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The Amazigh's Fight for Cultural Revival in the New Libya: Reclaiming and Establishing Identity Through Antiquity

Kim Lee¹

*Anything that has history they will break. They will destroy the Berber history on the Western Mountains. He's vowed on many occasions to destroy the Berber people and break their spirit, so never again will they rise or speak up against him.*²

I. INTRODUCTION

A. The Oppression of Indigenous Communities and the Effect on Indigenous Antiquities and Cultural Property—A Recurring Issue.

The persecution of indigenous communities by governing regimes is a frequent occurrence; the struggle for identity and recognition by the Native Americans and the Aborigines of Australia are just two examples.³ There are three hundred million indigenous people in the world,⁴ and in

¹ I would like to give tremendous thanks to Professor Bob Cumbow for enlightening me in this fascinating field of the law. Learning about antiquities law immediately prompted me to research and learn more about the field. I would also like to give thanks to Cinnamon Stephens, to whom Bob was kind enough to introduce me. Thank you so much for taking the time to meet with me on several occasions, for sharing your passion for antiquities law with me, and for your patience in helping me write this article. And finally, thank you to Dr. David Mattingly for taking the time to respond to an email from a complete stranger. Your expertise on the Amazigh and Libyan archaeology was an invaluable contribution to my article.

² *Libyan Man Says Gaddafi Crushing Berbers*, TAFSUIT (Aug. 29, 2011), http://tafsuit.com/index.php?option=com_content&view=article&id=92:gaddafi-pledges-to-fight-to-the-death&catid=37:news.

³ See generally THE WORLD BANK, INDIGENOUS PEOPLES: STILL AMONG THE POOREST OF THE POOR, available at http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/HDNEN_indigenous_clean_0421.pdf (last visited Aug. 28, 2012).

⁴ *Id.* at 1.

anticipation of the potential conflicts that might arise, several international conventions and treaties have been enacted to address their needs.

But very few of these conventions and treaties address indigenous antiquities and cultural property. This is especially true when an indigenous community has been oppressed by a governing regime that is later overthrown, and when specific information regarding the indigenous community's antiquities is difficult to obtain or perhaps even nonexistent. Given the large number of indigenous communities in the world, this is an issue that must be addressed. A look at the Amazigh and the ongoing conflict in Libya illustrates this issue.⁵ This article seeks to investigate the problems that are caused by a lack of governing laws and conventions by using the Amazigh as a lens into the issue, and to serve as a catalyst for further exploration of the subject. This article's primary purpose is to draw attention to the debate about indigenous antiquities and cultural property, while acknowledging that events surrounding the debate are constantly developing.

More specifically, this article asserts four main points. First, because indigenous communities are already underrepresented in their societies, a barrier is created that prevents the recognition of threats to their archaeological artifacts and cultural property. Second, there is often a dearth of information associated with antiquities of indigenous communities, making current bodies of law difficult to apply. Third, even if such information were available, current international law is still inapplicable because it is seriously inadequate when it comes to addressing indigenous artifacts and cultural property. And fourth, the complex nature of

⁵ The Amazigh are commonly known throughout the world as the Berbers. Because "Amazigh" is how the community refers to itself, this article will use Amazigh for cohesion and clarity, except for when the term "Berber" is used in quotes from other sources. The term "Berber" will be further discussed in Part IV.B, *infra*. Sylvia Smith, *Flying the flag for North Africa's 'Berber spring,'* BBC NEWS, Aug. 31, 2011, <http://www.bbc.co.uk/news/world-africa-14650257>.

indigenous antiquities and artifacts requires a collaborative effort from lawyers, archaeologists, linguists, indigenous scholars, and stakeholders to give indigenous antiquities and artifacts the protection that they need.

In order to use the Amazigh as a case study in the discussion of these points, much background information is necessary—both on the Amazigh in Libya, and on current bodies of law that govern antiquities law. Therefore, the second section of this article discusses the historical and current presence of the Amazigh and their rich cultural property in Libya. This discussion is necessary to emphasize the rationale for giving rights to the Amazigh. It also highlights the significance of protecting artifacts in order to revive the Amazigh's presence in Libya.

The third section discusses the problem of illicit antiquities trade and the current bodies of law that govern it. Specifically, the United Nations Educational, Scientific, and Cultural Organization's (UNESCO) 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (hereinafter, the UNESCO Convention), the International Institute for the Unification of Private Law's (UNIDROIT) 1995 Convention on Stolen or Illegally Exported Cultural Objects (hereinafter, the UNIDROIT Convention), and other conventions and treaties that are more attentive to the interests of indigenous populations will be addressed. Finally, this section discusses the inadequacies of these bodies of law in terms of addressing the needs of indigenous populations, and the Amazigh specifically.

The fourth section of this article highlights both the special significance that cultural property has to indigenous populations, and the problems that make it difficult to repatriate property to indigenous communities. Finally, the fifth section uses a framework proposed by UNESCO, and the legislation already in place in countries such as New Zealand, to illustrate how the Amazigh can strive for greater protection through strict domestic laws that explicitly forbid the export of antiquities out of the country.

II. SETTING THE BACKDROP: GADDAFI'S OPPRESSION OF THE AMAZIGH

A. *The Amazighs' Presence in Libya: Then and Now*⁶

The simplest way to define who the Amazigh are is to call them the indigenous peoples of North Africa and Libya. However, this definition is overly simplistic because “the Berbers did not develop in a vacuum.”⁷ Rather, the Amazigh’s history is intertwined with the history of groups who occupied and settled North Africa, such as the Romans, Punic settlers, and Arabs.⁸ The Amazigh are often considered Mediterranean, and are closely related to the Sicilians, Spaniards, and Egyptians, but they are more solidly defined as “people speaking Berber languages.”⁹ Even today, scholars have difficulty defining who the Amazigh are.

Roman African history is especially long, and is meshed with the history of the indigenous Amazigh. When the indigenous populations of North Africa intermingled with the Romans, “culturally, or at least epigraphically and archaeologically, they became indistinguishable from any other Roman citizen.”¹⁰ Well-known Amazigh from this period include Masinissa, the first King of Numidia, an ancient Amazigh kingdom that was closely allied with, and received much influence from, the Romans.¹¹ Although still debated, the Roman Emperor Septimius Severus is also said to have been Amazigh.¹² Severus was born in the Amazigh settlement of Leptis Magna,

⁶ Because the history of the Amazigh in North Africa is long, disputed, and beyond the scope of this article, only basic information that is necessary for this article will be provided.

⁷ MICHAEL BRETT & ELIZABETH FENTRESS, *THE BERBERS* 7 (1996).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See generally PHILLIP C. NAYLOR, *NORTH AFRICA: A HISTORY FROM ANTIQUITY TO THE PRESENT* 40–41 (2009).

¹² *Leptis Magna: Libyan Lepcis Magna, Lebda or Lubdah*, TEMEHU TOURISM SERVS., http://www.temehu.com/Cities_sites/LeptisMagna.htm (last visited May 25, 2012).

Libya, making him the “first foreign emperor in Roman history,” and he influenced much of Leptis Magna’s Roman characteristics.¹³

Today, the Amazigh, in their numerous tribes, make up 10 percent of Libya’s population of six million people.¹⁴ They concentrate in areas in the northwestern region of Libya known as Tripolitania, the Nefusa Mountains, and the Zuwara region, and can also be found in Ghadames, an Amazigh oasis town located in Libya’s Fezzan region.¹⁵

B. The Amazigh Under the Gaddafi Regime

On April 13, 1973, Muammar Gaddafi arrived at Zuwarah, a port city in northwestern Libya.¹⁶ Strongly desiring a homogenous nation possessing a single Arab identity, he confronted the large population of indigenous, non-Arab Amazigh, accusing them of being “the enem[ies] of the revolution.”¹⁷ In 1985, Gaddafi targeted the Amazigh language, proclaiming, “If your mother transmits you this language, she nourishes you with the milk of the colonialist, she feeds you their poison.”¹⁸ In a 2008 visit with tribal leaders from Jado, Gaddafi warned the communities that “[y]ou can call yourselves whatever you want inside your homes—Berbers, Children of Satan, whatever—but you are only Libyans when you leave your homes.”¹⁹

¹³ *Id.*

¹⁴ Anissa Haddadi, *Berbers, Other Groups Stake Their Claim on the ‘New Libya,’* INT’L BUS. TIMES, Sept. 29, 2011, <http://uk.ibtimes.com/articles/221920/20110929/libya-how-will-the-libyan-government-respond-to-the-berbers-and-other-sectarian-demands.htm>.

