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Publication date:

2018-08

Permanent link:

<https://doi.org/10.3929/ethz-b-000319863>

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Originally published in:

International Journal of Cultural Property 25(3), <https://doi.org/10.1017/S0940739118000188>

The Rise of Safe Havens for Threatened Cultural Heritage

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Abstract: In light of the recent rise of destruction and looting of cultural property, a need for formalized heritage protection has arisen. Increasingly popular in the debate has become the instrument of international assistance known as “safe havens.” These temporary refuges for at-risk cultural goods in a third country have recently been implemented by Switzerland, France, the United States, and the Association of Art Museum Directors. We assess the contributions and shortcomings of these four regimes using a comparative approach. Mainly, we find that, despite variations in their scope and structure, none of the models accounts entirely for today’s major difficulties in protecting endangered cultural properties. We draw recommendations for future safe haven states against the backdrop of the existing models and hope to see the instrument used in practice as a way to safely isolate cultural property from destructive conflicts.

Keywords: Safe havens, cultural heritage protection, comparative law

INTRODUCTION

The rampant destruction and looting of millennia-old cultural property in countries subject to armed conflicts, such as Iraq, Syria, Mali, Egypt, or Afghanistan, has prompted international outrage during the last decade. Heritage destruction, as an instrument of war, has led to irreplaceable losses and the illicit trafficking of

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ACKNOWLEDGMENTS: We are grateful to Rino Büchel, Marc-André Haldimann, the participants of the second All Art and Cultural Heritage Law Conference in Geneva, and two anonymous reviewers for their comments and suggestions.

cultural heritage items as a way to supplement the funding of militant groups.¹ The instrument of international assistance known as “safe havens”—granting temporary refuges for at-risk cultural goods in a third country—has become increasingly popular recently in the debate on heritage protection.

Though of a hybrid nature, generally the following three main characteristics of safe havens may be identified: (1) they stem from international cultural heritage obligations that are related to cultural materials endangered by armed conflicts, terrorism, and natural disasters; (2) they are primarily a matter of national law; and (3) they give effect to ethical considerations of non-state actors that establish such facilities based on instruments of self-regulation. The first two characteristics are mirrored in the manifold international soft and hard law developments that ultimately led to Switzerland, the United States, and France adopting national laws on the granting of safe havens during the last three years, while further countries are expected to follow. The Association of Art Museum Directors (AAMD) is exemplary of the third characteristic by issuing a self-regulatory framework for the provision of safe havens in the institutions of its members. Facing today’s challenges, safe havens are one instrument that may contribute to better protecting threatened cultural heritage.

In this article, we first explore the recent history of safe havens as a safekeeping instrument for threatened cultural property. Next, we apply a comparative approach to analyze the conditions and modalities of the provision of safe havens in Switzerland, France, the United States as well as at the museum level. After assessing the four different safe havens models, we then discuss the contributions and shortcomings of each of the four models. Finally, and against the backdrop of the challenges identified in the previous section, we conclude by identifying recommendations for the future establishment and implementation of safe havens through national laws.

A BRIEF HISTORY OF SAFE HAVENS

First International Developments

Traditionally, there has been a vast international humanitarian practice to protect and safeguard cultural property evacuated from occupied territories. It is by virtue of international customary law that states have a duty to protect, preserve, and return property belonging to foreign states.² Moreover, according to international law, the property of foreign states is immune from jurisdiction and seizure.³ Prominent examples for the granting of safe havens to works being endangered abroad can be found in Switzerland, though not on the basis of specific national

¹In this sense, archaeologists estimate that Islamic State of Iraq and Syria (ISIS) has looted up to USD 300 million worth of antiquities. See Sangwon Yoon, “Islamic State Is Selling Looted Art Online for Needed Cash,” *Bloomberg*, 29 June 2015.

²See illustratively Castel 1974, 124; Williams 1977, 154.

³Castel 1974, 125; Williams 1977, 152.

legal provisions. As early as the Spanish civil war (1936–39), the Musée d'art et d'histoire of Geneva provided a refuge for large numbers of paintings from the collection of the Museo Nacional del Prado in Madrid.⁴ More recently, from 2000 to 2007, Afghan cultural material was stored for safekeeping in the privately owned Afghanistan Museum in Bubendorf, Switzerland.⁵ Lastly, the city of Geneva has been storing archaeological treasures from Gaza in the Geneva Freeport.⁶

Until the middle of the last century, states would grant such protection based on their own diverse set of practices, national (antiquities) laws, export controls, and rules and mechanisms of enforcement.⁷ The role of international law gained importance with the passing of the 1954 Hague Convention.⁸ Setting rules for the transport of cultural property outside an endangered territory and for its return at the end of the hostilities,⁹ the convention constituted the first worldwide international treaty focused exclusively on the safeguard of cultural property. The obligation of states to cooperate to preserve cultural heritage from destruction and misappropriation was further strengthened by several additional treaties that were subsequently passed in the course of the last few decades, most notably the 1999 Second Protocol to the Hague Convention.¹⁰ International hard laws have been complemented by several political soft law commitments by states and by international mobilization campaigns. Prominent examples of such initiatives are “Unite4Heritage,” which was launched by the United Nations (UN) Educational, Scientific and Cultural Organization (UNESCO) in 2015, as well as the 2015 Expert Committee report and resolution on the proposed extension of the doctrine of the “responsibility to protect” to cultural property—that is, acts of intentional destruction of cultural heritage would justify action from the UN Security Council.¹¹

⁴Musée d'Art et d'Histoire, “Du Greco à Goya: Chefs-d'oeuvre du Prado et de collections espagnoles. 50e anniversaire de la sauvegarde du patrimoine artistique espagnol 1939–1989,” Exhibition, 16 June – 24 September 1989, Geneva, Switzerland.

⁵See Koellreuter and Bucherer 2008 for more details.

⁶Musée d'Art et d'Histoire, “Gaza à la croisée des chemins,” Exhibition, 25 April – 7 October 2007, Geneva. See Caroline Zumbach, “Des trésors de Gaza embarrassent Genève, qui appelle Berne à l'aide,” *Tribune de Genève*, 21 November 2014.

⁷Nafziger 2007, 148.

⁸Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240 (Hague Convention).

⁹Hague Convention, Art. 12–14; Regulations for the Execution of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Regulations for the Execution of the Convention), Art. 18; First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358, para. 5 (First Protocol).

¹⁰Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 172 (Second Protocol).

¹¹“Responsibility to protect” leads to an extensive interpretation of Art. 39 by incorporating human right violations as “threats to the peace” that would justify the decision of what measures should be taken to maintain and restore international peace, which is an exception to the general prohibition on the interstate use of force. See Brad Halt, “The Legal Character of R2P and the UN Charter,” *E-International Relations*, 8 August 2012; and Franklin Lamb, “Can Responsibility to Protect Preserve our Cultural Heritage in Syria?” *counterpunch*, 28 April 2016.

