

Yours, Mine, and Ours: International Law and the Problem of Museum Repatriation

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British museums are the homes to artworks and cultural objects from across the world. Whether these museums should be the homes of these objects is a more challenging question. As museums move into the twenty-first century, they are being asked to reconsider their role as repositories to the world’s art and cultural heritage and whether they are the correct place for those art and cultural heritage objects. In some cases, they are being asked to return art and cultural heritage objects to their country or people of origin, in other words, repatriate. How museums should respond to these requests for repatriation is not a simple question to answer. Nor is it easy to decide who deserves to have objects repatriated back to them or what criteria should be used when making that determination. International law should be a valuable source of guidance, however, when it comes to museum repatriation international law has failed to adequately address the problem. As a result, individual museums and nations have been left to make their own choices on whether to repatriate cultural heritage objects without clear guidance on the criteria that should be used to make those determinations.

This note will examine the practice and problem of museum repatriation and its interaction with international law. First, to provide context for the reader this note will begin with a brief history of museums, how cultural

heritage objects entered early museum collections, and how current trends toward anti-colonialism and nationalism have led to increased calls for repatriation. Second, we will examine two examples of museums responding to repatriation requests with one museum deciding to repatriate and the other deciding against repatriation. Third, we will look at the current sources of international law and how they are failing to address problems. Fourth, we will provide possible models for the creation of international law, looking to the ways in which individual countries or organizations have attempted to resolve museum repatriation problems. Fifth, we will examine whether international law is a suitable solution to museum repatriation.

I. WHY DO MUSEUMS EXIST?

A. *Brief History of Museums*

Museums are not new; they have existed in their current form for the past two centuries and in slightly different forms for several centuries before that. What is now referred to as a universal or encyclopedic museum was the product of the Enlightenment and the intellectual ideas that accompanied it.¹ These institutions were designed to showcase world culture, its ideas, and the interconnectedness between the peoples of the world and their ideas. The British Museum is widely considered to be the first major public museum and was created by an act of Parliament in 1753.² It opened six years later, although access to the public was limited, only visitors with tickets were allowed entrance and tickets were in practice restricted to the wealthy or those with connections to the museum's Trustees or curators.³ The British Museum, like many early museums, was initially the collection of one man, Sir Hans Sloane, who spent his life and wealth collecting natural specimens and "curiosities." These curiosities included the notably small shoes of a Chinese woman, an Egyptian mummy, the feathered headdress of a West Indian King, various Roman antiquities, and a backscratcher made from an elephant bone.⁴ Over the next several hundred years the museum expanded from a single collection of "curiosities" to over eight million objects. The museum notes that "some of these objects were taken or purchased in regions then under British colonial rule before they were purchased, donated or bequeathed to the museum, while others were acquired through excavations, sales and other bequests by collectors,"⁵ demonstrating a few of the ways in which objects journeyed into museum collections.

Other famous encyclopedic or universal museums began as former royal collections, like the Louvre founded in Paris in 1793, the Hermitage founded in St. Petersburg in 1852, and the collection of museums now on Museum

¹ JAMES CUNO, MUSEUMS MATTER: IN PRAISE OF THE ENCYCLOPEDIA MUSEUM 11 (2011).

² *History*, THE BRITISH MUSEUM, <https://perma.cc/UCU9-YRP2>.

³ *Id.*

⁴ CUNO, *supra* note 1, at 12.

⁵ *History*, *supra* note 2.

Island in Berlin.⁶ The Louvre and the Hermitage are even housed in former royal palaces and the collections represent many of the objects these countries' former monarchs purchased, were gifted, seized during war, or otherwise acquired. Thousands of smaller museums were founded across the western world largely by single families or collectors and universities. Museum collections such as The Manchester Museum at the University of Manchester in England were founded with donations from wealthy community members and as a result have diverse and disparate collections.⁷

The lofty purpose of each of these institutions is to represent “the legacy of humankind” and present “artifacts of one time and culture next to those of other times and cultures ... [and] encourage curiosity about the world and its many peoples.”⁸ As the name implies, universal or encyclopedic museums have a universal and global viewpoint and thus include cultural objects from across history and continents in a single building. To museum professionals this is an asset and allows museums to become places where visitors are educated, enlightened, challenged, surprised, and compelled to wonder.⁹

B. Why Repatriation Matters

Museums, particularly encyclopedic or universal museums, are made up of thousands (or even millions) of different objects. These objects do not all originate from the same place, and were acquired from people or places across the world. To *repatriate* an object means “to restore or return [it] to the country of origin.”¹⁰ Not all calls for museum repatriation are made equal. There are some cases where the repatriation is the right call every time, including objects stolen from Jewish families by the Nazis prior to or during World War II, objects recently looted from archaeological sites, objects stolen from museums during periods of conflict or political upheaval—examples of this include Iraq during the American invasion, Egypt during the Arab Spring, and Cyprus during the Turkish invasion. There should be no question that these objects should be returned to the people or places from which they were taken.

However, there is another category of objects. These objects have been in museum collections for decades, sometimes for a century or more. They were acquired by Western collectors or museums from places under colonial rule. The objects taken are often religiously sacred or culturally significant to the places from which they originated. These types of objects are most often at issue when it comes to museum repatriation. As a result, a criticism of museums is that they are monuments to the theft and decontextualization of

⁶ CUNO, *supra* note 1, at 11.

⁷ *History*, THE UNIVERSITY OF MANCHESTER MANCHESTER MUSEUM, <https://perma.cc/GLV9-JHXC>.

⁸ James Cuno, *Culture War: The Case Against Repatriating Museum Artifacts*, 93(6) FOREIGN AFFS. 119, 120 (2014).

