

EXPLORING MACHU PICCHU: AN ANALYSIS OF THE LEGAL AND ETHICAL ISSUES SURROUNDING THE REPATRIATION OF CULTURAL PROPERTY

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INTRODUCTION

In 1912, Yale University and the National Geographic Society supported an expedition by Yale professor Hiram Bingham to Machu Picchu, Incan ruins located in the Peruvian Andes.¹ Bingham carted off hundreds of tools, pots, and silver objects from the excavation site during this and a 1915 trip, allegedly with the Peruvian government's blessing.² The artifacts Bingham brought back from his trips to Peru currently compose a prominent exhibit in Yale's Peabody Museum and are now the subject of an escalating legal dispute between the state of Peru and Yale University.³ Yale claims that Bingham had permission to remove the artifacts from the Peruvian president and that Peru's Civil Code of 1852 permanently transferred title to Yale.⁴ While Peru does not dispute that Bingham had permission, it takes the position that the artifacts were only on loan to the University.⁵

International battles over cultural property housed in museums outside the country of origin are becoming increasingly common.⁶

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1. Danna Harman, *Peru Wants Machu Picchu Artifacts Returned*, USA TODAY, Jan. 6, 2006, at 10A.

2. *Id.*; Rupert Cornwell, *Peru Tells Yale It Wants Its Machu Picchu Treasures Back (After 100 Years)*, THE INDEPENDENT (London), Feb. 3, 2006, at 35, available at <http://news.independent.co.uk/world/americas/article342877.ece>.

3. Harman, *supra* note 1.

4. *Id.*

5. *Id.*

6. See Helena Smith, *Greece Demands Return of Stolen Heritage*, THE GUARDIAN (London), July 11, 2006, at 15, available at <http://arts.guardian.co.uk/news/story/0,,1817586,00.html>.

Some scholars and museum professionals believe that repatriating cultural objects will rob museums of the important opportunity to educate the viewing public, and rob academics and scientists of the chance to discover information about ancient cultures, the origins of mankind, and society in general.⁷ However, given the suspect circumstances that often accompany the acquisition of these objects, the recent trend is to view countries that retain the native artifacts of other countries as imperialistic, paternalistic, or even outright thieves.⁸ International law has responded to this shift in perspective and subsequent treaties have been signed and agreements made that facilitate the prosecution of art thieves and looters, as well as hinder the export of illicitly acquired cultural property.⁹ However, it is important to note that these conventions are prospective in nature and do not apply retroactively to those artifacts that are currently housed in foreign museums, but were acquired long ago.¹⁰

This Note examines the law and issues surrounding the repatriation of cultural property to countries of origin, focusing specifically on the case of the Machu Picchu artifacts housed in the Peabody Museum. The Note begins by describing in further detail the dispute between Yale and Peru. It then proceeds to discuss other modern examples of countries demanding repatriation and how the proliferation of these cases is providing precedent for the return of cultural objects. Next, the Note discusses a historical example of remarkable factual similarity, the Elgin Marbles. Then, it presents the political, cultural, and human rights issues that inform the legal debate. This is followed by an examination of the international law

7. See Maria Puente, *Stolen Art Met with Public Yawn: But the Metropolitan's "Hot Pot" Holds a Modern Cautionary Tale*, USA TODAY, Mar. 30, 2006, at 1D; see also JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 117-18 (2000) (discussing the role of access in developing cultural property policy).

8. See Elazar Barkan, *Amending Historical Injustices: The Restitution of Cultural Property—An Overview*, in CLAIMING THE STONES NAMING THE BONES 16, 18, 27 (Elazar Barkan & Ronald Bush eds., 2002) (“Efforts to save singular antiquities may, indeed, be well intentioned but can only be viewed locally as paternalistic imperialism and a misplaced renewal of the ‘white man’s burden’ to civilize the world.”).

9. See, e.g., UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *opened for signature* June 24, 1995, 34 I.L.M. 1330 (1995) [hereinafter UNIDROIT Convention]; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

10. PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 14-15 (2000); LYNDLE V. PROTTE, COMMENTARY ON THE UNIDROIT CONVENTION 78, 81 (1997).

on repatriation. Finally, it applies these laws, principles, and case studies to the Yale versus Peru dispute to conclude that while Yale is not legally bound to return the Machu Picchu artifacts to Peru, precedent, ethics, and politics dictate that they should compromise with Peru to at least share the artifacts or return them in exchange for the loan of other important cultural property for display.

I. PERU'S DEMAND TO YALE FOR THE RETURN OF MACHU PICCHU ARTIFACTS

Peru started requesting return of the fruits of Bingham's expeditions in 1917, but Yale kept postponing its response.¹¹ While the University claims to have returned a small number of pieces in 1922 following Peru's initial requests, the Peabody Museum retains what it reports to be 250 objects of "exhibit quality."¹² This conflicts with Peru's estimate that Yale still holds approximately five thousand items from Machu Picchu.¹³ The dispute over the number and kinds of artifacts Bingham took lies in the fact that the site had been looted by others before Bingham's trips to Peru.¹⁴

The main difference in opinion between the two parties lies, however, in whether the disputed artifacts were permanently transferred to Yale or simply on loan to the University until the Peruvian government requested their return.¹⁵ The government points to a 1912 agreement between Peru and Yale which states: "The Peruvian Government reserves to itself the right to exact from Yale University and the National Geographic Society of the United States of America the return of the unique specimens and duplicates."¹⁶ Peru argues that after World War I, it invoked this contract and requested return of the artifacts.¹⁷ Reportedly, relations between Peru and Yale had "soured" during the war and Yale

11. See Harman, *supra* note 1.

12. *Id.*

13. *Id.*

14. *See id.*

15. *See id.*; Matt Apuzzo, *Disputed Collection Holds Keys to Machu Picchu's Secrets*, ASSOCIATED PRESS NEWSWIRES, June 16, 2006 ("The Peruvian government maintains that, while Bingham had approval to remove the artifacts, they were essentially on loan to Yale and the country never relinquished legal ownership.").