Though generally providing for the safeguarding of cultural property, neither international laws nor national implementations had yet to contain particular rules on the granting of safe havens for threatened cultural property. In response, the International Law Association adopted the Guidelines for the Establishment and Conduct of Safe Havens for Cultural Material (ILA Guidelines) in 2008.¹² These guidelines constitute normative recommendations that act as a basis for states when establishing and conducting safe havens or when integrating the regime into their national laws. In essence, the ILA Guidelines and the appended Safe Haven Model Contract provide for non-binding standards for safekeeping, preserving, and returning cultural material on which governmental and non-governmental bodies—typically museums—may rely when establishing safe havens. Particular attention is given to the condition of care by both the safe haven state and the source state or entity.¹³ By providing for well-reflected and practical guidelines in a field so far characterized by uncertainty of standards and procedures, the ILA Guidelines contributed to the emergence of national safe haven implementation in the decade following their adoption.

The concept of granting safe havens dramatically gained importance during the international debate on heritage protection following the rise of the militant group of the Islamic State of Iraq and Syria (ISIS) and the destruction and looting of millennia-old cultural property as an instrument of war. It has only been recently that 40 states have committed to create an international network of safe havens, both at a national level and in third countries, by adopting the Abu Dhabi Declaration on Heritage at Risk in the Context of Armed Conflicts, 3 December 2016 (Abu Dhabi Declaration). As per the declaration, refuges in third countries shall be a solution of last resort and, in accordance with international law, be provided at the request of the governments concerned and take into account the national and regional characteristics and contexts of cultural property. The declaration also approves the setting up of a fund, an effort led by France and the United Arab Emirates, aiming to raise USD 100 million by 2019 for the implementation of programs for cultural property in danger on account of armed conflict.¹⁴ Following this initiative, the UN Security Council adopted Resolution 2347 (2017) in order to encourage nations, *inter alia*, to consolidate their cultural property in a network of safe havens in their own territories.¹⁵ Concurrently with the rise of the

¹²International Law Association (ILA), Guidelines for the Establishment and Conduct of Safe Havens as Adopted by the International Law Association at Its 73rd Conference Held in Rio de Janeiro, Brazil, Resolution no. 2/2008, 17–21 August 2008 (ILA Guidelines). For a comparison between the Swiss model and the ILA Guidelines, see Chechi 2015, 92.

¹³ILA Guidelines, Guidelines 4, 5.

¹⁴The Alliance for the Protection of Heritage in Conflict Areas is a Swiss fund based in Geneva. See “UNESCO, France and the Emirates Launch an International Alliance for the Protection of Heritage,” 20 March 2017, http://www.unesco.org/new/en/media-services/single-view/news/unesco_france_and_the_emirates_launch_an_international_alli/ (accessed 20 August 2018).

¹⁵This approach focuses on illegal trafficking originating from a context of armed conflicts, notably from terrorist groups, in particular from ISIL, Al-Qaeda, and associated individuals and groups.

concept on the international stage, the proliferation of safe havens has recently found its way into the national laws of several states as outlined in the subsequent paragraphs.

Switzerland

In the course of the complete revision of its Federal Act on the Protection of Cultural Property in the Event of Armed Conflict, Disaster or Emergency Situations (PCPA), Switzerland was the first country to transpose this instrument into its national laws in 2015.¹⁶ Pursuant to Article 18 of the PCPA, the Swiss state may henceforth grant safe havens to cultural property being threatened abroad.

France

In the same vein, Jean-Luc Martinez, director of the Musée du Louvre, was charged by François Hollande, the former French president, with a mission concerning the protection of cultural goods in armed conflicts. In the respective report, Martinez argued that France should follow Switzerland, and he foresaw a legal instrument to enable the removal and the temporary storage of threatened cultural material.¹⁷ Martinez's report led to the proposed amendment "Palmyre" of the *Projet de loi relatif à la liberté de création, architecture et patrimoine*, including a novel article added to the Code du patrimoine that enables the French state to grant safe havens. The bill was finally adopted in July 2016, and the result is an instrument based on the Swiss model, but containing certain particularities.¹⁸ Since the law stipulates that the modalities of its application are to be determined by the Conseil d'État on an ordinance level and since this ordinance has not been passed to date, certain concretizations still remain to be seen.¹⁹

United States

The Protect and Preserve International Cultural Property Act was signed into law in the United States on 9 May 2016. It seeks to counter the black market trade of plundered Syrian cultural goods. *Inter alia*, it imposes specified import restrictions (as set forth under section 307 of the Convention on Cultural Property

¹⁶Bundesgesetz über den Schutz der Kulturgüter bei bewaffneten Konflikten, bei Katastrophen und in Notlagen, SR 520.3 (PCPA).

¹⁷Jean-Luc Martinez, "Cinquante propositions françaises pour protéger le patrimoine de l'humanité: Rapport au Président de la République sur la protection du patrimoine en situation de conflit armé," 2015, particularly, proposition no. 47.

¹⁸Loi du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine, Art. 56; Code du patrimoine, Art. L. 111-11.

¹⁹The status can be reviewed under "Contrôle de l'application de la loi relative à la liberté de la création, à l'architecture et au patrimoine," <https://www.senat.fr/application-des-lois/pjl15-015.html> (accessed 9 March 2018).

Implementation Act) with respect to any archaeological or ethnological material from Syria, as if Syria was a state party to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.²⁰ The AAMD, in reaction to the first draft of the Protect and Preserve International Cultural Property Act introduced in the House of Representatives on 19 March 2015, released a statement in which it criticized the import restrictions for forbidding the entry into the United States of cultural property that ISIS was in the process of destroying or that may be brought in by Syrian refugees, forcing the latter to leave their heritage in Syria, where it was most likely to be stolen or destroyed.²¹ The result was the addition to the bill of a waiver to the import restrictions regarding a temporary deposit of the (unlawfully removed) cultural good in question, which led to a form of safe haven that may be granted by the United States upon the request of the owner or custodian.

Other Countries

Germany, which also revised its Kulturgutschutzgesetz (Law on the Protection of Cultural Property), considered the option of establishing safe havens for Syrian and Iraqi cultural property.²² The proposition was introduced by the Deutsche Kulturrat but, in the end, was not implemented as part of the revision that came into force in August 2016.²³

In February 2017, the United Kingdom's (UK) Parliament passed the Cultural Property (Armed Conflicts) Act 2017 to implement the 1954 Hague Convention²⁴ and its First and Second Protocols,²⁵ with the convention and the protocols subsequently being ratified in September 2017.²⁶ Part 5, section 28, of the Cultural Property (Armed Conflicts) Act 2017 implements the UK's obligations under Article 14

²⁰Protect and Preserve International Cultural Property Act, HR 1493, s. 3(a); Convention on Cultural Property Implementation Act, 19 USC §§ 2601 et seq.; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231 (1970 UNESCO Convention). See Perini and Cunliffe 2015, 54.

²¹Statement of the Association of Art Museum Directors, HR 1493, https://aamd.org/sites/default/files/key-issue/FINAL%20STATEMENT7471527_4.pdf (accessed 20 August 2018).

²²Kulturstaatsministerin Monika Grütters, Novellierung des Kulturgutschutz-Gesetzes, "Internationale Variante des Kulturgutschutzes," *Deutschlandfunk*, 22 April 2015.

²³"Asyl für bedrohtes syrisches und irakisches Kulturgut," *Deutscher Kulturrat*, 22 April 2015, <http://www.kulturrat.de/detail.php?detail=3097&ruebrik=2> (accessed 20 August 2018).

²⁴Hague Convention.

²⁵The UK signed the Hague Convention but has not ratified it nor acceded to the two protocols. See "Cultural Property (Armed Conflicts) Bill [HL]: Briefing for Lords Stages, Lords Library Doc. LLN-2016-0029, 27 May 2016, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2016-0029#fullreport> (accessed 20 August 2018).