⁹ Cuno, *supra* note 1, at 3.

¹⁰ *Repatriate*, MERRIAM-WEBSTER.COM, <https://perma.cc/J7T7-33FM>.

cultural objects and as institutions are ill equipped to properly display, frame, and explain the origins and importance of these culturally significant objects.

For certain indigenous and aboriginal communities, museums are a symbol of the colonialism that decimated their societies. Many sacred or cultural heritage objects became objects of curiosity for Western collectors, sometimes quite valuable curiosities.¹¹ As these objects became commodified, Western collectors preyed upon vulnerable community members who resorted to selling their cultural heritage objects to survive.¹² This led to the destruction of cultural identity, which community members are now attempting to revive.¹³ To facilitate this revival, indigenous communities are requesting the return of their sacred and cultural heritage objects from museums across the world in order to “renew cultural values and practices and [contribute] to efforts to revive traditional ceremonial practices as a component of contemporary life.”¹⁴ These communities see repatriation as a means to “aid recovery from post-colonial trauma, and, as such, it has the capacity to contribute to indigenous health and well-being.”¹⁵

Cultural heritage objects are also a powerful signifier of national identity. The basic idea is that cultural heritage “originates from some place. It was made by people who once lived there ... And that ‘some place’ is now the territory of a modern nation.”¹⁶ As nation states are building their identities, they take this idea a step further and use these cultural heritage objects to craft a narrative, using the objects “to tell the story of a nation’s past and confirm its present importance.”¹⁷ To effectively tell their unique story and communicate their particular identity, nation states use these cultural objects as symbols. This is done in a slightly different form in the United States with references to the Founding Fathers, which creates a connection between the present and the revolutionary ideas and actions of those who helped build and create the system of American government used today.

As cultural objects become symbols of identity, calls for the repatriation of these symbols begin. For example, Roman sculptures link modern Italians with their ancient influential ancestors, the hieroglyphs on the Rosetta Stone connect modern Egyptians to the time of the powerful pharaohs, and Chinese terra cotta soldiers tie the modern China to its goal of being a world power. In each of these cases, modern governments are using cultural heritage objects to bolster their position in the world in order “to affirm continuity with a glorious

¹¹ Moira Simpson, *Museums and Restorative Justice: Heritage, Repatriation and Cultural Education*, 61 MUSEUM INT’L 121, 126 (2009).

¹² *Id.*

¹³ *Id.* at 122.

¹⁴ *Id.* at 125.

¹⁵ *Id.* at 122.

¹⁶ JAMES CUNO, WHO OWNS ANTIQUITY?: MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 113 (2008).

¹⁷ *Id.* at 14.

and powerful past as a way of burnishing their modern political image.”¹⁸ To nation states, these cultural heritage objects become symbols of a nation’s identity, power, and cultural significance.

II. HOW DO MUSEUMS RESPOND WHEN ASKED TO REPATRIATE?

Museums essentially have two options when offered the chance to repatriate an object, keep the object or return the object. Two particularly illustrative examples of calls for museum repatriation are the Parthenon Marbles housed in the British Museum and several dozen sacred and ceremonial Aboriginal Australian objects formerly housed in The Manchester Museum at the University of Manchester that were recently repatriated to aboriginal peoples in Australia.¹⁹

A. *The “Elgin Marbles” Will Never Return to the Parthenon*

The fight over the future of the Parthenon Marbles, sometimes referred to as the Elgin Marbles, is the most famous example of a call for museum repatriation. The Parthenon Marbles were once decorative features on the Temple of Athena, the Parthenon, in Athens, Greece. They were carved in marble during the fifth century BCE and represent religious and mythological creatures. The British Museum’s collection includes “a frieze²⁰ which shows the procession of the Panathenaic festival (the commemoration of the birthday of the goddess Athena); a series of metopes (sculpted relief panels²¹) depicting the battle between Centaurs and Lapiths at the marriage-feast of Peirithoos; and figures of the gods and legendary heroes from the temple’s pediments²².”²³ In total, this represents about 250 feet of frieze, fifteen reliefs, and seventeen sculptures.²⁴ For 2300 years these sculptural works lived in Athens upon the Parthenon, during which time the building served as a temple, a church, a mosque, and even a weapons depot.²⁵

The sculptural works, that ultimately made their way to London, were originally exported from Greece in the early nineteenth century by the British

¹⁸ Cuno, *supra* note 8, at 120.

¹⁹ Josh Halliday, *Manchester Museum Returns Stolen Sacred Artefacts to Indigenous Australians*, *GUARDIAN* (Nov. 20, 2019), <https://www.theguardian.com/australia-news/2019/nov/20/manchester-museum-returns-stolen-sacred-artefacts-to-australians>.

²⁰ A frieze is a band of sculpted decoration, usually at the top of a building. *Frieze*, *MERRIAM-WEBSTER.COM*, <https://perma.cc/9CE4-8HN5>.

²¹ A relief is a sculpture made so that all or part of it projects from a flat surface. *Relief*, *MERRIAM-WEBSTER.COM*, <https://perma.cc/7HFT-R52Y>.

²² A pediment is the triangular space at the top of a building, usually decorated with sculptures. *Pediment*, *MERRIAM-WEBSTER.COM*, <https://perma.cc/J9NA-623H>. A modern example of a pediment is the sculptures decorating the top of the Supreme Court building in Washington, DC.

²³ *The Parthenon Sculptures*, THE BRITISH MUSEUM, <https://perma.cc/JQ4Q-8U5L>.