16. Andrew Mangino, *Peru Dispute Has Long, Murky Past*, YALE DAILY NEWS, Apr. 14, 2006, available at <http://www.yaledailynews.com/Article.aspx?ArticleID=32693> [hereinafter Mangino, *Peru Dispute*].

17. *Id.*

neglected to comply with Peru's request.¹⁸ Adding weight to Peru's argument is a letter written by Bingham, which states that the objects "do not belong to us, but to the Peruvian government, who allowed us to take them out of the country on condition that they be returned in eighteen months."¹⁹ Furthermore, the National Geographic Society, which co-funded Bingham's expeditions, supports the position that Peru has title.²⁰

The University has said that it returned, years ago, all the objects from Bingham's 1915 expedition; therefore, the chief dispute is who has title to the objects from the 1912 expedition.²¹ Yale counters Peru's claim that the items were on loan and subject to a demand for return at will by citing an 1852 Peruvian Civil Code provision, which Yale interprets as giving it permanent title.²² The University also claims that the relevant statute of limitations could bar Peru's claims for return of the objects, since they were removed from Peru nearly one hundred years ago.²³

While Peru's initial demands began shortly after the artifacts' removal from the Incan ruins, the government has pursued their return with renewed vigor in the last several years. The movement for repatriation has spurred popular protests in Cuzco, the region of Peru where Machu Picchu lies.²⁴ Moreover, the movement was a chief topic of concern for former Peruvian President Alejandro Toledo and his wife Elaine Karp, a cultural anthropologist, during a visit to Washington, D.C., in early 2006.²⁵

Peru wishes to publicly display the artifacts by 2011.²⁶ Negotiations between Yale and Peru have lasted for more than two years but have intensified since November 2005 when then-President Toledo threatened to sue Yale in Connecticut courts if an accord

18. *Id.*

19. Andrew Mangino, *Elections Could Avert Peru's Lawsuit*, YALE DAILY NEWS, Apr. 12, 2006, available at <http://www.yaledailynews.com/Article.aspx?ArticleID=32634> [hereinafter Mangino, *Elections*].

20. Kim Martineau, *Peru Presses Yale on Relics—Nation's First Lady Keeps Issue in Public Eye*, HARTFORD COURANT, Mar. 14, 2006, at A1.

21. Apuzzo, *supra* note 15.

22. Mangino, *Peru Dispute*, *supra* note 16.

23. See Mangino, *Elections*, *supra* note 19.

24. See *Protesters Demand Yale Return Machu Picchu Artifacts to Peru*, ASSOCIATED PRESS NEWSWIRES, May 9, 2006.

25. Martineau, *supra* note 20.

26. Robin Emmott, *Peru to Sue Yale for Machu Picchu Treasures*, REUTERS NEWS, Dec. 1, 2005.

could not be reached.²⁷ In addition, Toledo brought time pressure to bear, pledging to get the items returned before the July 2006 expiration of his term in office.²⁸ While it is uncertain whether current President Alan Garcia will advocate for repatriation with similar gusto, Peruvian officials say that this has become a state issue that will unlikely fade with the changing of the guard.²⁹

However, Yale and art law scholars believe that the case will not reach the courts, and that even if it does, Peru has a very weak legal case.³⁰ Yale continues to assert that it has legal title to the artifacts but is willing to work out a compromise.³¹ Roger Atwood, a well-known author on the looting of antiquities, agrees: “I don’t see that the [Peru] case would work if it came to court, but I like to think it suggests ethically that Yale would have some responsibility for handing these pieces back.”³² In Atwood’s opinion, Yale is being cooperative, and thus Peru has no need to resort to legal remedies.³³

Even if Peru had a compelling legal argument, some University officials say it would be a shame to return the artifacts given Yale’s custodianship of the pieces over the past century.³⁴ Yale has poured ample funds and effort into preservation and maintenance of the exhibit.³⁵ Indeed, Yale is willing to return some of the collection, but in exchange, seeks recognition for its stewardship of the artifacts and for the scientific and academic contributions the school has made by virtue of its studies.³⁶ Therein lies the tension between Peru’s national patrimony and the fact that Yale has cared for these objects for over

27. See Harman, *supra* note 1.

28. Cornwell, *supra* note 2.

29. See Mangino, *Elections*, *supra* note 19 (“[A] top Peruvian official . . . said it is essentially a ‘state policy’ to recover the artifacts from Yale, which will not change with the election of a new leader.”); see also Andrew Mangino, *Delays Cast Doubt on Peru Lawsuit*, YALE DAILY NEWS, Sept. 21, 2006, available at <http://www.yaledailynews.com/Article.aspx?ArticleID=33307> (conveying that while some experts believe that the one year delay since Peru’s threat to sue evidences the new government’s willingness to settle, others say that Garcia is unlikely to let the issue fade because of its importance to the Peruvian people).

30. See Mangino, *Elections*, *supra* note 19.

31. *Id.* (“Our position is that the law actually would support our claim to ownership, but in a way, that’s a technical issue,” [Yale President Richard] Levin said. “We feel the best solution for the long-term stewardship of these objects is to work out a cooperative arrangement.”).

32. *Id.* (alteration in original).