²⁶We are grateful to Rachael Bishop, Bill team manager, for the details provided.

of the convention to ensure that cultural property that is being transported for safekeeping may not be seized or forfeited while it is in the UK.²⁷ In the case of cultural property being transported to the UK for which the UK has accepted the obligation to act as depositary and safeguard under Article 18 of the Regulations for the Execution of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, subsection (5) of the Act provides that the cultural property is protected while under the custody of the secretary of state or the person or institution the latter has designated responsible for its safekeeping.²⁸ In the event that the UK is requested to act as depositary, any cultural property should be appropriately housed and cared for, and such property should only be returned on cessation of the conflict.²⁹ The government may make enquiries regarding the provenance of the cultural property in order to avoid bringing cultural property with disputed ownership into the UK.³⁰ According to Article 18 of these regulations, in such cases, the UK is to extend to the cultural property as great a measure of care as that which it bestows upon its own cultural property of comparable importance and only return the good on cessation of the conflict.

In Italy, a UNESCO Emergency Task Force for Culture has been established with the aim of protecting cultural sites and artifacts in zones of conflict. The task force will assist with the transfer of at-risk movable cultural heritage to safe havens.³¹ The implementation of safe havens into the national laws of Italy, however, does not seem to be planned at this current stage. In addition, China's national body overseeing the protection of historical heritage has recently vowed to respond to the call for establishing safe havens.³² It would seem that, following the Abu Dhabi Declaration and the UN Security Council's resolution outlined earlier and given the regulatory requirements associated with the granting of safe havens, it may be expected that further countries will follow and implement the concept in their national laws.

Criticisms

Not all states have embraced this evolution, with Greece and Egypt publicly raising concern about the concept of granting safe havens. Notably, contention arose

²⁷See the Explanatory Notes to the Cultural Property (Armed Conflicts) Act 2017, available under <http://www.legislation.gov.uk/ukpga/2017/6/notes> (accessed 20 August 2018).

²⁸Regulations for the Execution of the Convention.

²⁹Regulations for the Execution of the Convention, Art. 18.

³⁰See Cultural Property Act 2017, 77.

³¹Memorandum of Understanding between the Government of the Italian Republic and UNESCO on the Italian National Task Force in the Framework of UNESCO's Global Coalition Unite4Heritage, 16 February 2016, http://www.beniculturali.it/mibac/multimedia/MiBAC/documents/1455616287505_2._Memorandum_of_Understanding__11_II_2016_DRAFT_Finale_UNESCO_versione_Italia.pdf (accessed 20 August 2018).

³²Kaihao Wang, "China Answers Call for Relics 'Safe Havens,'" *China Daily*, 29 March 2017.

during Egypt's adoption of Resolution 2347 (2017).³³ In general, the creation of safe havens outside of national boundaries was seen as not respecting the principles of sovereignty and non-intervention.³⁴ The Greek prime minister, on the other hand, argued that the transfer of objects into third countries should be a solution of last resort and that guarantees for their safe return should be established.³⁵ Throughout the last century, these countries were repeatedly at the center of disputes over the return of cultural material. Illustratively, Greece has long sought the return of the Parthenon Marbles, sculptures removed from the Parthenon by Lord Elgin in the early 1800s and sold to the British Museum.³⁶ Despite several petitions since Greece's independence in 1832 and formal requests through the UN, the sculptures are still on permanent public display at the British Museum.³⁷

AAMD

Concurrently with these legal developments, the AAMD, with its current network of 242 museum directors in the United States, Canada, and Mexico, has issued a set of guidelines on 1 October 2015 regarding the provision of safe havens for threatened cultural property by museums.³⁸

SAFE HAVENS AT A NATIONAL LEVEL

The Conditions of Safe Havens

Cultural Property

In all three jurisdictions, the property concerned has to qualify as “cultural property” in the sense of the underlying rule in order to be entitled to receive protection

³³With the representative for Egypt arguing that “[s]tates must step up efforts while respecting the principle of sovereignty and non-interference in others' internal affairs” at the 7907th Meeting of the Security Council. “Security Council Condemns Destruction, Smuggling of Cultural Heritage by Terrorist Groups, Unanimously Adopting Resolution 2347 (2017),” 24 March 2017, <https://www.un.org/press/en/2017/sc12764.doc.htm> (accessed 20 August 2018); see also UNESCO, “Twelfth Meeting by the Committee for the Protection of Cultural Property in the Event of Armed Conflict,” 8 November 2017, 40–41, unesdoc.unesco.org/images/0026/002601/260141E.pdf (accessed 20 August 2018), which calls for a thorough review of the legal and policy framework for the implementation with safe havens.

³⁴See “Briefing and Draft Resolution on Protection of Cultural Heritage in Armed Conflicts,” <http://www.whatsinblue.org/2017/03/briefing-and-draft-resolution-on-protection-of-cultural-heritage-in-armed-conflicts.php> (accessed 20 August 2018).

³⁵Quoting the Greek Prime Minister Alexis Tsipras, see “40 countries create fund to protect cultural heritage endangered by conflict,” <https://www.i24news.tv/en/news/international/131661-161203-nations-set-to-approve-fund-to-protect-cultural-heritage> (accessed 20 August 2018).

³⁶For a historical account, see “How the Parthenon Lost Its Marbles,” 12 March 2016, <https://www.nationalgeographic.com/archaeology-and-history/magazine/2017/03-04/parthenon-sculptures-british-museum-controversy/> (accessed 20 August 2018).

³⁷Banteka 2016, 1238.

³⁸AAMD Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis, 1 October 2015, <https://aamd.org/document/aamd-protocols-for-safe-havens-for-works-of-cultural-significance-from-countries-in-crisis> (accessed 20 August 2018).

under the respective safe haven regime. However, while both the French and the Swiss legislature use fairly broad definitions of cultural property, the US definition is relatively narrow and, therefore, more restrictive. The Swiss legislature refers to the definition of Article 1 of the Hague Convention, according to which cultural property shall cover all “movable or immovable property of great importance to the cultural heritage of every people.”³⁹ The Hague Convention exemplifies this by enumerating manuscripts, books, and other objects of artistic, historical, or archaeological interest as well as scientific collections, important collections of books or archives, and reproductions of the property defined above.⁴⁰ The definition of cultural property under the French Code du patrimoine is even broader; it covers all movable or immovable property that represents a historical, artistic, archaeological, aesthetic, scientific, or technical interest and does not, therefore, require that the object to be protected have a specific significance.⁴¹

Under the US regime, however, a safe haven may only be granted to designated material of archaeological or ethnological interest. In order to qualify as material of archaeological interest, the object must be of cultural significance, must be at least 250 years old, and must have been normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or underwater. Ethnological objects are defined as products of a tribal or non-industrial society and as important to the cultural heritage of a people because of the objects’ distinctive characteristics, comparative rarity, or contribution to the knowledge of the origins, development, or history of that people.⁴² In addition, the material must, in theory, form part of the Designated List of Archeological Material of Syria issued by the secretary. However, the designated list “covers all archeological and ethnological material of Syria” and, thus, does not include further restrictions. Considering that these conditions are cumulative, the scope of the US regime is significantly more restrictive than the other two jurisdictions. However, it should be kept in mind that all material not qualifying thereunder may be imported without the import restriction applying and, therefore (in theory) is granted protection in the United States (though not under the safe haven regime).