²⁴ *Id.*

²⁵ *Id.*

Ambassador to the Ottoman Empire, Lord Elgin.²⁶ (This is why the Parthenon Marbles are frequently referred to as the Elgin Marbles, both terms are used to describe the Marbles in the British Museum). Lord Elgin's agents removed the sculptures from the ancient building, largely by prying them off or dismantling parts of the building,²⁷ to the horror of modern day archaeologists. As the sculptural works are carved into marble, they are quite heavy, so to ensure easier transport Lord Elgin's men sawed off the backs of many of the friezes and reliefs to remove extra weight.²⁸ Lord Elgin then had the Marbles shipped to England, where he displayed them at his home in London.²⁹ A decade later, Lord Elgin sold the Marbles to the British Museum, which was interested in expanding its collection.³⁰

The controversy surrounding the Parthenon Marbles begins with their export from Greece over 200 years ago. Lord Elgin obtained a permit to remove the Marbles from Ottoman officials, who occupied Athens from the late fifteenth century until 1821.³¹ The validity of this permit was first called into question by the Greeks in 1832 when the country first requested the return of the Parthenon Marbles from the British government.³² The Greeks argue that the Ottoman Empire—as occupiers of the city—did not have the legal right to grant such Elgin a permit to remove something so significant to Greek history and culture.³³ Greece has made several more requests for the return of the Marbles to Greece in the past 200 years.³⁴ The British Government and British Museum have denied each request.³⁵ Greece has even built a museum on the Acropolis in Athens to house the Parthenon Marbles should they be returned.

In 2015 UNESCO offered to mediate between Greece and the United Kingdom regarding the return of the Parthenon Marbles. The British Museum declined.³⁶ That same year, a Greek citizen filed a complaint with the European Court of Human Rights seeking the return of the Parthenon Marbles.³⁷ This complaint was dismissed.³⁸ The court stated it did not have the

²⁶ MARY BEARD, *THE PARTHENON 12* (Harvard Univ. Press 2003).

²⁷ *Id.*

²⁸ *Id.* at 14.

²⁹ *Id.* at 16.

³⁰ *The Parthenon Sculptures*, *supra* note 23.

³¹ *Id.*

³² Naomi Rea, *The British Museum Says It Will Never Return the Elgin Marbles, Defending Their Removal as a "Creative Act,"* ART WORLD (Jan. 28, 2019), <https://perma.cc/Z368-U4HR>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *The Position of the Trustees of the British Museum*, THE BRITISH MUSEUM, <https://perma.cc/Y5PW-CHTM>.

³⁷ *Syllogos Ton Athinaion v. United Kingdom*, App. No. 48259/15 (May 31, 2016).

³⁸ *Id.*

authority to act because the removal of the Parthenon Marbles occurred long before the court was created.³⁹ Reports in 2020 claimed that the return of the Parthenon Marbles might be a part of the United Kingdom's agreement to leave the European Union.⁴⁰ However, it is unlikely this will remain in the final deal, given how contentious the issue remains.⁴¹ At this point, Greece does not appear to have any other tools of international law at its disposal to ensure the return of the Parthenon Marbles. No international treaties apply, the International Court of Justice is unlikely to take up such a case given its wide-reaching implications for other museums across the world, and the United Kingdom is leaving the European Union which could have proved useful in negotiating a return of the objects.

The problem of returning the Parthenon Marbles is further complicated by British law. The objects in the British Museum are not owned by the U.K. government, they are legally owned by the museum's Board of Trustees.⁴² This means, the U.K. government does not have unilateral control over what is done with the objects in the collection. Further, the British Museum Act of 1963 governs how the British Museum can "dispose" of objects in its collection. To "sell, exchange, give away, or otherwise dispose of any object"⁴³ the Trustees of the British Museum must meet one of three criteria. First, the object must be a duplicate of another object in the collection.⁴⁴ Second, "the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter."⁴⁵ Or third, "the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students."⁴⁶ The Parthenon Marbles do not meet either of the first or second criteria, and it would be particularly challenging to say the Marbles are "unfit to be retained in the collections" when over three million people visit the specially designed galleries that house them every year and they are considered by art historians to be some of the most historically significant sculptures in the world.

Moreover, the British Museum sees itself as an encyclopedic or universal museum, and as a resource for the "global public to examine cultural identities and explore the complex network of interconnected human cultures."⁴⁷ To this

³⁹ *Id.*

⁴⁰ Adam Payne, *The EU Will Tell Britain to Give Back the Ancient Parthenon Marbles, Taken from Greece Over 200 Years Ago, If It Wants A Post-Brexit Trade Deal*, BUS. INSIDER (Feb. 20, 2020), <https://perma.cc/MHG8-WCHK>.

⁴¹ *Id.*

⁴² Hannah R. Godwin, *Legal Complications of Repatriation at the British Museum*, 30 WASH. INT'L L.J. 144, 147 (2020).

⁴³ British Museum Act, 1963, § 5 c. 24 (Eng.).

⁴⁴ *Id.* at § 5(1)(a).

⁴⁵ *Id.* at § 5(1)(b).

⁴⁶ *Id.* at § 5(1)(c).

⁴⁷ *The Position of the Trustees of the British Museum*, *supra* note 36.

end, returning objects like the Parthenon Marbles would defeat their mission of showcasing the world's interconnectedness and belief that culture belongs to all peoples, not just one people. And the British Museum does showcase the Parthenon Marbles. If you, and the roughly six million other people who visit the British Museum every year, wander through the British Museum you will likely stumble upon the Duveen Gallery. It is one of the most beautifully designed spaces in the museum and it contains the treasured Parthenon Marbles. Along the perimeter of the gallery, just above eye level, sit the friezes that would once have crowned the Parthenon in ancient Athens. The two additional rooms adjoining the main gallery handsomely house the sculptures that once decorated the temple's pediment.