33. Harman, *supra* note 1.

34. See Emmott, *supra* note 26.

35. See Martineau, *supra* note 20.

36. *Id.*

ninety years.³⁷ Further, Peru has benefited from the publicity garnered from the exhibition of Machu Picchu artifacts at the Peabody Museum.³⁸ The Peruvian government and Yale University have both benefited from this relationship: the viewing public has been inspired by the museum exhibit to visit the Peruvian site, strengthening tourism to the country, while Yale archaeologists have had access to priceless clues to an ancient civilization.³⁹

The parties have yet to reach a negotiated agreement and Peru has not made any definitive move toward filing suit (besides hiring a top counsel of Bill Clinton).⁴⁰ The resolution of other modern repatriation claims may shed insight on how this stalemate will end.⁴¹

II. MODERN EXAMPLES

Greece and Italy have also begun aggressively campaigning for the return of their ancient treasures scattered across the globe. Most recently, both countries have pursued repatriation claims with the J. Paul Getty Museum (Getty) in Los Angeles.⁴² In addition, Italy recently negotiated a deal for the return of the famed Euphronius krater with the Metropolitan Museum of Art (Met) in New York City.⁴³

The Euphronius krater, a large painted pot, is one of approximately twenty-some ancient pieces stolen by Italian tomb raiders and sold to the Met by art dealers.⁴⁴ The Met either legitimately believed false stories about the illicit acquisition of the pieces or it turned a blind eye to what it knew were illegally acquired goods.⁴⁵ Indeed, many people do not realize that much of the artwork from out of the United States was acquired as a result of looting.⁴⁶ Italy, armed with new evidence of the looting, has started to vigorously pursue repatriation of plundered artifacts by prosecuting a former Getty curator and an American dealer for allegedly selling

37. *See id.*

38. Mangino, *Peru Dispute*, *supra* note 16.

39. *See id.*

40. Mangino, *Elections*, *supra* note 19.

41. *Id.*

42. Smith, *supra* note 6; Puente, *supra* note 7.

43. Puente, *supra* note 7.

44. *Id.*

45. *See id.* (“The cynical explanation offered by critics: The museum was so overcome with lust for spectacular objects that it ignored clear signs of nefarious doings.”).

46. *Id.*

looted objects, including the krater, to the Met.⁴⁷ Suggesting a “new era of heightened scrupulousness in collecting, now that museums know they are in the legal cross hairs,” the current director of the Met has agreed to return the krater in 2008 in exchange for long-term loans of other important ancient Italian works.⁴⁸ The krater, which was purchased by a former director in 1972, is considered stolen property under U.N. Educational, Scientific and Cultural Organization (UNESCO), U.S., and foreign law.⁴⁹

Harry Brent, a Baruch College English professor who sends his students to study the krater, worries that the repatriation of this krater will become dangerous precedent that will require museums to return the bulk of their collections and leave them “empty shells.”⁵⁰ In fact, other countries such as Egypt, Greece, and Turkey have followed suit and demands on museums are multiplying.⁵¹ Greece has recently claimed a small victory in the antiquities war by successfully negotiating the return of a votive relief and tombstone that were housed in the Getty museum.⁵² Like the Met, the Getty may arrange for long-term loans of other important works in exchange for the repatriation of these two pieces.⁵³ Greece is still negotiating for the return of other artifacts that it claims were illegally excavated, operating on the principle that “all antiquities found in the country are property of the state.”⁵⁴

Perhaps the Getty’s willingness to reach an agreement with Greece has been spurred by its ongoing legal battles with Italy over pieces acquired by questionable means. The Getty’s former curator, Marion True, is on trial in Rome for “receiving stolen objects and for conspiracy to smuggle.”⁵⁵ While True maintains her innocence, her co-defendant, Giacomo Medici, a dealer in ancient art, was convicted

47. *Id.*

48. *Id.*

49. *Id.*; see UNESCO Convention, *supra* note 9, art. 3(2) (“[A] cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained, shall be considered stolen, when consistent with the law of the State where the excavation took place.”).

50. Puente, *supra* note 7.

51. *Id.*

52. See Hugh Eakin, *Getty Museum Agrees to Return Two Antiquities to Greece*, N.Y. TIMES, July 11, 2006, at E1; *Getty to Return Sculptures to Greece*, USA TODAY, July 11, 2006, at 1D [hereinafter *Getty*].

53. *Getty*, *supra* note 52.

54. *Id.*

55. SAFE/Saving Antiquities for Everyone, Museum Acquisitions Under Fire, <http://www.savingantiquities.org/f-culher-museums.php> (last visited Nov. 18, 2006).

in 2004. Another co-defendant, Robert Hecht, Jr., a Paris-based American dealer, faces similar charges.⁵⁶ Greece is also investigating True and recently raided her vacation home on the Greek island of Paros, confiscating a number of pieces.⁵⁷

The Getty's current director, Michael Brand, was extremely cooperative in reaching a compromise with Greece despite the fact that "there is no hard evidence of an unlawful excavation."⁵⁸ Brand has made statements that he will recommend the return of other antiquities in the future.⁵⁹ Greece's cultural minister has said that the Getty's promise to return the grave marker and marble relief will "lend momentum to Greece's bid to recover additional antiquities in the United States and Europe."⁶⁰ In considering the recent trend toward return in the modern examples above, it is important to note that the cultural property in question was recently acquired and claims to the stolen pieces were supported by evidence of illegal export.⁶¹

III. THE ELGIN MARBLES

While the modern cases are notable examples of the trend toward return, they differ greatly from the Machu Picchu dispute because they involve fairly certain instances of looting or stolen artifacts where the only question is whether the museums were aware of their illicit acquisition. Although the Machu Picchu artifacts have an uncertain history, the legality of their removal from Peru has never been doubted.⁶² Analogies to pieces at issue at the Getty and the Met are helpful, but none involve as remarkably similar a fact pattern as the case of the Elgin Marbles. More specifically, while the Getty, Met, and Yale cases all consist of demands by countries of origin for pieces housed in U.S. museums, the works in the Getty and Met cases discussed above were determined to have been obtained illegally. In

56. *Id.*

57. Eakin, *supra* note 52.

58. *See id.*

59. *See id.*

60. *Id.*

61. *See, e.g.*, Jason Felch, Tracy Wilkinson & Ralph Frammoling, *Getty May Surrender 21 Works to Italy*, L.A. TIMES, June 20, 2006, at A6 ("[A]n internal Getty review last year found that 350 objects had been acquired from dealers either convicted or implicated in the trafficking of looted antiquities.").

62. Apuzzo, *supra* note 15.

contrast, both the Yale artifacts and Elgin Marbles were removed with at least apparent, if not express, authority.