Endangerment in a Third State

Threat

According to the Swiss law, the cultural property must be under threat, while, in France, it must be subject to a situation of emergency and of serious danger in the

³⁹PCPA, Art. 2, lit. a. The ILA Guidelines refer to the definition of cultural property by the 1970 UNESCO Convention.

⁴⁰Hague Convention, Art. 1, lit. 1. Criticizing this approach, see Schweizerische Gesellschaft für Kulturgüterschutz, “Stellungnahme der Schweizerischen Gesellschaft für Kulturgüterschutz zur Totalrevision des Bundesgesetzes über den Schutz der Kulturgüter bei bewaffneten Konflikten vom 20,” June 2013, 3.

⁴¹Code du patrimoine, Art. L1.

⁴²Convention on Cultural Property Implementation Act, s. 302(2)(C)(ii).

third state.⁴³ In both cases, the endangerment does not depend on the origin of the situation of danger but, rather, on the probable impact of the danger on the cultural good.⁴⁴ Regarding the aim of a vast protection of both laws, we expect that the Swiss Federal Council and the Conseil d'État would interpret the notion broadly.⁴⁵

Under the US legislation, which is linked directly to the Syrian conflict, such endangerment is seen as *de facto* given, and refuge may be granted to all “property unlawfully removed from Syria on or after March 15, 2011,” which was the official date of the beginning of the Syrian civil war.⁴⁶ Under the import restriction, no archaeological or ethnological material from Syria may be imported unless (1) Syria issues a certification or other documentation that certifies that the exportation is not in violation of the laws of Syria or (2), in the absence of such documentation, satisfactory evidence is provided that the material was exported from Syria not less than 10 years before the date of such entry and that neither the person on whose account the material is imported (or any related person) has contracted for, or acquired an interest in, the material more than one year before the date of entry into the United States.⁴⁷

Armed Conflict and Disasters

In line with the ILA Guidelines,⁴⁸ in both Switzerland and France, the endangerment must be the result of an armed conflict or a catastrophe (or an emergency).⁴⁹ The term “armed conflict” encompasses both international and non-international conflicts and, hence, not only declared wars between two or more countries but also other armed conflicts without recognition as a state of war.⁵⁰ Since safe havens implement the international assistance efforts of the Second Protocol to the Hague Convention, it seems that the dichotomy between armed conflicts, on the one hand, and internal unrest and tensions (which are not, therefore, within the scope of the Swiss and French laws), on the other hand, should also apply.⁵¹

The revision of the Swiss rules in 2015 aimed at an adaptation toward today's danger and threat situation, therefore, extending its scope of application to disasters

⁴³PCPA, Art. 2 lit. c; Code du patrimoine, Art. L. 111-11, respectively. Similarly, see ILA Guidelines, Art. 2, requires that the cultural material is “endangered.”

⁴⁴Paumgartner and Zingg 2014, 1376–77; similarly Engelhardt 2010.

⁴⁵For Switzerland, see Paumgartner and Zingg 2014, 1377. On the assessment of the situation of threat, see Chechi 2015, 89. As outlined above, in France, the Conseil d'État will determine the conditions of applications of the article by way of a respective ordinary.

⁴⁶This date is derived from UN Security Council Resolution 2199, 12 February 2015, on threats to international peace and security caused by terrorist acts by Al-Qaeda.

⁴⁷Convention on Cultural Property Implementation Act, s. 307.

⁴⁸ILA Guidelines, Guideline 2.

⁴⁹The ILA Guidelines also call for a broad scope of application, naming endangerment by armed conflict, natural disasters, illegal excavations, or other insecurity, see ILA Guidelines, Guideline 2.

⁵⁰See Paumgartner and Zingg 2014, 1377; Message of the Federal Council on the Revision of the Federal Law over the Protection of Cultural Property in the Event of Armed Conflict, BBl 2013 8987 (Message of the Federal Council 2013), 9003; for the differentiation, see Pabst 2008; Lattman 1974.

⁵¹Paumgartner and Zingg 2014, 1377; Pabst 2008, 223.

and emergencies, whereas, as discussed earlier, France took over the notion of disasters only.⁵² According to the Swiss Federal Council, a catastrophe is an event whose implications overstrain the personal and material means of the community concerned and, therefore, requires external support. On the contrary, an emergency is not characterized by a single event but, rather, by a development of events that leads to the state of necessity of external support mentioned earlier.⁵³ In France, the term “catastrophe” should be interpreted broadly, considering the protective aims of the law, and, consequently, also cover what Switzerland defines as disaster and emergency (since the notion of an emergency is part of the definition of threat). Despite the fact that the Swiss message of the Federal Council only refers to natural disasters, we are of the opinion that man-made disasters should also be subsumed under the term.⁵⁴

Requesting Entity

Under the Swiss model, it is not entirely clear whether a safe haven may only be granted upon request by a foreign state owning or possessing the respective cultural good in danger or also upon request by a non-state owner or possessor (or even upon determination by the Swiss state itself), since the wording of the clause contains no information thereto.⁵⁵ On the contrary, the French model is clear in this sense. A safe haven may only be granted upon request of the foreign state owning or possessing the cultural good or upon a respective resolution by the UN Security Council.⁵⁶

An opposite approach is followed by the United States’s Syrian-adapted model, where safe havens may only be granted upon request of the foreign (non-state) owner or lawful custodian of the good in danger. Furthermore, in the case where no owner or lawful custodian can reasonably be identified, the president of the United States may determine whether a safe haven should be granted.⁵⁷

Conclusion of a (State) Treaty with the Source State

State Treaty

In France, the conclusion of a state treaty is required unless a respective resolution by the UN Security Council is in existence.⁵⁸ Even though the second paragraph

⁵²For Switzerland, see Message of the Federal Council 2013, 8991; for France, see Code du patrimoine, Art. L. 111-11.

⁵³Message of the Federal Council 2013, 9003.

⁵⁴See Paumgartner and Zingg 2014, 1377. Particularly industrial disasters. See the reference of the Message of the Federal Council 2013, 8991; BBl 2010, 5146.

⁵⁵In our view, safe havens can be granted in Switzerland upon request by a non-state owner or possessor; for a detailed assessment, see Paumgartner and Zingg 2014, 1378.

⁵⁶According to the Code du patrimoine, new Art. L. 111-11.

⁵⁷Protect and Preserve International Cultural Property Act, s. 3(c)(2)(A)(ii).