It is an incredible space designed solely to display the Parthenon Marbles. It is a space accessible to any person who finds themselves in London, it is free to enter, and information about the Marbles is available in multiple languages.⁴⁸ In the eyes of the British Museum, the Parthenon Marbles are in their best possible home. A home that is in a relatively stable and safe country, in an exceptionally well-funded and resourced museum, in an accessible and open gallery. They have fulfilled their mission of sharing culture with the world and repatriating that culture to a place where it would be less accessible, less moneyed, and less safe would be antithetical to the museum's purpose. As a result, it is a near impossibility that the British Museum will ever return the Parthenon Marbles to Greece, no matter how many times Greece asks and no matter what international law has to say.

*B. Manchester Museum: Repatriation as a Tool For Museum
Modernization*

While the British Museum is certainly a leader in the museum world, its stance against museum repatriation has not prevented other museums from repatriating objects in their collections. The Manchester Museum at the University of Manchester acquired forty-three objects, including a headdress decorated in emu feathers, traditional slippers, a churinga—wood item believed to embody the spirit of an ancestor, and musical instruments, from Australian Aboriginal communities in the early 20th Century.⁴⁹ The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), an organization created by the Australian government to “to develop, preserve and provide access to a national collection of Aboriginal and Torres Strait Islander culture and heritage,”⁵⁰ submitted a request for repatriation to the Manchester Museum in August 2019. The request by AIATSIS was made in conjunction with representatives from the Aranda, Gangalidda and Garawa,

⁴⁸ *Accessibility at the Museum*, THE BRITISH MUSEUM, <https://perma.cc/LTL5-WRU5>.

⁴⁹ Halliday, *supra* note 19.

⁵⁰ Australian Institute of Aboriginal and Torres Strait Islander Studies Act, 1989, Part III — Functions of Institute, s. 5(A) (Cth.)

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Nyamal and Yawuru Nations.⁵¹ Within three months of the request, the Manchester Museum agreed to return all forty-three sacred and ceremonial objects. This was done in two ceremonies, one in late 2019 and one in early 2020.⁵²

The Manchester Museum's director, Esme Ward, stated the museum made the decision because it was the right and ethical thing to do, noting "I think some museums, or even the museum sector, is in a bit of an existential crisis – particularly museums that are born of empire. The conversation about where collections belong is getting louder and louder and museums are out of kilter with the public sentiment."⁵³ The Manchester Museum was able to make a moral choice, a choice between what a museum legally must do and what a museum should do, and the moral choice won the day. It helps that, unlike the British Museum, the Manchester Museum is not restrained by legislation like the British Museum Act 1963. But, the Manchester Museum's remarkably swift response to AIATSI's request indicates that it is taking a much more active role in the repatriation of objects. The museum is thinking about its own future in the museum space and how it can respectfully be a part of a global community.

This more active role can be seen more closely when looking at the Manchester Museum's Collection Development Policy. There, the Museum states:

The museum's governing body, acting on the advice of the museum's professional staff, if any, may take a decision to return human remains, ... objects or specimens to a country or people of origin. The museum will take such decisions on a case by case basis; within its legal position and taking into account all ethical implications and available guidance.⁵⁴

The policy shows that the Manchester Museum is thinking about the role the museum plays in the community beyond simply being a building to hold cultural objects. It is thinking about how it interacts with the very cultures and peoples it claims to teach its visitors about. It is thinking about colonialism and how it as an institution benefited from that exploitation, about where the best place for sacred and ceremonial objects is, and about what museums ought to be and not just what they have always been.

The Manchester Museum is rising to the occasion and acknowledging that the world of today is very different than the world in which the museum began its collection, and perhaps that change in the world should be acknowledged

⁵¹ *Return of Cultural Heritage Project 2018-20*, AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES 29 (2020), https://aiatsis.gov.au/sites/default/files/2020-09/return-cultural-heritage-20182020-report_0.pdf.

⁵² *Id.*

⁵³ Halliday, *supra* note 19.

⁵⁴ *Collections Development Policy*, THE UNIVERSITY OF MANCHESTER—MANCHESTER MUSEUM §15.1 (2018), <https://perma.cc/M5HS-Q64C>.

and reflected with a change in its collections. It is also no doubt true, that returning these objects to aboriginal nations in Australia did not greatly affect the museum's collection. If the AIATSIS had requested something more substantial from the museum's collection, it is not entirely clear how it would have responded to that request. As the forty-three sacred and ceremonial objects did not represent the centerpiece of three large galleries, it probably was not a challenge to make the decision to repatriate. It was easy to make the moral and ethical choice when that choice did not require much of a sacrifice. It would be particularly interesting to see how the museum would respond to a repatriation request that required it to make both a moral and difficult choice.

III. WHAT ROLE DOES INTERNATIONAL LAW PLAY?

The problem is not necessarily that international law does not take seriously the protection of cultural heritage. It does. The United Nations Educational, Scientific, and Cultural Organization (UNESCO) was founded to promote peace among nations through education, science, and culture.⁵⁵ More specifically, one of their goals is to “[m]aintain, increase and diffuse knowledge: By assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science.”⁵⁶ In furtherance of these aims are the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention signed in 1954 and the Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property signed in 1970.

The 1954 Convention asks signatories to “prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict”⁵⁷ and “to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”⁵⁸ The Convention clearly speaks to an intention to protect and value cultural heritage objects, but it is not necessarily relevant to the issue of museum repatriation in most contexts.