¹⁵ *Id.*

¹⁶ *Berberism and Berber Political Movements*, TEMEHU TOURISM SERVS., <http://www.temehu.com/imazighen/berberism.htm> (last visited May 25, 2012) [hereinafter *Berber Pol. Mvmts.*].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

According to Gaddafi, the identity of Amazigh was only a creation of the colonialists in an attempt to “fragment the Libyan population.”²⁰

Gaddafi’s long-lived contempt for the indigenous population of the Amazigh did not end with mere insults towards the community. He found several ways to oppress the Amazigh in his attempt to “erase Berber identity from Libya history” and portray Libya as a wholly Arab nation.²¹ In 1973, Gaddafi and his forces destroyed books that even so much as mentioned the Amazigh.²² For several years, Gaddafi placed bans on speaking, printing, and writing the Amazigh language of Amazight; anyone found using Amazight was beaten by security forces or arrested.²³ Naming children Amazigh names was also prohibited.²⁴ In 2011, Gaddafi’s forces cut off all supply routes going through the Nefusa Mountains, an area heavily populated by Amazigh, and destroyed several villages and ancient ruins.²⁵ The Libyan constitution excluded all rights from the Amazigh, proclaiming that Libya was an Arab country and that “the Libyan people are part of the Arab nation.”²⁶

C. The National Transitional Council: Leading the Transition to the New Libya

In February 2011, rebels began to rise against the Gaddafi regime. The Amazigh, adamant about regaining a presence in their country, quickly

²⁰ Sarah A. Topol, *After Centuries of Oppression, a Libyan Minority Sees Hope in Qaddafi’s Fall*, ATLANTIC (Nov. 28, 2011), available at <http://www.theatlantic.com/international/archive/2011/11/after-centuries-of-oppression-a-libyan-minority-sees-hope-in-qaddafis-fall/249099/>.

²¹ Ishra Solieman, *Denied Existence: Libyan-Berbers Under Gaddafi and Hope for Current Revolution*, MUFTAH (Mar. 24, 2011), <http://muftah.org/?p=961>.

²² *Id.*

²³ Edwin Lane, *After Gaddafi, Libya’s Amazigh Demand Recognition*, BBC NEWS, Dec. 23, 2011, <http://www.bbc.co.uk/news/world-africa-16289543>.

²⁴ *Id.*

²⁵ *Libyan Man Says Gaddafi Crushing Berbers*, *supra* note 2.

²⁶ *Berber Pol. Mvmts.*, *supra* note 16.

joined the movement.²⁷ The National Transitional Council (NTC) was established on March 5, 2011, to lead the rebellion movements and uprisings.²⁸ In addition to leading the movement against the Gaddafi regime, the NTC held itself responsible for overseeing the “transition period to an elected government after the liberation of Libya.”²⁹ Upon its formation, the NTC vowed that the new Libya would recognize the full rights of all minorities and ethnic groups. This led the Amazigh to hope that they would finally be liberated and would be able to revive their heritage and culture in Libya.³⁰ Ishra Solieman, a Libyan-American, wrote the following: “The Amazigh people are united with their Libyan brethren in their quest for freedom and dignity. In a shade of successful revolution, they finally have the opportunity to reconnect with their identity and language, without fear of repression.”³¹

But since the NTC’s establishment, the Amazigh have begun to see only a repeat of what occurred with the Gaddafi regime, despite the key role they played in the uprisings and rebellion. On August 3, 2011, the NTC drafted a Constitutional Declaration to act as a framework for the transitioning government; in pertinent part, Article 1 proclaims Arabic to be Libya’s official language:

Libya is an independent and democratic country, in it people are the source of power, its capitol is Tripoli, its religion is Islam, Islamic Sharia its primary source of legislation, and the country pledges the freedom to practice religious ceremonies from non-Muslims, and its official language is The Arabic Language, and the

²⁷ Lane, *supra* note 23.

²⁸ *Founding Statement of the Interim Transitional National Council (TNC)*, INTERIM TRANSITIONAL NAT’L COUNCIL (Mar. 5, 2011), <http://www.ntclibya.org/english/founding-statement-of-the-interim-transitional-national-council/>.

²⁹ *National Transitional Council of Libya (NTC)*, TEMEHU TOURISM SERVS., <http://www.temehu.com/ntc.htm> (last visited May 25, 2012).

³⁰ *Berber Pol. Mvmts.*, *supra* note 16.

³¹ Solieman, *supra* note 21.

country Libya guarantees the cultural rights for all the components of the Libyan society and their languages are considered national languages.³²

Fathi Ben Khalifa, a renowned Amazigh dissident, was an NTC representative, but later left the NTC because it was still not giving recognition to the Amazigh.³³ Khalifa criticized the Constitution draft for not recognizing the Amazigh language, or the Amazigh presence in Libya.³⁴ According to Khalifa, the NTC decided to postpone these issues until there was more stability in the country, which, to the Amazigh's discomfort, was the same thing they were told before Gaddafi began his dictatorship after Libya gained its independence in 1951.³⁵ "The last thing we, the Berber, were expecting was that the new government would also stick to the old speeches," Khalifa said.³⁶ He emphasized that he was sure that "no Amazigh will accept this situation."³⁷ The new Constitution has also been criticized as being an attempt "to please the minorities of Libya rather than give them their due 'Constitutional' rights and acknowledge them equally as one of the official peoples of Libya."³⁸

Upon Gaddafi's death on October 20, 2011, the Libyan people saw an opportunity for freedom and liberation. "It's time to start a new Libya, a united Libya," Prime Minister Mahmoud Jibril proclaimed, "[o]ne people, one future."³⁹ The Amazigh thought it was finally their time for legitimate

³² *Berber Pol. Mvmts.*, *supra* note 16.

³³ *Libya's Berbers Feel Rejected by Transitional Government*, DEUTSCHE WELLE (Aug. 11, 2011), <http://www.dw-world.de/dw/article/0,,15515687,00.html>.

³⁴ *Libya's Berbers Feel Rejected by Transitional Government*, *supra* note 33.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Libya's TNC Pledges New Regional Model of Democracy, But Excludes Berber's Official Status*, TEMEHU BLOG (Sept. 29, 2011), <http://temehu.blogspot.com/2011/09/new-libyas-tnc-pledges-new-regional.html>.

³⁹ Barry Malone, *Libya NTC Chief to Declare Liberation Soon – PM*, REUTERS, Oct. 20, 2011, <http://af.reuters.com/article/worldNews/idAFTR79J55M20111020>.

recognition in Libya.⁴⁰ In the Nefusa Mountains, the floodlighted streets of the ancient Amazigh town of Kabaw were filled with dancing and singing Amazigh.⁴¹ The Amazigh flag, striped with green, blue, and yellow and inscribed with a red symbol representing the Amazigh alphabet, was waved around joyously.⁴²

However, the NTC was faced with the difficult task of transitioning the new Libya—how would it respond to a country heavily divided into groups, each holding different expectations? More specifically, for the purposes of this article, how would the NTC address the consequences of forty-two-years of Amazigh oppression? Would it give the Amazigh the rights that they sought?

On November 24, 2011, in what was proclaimed to be a significant step towards democracy, the NTC inaugurated an interim government with members that were specifically appointed to ease rivalries in the divided Libya.⁴³ However, the tension between the Amazigh and the NTC only increased—five Amazigh members of the NTC boycotted the inauguration, protesting that the Amazigh were not well represented in the interim government.⁴⁴ The interim government is already facing opposition—even from members of the NTC itself.⁴⁵ The Libyan Amazigh Congress, established to demand protection for Libya's Amazigh population, cut off

⁴⁰ Oliver Holmes, *Analysis—Excluded from Cabinet, Libya's Berbers Fear Isolation*, REUTERS, Nov. 25, 2011, <http://af.reuters.com/article/worldNews/idAFTRE7AO0QK20111125?sp=true>.

⁴¹ Alice Fordham, *An Exuberant Awakening for Libya's Berbers*, WASH. POST, Nov. 15, 2011, http://www.washingtonpost.com/world/middle_east/an-exuberant-awakening-for-libyas-berbers/2011/11/11/gIQASov7NN_story.html.

⁴² *Id.*

⁴³ Holmes, *supra* note 40.

⁴⁴ *Id.*

⁴⁵ *See id.*

all relations with the NTC.⁴⁶ In response, protests started to occur, causing concern for stability in Libya.⁴⁷

III. AMIDST THE CONFLICT: LIBYA'S ANTIQUITIES AT RISK

A. Libya: A "Melting Pot of Cultures"⁴⁸

With further conflict looming in Libya's future, there is an additional and consequential threat that has gone relatively unnoticed amidst the struggle to unify the new Libya: the threat to Libya's antiquities and archaeological artifacts.

