownership.<sup>262</sup> The cost of losing antiquities to other nations is less than the cost of losing antiquities to the black market. An antiquity on the black market is lost forever.<sup>263</sup> In contrast, voluntary trade of antiquities with another nation leaves the possibility of future trade back to Iraq.<sup>264</sup>

Furthermore, liberal export laws do not necessarily result in export of all a source nation's antiquities; such laws can be limited to legal export of duplicates.<sup>265</sup> Ninety percent of items excavated during an archaeological dig in a typical source nation are duplicates that can be exported without significant impact on the nation's collection.<sup>266</sup>

Loss of national patrimony due to liberal export laws presents even less of an issue for Iraq because of the abundance of archaeological sites in Iraq.<sup>267</sup> This abundance<sup>268</sup> supports the notion that export of antiquities will have little impact on Iraq's ability to build a significant collection of antiquities. The vast number of archaeological sites in Iraq compounds the amount of duplicates available for international trade.<sup>269</sup> With Iraq's rich archaeological inheritance, there are enough antiquities to build a significant Iraqi-owned collection and supply the international demand.

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261. *See id.*

262. *See supra* Part II.D.2.

263. Wendel, *supra* note 156, at 1059 (asserting that source countries likely will not regain possession of antiquities sold on the black market).

264. *See id.* ("Why not voluntarily agree to give up that possession in exchange for the benefits of the certainty of return . . . ?").

265. *See* Park, *supra* note 19, at 953; Shedwill, *supra* note 31, at 252.

266. Shedwill, *supra* note 31, at 252.

267. *See* Andrews, *supra* note 7 ("Iraq . . . has more than 10,000 registered archaeological sites.").

268. *See* Borke, *supra* note 20, at 385.

269. *See* Andrews, *supra* note 7 (mentioning the large number of sites); *cf.* Shedwill, *supra* note 31, at 252 (advocating international trade of duplicate pre-Columbian artifacts).

#### 4. Liberal Export Laws in Practice

Japan has successfully controlled exportation of art through liberal export laws.<sup>270</sup> Japanese law restricts exportation of items on a selective basis and applies export regulations only to items that are important to national patrimony.<sup>271</sup> The government has been very selective in deeming an item to be important and is estimated to have less than 10,000 designated objects and monuments.<sup>272</sup> Japan experiences little to no illegal exportation of art because it is able to satisfy demand through legitimate means.<sup>273</sup> The liberalization of the 1936 Law would similarly allow a legitimate means by which demand for Iraqi antiquities can be satisfied, and thus would control the illicit market and looting.<sup>274</sup>

#### B. *Shared Ownership*

The second step to adopting domestic laws based on cultural internationalism is to allow for shared ownership rather than declaring national ownership of all antiquities found within a nation's borders. This Note proposes that the ownership provisions of the 1936 Law mirror Ottoman-based shared ownership. A shared-ownership system would allow for vesting of ownership of Iraqi antiquities in foreign nations.<sup>275</sup> The unique nature of Iraqi antiquities to provide international culture and history justifies shared ownership.<sup>276</sup> Even though Iraq relinquishes rights in some of its antiquities, the shared-ownership program will ultimately benefit Iraq by garnering the international support necessary for Iraq to protect its antiquities and archaeological sites.<sup>277</sup>

#### 1. Reversion to Ottoman-Based Law

A modern shared-ownership system would operate similar to the Ottoman legal regime governing antiquities, which divided duplicate antiquities between the source nation and the nation that con-

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270. Bator, *supra* note 25, at 319-21 (citing the success of English and Japanese limited export laws).

271. *See id.* at 321-22.

272. *Id.* at 321.

273. *See id.* at 321-22.

274. *See id.* at 318-19.

275. *See* Borodkin, *supra* note 48, at 415; Park, *supra* note 19, at 953-54.

276. *See* Russell, *supra* note 1, at 23 (highlighting the international importance of Iraqi antiquities). *See generally* Russell, *supra* note 9 (commenting that Iraqi antiquities are important to world heritage).