More relevant is the 1970 Convention. The goal of this Convention is to protect cultural heritage objects and property from illegal import and export to “undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.”⁵⁹ The Convention asks nations to help make necessary reparations of illegally imported, exported, transferred,

⁵⁵ UNESCO Constitution Preamble, Nov. 16, 1945.

⁵⁶ *Id.* at art. 1, ¶ 2(c).

⁵⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention art. 3, May 14, 1954, 3511 U.N.T.S.

⁵⁸ *Id.* at art. 4, ¶ 3.

⁵⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 2, Nov. 14, 1970, 823 U.N.T.S. 231.

or stolen cultural heritage objects. However, it only requires that nations return such objects that were imported into their countries after the Convention entered into force in that country.⁶⁰ For example, the United Kingdom did not accept the Convention until 2002 so the requirements to return looted, stolen, and illegally exported cultural heritage objects only applies to objects brought into the U.K. after 2002.

As a result, the Convention is limited. That is not to say it has not been effective; dozens of stolen or looted cultural heritage objects have been returned to their countries of origins. Most of these objects were removed from their countries of origin only within the last several decades; so they fit within the terms of the Convention or were objects confiscated by authorities that never had the opportunity to find their way into museum collections.⁶¹ While the Convention is useful in those sorts of situations, it is much less useful as a means to force nations and museums to return objects that they have been in possession of for decades or centuries before the United Nations even existed.

The 1970 Convention, while clearly demonstrating the international community's commitment to safeguarding and prizing cultural heritage objects, is not particularly helpful for making determinations about museum repatriation, particularly when it comes to objects like the Parthenon Marbles in the British Museum. It creates a low bar for museums: do not add cultural objects to your collections that may have been illegally looted, stolen, or exported after 1970 (or the year the country ratified the Convention). In the case of the Parthenon Marbles, the 1970 Convention offers no guidance and requires no action by the British Museum or the U.K. government. The Parthenon Marbles were exported in the first decade of the nineteenth century. The Marbles, legally, were not stolen or looted; they were removed with a permit from those governing the territory, and then later legally purchased by the British government.⁶² Nothing in the Convention provides for this type of situation, nor does the Convention create any legal obligations for the Manchester Museum and their collection of sacred and ceremonial aboriginal objects. Those objects were removed from Australia well before 2002, when the United Kingdom agreed to the Convention, or to be generous, 1970 when the Convention was created. While the 1970 Convention is certainly a powerful symbol and tool to combat looting, theft, and illegal export, it does little to nothing to force or persuade museums to return cultural heritage objects that have been part of their historical collections.

⁶⁰ *Id.* at art. 7.

⁶¹ *Activities*, UNESCO, <https://perma.cc/W95K-GU3J>.

⁶² Beard, *supra* note 26, at 160.

IV. WHERE TO LOOK FOR MODELS OF MUSEUM REPATRIATION?

A. Repatriation to Indigenous and Aboriginal Communities

As there appears to be no obvious source of international law designed to respond to issues of museum repatriation, we must look elsewhere for possible solutions. Museum repatriation is not an exclusively international problem; it is also an intranational problem. In 1990 the United States Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA). The goal of NAGPRA was to reunite Native Americans in the United States with the human remains and associated funerary objects of their ancestors. The law requires that any museum or Federal agency receiving federal funding “which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.”⁶³ The museum or federal agency then must notify the relevant Indian tribe or Native Hawaiian Organization about the human remains or objects in their collection.⁶⁴ After the cultural affiliation has been established for the human remains or the associated funerary objects the museum, upon request, must “expeditiously” return such remains and objects to a “known lineal descendant of the Native American or of the tribe or organization. . . .”⁶⁵

This legislation has proved successful in reuniting some Native Americans with their ancestors’ remains.⁶⁶ In the 1990s, the Smithsonian repatriated the remains of at least seventeen people to the Northern Cheyenne tribe.⁶⁷ Other tribes have chosen to allow museums and universities to retain the remains of their ancestors to study, which has led to improved relationships between Native American tribes and cultural and educational institutions.⁶⁸ In total, hundreds of thousands of sacred objects and human remains have been repatriated to Native American tribes across the United States, and this has largely restricted the practice of trafficking in Native American cultural heritage property.⁶⁹ These are laudable accomplishments that have gone a long way to make up for the destruction and plunder of Native American sites by the American government and its citizens during a long period of colonialization.⁷⁰

⁶³ Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3003(a) (1990) [hereinafter NAGPRA].

⁶⁴ *Id.* at § 3003(d).

⁶⁵ *Id.* at § 3005(a).

⁶⁶ Caitlin Wunderlich, *Museum Sector Policy Deficit: Repatriation from United States Museums*, THE MUSEUM SCHOLAR (2017), <https://perma.cc/9ZMV-URW9>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Zia Akhtar, *Theft in Babylon: Repatriation and International Law*, 17 ART ANTIQUITY & L. 325, 342 (2012).

⁷⁰ *Id.* at 340.