Modern Libya is a part of what is collectively known as North Africa, which is "one of those rare regions of the world that serves as an axis of cultures and civilizations."⁴⁹ North Africa (including Libya), with its conquests by the Hyksos, Phoenicians, Kushites, Carthaginians, Greeks, Macedonians, Romans, Vandals, Byzantines, Arabs, Ottomans, Spanish, French, British, and Italians, has a rich and complex history.⁵⁰ Libya's diverse archaeological sites and antiquities further exemplify this richness; looking at the grand Romanesque columns, arches, basilicas, and podiums, one could only imagine they were located in Rome itself.⁵¹

⁴⁶ *Id.*

⁴⁷ Francois Murphy, *Libyan Berbers Protest Outside PM's Office*, REUTERS, Nov. 27, 2011, <http://www.reuters.com/article/2011/11/27/us-libya-amazigh-protests-idUSTRE7AQ0AN20111127>.

⁴⁸ Declan Butler, *Libya's 'Extraordinary' Archaeology Under Threat*, NATURE (Mar. 2, 2011), available at <http://www.nature.com/news/2011/110302/full/news.2011.132.html>.

⁴⁹ NAYLOR, *supra* note 11, at 1.

⁵⁰ *Id.* at 5.

⁵¹ Libya's most impressive archaeological sites that show a Roman influence can be found in Tripolitania, a northwest region of Libya. See generally Frans Lemmens, photograph, *Columns and Structures, Roman Ruins, Sabratha*, LONELY PLANET (2011), available at [http://www.lonelyplanet.com/libya/images/columns-and-sculptures-roman-ruins-sabratha\\$24638-62#content](http://www.lonelyplanet.com/libya/images/columns-and-sculptures-roman-ruins-sabratha$24638-62#content). See also UNESCO, photograph, *Archaeological Site of Leptis Magna*, UNESCO WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/list/183>; Libyan Permanent Mission to the United Nations, photograph, *An Arch Dedicated to Roman Emperor Marcus Aurelius*, <http://www.libyanmission-un.org/historic>.

Archaeologist Paul Bennett describes Libya as a “melting pot of cultures,” with Punic and Roman sites in the west, Greek and Egyptian sites to the east, Amazigh sites in the south, and prehistoric sites of rock and cave art in the Sahara.⁵² Libya also houses five UNESCO World Heritage sites that are considered to have “outstanding universal value”: the ancient Greek archaeological sites of Cyrene, the Roman ruins of Leptis Magna, the Phoenician port of Sabratha, the rock-art sites of the Acacus Mountains, and the Amazigh oasis city of Ghadames.⁵³

B. Uprisings Causing Concern for the Safety of Libya's Treasures

When the February 2011 uprisings began, the ensuing chaos and unrest caused concern for the safety of Libya's antiquity and archaeological sites. Groups such as the Archaeological Institute of America and the World Archaeological Congress pleaded for the international community to look out for smugglers and looting of artifacts.⁵⁴ Unlike Egypt's archaeological sites, which are “amazingly well guarded” under normal conditions,⁵⁵ Libyan sites that are “in principle protected are very . . . easy to get into,” which is evidenced by the disappearance of fifteen statue heads from the ancient Greek city of Cyrene before the riots occurred.⁵⁶

⁵² Paul Bennett is the director of the Canterbury Archaeological Trust and head of mission at the Society for Libyan Studies in London. Butler, *supra* note 48. See also *Sahara Prehistoric Rock Art*, TEMEHU TOURISM SERVS., <http://www.temehu.com/sahara-prehistoric-rock-art.htm> (last visited May 25, 2012).

⁵³ *World Heritage List*, UNESCO WORLD HERITAGE CENTRE, available at <http://whc.unesco.org/en/list> (last visited July 26, 2012).

⁵⁴ *A Call to Protect Libyan Antiquities*, WORLD ARCHAEOLOGICAL CONG. (Sept. 21, 2011), <http://www.worldarchaeologicalcongress.org/home/1-latest/555-a-call-to-protect-libyan-antiquities>.

⁵⁵ Declan Butler, *Egyptians Rally to Defend Cultural Heritage*, NATURE (Feb. 3, 2011), available at <http://www.nature.com/news/2011/110203/full/news.2011.72.html>.

⁵⁶ Jason Athanasiadis, *Smugglers Loot Libya's Ruins*, NAT'L, May 28, 2009, <http://www.thenational.ae/news/worldwide/africa/smugglers-loot-libyas-ruins>.

In August 2011, UNESCO issued a statement calling on Libya, neighboring countries, and those in international art and antiquities trade to protect “Libya’s invaluable cultural heritage.”⁵⁷ The statement cautioned that “in times of social upheaval” there is “serious danger of destruction,” and that experience has “taught us to look out for looting by unscrupulous individuals.”⁵⁸ In 2003, when American forces entered Iraq creating chaos and upheaval, the National Museum of Iraq was looted and at least 170 thousand artifacts went missing.⁵⁹

The looting of Iraq’s antiquities during recent unrest and war serves as a warning of what could happen to Libya’s antiquities.⁶⁰ By the end of the political uprisings in October, UNESCO confirmed that Libya’s ancient sites were “largely unscathed,” but warned that they were at even more risk because of the weaponry, armed groups, and instability that follow conflicts.⁶¹ Francesco Bandarin, UNESCO’s assistant director, said that post-conflict is “when the looting begins, so Libya must be helped right away to organize itself, otherwise we risk having cases like we did in Afghanistan or Iraq.”⁶²

⁵⁷ Press Release, UNESCO, Director-General Urges Measures to Protect Libya’s Cultural Heritage Through Period of Transition (Aug. 8, 2011), *available at* http://www.unesco.org/new/en/media-services/single-view/news/director_general_urgues_measures_to_protect_libyas_cultural_heritage_through_period_of_transition/.

⁵⁸ *Id.*

⁵⁹ In April 2003, an estimated fifteen thousand artifacts were looted from the National Museum of Iraq. Neil Brodie, *An Archaeologist’s View of the Trade in Unprovenanced Antiquities*, in *ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE* 57–58 (Barbara T. Hoffman ed., 2006). *See generally* Matthew Bogdanos, *Casualties of War: The Looting of the Iraq Museum*, *MUSEUM NEWS* (Mar.–Apr. 2006), *available at* http://www.aam-us.org/pubs/mn/MN_MA06_casualties.cfm.

⁶⁰ Bogdanos, *supra* note 59, at 52–63.

⁶¹ *UNESCO Warns Over Risk to Libya Heritage Sites*, *KHALEEJ TIMES*, Oct. 21, 2011, http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=data/international/2011/October/international_October880.xml§ion=international.

⁶² Jay Deshmukh, *Libya Displays Seized Roman-Era Artifacts*, *Agence France-Presse* (Nov. 26, 2011), http://www.google.com/hostednews/afp/article/ALeqM5hq11DK1-Zb-SEGbq71Gr_Mxd1N-g?docId=CNG.978515adba4543647b906ce636a1fc3b.6e1.

Bandarin's predictions have indeed come true. In late March, thieves stole treasures such as thousands of gold, silver, and bronze coins, rings, necklaces, bracelets, medallions, and bronze and ivory figurines—some approximately 2,600 years old, which had been locked away for decades in the National Commercial Bank of Benghazi.⁶³ Although archaeologists are now searching for the artifacts, they will be difficult to find.

IV. AMAZIGH ANTIQUITIES IN LIBYA: AN ONGOING DISCOVERY

A. A Blind Eye Towards the Amazighs' Antiquities and Cultural Property

As a few members of the international community keep a wary eye on Libya's World Heritage Sites, little has been said about the risk posed to Amazigh artifacts and cultural property by the upheavals in Libya, even though the Amazigh have demanded cultural and heritage revival. Given Gaddafi's contempt for the Amazigh population, the unrest that occurred in 2011, and the Gaddafi regime's raids in the Nefusa Mountains, it would seem highly probable that at least some damage has been done to the Amazigh's cultural property.

Indeed, Dr. David Mattingly, an expert of Roman Archaeology at the University of Leicester, confirmed that some damage had been done to the heritage of Amazigh areas, in particular to the Romano-Libyan mausoleum, which was damaged "seriously (and probably deliberately) by tank fire by pro-Ghad forces."⁶⁴ However, no media attention was given to this destruction of Amazigh heritage.

⁶³ Mike Elkin, *The Libyan Job: Insiders Used War to Steal Priceless Artifacts*, WIRED DANGER ROOM BLOG (Mar. 16, 2012, 6:30 AM), <http://www.wired.com/dangerroom/2012/03/libyan-job/>.