⁵⁸Although not explicitly mentioned, this may deviate from the fact that only states may request a safe haven and, therefore, a respective treaty between the requesting state and the French state must always be concluded in one form or another.

of Article 12 of the PCPA contains a detailed list of what should be included in a respective state treaty, it is not entirely clear whether the provision of safe havens in Switzerland requires the conclusion of a state treaty with the source state.⁵⁹ The question is linked with that regarding who may request the granting of safe havens. In this context, it remains questionable whether, for instance, a group of insurgents or belligerents, who does not have legal personality,⁶⁰ have the legal capacity to enter into a treaty with Switzerland regarding the protection of endangered cultural material under a safe haven⁶¹ or if a non-treaty-based safe haven may be granted. In the United States, on the other hand, where the provision of a safe haven constitutes a waiver of import restrictions for goods imported from Syria, no state treaty is required.⁶²

UN Security Council

As outlined above, an innovative approach to combat these issues was introduced in France by leaving the French government the possibility of granting a safe haven, irrespective of any approval of the source state, when a resolution of the UN Security Council is taken in this respect.⁶³

Treaty Conditions

Article 12, paragraph 2, of the PCPA contains a detailed list of what should be included in the state treaty between Switzerland and the source state,⁶⁴ whereas the French provisions currently remain silent in this regard.⁶⁵ The conclusion of the treaty may, in theory, be oral and is not subject to any formal requirements, but the written form will most probably be the rule, even in the course of time-restricted procedures.⁶⁶ France could eventually follow Switzerland's decision that foresees the drafting of a model safe haven treaty in order that the Federal Council may react promptly to potential requests.⁶⁷

⁵⁹PCPA, Art. 12, stipulates that the Federal Council "can" enter into state treaties.

⁶⁰Dinstein 2014, 65.

⁶¹When a state recognizes insurgents or belligerents, the latter are provided with a legal personality of functionally limited nature, which encompasses the capacity to enter into agreements regarding the protection of persons. In regard to the Swiss model and the open wording of the PCPA, Art. 12, it can, in our view, be deduced in analogy that insurgents or belligerents recognized by the Swiss state have the legal capacity to enter into treaties regarding the protection of cultural property. See Paumgartner and Zingg 2014, 1378.

⁶²See Paumgartner and Zingg 2014, 1378, for a detailed assessment.

⁶³Code du patrimoine, Art. L. 111-11.

⁶⁴Such as transport modalities, cost distribution, insurance and liability, modalities of the return, applicable law, or competent court; see also Paumgartner and Zingg 2014, 1379, for an overview.

⁶⁵Though this might form part of the ordinance to be passed by the Conseil d'État.

⁶⁶See Legal Status of Eastern Greenland (Norway v. Denmark), 1933, Series A/B, No. 53, 70; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), 1 July 1994, ICJ Reports (1994) 112.

⁶⁷Message of the Federal Council 2013, 9001.

No Contribution to Illegal Trafficking or Financing of Criminal or Terrorist Activities

In order to fight the abuse of safe havens, under the US model, there should not be any credible evidence that granting the waiver will contribute to illegal trafficking in cultural goods from Syria or to the financing of criminal or terrorist activities. Though not explicitly mentioned in the respective provisions, we expect that this also applies to the Swiss and French model. The same caveat was already identified in the ILA Guidelines.⁶⁸

The Provision of Safe Havens

Authority to Grant Safe Havens

The power to decide upon the granting of a safe haven lies with the executive authorities in all three jurisdictions—that is, the Federal Council in Switzerland, the *Ministre des Affaires étrangères* in France, and the president in the United States.⁶⁹ In order to grant the waiver, the president of the United States must certify to the congressional committees that the respective conditions (described above) for the granting of such are fulfilled.⁷⁰

Places of Refuge

Safe havens should generally be characterized as protected facilities offered by the countries with climatic, security, and technical conditions to guarantee state-of-the-art safekeeping.⁷¹ Illustratively, Switzerland has already determined a (secretly kept) refuge near Affoltern in the Canton of Zurich.⁷² Similarly, the French state will make available secured premises. It remains to be seen whether this will also happen in advance or only upon the individual requests for the granting of safe havens, whereas François Hollande in his former role as president of the French Republic indicated that the *Centre de réserves du Louvre* in Liévin could become a safe haven.⁷³ In the United States, the facilities of the US government or of a cultural or educational institution would be used.⁷⁴

⁶⁸ILA Guidelines, Guideline 4.

⁶⁹For Switzerland, see PCPA, Art. 12, para. 2; Message of the Federal Council 2013, 9012; for the United States, see Protect and Preserve International Cultural Property Act, s. 3(c)(1); and for France, see Code du patrimoine, Art. L. 111-11.

⁷⁰Protect and Preserve International Cultural Property Act, s. 3(c)(2)(A); see also Perini and Cunliffe 2015, 54.

⁷¹ILA Guidelines, Guideline 2. With France talking of “*locaux sécurisés*” (Code du patrimoine, Art. L. 111-11) and Switzerland of “*locaux protégés*” (PCPA, Art. 2, lit. C).

⁷²Discussion with the Swiss Federal Office for Civil Protection; see also, Cornelia Wegerhoff, “Hafen für gefährdete Kulturgüter, Der sichere Fels bei Affoltern,” *Deutschlandradio Kultur* July 16, 2015.

⁷³Kim Willsher, “Louvre to Offer Shelter for World Treasures Rescued from War Zones,” *The Guardian*, 1 November 2016.

⁷⁴Protect and Preserve International Cultural Property Act, s. 3(c)(3).

Collaboration with UNESCO

The pivotal role of UNESCO is underlined by the requirement that the safekeeping of the cultural material in Switzerland has to occur under the patronage of UNESCO and that, in France, UNESCO has to be informed about the provision of the safe haven.⁷⁵ In the past, the ILA Guidelines had already urged countries to ask UNESCO and other international organizations, such as the International Council of Museums and the International Council on Monuments and Sites, for assistance and advice.⁷⁶ On the contrary, there is no such rule under the laws of the United States.

Fiduciary Custody

Under Swiss law, the cultural material has to be deposited under “fiduciary custody,” which (pursuant to Swiss law) requires that all protective measures are taken according to the state of the art (*Fachkunst*) and in the exclusive interest of the bailor.⁷⁷ The further details of the obligations of Switzerland of such custody are to be specified in the respective treaty regulating the safe haven.⁷⁸ Under the new Article L111-11 of the Code du patrimoine, there is no such mention concerning how the deposit shall be handled; the obligations of the custodian, therefore, are either to be negotiated bilaterally between the French state and the source state or formalized in the ordinance still to be passed. Similarly, the US laws stipulate that the material is held in custody without further specifying the details. Detailed exemplary rules on the safekeeping and preserving of the cultural goods can be found in Article 4 of the ILA Guidelines.

Use of the Cultural Property

Under the Swiss model, the underlying treaty must contain the conditions and modalities of the exhibition or study of the cultural material.⁷⁹ On the contrary, the Swiss laws do not foresee the possibility of exhibiting the material in the absence of such an agreement. According to the French model, loans may be granted, upon the explicit consent of the source state, in order to circulate the material for exhibition with the purpose of making known that such material is in danger. The material, therefore, may also leave French territory under the condition that the state where the exhibition is taking place grants immunity from the seizure of the respective material.⁸⁰ In the United States, a set of uses, such as restoration, conservation,

⁷⁵PCPA, Art. 12, abs. 1; Code du patrimoine, Art. 111-11, respectively.

⁷⁶ILA Guidelines, Guideline 8.

⁷⁷The fiduciary custody works in the sense of Bundesgesetz über den internationalen Kulturgütertransfer, SR 444.1, Art. 14 (KGTG); see also the Message of the Federal Council 2013, 8994.

⁷⁸See Paumgartner and Zingg 2014, 1381; “Leitbild Finanzhilfen zu Gunsten der Erhaltung des beweglichen kulturellen Erbes,” *Bundesamt für Kultur BAK*, 31 March 2014, 2.

⁷⁹PCPA, Art. 12, para. 2.

