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THE CASE FOR AN INTERNATIONAL SOLUTION TO THE RESTITUTION OF CULTURAL PROPERTY: MORALITY, LEGALITY AND RIGHTING WESTERN WRONGS

INTRODUCTION

In June 2020, protestors stormed the Musée du Quai Branly-Jacques Chirac¹ in Paris and attempted to remove a nineteenth-century South Sudanese funeral pole, but were intercepted by authorities before they fled the museum.² Their leader, Congolese artist Mwazulu Diyabanza, declared that the group was seeking justice for the massive number of cultural objects in the museum's collection acquired at the height of European colonialism.³ Twitter⁴ subsequently exploded following a statement released by the British Museum⁵ that expressed its “solidarity” with the protestors and stated that it was “aligned with the spirit and soul” of “the Black community throughout the

1. The Musée du Quai Branly-Jacques Chirac is located in Paris, France and houses 300,000 objects from Africa, Asia, Oceania, and the Americas that it “aims to conserve, document and enrich.” *Missions and Operation*, MUSÉE DU QUAI BRANLY-JACQUES CHIRAC, <https://www.quaibrantly.fr/en/missions-and-operations/> (last visited Nov. 7, 2021).

2. Gareth Harris, *Protestors Seize African Artefact from Paris's Quai Branly Museum in Bid to “Bring to Africa What Was Taken,”* THE ART NEWSPAPER (June 15, 2020, 11:12 AM), <https://www.theartnewspaper.com/news/protestors-try-to-seize-african-arteffect-from-quai-branly-museum-in-paris>; Nosmot Gbadamosi, *Is It Time To Repatriate Africa's Looted Art?*, FOREIGN POLICY (July 28, 2020, 6:00 AM), <https://foreignpolicy.com/2020/07/28/time-repatriate-africa-looted-art-artifacts-cultural-heritage-benin-bronzes-nigeria-ghana-europe-british-museum/>.

3. See Gbadamosi, *supra* note 2.

4. Twitter is a popular global social media website where users can post text, photos, and videos to their profile, which are called “tweets.” *New User FAQ*, TWITTER, <https://help.twitter.com/en/new-user-faq> (last visited July 15, 2021). As of January 2021, Twitter has an average of 192 million active users daily, and nearly 500 million tweets are posted each day. Ying Lin, *10 Twitter Statistics Every Marketer Should Know in 2021*, OBERLO (Jan. 25, 2021), <https://www.oberlo.com/blog/twitter-statistics>.

5. The British Museum, located in London, UK, was the world's first national public museum. Its collections currently encompass eight million objects from across the globe. *About Us*, THE BRITISH MUSEUM, <https://www.britishmuseum.org/about-us> (last visited Sept. 25, 2021).

world.”⁶ Thousands of people criticized the Museum’s statement, with some calling its words “empty and hypocritical” because looted works comprise a significant percentage of its holdings.⁷ Many of these works come from Greece, as well as nations in Africa and South Asia that were colonized by the United Kingdom (UK).⁸

Following similar statements by museums across the UK, London-based arts and culture charity Culture&⁹ released an eight-point charter outlining steps for museums and other cultural institutions to follow.¹⁰ These guidelines are meant to “square the statements of support from museums with the unresolved nature of the sector’s own relationship with colonial violence.”¹¹ Culture& CEO Errol Francis sparked controversy after he compared cultural property looted during the colonial period to artwork stolen by the Nazis during World War II.¹² Though Francis stopped short of a moral comparison between colonialism and the genocide committed by the Nazis, he suggested that a “general failure” exists among the heritage sector to recognize “the genocidal consequences of colonialism.”¹³ Despite this failure, Francis remains optimistic about the future of cultural property restitution, adding that “[t]he moral case [for action in the

6. Catherine Hickley, “Time to Give Back the Swag, Guys!” *British Museum Unleashes Twitter Storm with Statement on Black Lives Matter*, THE ART NEWSPAPER (June 9, 2020, 11:12 AM), <https://www.theartnewspaper.com/news/british-museum-unleashes-twitter-storm-with-statement-on-black-lives-matter>.

7. *Id.*

8. *Id.*

9. Culture& is a UK charity that partners with artists and cultural institutions to develop programs aimed at promoting diversity through public programs and workforce initiatives. *About Us*, CULTURE&, <https://www.cultureand.org/about-us/what-we-do/> (last visited July 17, 2021).