277. *See* Borodkin, *supra* note 48, at 415 (referencing the success of joint archaeological ventures between Greece and Germany to excavate and restore the Olympic Stadium and the success of former Egyptian policy to share ownership of antiquities).

ducted the excavation.<sup>278</sup> Under this proposed shared-ownership system, Iraq would retain ownership of some of the discoveries of a foreign-funded excavation,<sup>279</sup> specifically the more unique antiquities. Straying from the 1936 Law,<sup>280</sup> foreign excavation teams would be allowed ownership rights in duplicate antiquities.<sup>281</sup>

While national-ownership laws divide rather than unite nations in efforts to control the antiquities market,<sup>282</sup> a shared-ownership law elicits international help to protect Iraqi archaeological sites.<sup>283</sup> Under the current regime, rather than working together to protect antiquities that have international importance, nations fight over ownership through repatriation claims.<sup>284</sup> In contrast, under a shared-ownership regime, the availability of foreign ownership would create an incentive for foreign nations to work with Iraq in controlling looting.<sup>285</sup> Shared ownership creates an international stake in the regulation of antiquities that will ultimately reduce the looting of Iraqi sites.<sup>286</sup>

## 2. Benefits of Shared Ownership

In its current socioeconomic state, Iraq is increasingly in need of international help because its domestic resources render it unable to adequately guard and properly excavate its archaeological sites.<sup>287</sup> International support resulting from shared ownership translates into tangible benefits including an increased number of

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278. For general discussion on the Ottoman legal regime, see Russell, *supra* note 9, at 50-52. Another version of a shared-ownership system is the "possessory estate and future interest approach." This approach gives a foreign nation temporary title of an antiquity and proscribes the return of the antiquity to the originating nation at a fixed date in the future. See generally Wendel, *supra* note 156, at 1020-21.

279. See Wendel, *supra* note 156, at 1020-21.

280. See *supra* Part II.D.3.

281. See Russell, *supra* note 9, at 45 (illustrating the possibilities for significant future finds).

282. See Park, *supra* note 19, at 944-6 (describing repatriation claims of Turkey and Italy to recover stolen antiquities).

283. See Wendel, *supra* note 156, at 1054 ("A possessory estate and future interest approach could be used to bring source countries and Western museums back together for the common goal of protecting newly discovered antiquities."); see also Borodkin, *supra* note 48, at 415 (describing the success of joint excavation teams).

284. See Borodkin, *supra* note 48, at 394-99.

285. See Wendel, *supra* note 156, at 1053-54; see also Borodkin, *supra* note 48, at 415; cf. Bogdanos, *Fighting for Iraq's Culture*, *supra* note 137 (proposing a system by which other countries provide coordinated security over the archaeological sites).

286. See Wendel, *supra* note 156, at 1053-54; see also Bogdanos, *Fighting for Iraq's Culture*, *supra* note 137; Borodkin, *supra* note 48, at 415.

287. Glanz, *supra* note 113; see also Johnston, *supra* note 13.

excavation teams and improved security around sites.<sup>288</sup> Shared ownership encourages market nations to send teams to excavate archaeological sites.<sup>289</sup> The United States and Italy have already indicated their willingness to jointly conduct excavations in exchange for partial ownership of excavated items.<sup>290</sup> The foreign teams that previously excavated Iraqi sites should return not only to excavate the sites, but also to indirectly guard them from looting.<sup>291</sup> Archaeological digs in Iraq previously had foreign sponsorship from “the Germans at Babylon and Uruk, the British at Ur and Nimrud, the French at Kish and Lagash, the Italians at Hatra, and the Americans at Nippur.”<sup>292</sup> These teams could help ensure that more excavations are properly conducted under the utmost archaeological standards.<sup>293</sup>

Shared ownership also results in improved protection of sites. Occupation of archaeological sites by authorized foreign excavation teams would reduce the opportunity for pillaging.<sup>294</sup> Foreign countries conducting an excavation also become more willing to finance protection of the land around the excavation site.<sup>295</sup> Iraq has already seen success of additional security in the deployment of 1750 armed guards to police archaeological sites.<sup>296</sup> According to Professor Russell, this initiative dramatically lessened looting.<sup>297</sup> Russell notes that with “200 trucks, we could cut it back fundamentally. With \$2 million, we could stop it.”<sup>298</sup> Looting would thus decrease exponentially with the increased security that would result from shared ownership.