⁸⁰Code du patrimoine, Art. L. 111-11.

study, or exhibition without profit, are foreseen,⁸¹ but it is not regulated whether or not the consent of the owner or the rightful custodian is required. Other forms of use, such as the private loan of cultural material or the exploitation of rights—for instance, by photographic reproduction—shall, in principle, be forbidden.⁸²

Immunity from Seizure

Immunity from seizure is granted to any material protected under safe haven in all three jurisdictions.⁸³ This mechanism creates *ex ante* incentives for the source state—respectively, the non-state owner or possessor—to transfer the cultural good(s) to the safe haven since claims by third parties will not be considered by courts in the safe haven country during the safekeeping period.

Import Restrictions

Customs and tax provisions are triggered by the entry of movable cultural goods with the aim of deposit.⁸⁴ In Switzerland, the Federal Council has proposed using a simplified warehousing procedure since the goods are not brought, distributed, or used in another context.⁸⁵ It remains to be seen whether a simplified import procedure may be available for safe haven goods in France.⁸⁶

Return of Cultural Property

Safe havens are limited in time by their very nature. The French laws stipulate that the state shall return the goods after the end of the situation that caused their safekeeping or at any moment upon a respective request of the source state. The conditions and modalities of return for Switzerland must be regulated in the underlying treaty. In the United States, the material must be returned to the owner or lawful custodian at any time it is requested, irrespective of whether the Syrian civil war has ended or not.⁸⁷

Costs

The Swiss Federal Council estimates that the yearly costs that will be incurred for the Swiss state in connection with safe havens (mainly for material and personnel) will be approximately 50,000 to 100,000 Swiss francs, whereas the exact cost allocation

⁸¹Protect and Preserve International Cultural Property Act, s. 3(c)(3).

⁸²Paumgartner and Zingg 2014, 1381.

⁸³For Switzerland, PCPA, Art. 12, para. 3; for France, Code du patrimoine, Art. L. 111-11; for the United States, see Protect and Preserve International Cultural Property Act, s. 3(c)(4).

⁸⁴See KGTG, Art. 19; “Merkblatt Ein-, Durch- und Ausfuhr von Kulturgütern,” *Bundesamt für Kultur BAK*, February 2014; Renold and Schönenberger 2014, 418ff.

⁸⁵See Paumgartner and Zingg 2014, 1382.

⁸⁶In this sense, see Ministère de l'Économie et des Finances, “Protection du patrimoine culturel,” *Circulaire no. 3*, July 2012, 33.

⁸⁷For France, Code du patrimoine, Art. L. 111-11; for Switzerland, PCPA, Art. 12, para. 2; for the United States, Protect and Preserve International Cultural Property Act, s. 3(c)(2)(B).

between the depositor and the Swiss state for each safe haven transfer is to be agreed upon in the underlying treaty.⁸⁸ The laws of France and the United States, on the contrary, do not specify details on the cost distribution. In that regard, the ILA Guidelines argue that based on fairness and on the importance to overcome financial reluctances, the source state is expected, in principle, to provide compensation for reasonable expenses.⁸⁹ Regarding the eventual revenues flowing from the protected good(s), we recommend that the parties agree that the safe haven state is entitled to use those for the maintenance and financing of the places of refuge.⁹⁰

SAFE HAVENS ON A MUSEUM LEVEL

As a result of the limitations of the first draft of the Protect and Preserve International Cultural Property Act, the AAMD has issued a set of ethical guidelines—the so-called AAMD Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis (AAMD Protocols)—for the provision of safe havens by museums.⁹¹ The AAMD Protocols therefore build upon an established practice in the field of cultural heritage and museum management, where self-regulation and the observation of extensive ethical codes have complemented (incomplete) legal standards.⁹² Most famously, this is illustrated in the return of World War II era art confiscated by the Nazis⁹³ or in the museum acquisition process.⁹⁴

Similar to the Swiss and the French rules, the AAMD Protocols apply to works in danger as a result of war, terrorism, and natural disasters. Under the protocols, however, assistance in the form of a safe haven may be requested by any depositor (that is, by state and non-state entities) of the works in danger and only require that the request is made in compliance with applicable laws (that is, not violating the rights of lawful owners). The AAMD Protocols list, *inter alia*, museums in the area affected that hold works, governmental entities of or within the areas affected, US government authorities who have seized works, or private individuals, companies, or organizations that own, or have come into possession of, works as examples of depositors that may request the granting of a safe haven from a member museum.⁹⁵

According to the AAMD Protocols, the works should be returned depending only on the circumstances existing in the source country and, therefore, in our opinion,

⁸⁸Message of the Federal Council 2013, 9013.

⁸⁹ILA Guidelines, Guideline 5.

⁹⁰Paumgartner and Zingg 2014, 1382. In the United States, the use of the material may not be made for profit, which, in our eyes, does not exclude the possibility of using the revenues for the maintenance and financing of safe havens. See also ILA Guidelines, Guideline 4, with such provision.

⁹¹AAMD Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis, 1 October 2015 (AAMD Protocols).

⁹²Frigo 2009, 50.

⁹³Dubin 2010, 102.

⁹⁴Nafziger 2007, 151.

⁹⁵See AADM Protocols, s. II.

only when the situation that gave rise to the need for a safe haven has passed. In between, the objects will be treated as loans⁹⁶ and published on the AAMD object registry.⁹⁷ In addition, it is recommended that the inventorying and documenting of the objects should take place in the country of origin and that a new condition report should be prepared upon their arrival.⁹⁸ Works should be transported by the safest and surest method to the closest safe haven possible, whereas the depositor shall bear the respective costs unless otherwise agreed. Subsequently, the works should be stored under conditions that are suitable and consistent with the security, climate, and storage protocols of the respective museum. The works may only be exhibited when appropriate and with the permission of the depositor. Similarly, conservation should only be undertaken with the consent of the depositor, unless there is an emergency.

Since the AAMD is aware of the potential legal issues that circumvent the granting of safe havens on a non-state level, the AAMD Protocols contain several precautionary provisions and recommendations in this regard. Accordingly, museums are advised to exercise caution in assuring that the granting of the safe haven will not violate the rights of lawful owners⁹⁹ and that the return of the objects is in compliance with applicable laws. Requests for safe haven and agreements to accept should be documented. Furthermore, the protocols recommend that the museum should examine whether legal protections, such as immunity from seizure, are available in the safe haven state before accepting the works.¹⁰⁰ Referring to the complexity of the legal issues, institutions are advised to consult with legal counsel before accepting or returning the objects.

ASSESSMENT OF THE MODELS

Switzerland

The Swiss model is characterized by provisions that are fairly broad, leaving the executive authorities a lot of space for individual tailor-made solutions in order to grant adequate protection to endangered cultural property. As with any other broad clause, this is naturally accompanied by several uncertainties. It is highly uncertain and thus remains to be seen whether a safe haven in Switzerland may be requested only by the foreign source state and whether a state treaty is required. Should that be the case, we think that the Swiss model is too restrictive and not adequately suited to the pitfalls of the protection of cultural property during armed conflicts. It is notable that the acceptance of works without the explicit consent of

⁹⁶See AADM Protocols, s. VIII.

⁹⁷See AADM Protocols, s. IX.

⁹⁸See AADM Protocols, s. III.

⁹⁹See AADM Protocols, s. II.