In 1801, Lord Elgin of Great Britain chipped away and removed almost one half of the Parthenon frieze from the Acropolis in Athens.⁶³ At the time, Athens was under the control of the Turks, who allegedly gave Elgin written authority to remove some of the stones.⁶⁴ Today, the British Museum houses fifty-six of the surviving panels, as well as original metopes, pedimental figures, and sculptures, collectively known as the Elgin Marbles, from the Parthenon and the surrounding buildings.⁶⁵ Greece began petitioning for the Marbles' return soon after they achieved independence from the Turks in 1832, making a formal request through the United Nations in 1983.⁶⁶ In response to this request, the British government formally declined to return the marbles, taking the position that they were "'secured' by Lord Elgin 'as a result of a transaction conducted with the recognized legitimate authority at the time.'"⁶⁷

The pivotal issues surrounding the Elgin Marbles are the authority of those who gave Elgin permission and the extent of that authority.⁶⁸ The Ottoman Turks conquered Greece in 1453 and ruled the area through the mid-1800s.⁶⁹ At the time, the Turks were on good terms with the British, and Lord Elgin served as a British ambassador in Constantinople (modern Istanbul).⁷⁰ Consistent with the era's trend of acquiring antiquities for country estates in the British Isles, Elgin sent his architects and draftsmen to Athens to measure and make casts for Elgin's new country home in Scotland.⁷¹ His men were only allowed to make limited casts, so Elgin sought a "firman," or permission from the Turkish government, to do more extensive casting.⁷² The wording of this firman issued by the government in Constantinople, via the Turkish governor of Athens, is ambiguous and some say Elgin misinterpreted it as permission to cart

63. JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 42 (2d ed. 1996).

64. *Id.* at 55.

65. *Id.* at 53.

66. *Id.* at 65, 72.

67. *Id.* at 74.

68. *Id.* at 59.

69. *Id.* at 55.

70. *Id.*

71. *Id.*

72. *Id.*

off nearly half the Parthenon frieze, as well as several statues.⁷³ However, an Italian translation of the firman still exists and states that Elgin had permission to take “pieces of stone with inscriptions and figures” and instructs that no one should obstruct the work of Elgin’s men, “nor hinder them from taking away pieces of stone with inscriptions or figures.”⁷⁴ This seems to allow for the removal of parts of the Parthenon, but “[i]t has been suggested that the document was ambiguous because it was probably a misinterpretation of the meaning of the words to say that permission to dig and take away meant that Lord Elgin could take sculptures from the building.”⁷⁵ At any rate, take he did, and in 1816 the British government was persuaded to purchase the Marbles from Elgin for £35,000.⁷⁶

Supporters of Elgin viewed the removal of the Marbles to Britain as an “act of preservation,” seeing it as a “rescue opportunity” and claiming the Marbles would have faced “imminent danger” had they remained in Greece.⁷⁷ At the time of the Marbles’ removal, the Turks were storing gunpowder in the Parthenon, and in fact, one explosion had already damaged a portion of the building.⁷⁸ Pollution in Athens has irreparably damaged many ancient works and inevitably would have scarred the friezes had they not been sheltered in a museum.⁷⁹ Moreover, the British Parliament, in the *Report on the Elgin Marbles of 1816*, considered it possible that had they not been taken by the British, the Marbles surely would have been plundered by the French.⁸⁰

As of today, the Marbles remain in the British Museum where they are visited by nearly three million viewers a year.⁸¹ The British government maintains that the Marbles were permissibly removed and legitimately purchased from Elgin.⁸² Parliament even rejected

73. *Id.* at 55-56.

74. *Id.* at 55.

75. *Id.* at 56.

76. *Id.* at 59.

77. *See id.* at 63.

78. MERRYMAN, *supra* note 7, at 47.

79. *Id.* at 59. *See also id.* at 48 (“[W]e know what has happened to the few works that were left on the Parthenon. Those that were not removed have deteriorated terribly in the intervening 175 years. Those taken to England and installed in the British Museum (as well as those smaller portions removed to France, Germany, and elsewhere) have on the contrary been much better preserved.”).

80. GREENFIELD, *supra* note 63, at 59.

81. *Id.* at 76.

82. *Id.* at 74, 78-90.

legislation that would have empowered the Trustees of the British Museum to return them.⁸³ Their formal reply to Greece's request asserted that Elgin had legitimate authority.⁸⁴ Greece continues to argue that the Marbles are better situated in Greece because they hold greater cultural value if viewed in context.⁸⁵ Returning the Marbles would restore the integrity of the Parthenon and Acropolis.⁸⁶ Greece also claims that the occupation by Turkey at the time "permission" was granted "seriously questions the legality of the acquisition."⁸⁷ A counterargument would be that because Greece was not independent when Elgin took the Marbles, they technically do not belong to Greece.⁸⁸

Although the modern cases discussed in Part II demonstrate a "post-imperial conscience," public, academic, and political opinion in Britain opposes the Marbles' return.⁸⁹ Museum professionals, as well as the Parliament, have shown concern that any acquiescence to Greece on this matter could set a dangerous precedent, leaving museums across Europe bereft of antiquities and cultural objects from around the world.⁹⁰ In contrast to the American trend of repatriation, Europe has been reluctant to part with questionably acquired artifacts, passing laws in the Council of Europe that are much less favorable to countries of origin than the current attitude in the United States.⁹¹

83. *Id.* at 73-74.

84. *Id.* at 74.

85. *Id.* at 72.

86. *See id.*

87. *Id.*

88. *Id.* at 71.

89. *See id.* at 72-73.

90. *See id.* at 89 ("The British government position has been that the Museum Trustees must be protected from political pressure, and that legislation enabling return would create the climate for such pressure and set the precedent for uncontrolled cultural returns.").