10. Geraldine Kendall Adams, *Black Lives Matter Charter Calls on Heritage Sector to Turn Words Into Action*, MUSEUMS ASSOCIATION (July 23, 2020), <https://www.museumsassociation.org/museums-journal/news/2020/07/24072020-black-lives-matter-charter/>; *Black Lives Matter Charter for the UK Heritage Sector*, CULTURE&, <https://www.cultureand.org/news/black-lives-matter-charter-for-the-uk-heritage-sector/> (last visited July 17, 2021).

11. Adams, *supra* note 10 (internal quotations removed).

12. *Id.*

13. *Id.* (internal quotations removed).

heritage sector and beyond] has now become overwhelming. It's unstoppable."¹⁴

In recent decades, there has been a surge of discourse and dialogue about the method of handling the return of displaced human remains and looted artworks stolen by the Nazis during World War II.¹⁵ Unfortunately, this dialogue has yielded no consensus on what to do regarding cultural property dubiously acquired during the European colonial era.¹⁶ Cultural property's value comes from its direct connection to the histories of the world's unique cultural and ethnic groups.¹⁷ These objects are seen as emblematic of humankind and important to the history of all people, yet they have become increasingly both politicized and commodified.¹⁸ While history *does* belong to all humanity, the importance of aiding formerly colonized nations and victims of genocidal atrocities in the effort to reclaim aspects of their heritage cannot be denied.

This Note will provide an overview of some cultural property disputes that have been raging for decades and propose how current processes of restitution can be altered to reflect consideration of moral concerns tied to colonialism. Part I of this Note will proceed in two parts: Section A will provide background on international treaties governing cultural objects and Section B will discuss Alternative Dispute Resolution (ADR). Part II will outline examples of recent disputes over cultural property originating in Peru, Turkey, and Greece. Part III will discuss the history behind Nazi-looted art and the domestic processes for the restitution of Nazi-spoliated works in the UK and United States (US). Part IV will propose the creation of an independent international body to regulate international cultural property disputes, and perhaps the global art market at large.

14. *Id.*

15. JOS VAN BEURDEN, TREASURES IN TRUSTED HANDS: NEGOTIATING THE FUTURE OF COLONIAL CULTURAL OBJECTS 19 (2017).

16. *See id.* at 19.

17. *See Cultural Property Protection*, N. ATL. TREATY ORG. (last updated Mar. 17, 2021, 10:29 AM), https://www.nato.int/cps/en/natohq/topics_166114.htm.

18. *See* Ewelina U. Ochab, *Why We Should Be Concerned About the Destruction of Cultural Heritage*, FORBES (July 3, 2021, 4:01 AM), https://www.forbes.com/sites/ewelinaochab/2021/07/03/why-we-should-to-be-concerned-about-the-destruction-of-cultural-heritage/?sh=4d70a88731c5_

I. BACKGROUND

A. International Conventions for the Protection of Cultural Property

The first multilateral international treaty enacted specifically for the purpose of protecting cultural heritage was the Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted by the International Court of Justice¹⁹ in 1954 (the Hague Convention).²⁰ The scope of protection of cultural heritage was magnified with the 1970 UNESCO²¹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (the UNESCO Convention) and the 1995 UNIDROIT²² Convention on Stolen or Illegally Exported Cultural Objects (the UNIDROIT Convention).²³

19. The International Court of Justice, located at The Hague, Netherlands, is the “principal judicial organ of the United Nations” and was established in 1945. Fifteen judges, each sitting for a term of nine years, make decisions regarding legal disputes between Member States using principles of international law. The judges also provide legal advice to other UN agencies and organs. *The Court*, INT’L CT. OF JUST., <https://www.icj-cij.org/en/court> (last visited Sept. 26, 2021).

20. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOC. NO. 106-1, 249 U.N.T.S. 216, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/> [hereinafter Hague Convention]; Zsuzsanna Veres, *The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention*, 12 SANTA CLARA J. INT’L L. 91, 96 (2014).

21. The United Nations Educational, Scientific and Culture Organization (UNESCO) was founded after World War II and provides “educational tools to help people live as global citizens free of hate and intolerance” by “promoting cultural heritage and the equal dignity of all cultures.” *UNESCO in Brief—Mission and Mandate*, UNESCO, <https://en.unesco.org/about-us/introducing-unesco> (last visited Sept. 26, 2021).