¹⁰⁰See AADM Protocols, s. III.

the source state could lead to several legal and diplomatic uncertainties. In order to avoid these situations, Switzerland would have to undertake complex legal clarifications, especially regarding whether the cultural property has been lawfully removed from the source state. Otherwise, Switzerland would risk, *inter alia*, being accused of having breached international treaties and of supporting the illicit plundering of cultural heritage.

The Swiss model does not provide for protective measures regarding the export of the endangered cultural objects from the conflicted area to Switzerland. Despite the fact that the transport may be regulated in the treaty, the depositor is left with the highest hurdle when seeking to receive protection abroad. We are of the opinion that safe haven states should also try to account actively for this problem area. Room for respective actions becomes particularly small when a safe haven is requested by a non-state entity, given that any measures taken by Switzerland in the absence of the consent of the source state would potentially interfere with the source state's sovereignty. Nevertheless, the safe haven state could seek collaboration with international organizations, such as the UN.

The broad definition of cultural property is clearly advantageous as it covers all types of cultural material. The Swiss provision accounts properly for today's risk situation by covering external and internal armed conflicts. As a first Safe Haven has already been determined in Switzerland, we welcome the fact that Swiss authorities are demonstratively prepared to react promptly to requests. As mentioned above, a model state treaty will also be drafted; a task to which particular attention shall be drawn, as a detailed regulation would enable certain uncertainties to be overcome. One point that should be regulated in greater detail is the return of the object in order to overcome possible problems that might arise, for example, in cases where the conflict ends earlier or later than anticipated under the treaty or in the case where the state entity with which the treaty was concluded no longer exists.

The Swiss model ensures that measures are taken in accordance with international expert organizations by requiring that the provision of safe haven must occur under the patronage of UNESCO. The Swiss legislature has also reacted to the urge to grant immunity from seizure to the cultural material in storage. Lastly, one should remember that the Swiss model has played a pioneer role in this matter, driving other states to enact similar legislation based thereon.

France

Aspects of the French legislation point to the Swiss model as an example but expand on existing principles. The result is more detailed and clear provisions that, however, also contain shortfalls with regard to the vast protection of cultural property in danger. The respective ordinance that is to be passed by the Conseil d'État will potentially bring further clarifications. The central shortfall of the French model is that the provision of a safe haven by the French state may only be requested by the source state of the cultural objects in danger. This is highly problematic in the

case where the government requesting a safe haven is not accepted by the international community, the state itself is not recognized by France, or where a non-state owner of cultural property (for example, a private owner or non-state museum) wishes custody of works in a safe haven, but the source state does not. Even though enabling non-state entities to request safe havens leads to several legal and diplomatic uncertainties (particularly in the absence of the source state's consent¹⁰¹), we believe that this is essential in order to account adequately for the dynamics of today's armed conflicts.

The only possibility to overcome this deadlock situation under the French system is a respective resolution by the UN Security Council. Although such a resolution would be an innovative and clearly useful approach that would improve possible protection and that, at the same time, would express the value of safe havens as an instrument of international peace and security, it is questionable whether a resolution would be taken against a source country's explicit dissent or whether a resolution may always be taken in due time and prior to the danger having manifested itself. Of a primarily symbolic nature, the willingness of the French state to collaborate internationally in this field is further marked by the legal obligation to inform UNESCO about the granting of a safe haven.

In addition thereto, the fact that the property has to be returned at any time upon request of the source state is to be criticized, especially since cultural property may still be at risk when a respective request for return is placed. The French model also currently provides no answer as to whether and to whom the cultural goods shall be returned in case the owner or possessor no longer exists or has changed since the safe haven was granted. A recent case in the Netherlands has shown that such uncertainty may restrain the state in which the goods are temporarily located from returning such goods. The Netherlands "handed back" 69 looted artifacts to Iraq in 2009. In fact, the items could only be symbolically returned to the Iraqi ambassador in the Netherlands and will be exhibited in the Dutch National Museum for Antiquities until they can be safely returned to the Iraqi National Museum in Bagdad.¹⁰² Another prominent example of the problems that can arise was the storage of certain Polish art treasures in Canada during World War II. With the change of the Polish government leading to various complications *vis-à-vis* the Canadian authorities, among many other issues, it took the new Polish government from 1945 until 1960 to re-obtain possession of all of the treasures.¹⁰³

The French model, which is similar to the Swiss model, does not contain any measures regarding the export of the goods from the conflicted areas to French territory. Whilst immunity from seizure is granted, it remains to be seen how

¹⁰¹This raises the same comments as those mentioned above.

¹⁰²See "Dutch Hand Back Looted Iraqi Art," BBC News, 9 July 2009, <http://www.museum-security.org/2009/08/war-in-iraq-u-of-t-expert-helps-track-priceless-artifacts-looted-in-2003-invasion-and-scattered-worldwide/> (accessed 20 August 2018).

¹⁰³Castel 1974, 122.

custody will occur—that is, since there is no mention with regard to its fiduciary. Therefore, it is desirable that questions such as these will be regulated under the ordinance. What is clearly advantageous regarding the French model is the fact that the definition of cultural property is the broadest among the three models, enabling for the protection of a wide range of cultural goods without undergoing problems of qualification. The French model adequately covers the main threats of cultural property today (that is, all types of armed conflict and natural catastrophes). The legal anchoring of the possibility of displaying the cultural objects in national and international exhibitions should be considered primarily advantageous, particularly since this action enables the awareness of the endangerment of the cultural objects to be raised. However, caution must be taken in case the ownership of the works is unclear since false impressions can be created by displaying illegally acquired and/or imported goods as goods that have been rightfully acquired and imported.

United States

When assessing the US model, it should be taken into account that it works as a waiver to certain import restrictions that would otherwise prohibit the import of certain goods from Syria. As it only applies to a very limited set of cases, the model cannot be examined from the same perspective as the Swiss and French models. Overall, however, we are of the opinion that it represents a relatively flexible exemption solution regime and that the principle of safe havens at an individual state level should be further explored. In particular, a highly democratic legitimation within the safe haven state is ensured, which, in our view, is particularly important with respect to the granting of safe havens without the source state's (explicit) consent. The requirement that there must be no credible evidence that granting the waiver will contribute to illegal trafficking or financing of criminal or terrorist activities additionally lowers the risk of abuse of the protection measures, particularly if the works are exhibited.

As outlined above, the definition of cultural property to which a safe haven may be granted under the US model is relatively narrow. Goods that do not fall under the definition are not subject to the import restriction and may be imported (all other conditions fulfilled) and be granted protection in the United States.¹⁰⁴ Through the requirement that the request for protection has to be made by the lawful owner or custodian, the US model reacts adequately to the situation in Syria and the pitfalls of cultural property endangered in zones of conflict. Practical issues might yet arise with regard to proof of ownership or the lawfulness of the custody. In order to mitigate this problem, the president of the United States is granted the power to decide upon a safe haven in case no owner or lawful custodian can be reasonably identified.

¹⁰⁴Except for if they were stolen from a museum and so on.

As under the French model, the objects may be exhibited, in which case, interestingly, custody transfers to the respective institution in the United States. Similar to the other two countries, the United States has addressed the central need of granting immunity from seizure to the stored cultural material. Finally, as with the French model, a point to criticize is that the objects must be returned anytime upon an owner's or a custodian's request and that certain modalities of return are not regulated. A further issue lies in the fact that the power to make such decisions lies with the president, who must certify to the appropriate congressional committees considering that a decision on this level of democratic legitimacy may not be taken in due time.