91. MERRYMAN, *supra* note 7, at 33 n.35 ("Canada and the United States have been the most generous of the cultural property importing nations in their response to the concerns of nations of origin."). *See, e.g.*, GREENFIELD, *supra* note 63, at 68-71 (Greenfield states that the Council of Europe passed a resolution in 1983 which implies that cultural property from a European country is the property of all European countries and cautions against returning major works to countries of origin. The accompanying report specifically finds a lack of connection between Ancient Greek civilization and modern Greece, thus weakening Greece's claim for the marbles.).

IV. THEMES

Many political and ethical issues influence the law and negotiations concerning ancient artifacts housed in museums outside the originating country. This Part will look at the positions of scholars on both sides of the debate to provide a framework for a subsequent analysis of the law on the repatriation of art and artifacts.

Some scholars divide the debate between nationalism and internationalism.⁹² Nationalism is used as a justification for repatriation and consists of the fundamental principle that cultural items belong in the country of origin.⁹³ Political nationalism in Greece, for example, has been expressed in sentiments that it is insulting not to have possession of the Marbles and to have them outside of Greece.⁹⁴ Repatriation also allows a piece's contextual identity to be restored.⁹⁵ Museums displaying looted objects rip them out of context and deprive viewers of a depth of understanding which comes from seeing how they fit into their culture.⁹⁶ For example, a nationalist would argue that artifacts from Machu Picchu lose meaning outside the original site.⁹⁷ Some view museums keeping another culture's property as a human rights violation that robs a people of the "shared identity and community" that is forged through a connection with their history.⁹⁸ A popular argument is that retention of cultural property by museums abroad smacks loudly of imperialism.⁹⁹ In fact, there may be instances of repatriation by

92. MERRYMAN, *supra* note 7, at 66-67.

93. *Id.* at 45. Merryman notes:

Byronism lies at the base of widely accepted attitudes toward cultural property. It supports the claims of nations of origin while it discredits those who, whether out of principle or self-interest, would advance alternative bases for the distribution of the world's cultural property. Byronism supplies and limits the terms of discourse, preempting the argument and blocking the assertion of more appropriate criteria. It is strongly built into Western culture. Many who firmly believe that the Marbles should be returned to Greece base their positions on the Byronic version of events and motivations.

Id.

94. *Id.* at 55.

95. *Id.* at 80-81, 116.

96. Puente, *supra* note 7 ("Richard Leventhal, director of the University of Pennsylvania's Museum of Archaeology and Anthropology, says museums . . . can no longer argue that most of what can be known about an artifact comes from the aesthetic qualities of the object itself and only a fraction from its archaeological context.").

97. See MERRYMAN, *supra* note 7, at 81 ("This concern with 'de-contextualization' applies with particular force to undocumented archaeological objects.").

98. *Id.* at 53, 89.

99. See Barkan, *supra* note 8.

former colonial powers that act as gifts out of guilt.¹⁰⁰ It seems almost politically incorrect to keep questionably (though perhaps not technically illegally) acquired cultural objects. Even the preservation or protection arguments waged by internationalists implicate a type of paternalism that is distasteful in modern times and, in most cases, no longer justified.¹⁰¹

Internationalists view cultural property globally, as the property of humankind rather than as that of a specific culture or country.¹⁰² Access and preservation are enhanced if an object is housed in a museum in a major city, which may be outside of the country of origin. Preservation is used as both a justification for removal from a country (for example, protective intervention if a site is being looted or in danger from war or pollution),¹⁰³ as well as retention by museums (damage might result in the process of moving these ancient delicate pieces back to their country of origin).¹⁰⁴ Internationalists also argue that displaying cultural property abroad has an ambassadorial function, making countries richer by exposing citizens to other cultures; this effect would be lost if the cultural property remained in the source nation.¹⁰⁵ In exchange, the exporting country benefits by increased tourism inspired by display of its artifacts abroad. Housing cultural property in foreign museums increases access not only to the viewing public, but to archaeologists and scientists as well. Arguably, the Machu Picchu artifacts better serve scientists who study them at Yale than if they remained a part of the Incan ruins. In addition, there is always the question of whether

100. See, e.g., GREENFIELD, *supra* note 63, at 40 (suggesting that “Danish regret for its sometimes harsh colonial rule spanning 500 years must have played [a] part” in Denmark’s return of Icelandic manuscripts).

101. See Barkan, *supra* note 8, at 21. Barkan notes:

There are those who, in hindsight, justify the removal of cultural artifacts from their place of origin as contributing to their preservation, and hence, to contemporary indigenous culture, although they saw it as preserving a dying and disappearing stage of human evolution. The imperial agents were, however, mostly interested in the kind of personal enrichment and institutional glory that pervaded other facets of imperialism and voyages of discovery.

Id. (footnote omitted).

102. See MERRYMAN, *supra* note 7, at 57.

103. Barkan, *supra* note 8, at 27.

104. MERRYMAN, *supra* note 7, at 59.

105. See, e.g., *id.* at 61. Merryman argues:

If all the works of the great artists of classical Athens were returned to and kept there, the rest of the world would be culturally impoverished. That is not specifically an argument for retention of the Marbles by the British; it is a refutation of the notion that all of the works of a culture belong at that culture’s situs.

Id.

cultural property truly belongs to a country that was not even in existence when the people who created these masterpieces roamed the earth.¹⁰⁶ For example, Greece was not independent at the time Elgin acquired the Marbles and the Incans existed long before Peru established a government. The relationship between ancient artifacts and contemporary societies, as well as the question of whether everything within a nation's borders is its property, permeate the inquiry into who owns cultural property.

V. LEGAL FRAMEWORK

Relatively new developments in international law on illicit antiquities reflect the growing sentiment that a framework needs to be in place both to stop the trade in illegally exported artifacts as well as to encourage museums to return pieces with questionable title.

UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention) in 1970.¹⁰⁷ The preamble reflects the document's nationalist bent, stating "that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."¹⁰⁸ The UNESCO Convention conveys the principle that an illicit trade in art robs pieces of their cultural context and accordingly mandates that parties put a legal scheme in place to halt illegal import of cultural property.¹⁰⁹ Parties must ensure that imported pieces have been exported under proper authority¹¹⁰ and must allow legal action in their jurisdiction by the rightful owner.¹¹¹ The UNESCO Convention is hugely favorable to the state of origin, instructing parties "to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable" and to facilitate the return of illegally

106. GREENFIELD, *supra* note 63, at 71 ("[T]he Council of Europe Report in 1983 said, 'It is as difficult to see any realistic connection between the people who built the Pyramids and the modern Egyptians as it is between those who built Stonehenge and the citizens of the United Kingdom. The same applies for the civilization of the Incas and Ancient Greece.'").

107. UNESCO Convention, *supra* note 9, pmb1.

108. *Id.*

109. *Id.* pmb1., art. 5.

110. *Id.* art. 6.

111. *Id.* art. 13.

exported objects.¹¹² States party are allowed to negotiate their own terms regarding the restitution of cultural property that was acquired before the UNESCO Convention took effect.¹¹³

This leads to the most important point for the purposes of this note: the UNESCO Convention is not retroactive.¹¹⁴ It is clear that “Article 7(a) of the international convention . . . specifically states that the convention only applies to cultural property ‘Which has been illegally exported after entry into force of this convention in the states concerned,’ and further, ‘(which has been) illegally removed from the state after the entry into force of this convention in both states.’”¹¹⁵ Many states involved in the drafting were unhappy with the resulting Convention because they wanted it to cover objects that were illicitly exported before the UNESCO Convention became law.¹¹⁶ Lack of retroactivity means that all objects housed in foreign museums cannot be touched by the new agreement. Although the United States is a party to the UNESCO Convention, it made reservations in its enacting legislation such that, in the United States, the UNESCO Convention only prevents the import of cultural property stolen from *museums* in other countries rather than all illegally exported cultural property.¹¹⁷ Thus, in the United States, the UNESCO Convention’s effect is limited to museum heists post-dating the Convention’s entry into force and does not apply to looting of archaeological sites or other black market acquisitions.

The International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention), a convention better suited to the case at hand (as well as the Elgin Marbles), deals not only with illegal exports but also with cultural property “which has been unlawfully excavated or lawfully excavated but unlawfully retained.”¹¹⁸ The UNIDROIT Convention concludes that such cultural property “shall be considered stolen, when consistent with the law of the State where the excavation took place.”¹¹⁹ While this could arguably be applicable to either case, Article 10 kills any hope of using the UNIDROIT

112. *Id.*

113. *Id.* art. 15.

114. O’KEEFE, *supra* note 10, at 14.

115. *Id.* at 15 (quoting *R. v. Heller*, [1983] Alta. L.R.2d 346 (Can.)).

116. *Id.* at 14.

117. See PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART 97* (1981).

118. UNIDROIT Convention, *supra* note 9, art. 3(2).

119. *Id.*

Convention retroactively by stating that the provisions only apply to objects stolen after the convention comes into force in the state where the action for recovery is brought.¹²⁰ Further, although active in the negotiation of the UNIDROIT Convention, neither the United States, nor the United Kingdom, signed it.¹²¹

While neither the UNESCO or UNIDROIT conventions would be applicable to the Machu Picchu artifacts or the Elgin Marbles, they are important to discuss as reflections of the new international approach, in which cultural property is thought to belong to the original state. Another manifestation of this idea is the International Council of Museums' (ICOM) Code of Ethics for Museums.¹²² This Code instructs museums to ensure that each cultural object has valid title that can be obtained before they acquire the object.¹²³ The Code states that "Museums should avoid displaying or otherwise using material of questionable origin or lacking in provenance. They should be aware that such displays or usage can be seen to condone and contribute to the illicit trade in cultural property."¹²⁴ ICOM does include a caveat for rare instances in which an item "may have an inherently outstanding contribution to knowledge that it would be in the public interest to preserve," in which case specialists should determine the fate of this cultural property of international significance.¹²⁵ Parallel to the UNIDROIT Convention, the Code has a section that provides a framework for museums on which a demand for repatriation has been made.¹²⁶ If the object in question was transferred in violation of international conventions and is a part of the requesting party's cultural heritage, the museum should cooperate in its return.¹²⁷ The Code encourages negotiation instead of litigation and urges museums to initiate dialogues with an open-minded attitude "based on scientific professional and humanitarian principles . . . in preference to action at a governmental or political

120. *Id.* art. 10.

121. *See* PROTTE, *supra* note 10, at 110.

122. INT'L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2006), available at http://icom.museum/code2006_eng.pdf.

123. *Id.* art. 2.2.

124. *Id.* art. 4.5.

125. *Id.* art. 3.4.

126. *Id.* art. 6.3.

127. *Id.*

level.”¹²⁸ Further, cooperative partnerships should be developed with countries whose cultural property has been plundered.¹²⁹

VI. APPLICATION TO THE MACHU PICCHU CASE

While Yale is under no legal duty to return the Machu Picchu artifacts, the University, guided by precedent, public sentiment, political climate, and ethical considerations, should repatriate Peru's cultural property. While they differ in terms of the nature of acquisition, the Getty and Met cases are instructive with regard to how those in the field view antiquities housed in U.S. museums. They also exhibit a trend toward return in the American museum community. The Elgin Marbles debate, while more factually similar to the Machu Picchu dispute, involves a different set of actors and is framed by a European sentiment and legal backdrop.

Although the Machu Picchu exhibit was not a result of looting or illegal export and thus not subject to the UNESCO or UNIDROIT conventions, its debatable acquisition raises implications of imperialism and coercion that would strongly suggest that repatriation would be the best solution politically and morally. While universalists pose a convincing argument in the abstract, concerns about preservation and access are less apropos to the specific facts involved in the case at issue. The ICOM Code of Ethics is a concrete manifestation of the current position of the museum community, which encourages restitution and cooperation.