While NAGPRA is a useful tool for repatriation, it has several flaws. First, the legislation applies only to Indian Tribes in the United States, defined in the statute as “any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village ... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”⁷¹ As a result, Native American tribes or groups not recognized by the federal government do not qualify under the statute as recipients of repatriated remains or funerary objects. Second, the legislation applies largely to human remains and associated funerary objects.⁷² While there are provisions for the return “of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony,”⁷³ the inventory requirements are much less stringent and therefore the objects are less likely to be returned. Third, the legislation applies only to museums that receive federal funding. Thus, museums that are funded exclusively through private donations, grants, etc., are not required to comply with the law. Fourth, the legislation creates an exception for scientific study whereby the museum does not have to return the objects if they are “indispensable for completion of a specific scientific study, [and] the outcome of which would be of major benefit to the United States.”⁷⁴ The value of these scientific studies is determined by the organization in possession of the objects, not the tribes from which they came. Fifth, the law does not help communities who live outside the United States.⁷⁵

NAGPRA offers a very narrow model for the repatriation of human remains and cultural heritage objects. It would only reasonably provide a model for the repatriation of objects to minority indigenous and aboriginal communities. While this would certainly be useful, as these communities have generally been the victims of colonialism and racism, it would also be challenging to administer. Minority communities do not have a lot of power within the international community, so this sort of repatriation model would require buy-in from larger nations who do not always have positive relationships with these minority communities.

However, this model is not without value. NAGPRA defines what objects can be repatriated, to whom objects can be repatriated, and who has the responsibility of initiating that repatriation relationship. These ideas can be replicated elsewhere, by individual nations and the wider international community. It is also a value statement by the American government—that the United States wants to redress some of the wrongs it helped perpetrate against Native communities by recognizing that cultural heritage objects have value to the communities from which they originated.

⁷¹ NAGPRA § 3001(7).

⁷² *Id.* § 3004(a).

⁷³ *Id.*

⁷⁴ *Id.* § 3005(b).

⁷⁵ Wunderlich, *supra* note 66.

B. Diplomatic Hardball

Another possible model or strategy is based on international diplomacy, or, more accurately, bullying. This strategy was notably used by Dr. Zahi Hawass who acted as Egypt's Secretary General of the Egyptian Supreme Court of Antiquities and later as the Minister of State for Antiquity Affairs from 2002 to 2011. Hawass, an archaeologist turned minister, made it his goal to have Egyptian antiquities in western museums returned to Egypt, and he used any tool at his disposal to do so.⁷⁶ One such tool is the media. If you have seen a documentary on Egypt made in the last twenty years, you have probably seen Dr. Zahi Hawass. He is remarkably well-known internationally for a former Egyptian Antiquities Minister. Hawass has appeared on tv, in magazines, and newspapers because he wants everyone to know his repatriation goals and he wants to use public pressure to achieve them.

Notably, Hawass has achieved his aim of repatriation. In 2009, he suspended the Louvre's archaeological excavation permit, leading the museum to return the fragments of fresco he had requested.⁷⁷ That same year the Metropolitan Museum of Art (Met) in New York made a gesture of appeasement to Hawass by purchasing a piece of a shrine, not for its own collection, but to donate to Egypt.⁷⁸ The Met did this to maintain its relationship with the country and ensure they are not prevented from borrowing objects from the country's museums in the future.

Hawass, while no doubt a talented and dedicated advocate and negotiator, likely found his success because he was a representative for Egypt. In the museum world, Egypt and Egyptian history are very popular, thus the person who controls the flow of these objects wields a lot of power and influence. People, especially museum visitors, love Egyptian objects. This desire to possess Egyptian antiquities has been longstanding in the western world. When Napoleon invaded Egypt in 1798 he established the Instiut d'Egypte, a group of "savants" or scientists and scholars who assisted with the invasion.⁷⁹ Among the savants were antiquities experts, and in 1799 those experts identified the Rosetta Stone, which had been long buried in the sand.⁸⁰ When the French were defeated by the British, the British took all the antiquities collected (stolen) by the French and rehomed them in the British Museum.⁸¹ This Egyptian collection, now a wing of the museum, has been a hit with visitors since it was installed. Travelling exhibitions of Egyptian antiquities are also a big business, when the exhibition "Tutankhamun and the Golden Age of the

⁷⁶ Sharon Waxman, *The Show-Biz Pharaoh of Egypt's Antiquities*, N.Y. TIMES (June 13, 2005), <https://perma.cc/8PED-Y2HF>.

⁷⁷ John Tierney, *A Case in Antiquities for 'Finders Keepers'*, N.Y. TIMES (Nov. 16, 2009), <https://perma.cc/FB74-RCRA>.

⁷⁸ *Id.*

⁷⁹ JOHN RAY, *THE ROSETTA STONE AND THE REBIRTH OF ANCIENT EGYPT* 4 (2007).

⁸⁰ *Id.*

⁸¹ *Id.*

Pharaohs” travelled to the US in 2004 and 2005 tickets cost \$25-30.⁸² Even with that price tag millions of people in the US made their way to museums across the country.

If Egyptian artifacts were not so popular with museum visitors and desired by museum curators, Hawass and his campaign of diplomatic bullying would not have been so successful. If Australia publicly declared that it would refuse to loan objects to countries with Australian cultural objects in their museums or denied requests for permits from archaeologists in those same countries, it is unlikely that museums would promptly return the requested objects. Australian cultural heritage objects are not the big attraction or financial draw that Egyptian objects are. So, while Hawass and Egypt have overseen the repatriation of several objects, it is unlikely that other countries would see similar results using this model. There is no equivalent to Egypt in the minds of museums or museum visitors.