### 3. Justification for Foreign Ownership of Iraqi Cultural Property

The shared-ownership scheme rejects cultural nationalism and recognizes cultural internationalism by allowing foreign ownership

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288. See Borodkin, *supra* note 48, at 413; see also Park, *supra* note 19, at 953.

289. Wendel, *supra* note 156, at 1054-55; cf. Bogdanos, *Fighting for Iraq's Culture*, *supra* note 137 (arguing that it is in the interest of other nations to protect Iraq's archaeological sites for humanitarian and security purposes).

290. Wendel, *supra* note 156, at 1055 (citing Stephen W. Clark, *Cultural Property Update*, in ALL-ABA COURSE OF STUDY, LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 125, 141 (2003)).

291. See Bogdanos, *Fighting for Iraq's Culture*, *supra* note 137.

292. *Id.*

293. See *id.*

294. See *id.*

295. See *id.*; Wendel, *supra* note 156, at 1061.

296. Johnston, *supra* note 13.

297. *Id.* (quoting John Malcolm Russell, Professor of Art History and Archaeology, Massachusetts College of Art).

298. *Id.*

in excavated items despite their origination within the source nation's boundaries.<sup>299</sup> In Iraq, an ownership system based on cultural internationalism enjoys greater justification. The strong universal implications of Iraqi antiquities make them unique among all antiquities.<sup>300</sup> The importance of Iraqi antiquities is not nation-specific because Iraq is the birthplace of civilization.<sup>301</sup> Thus, a system that allows for foreign ownership is justified.

#### 4. Shared-Ownership Laws in Practice

In addition to its success when Iraq was under Ottoman rule,<sup>302</sup> the shared-ownership system was successfully used by Egypt.<sup>303</sup> Foreign excavations were successfully conducted under agreements by which the government and the excavator would divide discoveries.<sup>304</sup> The last foreign excavation under this type of agreement was the excavation of Pharaoh Tutankhamen's tomb by British archaeologist Howard Carter.<sup>305</sup> In 1922, disputes over the publication of findings and rights of ownership prompted the Egyptian government to change their system of shared ownership to a system that provides for no division of discovered antiquities.<sup>306</sup> The main crux of the Egyptian government's argument was that the unprecedented value of the tomb of Tutankhamen justified Egyptian, rather than foreign, rights in publication and ownership.<sup>307</sup> Egyptian policy, however, had always been to equally share excavated items, and thus the Egyptian government found difficulty in advancing their argument.<sup>308</sup> The proposed Iraqi shared-ownership law would avoid this pitfall by expressly providing for Iraqi ownership of unique items and foreign ownership of only duplicate antiquities.<sup>309</sup>

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299. See Merryman, *supra* note 50, at 846-47; Merryman, *supra* note 22, at 1916-17.

300. See generally Russell, *supra* note 9 (describing numerous archaeological finds of historical and international significance).

301. *Id.* at 45.

302. *Id.* at 50.

303. Borodkin, *supra* note 48, at 415.

304. *Id.*

305. *Id.*; see Brian R. Parkinson, Judge Pierre Crabitès: A Bourbon Democrat in Egypt, 1877-1943, 171, 171-209 (Aug. 4, 2005) (unpublished Ph.D. dissertation, Florida State University), available at <http://etd.lib.fsu.edu/theses/available/etd-12192005-165822/> (discussing generally the excavation and the dispute relating to the excavation).