While factually distinguishable, the Getty and Met cases set an important precedent for the return of cultural property. The recent return of two important objects held by the Getty to Greece has fueled Greece's pursuit of repatriation of other cultural objects, prompting the country to make a list of additional items of disputable provenance¹³⁰ and prompting a statement by the Greek culture minister that the country is “aggressively compiling evidence that establishes Greek provenance and ownership for all these disputed items.”¹³¹ Both Italy and Greece have been encouraged by the Getty director's cooperative attitude. Greece considered his “‘placating’ style”¹³² as crucial to the return, while an Italian negotiator contrasted

128. *Id.* art. 6.2.

129. *See id.* art. 6.1.

130. Smith, *supra* note 6.

131. Eakin, *supra* note 52.

132. *Id.*

a “‘new spirit’ of willingness, understanding and cooperation” with the Getty’s previous air of entitlement.¹³³ The Getty’s board chairman, John Biggs, has said that cases that are sufficiently ambiguous should be resolved in favor of repatriation, and hopes that “talks [between Italy and the Getty] would create a template for other museums facing similar demands from the Italians.”¹³⁴ While the Met seemed slightly less enthusiastic about returning the Euphronius krater and other cultural objects to Italy, the current director, responsible for making the deal, blames “radical archaeologists” and “misplaced patriotism,” and acknowledges that the public and scholars in the field had the ability to force his hand.¹³⁵ There is a growing sentiment that retention of cultural property is an example of American entitlement.¹³⁶

While Yale may not face the same legal constraints as the Getty and Met (had they been unwilling to negotiate), the University should take heed of the political culture that contributed to repatriation in both the Getty and Met cases. It is important to reiterate that in both instances, the museums were faced with strong proof that the disputed items were acquired illegally. For example, the “Italian Cultural Ministry presented evidence that fifty-two Getty objects were looted from Italy and trafficked by a convicted Italian dealer.”¹³⁷ The Euphronius krater was “looted from archaeological sites by Italian tomb robbers.”¹³⁸ While the former Getty curator was implicated as having knowledge that the goods were stolen,¹³⁹ less cynical players in the art world may view the Met as being tricked into believing they had legitimately acquired the krater.¹⁴⁰ Regardless of the museums’ directors’ knowledge and intent, both museums arguably could have faced legal ramifications had they not reached agreements. In both cases, the objects would have been considered stolen property under the UNESCO Convention, but it is doubtful the UNESCO Convention would have applied, as the Met purchased

133. Felch et al., *supra* note 61.

134. *Id.*

135. *See Puente, supra* note 7.

136. *See id.* (“It also reflects badly on how Americans see other cultures. ‘If we feel that we can at any time step on the law to purchase these objects from another culture, what does that say about our role in the world today?’” (quoting Richard Leventhal, Dir., Museum of Archaeology, Univ. of Pa.)).

137. Felch et al., *supra* note 61.

138. Puente, *supra* note 7.

139. *See supra* Part II (discussing Marion True’s criminal prosecution in Rome).

140. Puente, *supra* note 7.

the krater in 1972.¹⁴¹ However, True's prosecution in Rome shows that at least the Italians are willing and able to assume jurisdiction and to pursue repatriation through legal channels.

In contrast, it is conceded that Bingham did not steal, loot, or illegally export Machu Picchu artifacts. Therefore, the UNESCO Convention implementing legislation is inapplicable for two reasons: the items were not illegally exported and were exported about seventy years before the United States adopted the Convention. However damning the evidence that contracts between Peru's then-president and Bingham, as an agent of Yale, provided for the return of the objects eighteen months after their export,¹⁴² the fact that Connecticut's statute of limitations for contractual actions ran ninety years ago¹⁴³ makes Peru's case less compelling from a legal standpoint. The contracts do however, provide an important weapon for Peru's moral argument, making Yale's retention of the Machu Picchu artifacts look obviously wrong as a retraction of its promise. Even Bingham acknowledged that the items were just on loan.¹⁴⁴

While Yale has tried to work out some sort of sharing program with Peru, Peru has not seemed as amenable to compromise.¹⁴⁵ Perhaps part of the problem is Yale's insistence that the University has valid title to the objects¹⁴⁶ and the attitude that any sort of deal with Peru would be a magnanimous step on its part. This appears more like a parent placating an indignant child than any kind of acknowledgement that the University was wrong and should give back to a country what rightfully belongs to it. Perhaps Peru is reluctant to accept the deal because it just furthers the imperialistic flavor that colored the artifacts' original acquisition and denial of its initial requests for their return. Peru may be willing to work out some sort of cooperative arrangement but is unlikely to do so until Yale abandons its position that the University has title.

141. See O'KEEFE, *supra* note 10, at 108-09. The Convention on Cultural Property Implementation Act, the implementing legislation through which the United States enacted the 1970 UNESCO Convention, was not passed until 1983 and only covers objects stolen from museums or similar institutions. *Id.*

142. Mangino, *Elections*, *supra* note 19.

143. See Aaron Larson, *Connecticut Statute of Limitations for Civil and Personal Injury Actions—An Overview*, EXPERTLAW (July 2004), http://www.expertlaw.com/library/limitations_by_state/Connecticut.html (stating that the statute of limitations for a bringing an action for breach of contract is six years in Connecticut).