22. The International Institute for the Unification of Private Law (UNIDROIT), located in Rome, Italy, is an independent intergovernmental organization that “stud[ies] needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law” across the globe and “formulate[s] uniform law instruments, principles and rules” to accomplish these goals. *About UNIDROIT*, UNIDROIT, <https://www.unidroit.org/about-unidroit/> (last visited Sept. 26, 2021).

23. See Veres, *supra* note 20, at 96.

1. The 1954 Hague Convention

The Hague Convention focuses specifically on the protection of cultural property during wartime and military occupation.²⁴ The preamble to the Hague Convention declares that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.”²⁵ The Hague Convention defines cultural property as:

[M]ovable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history . . . archaeological sites . . . works of art, manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives.²⁶

This definition also covers “buildings whose main and effective purpose is to preserve or exhibit . . . movable cultural property . . . such as museums, large libraries and depositories of archives, and refuges intended to shelter [movable cultural property] in the event of armed conflict.”²⁷

In 1999, the second protocol to the Hague Convention provided for increased protection of cultural property considered to be of the “greatest importance to humanity” and imposed harsher punishment for especially egregious violations, such as theft, vandalism, or destruction.²⁸ The Hague Convention, however, does not apply retroactively and therefore does not provide any recourse for formerly colonized countries.²⁹

24. *Id.*

25. Hague Convention, *supra* note 20, pmb1.

26. Sahar Akhavan, Note, *Art as a Weapon*, 38 CARDOZO ARTS & ENT. L.J. 153, 169 (2020); Hague Convention, *supra* note 20, art. 1(a).

27. Hague Convention, *supra* note 20, art. 1(b).

28. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, arts. 10, 15, Mar. 26, 1999, 38 I.L.M. 769, 2253 U.N.T.S. 172.

29. VAN BEURDEN, *supra* note 15, at 99. Adding further insult to injury, these countries would not be able to take advantage of the Hague Convention’s protection even if its provisions did apply retroactively, as it is an agreement between states and “colonial possessions” were never considered to be states. *Id.*

2. The 1970 UNESCO Convention

The 1970 UNESCO Convention expanded on the Hague Convention's forward-looking cultural heritage protections by focusing primarily on conduct occurring during peacetime.³⁰ Like the Hague Convention, the UNESCO Convention is not retroactive and does not provide any legal routes for clashes over previously stolen cultural property.³¹ It does, however, reference the possibility of bilateral agreements covering the restitution of cultural property that was taken prior to it taking effect.³² The UNESCO Convention defines cultural property as property on "religious or secular grounds" that is "specifically designated . . . as being of importance for archaeology, prehistory, history, literature, art or science" and belongs to a broad number of categories.³³ The

30. Veres, *supra* note 20, at 96.

31. VAN BEURDEN, *supra* note 15, at 99. Notably, China attempted to introduce a retroactivity clause at the UNESCO Conventions inception, but was overruled by the protests of countries guilty of former colonialism. *Id.*

32. *Id.*

33. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, Nov. 14, 1970, 823 U.N.T.S. 231. According to Article 1, cultural property can belong to any of the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;

UNESCO Convention, however, does not apply to any artifacts, objects, or works yet to be discovered.³⁴

The UNESCO Convention requires Member States to standardize the cultural property trade within their borders and provides a basic framework for how this should be executed.³⁵ Its central purpose is not only the “return and restitution of cultural property,” but to “fundamentally safeguard the identity of peoples and promote peaceful societies whereby the spirit of solidarity will be strengthened.”³⁶ While the UNESCO Convention does not outright ban importing or exporting cultural property, Member States are asked to utilize their available resources to prevent the illicit export, import, and sale of such items.³⁷ “Illicit” is defined as “any import, export, or transfer of ownership” of cultural objects that directly contradicts the provisions of the UNESCO Convention as adopted by Member States.³⁸ Each Member State is free to define “illicit” however they see fit, but must enforce any export laws of fellow Member States.³⁹ The obligations created under the UNESCO Convention are “non-self-executing,” meaning that each Member State must implement its own legislation for the UNESCO Convention to function as

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- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
 - (i) postage, revenue and similar stamps, singly or in collections;
 - (j) archives, including sound, photographic and cinematographic archives;
 - (k) articles of furniture more than one hundred years old and old musical instruments.

Id. art. 1.