306. Parkinson, *supra* note 305, at 177-78.

307. See *id.* at 178.

308. See *id.*

309. See Russell, *supra* note 9, at 52.

The illicit antiquities trade is an international trade and thus an international problem.<sup>310</sup> Nations that lack original sources demand the antiquities of nations with abundant original sources.<sup>311</sup> Domestic laws should recognize, rather than work against, the inherent international nature of the antiquities trade.<sup>312</sup> This Note ultimately suggests that Iraq should take advantage of the international nature of the trade in order to garner the help it needs because of its sociopolitical state. Liberal export laws will allow Iraq to extract monetary value from an international market to help its economy.<sup>313</sup> Shared-ownership laws create the international synergy necessary to counteract the illicit antiquities trade and the looting of its archaeological sites.<sup>314</sup>

#### IV. CONCLUSION

With growing incentives to pillage the sites and growing demand for the antiquities in the international community, Iraq's treasures, and consequently the items of the world's heritage, are in danger.<sup>315</sup> Current domestic laws to control this global problem take an approach based in cultural nationalism.<sup>316</sup> Focusing on national values over international values, these laws fail to protect antiquities and the archaeological process.<sup>317</sup> Both export laws and national-ownership laws do not have the international recognition necessary to control the antiquities trade and the looting of archaeological sites.<sup>318</sup> On a domestic level, export laws are too broad to be adequately enforced.<sup>319</sup> National-ownership laws cannot be enforced because the extent of the looting is greater than the Iraqi ability to enforce national-ownership laws.<sup>320</sup> In the long-term, these types of law place too much emphasis on ownership of the source nation.

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310. See Borodkin, *supra* note 48, at 382.

311. See *id.* at 385.

312. See *id.* at 411-16; Park, *supra* note 19, at 953; Shedwill, *supra* note 31, at 253-54.

313. See Borodkin, *supra* note 48, at 411-16; Park, *supra* note 19, at 953; Shedwill, *supra* note 31, at 253-54.

314. See Borodkin, *supra* note 48, at 415; Wendel, *supra* note 156, at 1062-63 ("Consuming country museums and source countries need to work together if protection for newly discovered antiquities is to be maximized.").

315. See Johnston, *supra* note 13.

316. Willis, *supra* note 18, at 236.

317. See *supra* Parts II.C, II.E.

318. See *supra* Part II.E.

319. See Bator, *supra* note 25, at 318-19.

320. See Borodkin, *supra* note 48, at 393.

In order to protect its antiquities, Iraq should implement laws that have a more international approach to controlling the antiquities market and eliminating looting. Liberal export laws decrease the illegitimate market and allow Iraq to benefit economically from its archaeological inheritance.<sup>321</sup> Shared-ownership laws create international stakeholders in controlling the illicit antiquities market by allowing for foreign ownership in duplicate antiquities. By allowing the vesting of partial ownership of Iraqi antiquities in other nations, Iraq encourages foreign aid.<sup>322</sup>

The two proposed laws use antiquities to benefit Iraq in different ways. Liberal export laws result in increased money returning to the Iraqi government through the sale of antiquities on an international legitimate market.<sup>323</sup> In contrast, shared-ownership laws allow foreign ownership of Iraqi-originating antiquities in exchange for increased foreign aid and cooperation.<sup>324</sup> Liberal export laws, however, will have a more long-lasting effect because they address the heart of the problem, demand of antiquities,<sup>325</sup> by attempting to satisfy demand through legitimate means.<sup>326</sup> While Iraq should implement both laws in the short run, it should thus consider stronger reliance on liberal export laws. Iraq is fortunate to have a plethora of culturally significant antiquities but currently suffers from the constant looting and destruction of these antiquities. A legal regime incorporating theories of cultural internationalism will help Iraq in its fortunate, yet ill-fated situation.

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321. See *supra* Part III.A.1-2.

322. See *supra* Part III.B.1-2.

323. See *supra* Part III.A.2.

324. See *supra* Part III.B.2.

325. See Borke, *supra* note 20, at 385-87.

326. See *supra* note 244 and accompanying text.