⁶⁴ Email from Dr. David Mattingly to author (Nov. 14, 2011) (on file with author). After not being able to find much information on the status of Amazigh antiquities and cultural property amidst the conflict, the author emailed Dr. Mattingly after reading that he was in southern Libya leading an archaeological survey. *Id.* "Pro-Ghad" refers to "Pro-Gaddafi." *See id.*

One of the few articles written about this problem seems to hint that Amazigh heritage was purposefully destroyed by Gaddafi forces:

The old city of Jadu lies in ruins. The sandstone walls of Baroni's family home have crumbled and the wood rafters of the collapsed roof are scattered in the street. Baroni says that Berber heritage was deliberately not preserved and families were moved into concrete houses in the town.⁶⁵

In comparison, far more attention has been focused on the larger, more famous World Heritage Sites, such as the Leptis Magna.⁶⁶

B. Amazigh Antiquities

There is no lack of Amazigh culture and artifacts in Libya; Amazigh artifacts are still being discovered today. Determining how much Amazigh culture there is in Libya is both "simple and complicated."⁶⁷ Today, the Amazigh are most commonly referred to as the Berbers. The term Berber can have two different meanings, one of which equates Berber "with the culture of the early Libyans who spoke a Libyan (Berber) language."⁶⁸ "Berber" has also become a political term used to discuss the persecution of the Amazigh, which has caused a "disjuncture between North African peoples and the pre-Islamic heritage and culture."⁶⁹ Since it is so difficult to define the Amazigh, it is even more difficult to determine what artifacts can be called "Amazigh." Defining artifacts as "Amazigh" is further complicated by Libya's long history, during which the Amazigh intermingled with several different cultures.

⁶⁵ Holmes, *supra* note 40.

⁶⁶ *UNESCO Convenes Libyan and International Experts Meeting for the Safeguard of Libya's Cultural Heritage*, UNESCO WORLD HERITAGE CENTRE (Oct. 21, 2011), <http://whc.unesco.org/en/news/799>.

⁶⁷ Email from Dr. David Mattingly to author, *supra* note 64.

⁶⁸ *Id.*

⁶⁹ *Id.*

Notwithstanding the above information, Libyan travel agencies reveal several small “Amazigh” museums, as well other museums that house Amazigh artifacts. These museums are located throughout the country, mainly in the regions of Tripolitania, but also in the regions of Cyrenaica and Fezzan.⁷⁰ The Assaraya Alhmarra Museum, also known as the National Museum, is well known for its collection of items from the Stone Age, the prehistoric civilizations of the Sahara, the medieval periods, and modern times.⁷¹ The museum houses the archaeological and historical heritage of Amazigh, Garamantian, Phoenician, Punic, Greek, and Roman cultures,⁷² and displays artifacts such as marble and stone statues, busts, columns, grave covers, tombs, and pottery.⁷³ The Cyrene Sculpture Museum, located in Cyrenaica, and the Museum of Ghadames, located in the Fezzan region, also house Amazigh archaeology.⁷⁴

The Albarouni Museum is more focused on the Amazigh than other museums and contains “a unique mix of Berber architecture and traditional everyday objects and artifacts.”⁷⁵ The Temehu tourist website reveals that many of these artifacts “appear to slowly disappear whence they came,”⁷⁶ indicating the lack of protection that is given to these artifacts. The website also affirms the Amazigh’s desire to conserve their cultural heritage:

⁷⁰ See *Assaraya Alhamra Museum*, TEMEHU TOURISM SERVS., http://www.temehu.com/Cities_sites/museum-of-tripoli.htm (last visited June 1, 2012); *Ghadames Museum*, TEMEHU TOURISM SERVS., http://www.temehu.com/Cities_sites/museum-of-ghadames.htm (last visited June 1, 2012); *Jado's Soulaïman Albarouni Museum*, TEMEHU TOURISM SERVS., http://www.temehu.com/Cities_sites/museum-of-jado.htm (last visited June 1, 2012); *Cyrene Sculpture Museum*, TEMEHU TOURISM SERVS., http://www.temehu.com/Cities_sites/museum-of-cyrene.htm (last visited June 1, 2012)

⁷¹ *Assaraya Alhamra Museum*, *supra* note 70.

⁷² This is not an exhaustive list.

⁷³ *Assaraya Alhamra Museum*, *supra* note 70.

⁷⁴ *Cyrene Sculpture Museum*, *supra* note 70.

⁷⁵ *Jado's Soulaïman Albarouni Museum*, *supra* note 70.

⁷⁶ *Id.*

[Amazighs] at the summits of Nafousa and along the plains of Zuwarah endured so much unnecessary persecution from Libya's previously installed regimes and they continue to hope the forthcoming rulers can reverse the trend and serve justice. As a result of the recent awareness of the true value of Libyan culture, history and heritage, many societies began reviving their inherited traditions and collecting their oral lore for publishing in the Internet. This was hoped to slow down the rate of disappearance as well as to teach the newer generations the traditions of the past ancestors.⁷⁷

Artifacts of Amazigh culture and heritage are still being discovered today. The fall of the Gaddafi regime has allowed archaeologists to penetrate Libya's Sahara desert and "explore an ancient kingdom" that was highly civilized and ruled by the Garamantes, an Amazigh tribe.⁷⁸ Thus far, archaeologists have discovered "over 100 qsurs (castles), fortified towns and villages, along with sophisticated underground irrigation channels."⁷⁹ These discoveries have been compared with "someone coming to England and suddenly discovering all the medieval castles. These settlements had been unremarked and unrecorded under the Gaddafi regime."⁸⁰ Mattingly called these discoveries a "new start for Libya's antiquities service and a chance for the Libyan people to engage with their own long-suppressed history."⁸¹ With exploration of the region still underway, more discoveries are likely to be made in addition to the ones already made.

⁷⁷ *Id.*

⁷⁸ *Fall of Gaddafi Regime Allows Archaeologists in to Explore Hidden Ancient Civilization*, DAILY MAIL, Nov. 11, 2011, <http://www.dailymail.co.uk/news/article-2060396/Fall-Gaddafi-s-regime-allows-archaeologists-explore-hidden-ancient-civilisation.html>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

V. THE ILLICIT ANTIQUITIES TRADE

A. A Brief Introduction to Illicit Antiquities Trade

Antiquities and artifacts are frequently “torn from standing monuments, secretly dug out from archaeological sites, or stolen from museums.”⁸² These antiquities then become a part of the fourth or fifth largest criminal industry in the world—the illicit antiquities trade.⁸³ While it is impossible to put an exact figure on the market, illicit antiquities trafficking is estimated to generate a conservative \$6 billion a year.⁸⁴

From a legal standpoint, the trade is difficult to track. Not only is the trade extremely international in scope, thus creating much potential for conflict of laws, but it is frequently difficult, if not impossible, to prove whether an antiquity has been looted.⁸⁵ Because antiquities are often looted, they have no provenance when they enter the international market—meaning that there is no information about where the artifact was found or who previously owned it.⁸⁶ This makes it “difficult to investigate the pedigree of a single antiquity.”⁸⁷ Today, an estimated 60 to 90 percent of antiquities are sold without provenance.⁸⁸ However, on the policy grounds of “commercial necessity (keeping a source secret) or client confidentiality,” even if there is provenance, dealers advocate nondisclosure.⁸⁹ Many antiquities are looted from their originating countries

⁸² Brodie, *supra* note 59, at 52.

⁸³ Laura Allsop, *Looting of Libyan Treasure Highlights Illicit Antiquities*, CNN, Nov. 11, 2011, <http://www.cnn.com/2011/11/11/world/europe/looted-treasure-libya/index.html>.

⁸⁴ United Nations Educational, Scientific, and Cultural Organization, *The Fight Against the Illicit Trafficking of Cultural Objects; The 1970 Convention: Past and Future*, Information Kit 3 (2011), available at <http://unesdoc.unesco.org/images/0019/001916/191606E.pdf>.

⁸⁵ Brodie, *supra* note 59, at 52–63.

⁸⁶ *Id.* at 52.

⁸⁷ *Id.* at 53.

⁸⁸ *Id.*

⁸⁹ *Id.*

when it was legal to do so, making them licit and legally in the market.⁹⁰ This problem is further aggravated by the fact that the two main international conventions that govern illicit antiquity trade—the UNESCO Convention and the UNIDROIT Convention—are not retroactive, making them inapplicable if a country did not ratify the conventions before the antiquities were found.⁹¹

The illicit antiquities trade has a long history worldwide, but it was not until after the two World Wars that it was given serious attention, thus prompting action by international conventions.⁹² It was at this time that the two significant international conventions—the non-self-executing UNESCO Convention and the self-executing UNIDROIT Convention—were adopted.⁹³ The UNIDROIT Convention was adopted to address the holes of the UNESCO Convention and the two now function as complementary conventions.⁹⁴

B. The UNESCO and UNIDROIT Conventions, and Why They Are Inadequate and Difficult Methods for Repatriation of Amazigh Antiquities

1. The UNESCO Convention

The Preamble to the UNESCO Convention states that “[c]ultural property constitutes one of the basic elements of civilization and national culture,

⁹⁰ *Id.*

⁹¹ *Explanatory Memorandum on the Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, FOREIGN & COMMONWEALTH OFF. (Sept. 30, 2009), <http://www.fco.gov.uk/en/publications-and-documents/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2002/culture> [hereinafter *Explanatory Memorandum*].