34. Veres, *supra* note 20, at 98–99.

35. *About: The 1970 Convention*, UNESCO, <https://en.unesco.org/fightrafficking/1970> (last visited Sept. 25, 2021).

36. *Id.*

37. Veres, *supra* note 20, at 97–98.

38. *Id.* at 99–100.

39. *Id.* at 100.

intended.⁴⁰ As of July 2021, 141 Member States have ratified the UNESCO Convention.⁴¹

3. The 1995 UNIDROIT Convention

In 1995, UNESCO asked UNIDROIT to develop the Convention on Stolen or Illegally Exported Cultural Objects as an extension to the 1970 UNESCO Convention, which greatly increased the protections available to cultural property.⁴²

The UNIDROIT Convention defines cultural property as objects that, “on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science,” *and* belong to one of the enumerated categories set forth by the UNESCO Convention.⁴³ Unlike the UNESCO Convention, which allows Member States to decide under their respective laws what constitutes illicit activity, the UNIDROIT Convention specifically regulates and defines both theft and illicit export of cultural objects.⁴⁴ Under the UNIDROIT Convention, a cultural object is considered to be “stolen” when it has been “unlawfully excavated or lawfully excavated but unlawfully retained...when consistent with the law of the State where the excavation took place.”⁴⁵ Similarly, a cultural object is deemed to have been illegally exported when it has been “temporarily exported from the territory of the requesting State, for purposes such as exhibition,

40. *Id.* at 97–98. Generally, a “self-executing” treaty or provision is “one that may be directly applied in [a country’s] courts,” while a “non-self-executing” treaty or provision is “one that requires legislative implementation before it may be applied by the courts and other domestic law-applying officials.” Carlos Vasquez, *The Distinction Between Self-Executing and Non-Self-Executing Treaties in International Law*, UNIV. OF OXFORD (May 10, 2018, 12:30PM), <https://www.law.ox.ac.uk/events/distinction-between-self-executing-and-non-self-executing-treaties-international-law>.

41. *About: States Parties*, UNESCO, <https://en.unesco.org/fighttrafficking/1970> (last visited Sept. 25, 2021).

42. *The 1995 UNIDROIT Convention*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1995-unidroit-convention/> (last visited Nov. 7, 2021); *see also* Marilyn E. Phelan, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L. J. 31, 33 (1998).

43. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, art. 2, June 24, 1995, 35 I.L.M. 1332, 2421 U.N.T.S. 457 [hereinafter UNIDROIT Convention].

44. *Id.* arts. 3, 5.

45. *Id.* art. 3.

research or restoration, under a permit issued according to its law regulating its export for the purpose of protecting its cultural heritage and not returned in accordance with the terms of that permit.”⁴⁶

The UNIDROIT Convention differs from the UNESCO Convention because its provisions apply to objects that have not yet been discovered.⁴⁷ Additionally, the UNIDROIT Convention offers guidelines to ensure consistency across the laws of each Member State.⁴⁸ To that end, the provisions of the Convention are “self-executing,” meaning that Member States “directly apply the Convention’s provisions as governing law.”⁴⁹ This feature of the UNIDROIT Convention has made it much less attractive to potential signatories, as its regulations can create disharmony within a given nation’s domestic law.⁵⁰ As of September 2021, only fifty-one countries have ratified the UNIDROIT Convention, less than half the amount of the UNESCO Convention’s 141 signatories.⁵¹ The UNIDROIT Convention’s signatories do not include the US and the UK, who account for two of the largest shares in the global art market.⁵²

B. Alternative Dispute Resolution

Despite the existence of these three major treaties, the theft of cultural objects has continued.⁵³ For countries frustrated and

46. *Id.* art. 5.

47. Veres, *supra* note 20, at 101.

48. Ho-Young Song, *International Legal Instruments and New Judicial Principles for Restitution of Illegally Exported Cultural Properties*, 4 PENN ST. J.L. & INT'L AFF. 718, 733 (2016).

49. *Id.* at 739.

50. *Id.*

51. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome 1995)—Status*, UNIDROIT, <https://www.unidroit.org/instruments/cultural-property/1995-convention/status/> (last visited Sept. 26, 2021).

52. *Id.*; see Angelica Villa, *2020 Art Basel Global Market Report Reveals Leveled Growth, with Emerging Collectors a New Focus*, ARTNEWS (Mar. 5, 2020, 12:28 PM), <https://www.artnews.com/art-news/market/global-art-market-report-2020-overview-1202680041/>.