C. Mediation

As with all intractable problems, mediation can be an effective way to achieve an equitable outcome. UNESCO even has a body designed to help mediate disputes over cultural objects, the Intergovernmental Committee for Promoting the Return of Cultural Property (ICPRCP). The ICPRCP was created because UNESCO recognized that it did not have enough tools to encourage its Member States to reach agreements on the return of cultural property.⁸³ One purpose of the ICPRCP is “seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its country of origin.”⁸⁴ The ICPRCP defines cultural property as “historical and ethnographic objects and documents including manuscripts, works of the plastic and decorative arts, paleontological and archaeological objects and zoological, botanical and mineralogical specimens.”⁸⁵ It further notes that any request for cultural property may be made by a UNESCO Member State if that cultural property “has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation.”⁸⁶

The main tool that the ICPRCP has at its disposal to accomplish its goals is mediation. Mediations must be between UNESCO Member States or Associate Members of UNESCO, although these Member States “may represent the interests of public or private institutions located in their territory

⁸² Robin Pogrebin & Sharon Waxman, *King Tut, Set for 2nd U.S. Tour, Has New Decree: Money Rules*, N.Y. TIMES (Dec. 2, 2004), <https://perma.cc/9EMB-HZ2J>.

⁸³ *Historical Background*, UNESCO, <https://perma.cc/FZ7E-JT85>.

⁸⁴ U.N.E.S.C.O. Res. 20 C/7.6/5, at art. 4, ¶ 1.

⁸⁵ *Id.* art. 3, ¶ 1.

⁸⁶ *Id.* art. 3, ¶ 2.

or the interests of their nationals.”⁸⁷ The mediation process can only begin after “the requesting State [initiates] bilateral negotiations with the State in which the requested object is located. Only when such negotiations have failed or have been suspended, can the case be brought before the Committee,”⁸⁸ and then after both parties agree to the mediation procedure.⁸⁹ The ultimate outcome of the mediation process, if successful, is not automatically binding on the parties.⁹⁰

The ICPRCP has found some success with mediation. In 2010, Switzerland facilitated the return of the Makondé Mask to the United Republic of Tanzania.⁹¹ This was the result of four years of discussions on behalf of the relevant parties: the United Republic of Tanzania and the Barbier-Mueller Museum in Geneva, which led to the bilateral agreement precipitating the repatriation.⁹² Other examples of successful ICPRCP mediations include the Cincinnati Art Museum in the United States agreeing to exchange sandstone panels of Tyche with the Department of Antiquities of Amman in Jordan and the United States repatriating the Phra Narai lintel to Thailand.⁹³

While the ICPRCP does have several examples of successful mediations, these several examples represent almost the entirety of its success over nearly forty years. There is a lot of value in using international bodies to facilitate and encourage mediation between interested parties with disputes regarding cultural heritage objects; however, the structure created by the ICPRCP is not accomplishing that mission. There are several problems with this model, including: the requirement of voluntary participation, the ability of the parties to choose their own mediators, and the lack of a binding resolution. These are not intractable problems; they can be solved if the international community saw the ICPRCP as a more valuable asset and gave it more authority to initiate requests and hold parties to a binding agreement.

V. IS INTERNATIONAL LAW A SUITABLE SOLUTION FOR THE PROBLEM OF MUSEUM REPATRIATION?

International law currently does not have a mechanism to properly address all problems with museum repatriation and it seems unlikely to create one any time soon. Many museums exist in the western world, in nations that are powerful and influential. Powerful and influential museums and nations do

⁸⁷ Rules of Procedure for Mediation and Conciliation in Accordance with Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, U.N.E.S.C.O. Doc. CLT-2010/CONF.203/COM.16/7, at art. 4, ¶ 2 (Oct. 2010).

⁸⁸ *Modalities of Requesting Return or Restitution*, U.N.E.S.C.O., <https://perma.cc/86QX-7H8L>.

⁸⁹ Rules of Procedure for Mediation, *supra* note 87, art. 1, ¶ 1.

⁹⁰ *Id.* art. 10, ¶ 4.

⁹¹ *Return or Restitution Cases*, U.N.E.S.C.O., <https://perma.cc/EZ8A-J7LB>.

⁹² *Id.*

⁹³ *Id.*

not like to hand over objects they believe belong to them. Some of the objects in question, like the Parthenon Marbles in the British Museum, are some of the most valuable and famous pieces in these museums; there is no will from these institutions to give up the very attractions that bring people to their doors every day. As a result, it is worth asking if inaction by the international community is the intended policy.

If the goal is to prevent the repatriation of cultural heritage objects to their home nations or peoples, then international law should not advocate for policy changes or mediation. If, however, the goal is to enable the repatriation of those cultural heritage objects, then a lot of work needs to be done. As a starting point, UNESCO, as the international body most closely tied to cultural heritage objects, needs to create clear standards for determining if an object should be repatriated. Those standards should consider who is making the request, where the object is currently located, the circumstances surrounding initial acquisition, and the importance of the object to its original community. UNESCO should also create a system and make available funding for ensuring the protection and care of repatriated objects, so they are not returned to places where they are likely to be stolen, damaged, or destroyed. This system should be created with the input of museums, cultural heritage groups, and nations to encourage compliance. This coalitional group will establish a common international baseline, similar to the one in NAGPRA, that will formally recognize the problem of museum repatriation and provide a guide for individual museums and stakeholders.

After the creation of this international baseline, UNESCO should combine elements of the previously discussed models with the support of professional organizations to create a new body to adjudicate repatriation requests. Like the ICPRCP, this body would mediate between museums or governmental organizations in possession of cultural heritage objects and those looking to have those objects repatriated. This new structure should lower the barrier to entry by allowing cultural minority groups to independently petition for repatriation. Like the ICPRCP, this body would make nonbinding decisions; however, unlike the ICPRCP, this body would utilize the resources and support of professional museum organizations to achieve its goals. These professional organizations would help comprise the new body and would have the influence to encourage their members and colleagues to comply with decisions.