⁹² PATRICK J. O’KEEFE, COMMENTARY ON THE 1970 UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY 3–6 (2d ed. 2007).

⁹³ *Id.*

⁹⁴ *What is the Difference Between 1970 UNESCO Convention and the 1995 UNIDROIT Convention?*, UNESCO, http://portal.unesco.org/culture/en/ev.php-URL_ID=36294&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited July 26, 2012).

and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting.”⁹⁵ It furthermore declares that it is the responsibility of every state to protect its cultural property from theft, excavation, and illicit export, and that it is therefore “essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations.”⁹⁶

State parties have several obligations under the UNESCO Convention, including adopting national services protecting cultural heritage,⁹⁷ establishing a list of public and private cultural property whose export would be an “appreciable impoverishment of the national cultural heritage,”⁹⁸ and making sure that there is “appropriate publicity”⁹⁹ in the event that cultural property goes missing. Currently 120 countries, including Libya, have ratified the UNESCO Convention,¹⁰⁰ but there is a single gaping hole that allows for many state parties, especially Libya in regards to Amazigh antiquities, to avoid protecting certain antiquities.

The problem lies in the definition of “cultural property,” which is what the UNESCO Convention seeks to protect. Under the UNESCO Convention, “cultural property” is given a very narrow definition: “property which on, religious or secular grounds, is specifically designated by each

⁹⁵ United Nations Educational, Scientific, and Cultural Organization, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, pmbl., 823 U.N.T.S. 231, 232 (Nov. 14, 1970), available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20823/volume-823-I-11806-English.pdf> [hereinafter UNESCO Convention].

⁹⁶ *Id.* at 232.

⁹⁷ UNESCO Convention, *supra* note 95, art. 14, 823 U.N.T.S. at 244.

⁹⁸ UNESCO Convention, *supra* note 95, art. 5, 823 U.N.T.S. at 238.

⁹⁹ *Id.*

¹⁰⁰ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, UNESCO (Nov. 14, 1970), available at <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (listing the countries that have ratified and accepted the UNESCO Convention) [hereinafter UNESCO Convention ratifying countries].

State as being of importance for archaeology, prehistory, literature, art, or science.”¹⁰¹ The UNESCO Convention, therefore, leaves to the state parties complete discretion in the “precise designation as to which objects fall within the category of specifically protected items.”¹⁰² This definition of “cultural property” has not escaped criticism. Some critics describe the definition as too broad because it imposes “no meaningful constraints on the coverage of the UNESCO Convention,”¹⁰³ but it is also criticized for being too narrow. In the context of indigenous communities that are oppressed in their countries, the argument can be made that the definition allows governing regimes to oppress minority populations even more by refusing to designate their antiquities and property as cultural property.

Gaddafi most likely oppressed the Amazigh in this manner. During his regime, he did not show the slightest regard for their cultural property, as evidenced by the damages done to the Amazigh town of Jadu.¹⁰⁴ It appears that he did not care for Libya’s other cultural property either—he may have even had incentive not to care. Not only did Gaddafi forbid scholars from studying or documenting archaeological artifacts because he rejected Libya’s history as colonialist,¹⁰⁵ but Gaddafi forces also took seventeen artifacts from the Archaeological Museum of Tripoli, claiming that they were to be exhibited in European museums.¹⁰⁶ Yet, these artifacts were never returned, and rather than being taken for exhibition in Europe, it appears that Gaddafi’s forces wanted to smuggle the artifacts and sell them

¹⁰¹ UNESCO Convention, *supra* note 95, art. 1, 823 U.N.T.S. at 234.

¹⁰² Barbara T. Hoffman, *Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy*, in ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 11 (Barbara T. Hoffman ed., 2006).

¹⁰³ O’KEEFE, *supra* note 92, at 34.

¹⁰⁴ Holmes, *supra* note 40.

¹⁰⁵ Elkin, *supra* note 63.

¹⁰⁶ *Libyans Recover Looted Roman Antiquities*, AHARAM ONLINE (Nov. 27, 2011), <http://english.ahram.org.eg/News/27712.aspx>.

for the forces' own funding.¹⁰⁷ Unfortunately, this is a frequent occurrence during times of war.¹⁰⁸ Gaddafi's disregard for Libya's cultural property is evidenced in other areas as well—even the UNESCO World Heritage Sites in Libya are in bad shape as they decay from “the harsh environment and continuing new human settlement.”¹⁰⁹ As of November 2011, Roman stones were even being used as walls for new buildings, illustrating not only Gaddafi's complete lack of respect for the country's history but also the NTC's lack of concern for Libya's cultural property.¹¹⁰

In addition to the UNESCO Convention giving state parties too much discretion to define their “cultural property,” it also gives state parties too much discretion to address importation restrictions. For example, Article 9 of the UNESCO Convention allows state parties to help each other when pillage of antiquities and archaeological artifacts occurs.¹¹¹ In a “complex” implementation of this provision by the Convention on Cultural Property Implementation Act (CCPIA),¹¹² the United States requires the President to impose import restrictions on “designated categories of archaeological and ethnological materials,” but only at the request of another state party.¹¹³ Section 303 of the CCPIA allows the United States to enter into bilateral agreements with requesting state parties, but thus far, it has entered into agreements with only thirteen state parties.¹¹⁴ Libya is not one of these

¹⁰⁷ These artifacts were seized from a car that was on its way to the Tripoli International Airport. It appears that the “anti-Gadhafi fighters” seized the artifacts before they were smuggled out of Libya. *Id.*

¹⁰⁸ Brodie, *supra* note 59, at 57–58.

¹⁰⁹ William Y. Brown, *Heritage, Democracy and Development in Libya*, BROOKINGS INST., (Nov. 8, 2011), http://www.brookings.edu/opinions/2011/1108_libya_brown.aspx.

¹¹⁰ *Id.*

¹¹¹ UNESCO Convention, *supra* note 95, art. 9, 823 U.N.T.S. at 242.

¹¹² 19 U.S.C. §§ 2601-13

¹¹³ ARCHAEOLOGICAL INSTITUTE OF AMERICA, UNITED STATES IMPLEMENTATION OF THE 1970 UNESCO CONVENTION: THE CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT, *available at* http://www.archaeological.org/pdfs/sitepreservation/CPAC_OverviewAIA.pdf (last visited July 26, 2012).

¹¹⁴ *Id.*

states, and it is Libya's responsibility to request an agreement with the United States.¹¹⁵ Although Libya may be a signatory to the UNESCO Convention, its signature does not really mean anything unless it actively seeks repatriation of property.

2. The UNIDROIT Convention

In response to the inadequacies and holes of the UNESCO Convention (those which are unrelated to the amount of discretion given to signatories in defining cultural property¹¹⁶), the self-executing UNIDROIT Convention was adopted in 1995 and is regarded as the private law supplement to the UNESCO Convention.¹¹⁷ Unlike the UNESCO Convention, the UNIDROIT Convention is self-executing, meaning that it goes into effect without states needing to adopt their own legislation.¹¹⁸ Of particular relevance for this article is the UNIDROIT Convention's definition of "cultural object," which mainly follows the UNESCO Convention's definition of "cultural property," but noticeably omits the phrase "designated by each state."¹¹⁹ With this omission, therefore, it is "entirely appropriate that cultural objects, whether or not designated, should be covered by the UNIDROIT Convention."¹²⁰

Derek Fincham, Academic Director of the Association for Research into Crimes Against Art, has highlighted the main gaps of the UNESCO Convention that the UNIDROIT Convention was meant to fill: first, the

¹¹⁵ JAMES A.R. NAFZIGER & ANN M. NICGORKSI, CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 183 (2009).

¹¹⁶ See *supra* Part V.B(1).

¹¹⁷ See *What is the Difference*, *supra* note 94.

¹¹⁸ *Id.*

¹¹⁹ Compare UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995, available at <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf> [hereinafter UNIDROIT Convention], with UNESCO Convention, *supra* note 95, art. 1.

¹²⁰ LYNDEL V. PROT, COMMENTARY ON THE UNIDROIT CONVENTION ON STOLEN AND ILLEGALLY EXPORTED CULTURAL OBJECTS 1995, 26 (1997).

UNIDROIT Convention recognizes how difficult it is to count on developing nations to protect their own borders and archaeological sites; second, it creates a uniform law that requires cultural property to be returned even when a theft has not been proven; third, it allows for a private right of action; and fourth, it attempts to fix problems with UNESCO's disregard of undiscovered antiquities.¹²¹ Regarding this final concern, the UNESCO Convention may be especially inadequate in addressing the newly discovered Garmantes cultural heritage and property in the Sahara.