53. See, e.g., Mackenzie Warner, *The Last Poor Plunder from a Bleeding Land: The Failure of International Law to Protect Syrian Antiquities*, 42 BROOK. J. INT'L L. 481 (2016); Steven Lee Myers & Nicholas Kulish, “Broken System” Allows ISIS to Profit from Looted Antiquities, N.Y. TIMES (Jan. 9, 2016), <https://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html> (for discussions on the shortcomings of international law in protecting cultural property from terrorist groups whose activities often

wearied by the inefficacy and expense of traditional legal recovery methods, alternative dispute resolution (ADR)⁵⁴ has emerged as a powerful tool in cultural property repatriation efforts.⁵⁵ ADR has grown in popularity as a strategy to mitigate cost-prohibitive litigation and diversify the services that legal professionals can offer.⁵⁶

Two chief characteristics of ADR are that the parties must agree to engage in the dispute and a neutral third party must resolve the dispute.⁵⁷ The neutral party is typically referred to as the “mediator” or “arbitrator,” and does not always have to be an attorney.⁵⁸ In some circumstances, anyone who possesses expert knowledge on the disputed matters can be a sufficient mediator.⁵⁹ The most common methods of ADR are negotiation, mediation, and arbitration.⁶⁰

Negotiation is “a decision-making process by which disputes are resolved.”⁶¹ Parties engaging in negotiation will address underlying issues that might influence the dispute and must differentiate wants from needs; acknowledge any imbalances in power or resources; discern facts from opinions; temper expectations; and decide what the most optimal resolution is and how it would be achieved.⁶² As negotiation is often linked to more combative legal processes, it can be undervalued as a tool to build

operate outside of declared war, therefore enabling such groups to successfully avoid following cultural heritage protocols).

54. ADR is “any procedure, agreed to by the parties of a dispute, in which they use the services of a neutral party to assist them in reaching an agreement and avoiding litigation.” *Alternative Dispute Resolution*, U.S. DEPT. OF LABOR, <https://www.dol.gov/general/topic/labor-relations/adr> (last visited Sept. 26, 2021).

55. See generally Folarin Shyllon, *The Rise of Negotiation (ADR) in Restitution, Return and Repatriation of Cultural Property: Moral Pressure and Power Pressure*, 22 ART ANTIQUITY & L. 130 (2017) (discussing the efficacy of ADR tactics in the restitution of cultural property).

56. Edwin H. Greenebaum, *Lawyers’ Agenda for Understanding Alternative Dispute Resolution*, 68 IND. L. J. 771, 771 (1993).

57. Shyllon, *supra* note 55, at 130.

58. *Id.*

59. *Id.*

60. Robert E. Wells, Jr., *Alternative Dispute Resolution—What Is It? Where Is It Now?*, 28 S. ILL. U. L. J. 651, 651–52 (2004).

61. *Id.* at 652.

62. *Id.*

trust and understanding between parties and pave the way for lasting, constructive relationships.⁶³

Mediation can be broadly defined as “a non-adversarial, non-binding and cooperative process for privately resolving disputes with the assistance of a trained, neutral third party.”⁶⁴ There is some dispute as to whether mediators should simply facilitate the parties coming to their own resolution, or whether it is appropriate for the mediator to give their own opinions based on an evaluation of the facts.⁶⁵ While all agree that mediators can push back against each party’s perceptions and assumptions, those who adhere to the “facilitative approach” feel that providing an evaluative opinion removes too much of the parties’ control, which is a significant allure to choosing an ADR method in the first place.⁶⁶

Arbitration is “the adversarial process stripped of many of the procedural aspects of the judicial system and is intended to result in a more prompt, more economical, and less emotional resolution.”⁶⁷ An arbitration agreement grants the parties flexibility to arrive at their own “dispute resolution mechanism,” which is an ostensibly superior alternative to a court-ordered solution.⁶⁸ For two parties to benefit the most from the use of arbitration over other forms of ADR, it is best for them to secure an experienced arbitrator and to have near-equal bargaining power.⁶⁹ Arbitration can take the form of a contract, legislative order, or judicial ruling.⁷⁰ A hybrid of mediation and arbitration also exists, in which parties first begin the process via mediation, but the mediator can transition to the role of arbitrator if the parties are unable to reach an agreement.⁷¹

Regardless of the type of ADR used, the keys to success of any compromise are the “bargaining chips that the parties bring to the table,” which have been characterized as “moral pressure”

63. *Id.*

64. *Id.*

65. *See id.*

66. *Id.* at 652–53.