144. Mangino, *Elections*, *supra* note 19.

145. See *supra* note 29 and accompanying text.

146. See *supra* note 31 and accompanying text.

Regardless of whether the 1852 Civil Code of Peru conveyed title,¹⁴⁷ ignoring the fact that the parties made two contracts providing for the objects' return¹⁴⁸ suggests an attitude of U.S. imperialism and entitlement. Even if Yale is entitled to keep the artifacts via legal technicalities, the blatant disregard of the contracts is distasteful and inconsistent with the current trend of repatriation. Yale first began turning a blind eye toward Peru's demands early in the twentieth century.¹⁴⁹ While we can critique this reaction now, the truth is that there was a different attitude in Bingham's era, as well as legitimate concerns over the safety of the objects were they returned to Peru. Previously, an internationalist viewpoint dominated, viewing cultural property as the property of mankind and regarding the austere environment of a museum as far superior to leaving archaeological finds on-site.¹⁵⁰ This opinion was well-founded as at the time, as Machu Picchu and other Incan ruins were subject to looting and a thriving black market.¹⁵¹ These concerns have been all but eliminated and most importantly, the artifacts, if returned, would to be restored not to the original site, but to a museum planned to be completed by 2011.¹⁵²

While preservation arguments tend to be paternalistic, they would be especially so here, given Peru's status as a developed country with concrete plans for protecting and maintaining these artifacts. Combining that with the appearance of imperial coercion¹⁵³ in their acquisition, a complete argument commanding their return is formed. It seems as if Yale bamboozled Peru into allowing the export of the objects on condition that they would be returned in eighteen months. Once in its possession, the University benefited from the power imbalance between the United States and Peru and could deny repatriation with impunity. Now, the United States and the University know better and any claim of title perpetuates the arrogance with which the items were acquired and retained.

147. *Id.*

148. See Mangino, *Elections*, *supra* note 19.

149. See *supra* text accompanying notes 11-23.

150. See Barkan, *supra* note 8, at 22.

151. See ICOM, Red List of Latin-American Cultural Objects at Risk: Stop the Illicit Trafficking in Heritage, http://icom.museum/press/am_lat_more_eng.html (last visited Nov. 16, 2006).

152. See *supra* note 26 and accompanying text.

153. See Barkan, *supra* note 8, at 19-21.

The best solution would be for Yale to follow the examples of the Getty and Met. Both parties would be best served by Yale ceding title of the objects to Peru in exchange for some sort of long-term loan from Peru of similar or duplicate objects. In his book on the international art trade, Paul M. Bator notes that although legal restrictions on acquisition policies do not apply retroactively, “there is an interest in the international community in promoting the ‘repatriation’ on a voluntary basis of specific art treasures that are important to the cultural patrimony of another country.”¹⁵⁴ He views shared ownership or similar cooperative relationships as a far more desirable solution than the black and white outcome of retention versus repatriation.¹⁵⁵

However, as discussed above, any sort of agreement in which Yale continues to assert its legal ownership is unlikely to be accepted by Peru. Nationalism permeates Peru’s demand for those artifacts and any kind of arrangement would have to move toward healing Peru’s wounded pride in order to be successful. The quest for repatriation has become a cause célèbre, spurring protests and serving as an issue in the recent presidential elections. It has become a matter of political nationalism like the Elgin Marbles (or “Parthenon Marbles,” as they are called in Greece).¹⁵⁶ The dispute has become larger than simply whether the artifacts are returned. Dismissing Peru’s requests all these years has been an assertion of U.S. dominance that cannot be undone by repatriation unaccompanied by some sort of acknowledgement that the artifacts are indeed the property of Peru, and always have been. There is no reason for Peru rejecting Yale’s proposal in March other than stubborn patriotism. Perhaps more offensive to the Peruvians than the retention of the artifacts is Yale’s assertion that it is the rightful owner.

Even if Yale technically has title, the appearance of propriety in the acquisition is a construction of the age of imperialism. Elazar

154. BATOR, *supra* note 117, at 87-88.

155. *Id.* at 88 (“What seems to me far more promising is to invite museums (and collectors) to consider the possibility of arrangements with foreign museums and governments that involve reciprocal measures rather than simply the repatriation of objects to their countries of origin.”).

156. See GREENFIELD, *supra* note 63, at 73 (“[E]ven in the most remote village or island the average Greek is well aware of the great historical and cultural significance of the marbles and remains concerned about their ultimate fate.”). Greece’s Minister of Culture has said that the marbles “are the symbol and the blood and the soul of the Greek people . . . [W]e have fought and died for the Parthenon and the Acropolis . . . [W]hen we were born, they talk to us about all this great history that makes Greekness.” Melina Mercouri, Q & A, *Greece’s Claim to the Elgin Marbles*, N.Y. TIMES, Mar. 4, 1984, at E9.

Barkan observes that “civilized” nations would create at least a “semblance of imperial order that placed constraints on outright plunder.”¹⁵⁷ The fact that Bingham legally removed the artifacts from Peru with the promise of their return does not make Yale’s retention of the artifacts any more acceptable. Although this Note distinguishes the Getty and Met cases throughout, the failure to return items “on loan” is no different than receiving goods that have been stolen or looted from their countries of origin. Nor is there much of a difference in the case of the Elgin Marbles, where the British were given a gift by a party that did not have the authority to give it.¹⁵⁸

Even if Yale supposedly had title, even if the Getty and Met did not know the pieces were stolen, and even if the firman gave Elgin permission, the truth is that importing states know better now. Today, artful drafting, subtle coercion, and legal trickery are not tolerated, but “[a]t the time of acquisition some of these methods were considered not only legal but also honorable.”¹⁵⁹ American and British retention of cultural property is a blow to a source nation’s self-esteem and amounts to a form of bullying by these importing nations.

CONCLUSION

Opponents of repatriation counter with the arguments of access and custodianship. They worry that museums will be bereft of foreign treasures and that the years of preserving and displaying these items should convey some type of ownership rights to the institutions that maintain them. However, once an acquisition has been determined to have been unethical, it is difficult to argue that museums take precedence over the countries that have been robbed of their treasures. Just because a thief polishes the silver he stole every day does not make him more worthy of possession than the rightful owner. Similarly, one cannot argue that the thief should maintain possession because it would be such a shame to deprive him of this treasure. The scientific and academic benefits of cultural property housed in museums abroad are beyond dispute. However, current

157. Barkan, *supra* note 8, at 20.

158. *Id.* (“Even in the midst of this imperial plunder, however, there evolved a *modus vivendi* . . . This order included anomalies that recognized some local groups as having agency and, therefore, the right to control and trade their cultural property.”).

159. *Id.* at 18.

notions of national patrimony and ethical acquisition practices mandate their return.