In addition to allowing for private causes of action, the UNIDROIT Convention specifically recognizes indigenous communities' cultural properties and antiquities. Chapter 2 of the Convention states that a restitution claim for a cultural object "belonging to and used by a tribal or indigenous community" in a contracting state, is subject to the time limitation that is applied to public collections (restitution claims for public collections, unlike private collections, are not subject to time limitations).¹²² According to an explanatory report on the UNIDROIT Convention, during negotiations regarding the Convention's formation, many delegations emphasized that they would not agree to the Convention unless it also protected cultural objects that were important to indigenous or tribal communities.¹²³ In particular, the Australian and Canadian delegations pointed out that while most people could survive the destruction and loss of public collections, traditional communities would be "devastated to the point of the destruction of their traditional culture by the loss from the community of sacred or secret objects."¹²⁴

¹²¹ Derek Fincham, *How Adopting the Lex Origins Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111 (2008).

¹²² UNIDROIT Convention, *supra* note 119.

¹²³ MARINA SCHNEIDER, UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS: EXPLANATORY REPORT (2001), *available at* <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-e.pdf>.

¹²⁴ PROTTE, *supra* note 120, at 40.

While the UNIDROIT Convention seems to address the needs of indigenous communities in regards to protecting their cultural artifacts, the reality is that only thirty-two states have signed the Convention, and Libya is not one of them.¹²⁵ Derek Fincham articulates two weaknesses of the UNIDROIT Convention that currently prohibit it from being widely implemented. First, Article 18 of the UNIDROIT Convention, which reads, “[n]o reservations are permitted except those expressly authorized in this Convention,” illustrates the lack of flexibility that allowed by these provisions.¹²⁶ This is in stark contrast to the UNESCO Convention, which does allow reservations to its provisions.¹²⁷ By allowing reservations, a state may accept most of the UNESCO Convention’s provisions, except in specified pieces where it reserves the right not to be bound.

Second, there are contradictory provisions in the UNIDROIT Convention. Article 3, section 2, which requires the return of property, is regarded to be a controversial provision that contradicts Article 5, section 3, which provides for limited return of property.¹²⁸ Fincham describes Article 3, section 2, as an “all-encompassing, streamlined return provision” that “provides no safeguards.”¹²⁹ While the provision demands for return in broad circumstances, it does not make sense to demand repatriation when the source nation has done little to protect its cultural property in the first place.¹³⁰ This last point is especially applicable to Libya’s situation, where the governing regime has done nothing to protect its cultural property and has even exploited its property for military funding.

¹²⁵ Signature Page, UNIDROIT Convention, *available at* <http://www.unidroit.org/english/implement/i-95.pdf> (last visited Aug. 2, 2012).

¹²⁶ UNIDROIT Convention, *supra* note 119.

¹²⁷ *See* UNESCO Convention, *supra* note 95.

¹²⁸ Fincham, *supra* note 121, at 140.

¹²⁹ *Id.*

¹³⁰ *Id.*

Another shortcoming of the UNIDROIT Convention is that it is not retroactive. As a result, if artifacts were not designated as “cultural property” under the Gadaffi regime, the UNIDROIT Convention would not apply if they were stolen; the NTC then decided to ratify the Convention. However, it is unlikely that the NTC will choose to ratify the UNIDROIT Convention at this point in time.

C. Problems that the Conventions Specifically Cause to Indigenous Communities

With the UNESCO Convention’s narrow definition of “cultural property” and the unlikelihood of Libya ratifying the UNIDROIT Convention, it is questionable whether these international conventions will protect Amazigh cultural property and artifacts. However, the unique problems posed by indigenous cultural property have not gone unrecognized. Karolina Kuprecht wrote that the legal remedies for indigenous peoples’ repatriation claims are “in the first instance the same as for any other individual or non-state group,” but that the burdens that come along with repatriation claims are often especially difficult for indigenous communities.¹³¹ A main problem is that of ownership, which is difficult, if not impossible, to prove in the case of indigenous communities with undocumented or convoluted histories and origins.

Other than procedural problems, civil substantive laws also pose important obstacles.¹³² In repatriation claims, a plaintiff claiming title of an object that is in the possession of another has the burden of proof; he must show “illegal taking, or excavation, of the object and the plaintiff’s proper

¹³¹ Karolina Kuprecht is a Doctoral Fellow with the Swiss National Centre of Competence in Research. Karolina Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation* 10 (Swiss National Centre of Competence in Research, NCCR Trade Working Paper No. 34, 2009), available at <http://www.unilu.ch/files/Human-Rights.pdf>.

¹³² *Id.* at 10–11.

ownership.”¹³³ Proof is also required in repatriation claims under the UNIDROIT Convention.¹³⁴ However, as illustrated earlier, the Amazigh have a long and convoluted history, and even scholars today have difficulty in reaching a consensus about their origins. The Amazigh history is extremely multicultural—how are the Amazigh to establish “proper ownership” if an artifact’s history is potentially mixed with other communities and cultures?

D. Indigenous-Specific Conventions and Treaties: Are They Any Better?

Various conventions and treaties have attempted to address the difficulties that indigenous communities face in repatriation claims. Unfortunately, as described below, none of the major conventions are binding, and very few nations have ratified these conventions and treaties. Even for those nations that have sought ratification, repatriation is not an obligation.

The UN Declaration on the Rights of Indigenous Peoples (hereinafter, the UN Declaration) is an example of a convention that is non-binding. In pertinent part, Article 12 of the UN Declaration states,

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.¹³⁵

Hence, while indigenous communities may have the right to maintain the cultural property already in their countries, the UN Declaration does not

¹³³ *Id.* at 11.

¹³⁴ *Id.* at 13–15.

¹³⁵ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 295, U.N. DOC. A/RES/61/295 (Oct. 2, 2007), available at http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf.

obligate states to repatriate cultural property.¹³⁶ The UN Declaration, although considered to be a “landmark declaration outlining the rights of the world’s estimated 370 million indigenous people and outlawing discrimination against them,” should not be wholly relied upon because it is non-binding.¹³⁷ It must be substantiated in binding international law.

Unfortunately, the only binding international human rights convention that expressly addresses the rights of indigenous communities is the International Labor Organization (ILO) Convention 169, simply known as the C169.¹³⁸ Unlike the UN Declaration, C169 makes no mention of repatriation; instead it focuses on the adoption of “special measures . . . as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”¹³⁹

Nonetheless, Article 5 of C169 optimistically states, “[i]n applying the provisions of this Convention[,] the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals.”¹⁴⁰ While this may possibly require states to seek repatriation, this argument is tenuous at best. As with the UNESCO Convention, C169 leaves complete discretion to the state to determine when to protect these interests.¹⁴¹ Finally, only twenty-two states have ratified the

¹³⁶ *Id.*

¹³⁷ Press Release, UN News Centre, United Nations Adopts Declaration on Rights of Indigenous Peoples (Sept. 13, 2007), available at <http://www.un.org/apps/news/story.asp?NewsID=23794>.

¹³⁸ Kuprecht, *supra* note 131, at 17.

¹³⁹ International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (C169), art. 4, June 27, 1989, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> [hereinafter C169].

¹⁴⁰ *Id.*

¹⁴¹ Kuprecht, *supra* note 131, at 17–18.

Convention.¹⁴² Therefore, international law has been ineffective in addressing the repatriation claims of indigenous communities.

VI. THE SIGNIFICANCE OF AMAZIGH ANTIQUITY IN PRESERVING AND REVIVING AMAZIGH CULTURE

A. The Amazighs' Interests in Their Antiquities and Cultural Property

The Amazigh population is currently, and understandably, striving for recognition of their language, Amazight, in Libya's new constitution. However, attention should also be given to recognition of their cultural property. Indigenous communities have a great interest in their cultural property because for "every artifact indigenous people lose to smuggling or theft, those people are denied the pride, virtue, and confidence that would have resulted from caring for it."¹⁴³ Essentially, cultural property is a reassurance of one's roots.¹⁴⁴ In Libya, the NTC seems to acknowledge this as well. When Libya recovered ancient Roman artifacts that were looted by Gaddafi forces, the director of Libya's antiquities department, Saleh Aglabe, said that the Roman antiquities were symbols of "local influence" and "confirm[] the role of Libyans in civilization."¹⁴⁵

The Amazigh likely have a greater interest in their cultural property as compared to Libya's cultural property as a whole. The Amazigh are struggling to not only assert their cultural presence in Libya, but to again feel empowered after forty-two years of oppression by the Gaddafi regime. As a result of Gaddafi's various policies and bans, many of the Amazigh

¹⁴² *Convention No. C169*, INT'L LABOUR ORG., <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169> (last visited July 25, 2012) (listing the countries that have ratified C169).

¹⁴³ Kimberly Alderman, Note, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*, 45 IDAHO L. REV. 515, 525 (2009).

¹⁴⁴ *Id.* at 525–26.