AAMD

The AAMD Protocols demonstrate a remarkable private initiative. With its current network of 242 member museums across Mexico, Canada, and the United States, potential depositors may not only select the country but also the museum and, therefore, the most suitable conditions for storage of the respective endangered cultural objects. The protocols are exemplary for the introduction of codes of ethics and self-regulation by museums and other actors in the field of art due to ethical considerations. Scholars widely acknowledge the positive impacts such ethical codes can have, supplementing or substituting incomplete legal norms.¹⁰⁵ Given that the AAMD Protocols do not limit the entities that may request a safe haven to states, the problems that are discussed above do not arise. In addition, since the objects should be returned depending only on the circumstances, we believe that a higher degree of protection may be reached.

Although the AAMD Protocols address the handling of legal risks repeatedly, the central shortfalls of the model on a museum level are the legal uncertainties that may impede this development. Determining the origin of the work in order to avoid accepting illegal artifacts with false provenance¹⁰⁶ and identifying the rightful owner may be particularly challenging, especially under time constraints. A museum also needs to ascertain that the object was not unlawfully removed from its source state, which is a problem that is further exacerbated by the fact that safe havens may also be requested by private individuals and, therefore, without the consent of the source state. Museums are thus confronted with the strong risk of complex legal disputes, fines, and high financial and reputational damages. The protocols recommend that museums consult legal counsel before accepting or returning any works. In addition to being costly, the determination of the legal framework of the ownership and the conditions of the return in special situations

¹⁰⁵See Frigo 2009.

¹⁰⁶See Emily Sharpe, "We'll Store Your Artefacts, US Tells Syrian Museums," *The Art Newspaper*, 8 November 2015.

may also become extremely complicated and time consuming to clarify for legal experts.¹⁰⁷

A recent case in Switzerland (as mentioned above) may illustrate the complexity and challenges of safe havens at the museum level. The Musée d'art et d'histoire in Geneva had exhibited a collection of 530 pieces belonging to the Palestinian National Authority and the collector Jawdat Khoudary in its exhibition *Gaza à la croisée des civilisations* in April 2007. After Hamas took power in Palestine in June 2007, the works could not be returned due to the political insecurity that followed. The city of Geneva then accepted custody of the works, but several issues followed. Because the goods had transited partly via Alexandria and partly via Tel-Aviv, custom-related issues prevented the cultural goods from being returned.¹⁰⁸ In addition, the city of Geneva could not discuss the case with the Palestinian National Authority for several years. Ultimately, the city of Geneva had to request federal funding to cover the yearly costs of 35,000 Swiss francs for the works' deposit in the Geneva Freeport.¹⁰⁹ The transport of the collection to the Palestinian Museum, near Ramallah, was planned for 2017.¹¹⁰

We believe that safe havens for objects with a complex legal background may be granted by museums only in collaboration with the safe haven state. The AAMD Protocols also eventually recommend that the museums should consider whether legal protection, such as immunity from seizure, is available to protect the object and the museum from claims. Since the objects may be deposited in museums under the US model, this model works as an example for such museum–state cooperation.

CONCLUSION AND RECOMMENDATIONS

In light of the current systematic destruction and looting of cultural heritage, the world faces immense challenges in preserving cultural sites and artifacts in conflict zones. In this respect, we think that the establishment of places of refuge abroad may, in theory, contribute largely to the rescue of endangered relics. Though the possible measures for protecting cultural material on site in the conflicted areas are manifold and potentially of great impact, such protective actions must always be weighed against other priorities, such as preventing attacks on civilians or protecting key infrastructure.¹¹¹

¹⁰⁷See also Lee Rosenbaum, "ISIS Crisis: AAMD's Risky 'Safe Haven' Initiative for Endangered Archaeological Material," 7 October 2015, <http://www.artsjournal.com/culturegrill/2015/10/isis-crisis-aamds-risky-safe-haven-initiative-for-endangered-archaeological-material.html> (accessed 20 August 2018).

¹⁰⁸The shipping with an ATA Carnet requests that the identical customs points are used for exit and return, but transit through Egypt is nowadays not practicable.

¹⁰⁹See Zumbach, "Des trésors de Gaza." Although the yearly costs went down from approximately 30,000 to 18,000 Swiss francs in 2010, and, ultimately, the deposit was offered for free since 2014.

¹¹⁰Discussion with Marc-André Haldimann, who will coordinate the transfer.

¹¹¹Adam Taylor, "General Says U.S. Will 'Consider' Saving Iraqi Antiquities Being Destroyed by the Islamic State," *Washington Post*, 9 March 2015.

Safe havens, on the contrary, have the potential to isolate movable cultural goods from imminent or ongoing conflicts and to keep them safe until the conflict has ended. However, the challenge that safe haven states will often face is that of moving from a symbolic measure to an instrument with practical impact. When considering how fast conflicts may spread, one realizes that there may be little time in the early period of a crisis to export works threatened by the imploding violence.¹¹² At later stages, the geopolitical situation may prevent the conflicted state from making use of the possibility of requesting a safe haven abroad, as currently evidenced by Syria. Simultaneously, and particularly in the absence of the consent of the source state, it may become extremely difficult for non-state entities to export endangered cultural objects from conflicted areas without any external support.

As outlined herein, each of the four models has different advantages and disadvantages regarding the challenges inherent with the granting of safe havens, despite the fact that, to our knowledge, neither the Swiss, the French, nor the AAMD safe haven models have been used so far.¹¹³ Our recommendations to strengthen the effectiveness and potential impact of safe havens are sevenfold. First, as the granting of safe havens under consent of the source state is clearly beneficial, safe haven states must engage in diplomatic proactive efforts and flexibility to create incentives for third countries to make use of safe havens. Second, safe haven states should put a high value on the safeguard of mankind's heritage and, thus, be open when negotiating the cost allocation in order to counter the eventual lack of financial means of source states. Additionally and ideally, safe haven states should, *inter alia*, by way of collaboration with international organizations, such as the UN, foresee measures for the export and transportation of the cultural goods from the source state to the safe haven state. This is particularly important in the case of requests by non-state depositors. Third, the treaty regulating the safe haven should address issues such as the transfer and return of the cultural property clearly, also foreseeing unexpected legal, factual, and political changes. Fourth, we recommend that future safe haven states account better for the potential impact of a crisis in the law, such as a change of regime or failed states. Fifth, goods should only be returned once the conflict has ended. Sixth and despite the diplomatic and legal issues, we argue that the effectiveness and use of safe havens should be reinforced through the acceptance of deposits by non-state actors. Finally, we are of the opinion that states should support private non-state initiatives, such as that by the AAMD, particularly by providing them with legal protection measures.

¹¹²One recent example is the Arabic Spring, where Hosni Mubarak resigned from the presidency of Egypt only 18 days after the first protests in Tahrir Square or where Zine El Abidine Ben-Ali was ousted within one month.

¹¹³Discussion with Rino Büchel, Chief Protection of Cultural Property, Federal Office for Civil Protection, Switzerland and with Association of Art Museum Directors (AAMD) staff members in November 2016; a list of the objects under safe haven protection can be retrieved from AAMD, "Object Registry," <https://www.aamd.org/object-registry> (accessed 20 August 2018) (currently none).

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