Utilizing these professional organizations is an important component of this new body. Professional organizations will be a valuable resource for creating policy around museum repatriation without resorting to the creation of sweeping new international laws with no enforcement mechanisms. These organizations, while not neutral bodies, are filled with some of the people best able to determine if and how objects should be repatriated. There are dozens of such organizations, but one good example is the International Council of Museums (ICOM), a global association of tens of thousands of museum professionals.⁹⁴ The purpose of this organization is to create “professional and

⁹⁴ *Statutes*, INTERNATIONAL COUNCIL OF MUSEUMS, art. 2, § 2, <https://perma.cc/4ZVF-EFQB>.

ethical standards for museum activities, [make] recommendations on issues related thereto, . . . and [raise] public cultural awareness through global networks and co-operation programmes.”⁹⁵ As a coalition of professionals dedicated to creating professional and ethical standards for museum professionals and raise public cultural awareness, this is exactly the type of organization that has the incentive, power, and influence to support a new system of international museum repatriation.

Currently, ICOM has limited guidance on the issue of museum repatriation. The only ethical guideline on the issue states:

Museums should be prepared to initiate dialogue for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level.⁹⁶

This general guidance could be supported with more specific criteria developed by the organization’s coalition of professionals who know and understand the needs of museums, the significance of cultural heritage, and the limitations of conservation. Putting repatriation decisions into the hands of museum professionals is not a perfect solution and museum professionals will be biased toward keeping objects in museums; however, these professionals are also best suited to understanding the practical realities of repatriation and are most likely to listen and respond to the advice and suggestions of each other.

For an initiative like this to work there must be some sort of enforcement or incentive. Professional museum organizations already have a system for holding each other accountable, and this is merely building off that system. One such example is the Association of Art Museum Directors (AAMD) which holds its members to a strict set of Professional Practices.⁹⁷ The most notable of these practices concerns deaccessioning, the process of removing a work from a museum collection.⁹⁸ Museums must follow strict rules when deaccessioning pieces from their collections or they are subject to sanctions from the AAMD.⁹⁹ Sanctions such as the “suspension of loans and shared exhibitions between the sanctioned museum and museums of which the AAMD members are directors”¹⁰⁰ can have massive consequences for museums. One of the ways museums make money is through traveling exhibitions, so if a museum

⁹⁵ *Id.*

⁹⁶ *ICOM Code of Ethics for Museums*, INTERNATIONAL COUNCIL OF MUSEUMS, § 6.2, <https://perma.cc/3ATT-UPBL>.

⁹⁷ *Professional Practices in Art Museums*, ASSOCIATION OF ART MUSEUM DIRECTORS, <https://perma.cc/JX8X-FS9J>.

⁹⁸ *Id.* at 19.

⁹⁹ *Id.* at 21–24.

¹⁰⁰ *Id.* at 25.

breaches AAMD's policies and is sanctioned they are cut off from a huge stream of revenue. As a result, museums have a strong incentive to comply with the policies and practices created by the AAMD. Museums are collaborative organizations; they do not want to risk alienating themselves from their fellow institutions. By utilizing museum professionals and organizations, the international community has a greater likelihood of convincing reluctant museums to repatriate objects from their collections.

The value in creating a partnership between professional museum organizations and this new body to mediate repatriation disputes is that it will create more buy-in and support from museums. The problem with museum repatriation is that museums do not like to let go of objects in their collections and would resent any international body that attempted to force them to do so. These proposed partnerships allow for the sort of diplomatic pressure that will be required to come not from shadowy international figures, but from respected and influential members of the museum community. It will also encourage large western museums to overcome their paternalistic feelings that the western world is the only place in which cultural heritage objects can be protected. The storming of the United States Capitol in January 2021 shows that even the most protected and lauded of western institutions are not invulnerable.¹⁰¹ The ultimate goal should be to ensure that our cultural treasures are "viewed in a just way."¹⁰² That means, cultural heritage objects belong in more places than they currently occupy, and this new repatriation body could help create that change.

The purpose of museums is to protect cultural heritage objects and ensure those objects are accessible to the public well into the future. The goal of museum repatriation is not to undermine that purpose, but to ensure that communities can have access to specific objects that are significant to them. At the same time, part of the museum repatriation analysis is recognizing that some places are better repositories than others. Perhaps the British Museum, one of the world's largest, best funded, well-staffed, most visited museums in the world is the best place for certain cultural heritage objects. However, that decision should not be made exclusively by the British Museum or any one museum or nation, that determination should be made by a body of stakeholders and professionals with access to research, records, and important cultural information. This will protect museums from accusations of irrelevance, colonialism, and cultural appropriation and ensure their survival for the decades and centuries to come.

VI. CONCLUSION

The problem of museum repatriation is not a single problem with a single solution. This is not a problem that can be solved with a single treaty or

¹⁰¹ Sarah Bahr, *First Inventory of Damage to U.S. Capitol Building Released*, N.Y. TIMES (Jan. 8, 2021), <https://perma.cc/6F27-DLNV>.

¹⁰² Derek Fincham, *The Parthenon Sculptures and Cultural Justice*, 23 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 943, 986 (2012) (emphasis in original).

international agreement. Individual nation states can be plagued by politics, nationalism and sometimes even arrogance and greed, making straight political solutions unlikely to bring about changes. A lasting solution will require both a willingness to address past wrongs and a commitment to change by individual museum professionals, museums, nations, and the wider international community. It will require partnerships between international bodies already in existence, international bodies yet to be formed, museums, and museum professionals all working to ensure the preservation and contextualization of cultural heritage objects. Only this type of global cooperation will ensure the world's treasures are accessible to people of all ethnic, racial, and socioeconomic backgrounds and inspire them to create their own treasures to be appreciated in the centuries to come.