¹⁴⁵ *Libyans Recover Looted Roman Antiquities*, CNSNEWS.COM, <http://cnsnews.com/libyans-recover-looted-roman-antiquities-1> (last visited July 25, 2012).

gave up teaching their own children Amazigh and promoting their culture in public.¹⁴⁶ Demanding recognition of their cultural property will remind the Amazigh of their entrenched roots in Libya. Because the NTC is hesitant to grant the Amazigh full recognition as a community, an emphasis on the prevalence of Amazigh cultural property in Libya may provide leverage, and act as justification for the NTC to give the Amazigh the rights that they deserve.

The Amazigh were prevented from learning about their history for many years—in fact, under the Gaddafi regime it was as if their history was non-existent. If the Amazighs' cultural property is not protected, this “nonexistence” will be promulgated. Recognition of the significance of Amazigh cultural property would help the Amazigh gain legitimacy in Libya and internationally, and have greater control over their tangible property.

B. The Hurdles that Amazigh and Indigenous Communities Face in Maintaining Cultural Property

Unfortunately, the Amazighs' fight for their cultural property is hindered by the obstacles that are commonly faced by other indigenous communities, and the Amazigh's struggle serves as a lens through which to examine these problems. Like the confusion caused by the origin of most indigenous communities, there is confusion about the Amazighs' multicultural and mixed history, and this gives rise to questions about the substantive definition of “Amazigh.” The Amazighs' complex history also leads one to wonder what kind of influence the Amazigh had on Libya's archaeology and antiquities. For instance, are the World Heritage Sites solely of Greek or Italian influence, or were the Amazigh also of Greek or Italian origin, thereby making the sites of Amazigh influence too? These questions also

¹⁴⁶ Topol, *supra* note 20.

give rise to concerns for lack of provenance, which is often required in cultural property and antiquity disputes.

An oppressive governing regime creates even more problems for indigenous communities when they are seeking repatriation of cultural property and antiquities. As illustrated with the case of the Amazigh and the Gaddafi regime, governing regimes may have absolutely no desire to give recognition to indigenous communities' cultural property. As a result, this creates a barrier for the applicability of the UNIDROIT and UNESCO Conventions.

VII. PROTECTION OF AMAZIGH CULTURAL PROPERTY AND ANTIQUITIES

A. Reliance on International Conventions and Treaties is Inefficient and Unsustainable

Libya must restructure the ways in which it protects its cultural heritage if it is to give the Amazigh the recognition that they need. For example, Libya's constitution ought to oblige the government to recognize the "conservation, study, and beneficial public use of Libya's culture and natural heritage."¹⁴⁷ Libya should aim to strengthen its legal authorities and governance structures for cultural and natural heritage.¹⁴⁸ While long-term policy should certainly be emphasized in an overhaul of Libya's cultural heritage laws, it is also important for the government to take actions that will have an immediate effect in order to prevent difficulties for the Amazigh later on. Unfortunately, international conventions and treaties are not the first place where the Amazigh and other indigenous communities should look for answers.

¹⁴⁷ Brown, *supra* note 109.

¹⁴⁸ *Id.*

Reliance on the UNESCO Convention is unwise. First, considering that Libya has already ratified the UNESCO Convention¹⁴⁹ and that it is unlikely that Gaddafi has designated Amazigh artifacts and antiquities as “cultural property,” or has even considered cultural property in general as worthwhile, the UNESCO Convention would not be applicable to the Amazighs’ artifacts. Second, Amazigh and other indigenous artifacts are still being discovered as the fall of the Gaddafi regime is allowing archaeologists to plunge into unexplored or unknown territories. These undiscovered artifacts, therefore, if stolen, would not fall under the UNESCO Convention because it does not apply to undiscovered artifacts.

The UNIDROIT Convention is also unlikely to be useful. First, Libya has not yet ratified the UNIDROIT Convention, which is not retroactive.¹⁵⁰ If any Amazigh cultural property was looted during the uprisings, or even before the uprisings, and Libya then ratified the Convention, the Convention would still be inapplicable. Second, the UNIDROIT Convention applies to cultural property that has been either stolen or illegally exported.¹⁵¹ Illegal exportation, of course, requires that laws be in place against exportation of cultural property, and Libya does not appear to have any laws against exportation of cultural property.¹⁵²

If cultural property is stolen, the claimant must produce evidence that the property has been stolen, leaving it to the discretion of the courts to determine whether such evidence is sufficient.¹⁵³ As previously discussed, however, it is rare for cultural property stolen from unexplored or unexcavated areas to have provenance. Furthermore, given the Amazighs’ extremely multicultural history, it may be even more difficult to show proof

¹⁴⁹ See UNESCO Convention ratifying countries, *supra* note 100, and accompanying text.

¹⁵⁰ *Explanatory Memorandum*, *supra* note 91.

¹⁵¹ UNIDROIT Convention, *supra* note 119.

¹⁵² *Export Regulations by Libya Customs*, VISA HQ, <http://libya.visahq.com/customs/> (last visited June 1, 2012).

¹⁵³ Schneider, *supra* note 123.

of who really owns the property. And finally, it is unlikely that Libya would ratify the UNIDROIT Convention because of its post-conflict state. Even if Libya did ratify the UNIDROIT Convention, this would still not help the Amazighs' situation very much because only thirty-two other states have ratified it.¹⁵⁴ In a claim for repatriation or return of artifacts, both parties must be signatories; hence, if Libya was a signatory and a stolen artifact was located in a state that was not a signatory, Libya would not be able to seek repatriation under the UNIDROIT Convention. Additionally, the current states that have ratified the UNIDROIT Convention are not major market countries. The countries of Algeria and Tunisia, neither of which are parties to the Convention,¹⁵⁵ should be of particular concern if antiquities were to leave Libya because of Libya's porous boundaries with those nations.

Most problematically, even if a convention or treaty were to give protection to indigenous communities, the Libyan government is still a barrier to the success of these conventions or treaties. International conventions give power to state governments, and when the dominant regime is seeking to oppress indigenous communities, as in the instant case, these conventions and treaties are completely futile. The conventions give too much discretion to the state governments, and the indigenous peoples must still rely on their state governments' policies that essentially relegate the communities as second-class cultures. At this point in time, considering the current post-conflict conditions in Libya, and the hurdles that a lack of provenance would pose, a more efficient and more immediate method of protection is needed.

¹⁵⁴ See Signature Page, *supra* note 125, and accompanying text.

¹⁵⁵ *Id.*

B. A Call For the Amazigh to be Proactive in Emphasizing Their Roots in Libyan History and in Asserting Their Cultural Property Rights

The international community must focus on applying preventative measures to prevent cultural property exportation. But at the same time, the Amazigh must also fight for the preservation of their cultural property, much like they are fighting to preserve their language.

Preserving heritage necessitates preserving cultural property—cultural property creates a “common national pride,” and is an “easily accessible reminder of accomplishments.”¹⁵⁶ This is especially significant for the Amazigh community, whose history and accomplishments were stripped away for decades. Recognizing their cultural property rights would reassert their history. Doing so would affirm their identity and roots in Libya’s long and multicultural history, perhaps thereby garnering respect from the rest of the nation as the country learned about a history that was repressed for years. A realization of the firmly rooted presence the Amazigh hold in Libyan identity might garner respect and stricter laws on exportation.

C. An Emphasis on Prevention: A Call for the NTC to Adopt Strict Antiquity Exportation Laws

The view that countries must take responsibility for protecting their own cultural property is weakened when the groups whose artifacts are threatened are those that are being oppressed by a majority population within the country. Admittedly this is true, and it most likely would have been true for the Amazigh had Gaddafi remained in power. However, rather than non-binding international conventions and treaties that allow for arbitrary decisions on what is “cultural property,” domestic laws should provide better hope and remedy for a population that is eagerly striving to revive its cultural presence. Emphasis on prevention of property exportation would avoid the burdens and hurdles that the Amazigh, with their weaker

¹⁵⁶ Alderman, *supra* note 143, at 525.

bargaining power, would face if they were to seek repatriation of their cultural property.

Libya should emphasize prevention of property exportation for two reasons. First, because there is a high possibility of future conflict among the Amazigh, other minority groups, remaining Gaddafi supporters, and the NTC, there is also an increased possibility of future looting of antiquities. History has shown that conflict and post-conflict are the prime times for looting and decreased protection of antiquities. Second, there is a possibility of high levels of illicit antiquity trafficking across the borders to Tunisia and Algeria.¹⁵⁷ Libya's western borders with Tunisia and Algeria are notoriously porous, and currently, post-conflict, leftover Libyan weapons from the Gaddafi regime are starting to slip through the borders and into the two countries, prompting fears about security threats and terrorism.¹⁵⁸ The porous borders and lack of efficacy of the Libyan security agencies have encouraged terrorist organizations such as the Al-Qaeda Organization in the Islamic Maghreb to enact plans to acquire Libyan arms.¹⁵⁹ In February 2011, pistols, rifles, and live bullets were seized from Libyans and Tunisians crossing into Tunisia.¹⁶⁰ In March 2012, Libya began to ask neighboring countries for help in securing its borders, which a representative of another indigenous tribe in southeastern Libya described as being a "hub for smuggling and human trafficking."¹⁶¹ Troubles caused

¹⁵⁷ See Monia Ghanmi, *Libyan Arms Pose New Dangers for Maghreb*, MAGHAREBIA, Nov. 2, 2011, http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2011/11/02/feature-01.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Help Plug Porous Borders-Libya*, NEWS24.COM, Mar. 2, 2012, <http://www.news24.com/Africa/News/Help-plug-porous-borders-Libya-20120301>.

by smuggling continued throughout May 2012 as well.¹⁶²

The Tripolitania region is located on the western border of Libya. Many of the already-identified Amazigh antiquities are located in Tripolitania, as is the excavation to uncover Garamantes heritage.¹⁶³ The close proximity of the borders to the archaeological sites and antiquities, as well as the increased volume of weapons in this region, escalates the risk of the antiquities being transported into neighboring countries. Before letting a high number of antiquities and artifacts leave the country, which would cause burden of proof issues, prevention would seem to be the most efficient way of addressing illicit antiquities trade. The Libyan antiquities department, which is reported to have been “badly under-resourced” under Gaddafi,¹⁶⁴ must be more active in policing these antiquities in the new Libya.

D. The UNESCO Framework for Implementing Domestic Laws

In a handbook on legal and practical measures to combat illicit antiquities trade, UNESCO provides twelve recommendations for domestic laws both in Libya and in other nations:

- (a) Provide a clear definition of cultural property/objects and/or cultural heritage that are covered within the scope of the legislation;
- (b) Establish the State’s ownership of: (i) whatever is deemed appropriate by the national authorities; and (ii) cultural property not yet excavated, or illicitly excavated from the national territory . . . ;

¹⁶² Lin Noueihed & Tarek Amara, *Smuggling Stirs Trouble on Tunisia’s Libya Border*, REUTERS, May 2, 2012, <http://www.reuters.com/article/2012/05/02/us-tunisia-smuggling-idUSBRE8410UL20120502>.

¹⁶³ *Fall of Gaddafi Regime*, *supra* note 78.

¹⁶⁴ *Id.*

- (c) Regulate archaeological excavations on national territory . . . ;
- (d) Establish a clear legal regime applicable specifically to cultural property that provides a legal answer to [various] issues . . . ;
- (e) Subject any export (and possibly import) of certain categories of cultural objects to a certificate . . . ;
- (f) Establish a national inventory system of cultural heritage . . . ;
- (g) Recommend or ensure more broadly the making of inventories . . . ;
- (h) Ensure that antique dealers keep a registry of all transactions of cultural objects . . . ;
- (i) Establish and finance national services/units focused on the protection of cultural heritage . . . ;
- (j) Elaborate and require policies for museums and collections that prevent acquisition of stolen, looted, or illegally exported cultural objects . . . ;
- (k) Impose sanctions to . . . deter wrongdoers . . . ; and
- (l) Elaborate specific measures for the protection of underwater cultural heritage.¹⁶⁵

The first four recommendations should act as a framework to build cultural property laws in Libya, and the first—providing a clear definition of cultural property—is the most important. It appears that the definition of cultural property has allowed countries to avoid protecting indigenous communities and remedying past wrongs, and with the convoluted and

¹⁶⁵ United Nations Office on Drugs and Crime, *Protection Against Trafficking in Cultural Property* 24 UNODC/CCPCJ/EG.1/2009/CRP.1 (2009), available at <http://www.unodc.org/documents/organized-crime/V0987314.pdf> (emphasis omitted).

multicultural history of Libya and the Amazigh, it is significant to have a definition of cultural property that will ensure protection.

Current legislation in New Zealand aimed towards protecting antiquities, especially indigenous antiquities, provides a good model as to how Libya could define cultural property. While New Zealand's history is relatively short compared to Libya's, its definition of "antiquity" is broad enough to encompass Libya's expansive history. New Zealand's legislation defines antiquity as "any chattel of any kind whatsoever . . . which (i) is of national, historical, scientific, or artistic importance; and (ii) relates to the European discovery, settlement of New Zealand; and (iii) is, or appears to be, more than 60 years old."¹⁶⁶

The first portion of the definition would need little alteration for Libya's legislation; however, "tribal or indigenous significance" should be inserted, and to avoid making the definition too broad, "artistic importance" should be eliminated because what constitutes "artistic" is entirely subjective. The second portion of the definition appears to be an all-encompassing and cautionary approach so that artifacts that do not have clear pedigrees, but are obviously related to New Zealand's history, are captured in the definition. For Libya, such a provision would be especially fruitful considering its multicultural history.

E. Another Necessity: Indigenous Cultures Require a Collaborative Effort for Property Repatriation

As evidenced by the Amazigh, indigenous communities' repatriation claims for cultural property and antiquities can be burdened, or prevented, in several different ways. The community could have been oppressed for several years by a governing regime that completely disregarded the

¹⁶⁶ Sir Ian Barker, *The Protection of Cultural Heritage Items in New Zealand*, in *ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE* 145, 145 (Barbara T. Hoffman ed., 2006).

community's cultural property. The community could have either an undocumented history or a convoluted one, giving rise to questions of provenance and ownership. The source country could have multicultural influences and origins, giving rise to questions of what it means to be that indigenous community.

Because of the complex context that is most likely to be implicated by an indigenous community's search for its cultural property, the solution cannot just be a legal one. The complex problems that arise from communities' repatriation claims deal with legal as well as historical questions. In the case of the Amazigh, whose history is still largely debated, the effort for property repatriation requires collaboration from lawyers, archaeologists, linguists, indigenous scholars, and stakeholders.

VIII. CONCLUSION

The world watched Muammar Gaddafi oppress the Amazigh in Libya, denying their language and history, and mocking their culture. It watched Libyans finally rise up against the Gaddafi regime, and it watched the Amazigh join the revolt, playing a key role along with the NTC in overthrowing the dictator. With Gaddafi's death in October 2011, the NTC has assumed the responsibility of transitioning the country towards democracy, and it faces a challenging role of appeasing a country populated with diverse groups with different interests. The Amazigh expected a new Libya that would legitimize its rights and heritage, beginning with a constitutional recognition of the Amazigh language. Yet, the Amazigh still find themselves unrepresented and unsatisfied with their treatment under the NTC.

Amidst the uprisings and rebellion in a country rich in archaeology and ancient artifacts, archaeological groups expressed concern for the protection of cultural property, primarily the five UNESCO World Heritage Sites. Understandably, in times of conflict and instability, looting of cultural property becomes a concern—as demonstrated by the looting of cultural

artifacts from the National Museum of Iraq— and precautions must be taken. Among the scant media attention given to protecting Libya's World Heritage Sites, even less attention has been given to the safety of Amazigh antiquities. Purposeful destruction of Amazigh areas illustrates the lack of protection and care that the Libyan government has afforded to this community. Furthermore, as archaeological explorations plunge into indigenous areas that have previously been untouched, the country should be wary of artifacts that have not yet been excavated.

The governing conventions for illicit antiquities trade, the UNESCO Convention and the UNIDROIT Convention, are both inadequate to redress the destruction and theft of Amazigh cultural property. In order to be governed by the UNIDROIT Convention, cultural property must first be state-designated; not only is it highly unlikely that the Gaddafi regime designated Amazigh cultural property, but it seems that the regime did not even care for any other Libyan cultural heritage and did not designate any cultural property at all. The UNIDROIT Convention is also problematic because it does not address the difficulties that the Amazigh and other indigenous communities face in establishing the requisite burden of proof. Other treaties that are specific to the concerns of indigenous communities have been adopted, yet even these do not seem to be adequate—these treaties are non-binding and do not specifically address repatriation or return of artifacts.

This is not a problem that is specific to the Amazigh. Throughout the world, numerous indigenous groups are oppressed by governing regimes that do not want to recognize indigenous groups' cultural property. The histories of indigenous communities are often vague and ambiguous, or mixed with those of other communities, making it difficult to identify who exactly belongs to a particular indigenous group. A multicultural history also contributes to the confusion about what kind of cultural property a group has and owns. The situation of the Amazigh in Libya illustrates these

complications well, and it is important that these complications are addressed for similar occurrences in the future.

Prevention of looting, especially now that Libya is in a post-conflict situation, should be a main focus because there is a lack of provenance—Libya’s extremely multicultural history and the Amazighs’ close relation to various other cultural groups makes it difficult to navigate through an artifact’s own historical pedigree. Looting of artifacts straight from archaeological sites—so that the context in which they were found is nonexistent—further contributes to this problem. And finally, with more conflict looming in the future, and with weaponry easily passing through Libya’s borders, especially in regions where there is much cultural heritage, Libya should be wary of antiquities passing through its porous boundaries.