67. *Id.* at 653.

68. *Id.*

69. *See id.*

70. *Id.* Legislative or judicial arbitration is considered to be “court annexed”; that is, subjected to judicial review and controlled by judicially enforced rules. *Id.*

71. *Id.*

and “power pressure.”⁷² Moral pressure appeals to a person or group’s moral sensibilities to achieve a certain result.⁷³ Power pressure, on the other hand, involves utilizing authority against another person or entity to achieve a certain result.⁷⁴

II. COLONIAL-ERA CULTURAL PROPERTY DISPUTES

All three of the following cases are emblematic of the use, or attempted use, of ADR in international cultural property disputes. They also demonstrate the uphill battles waged by developing nations fighting countries with both superior economic might and destructive paternalistic attitudes towards these developing nations and their ability to care for their own cultural heritage. Section A will discuss moral pressure as applied to the nearly hundred years long dispute between the Peruvian government and Yale University over artifacts taken from Machu Picchu. Section B will explore Turkey’s successful use of power pressure to effectuate the return of numerous cultural objects from Western museums. Finally, Section C will examine Greece’s hitherto unsuccessful efforts to effectuate the return of the Parthenon Marbles from the British Museum, despite its attempted utilization of ADR strategies.

A. Moral Pressure: Peru and the United States

In 1911, Yale University initiated the Yale Peruvian Expedition (YPE) as a way to broaden the horizons of human knowledge through an in-depth survey of Latin American geography.⁷⁵ One of several academic institutions embarking on an exploration of the region, Yale was keen to be recognized as a research university, rather than an undergraduate college.⁷⁶ The YPE also took place at a time when the US had burgeoning political and business interests in Latin America. As a result, the YPE enjoyed enthusiastic support from both the US and Peruvian governments.⁷⁷

72. Shyllon, *supra* note 55, at 130.

73. *See id.*

74. *See id.*

75. Stephanie Swanson, *Repatriating Cultural Property: The Dispute Between Yale and Peru Over the Treasures of Machu Picchu*, 10 SAN DIEGO INT’L L. J. 469, 472 (2009).

76. *Id.* at 473.

77. *Id.* The US granted Yale a waiver of customs payments and introductions to Peruvian government leaders. *Id.* Among the perks granted by the

During the first phase of the YPE, the Incan site of Machu Picchu was “discovered” by Yale professor Hiram Bingham.⁷⁸ A massive citadel composed of nearly 200 agricultural and ceremonial structures, the exact function of Machu Picchu within Incan society remains a mystery.⁷⁹ After Spain conquered the Inca Empire in the sixteenth century, the structure was abandoned.⁸⁰ Local communities, however, were already quite aware of Machu Picchu’s existence long before the YPE was launched.⁸¹

Bingham initially told New York press that the expedition would not involve removing artifacts from Peru and that “anything . . . found in that line . . . would become the property of the Peruvian government.”⁸² Despite this promise, Bingham exported over four thousand artifacts to Yale over the course of multiple expeditions taken between 1912 and 1916.⁸³ The Peruvian government agreed to allow Bingham to study the artifacts at Yale under the condition that he would send them back upon request.⁸⁴ Among the objects exported were “bronze, gold and other metal objects, pottery, utensils, ceramics and assorted art objects and human remains, such as mummies and skulls.”⁸⁵ In 1918 and 1920, Peru made formal requests to Yale for restitution of the exported objects, but these were largely ignored.⁸⁶

Over eighty years later, Yale and Peru once again entered into negotiations for the return of the objects.⁸⁷ In 2007, a preliminary agreement was finally reached, granting Peru legal title of more than 350 ceramic, metal, and stone “museum quality” artifacts and a few thousand fragments that would be of little aesthetic interest to the public, but valuable for research

Peruvian government were duty-free entry into the country, a military escort, and free use of a telegraphing system. *Id.*

78. *Id.* at 471.

79. *Historic Sanctuary of Machu Picchu*, UNESCO, <https://whc.unesco.org/en/list/274/> (last visited Sept. 26, 2021).

80. *Id.*

81. Swanson, *supra* note 75, at 471.

82. *Id.* at 473–74.

83. *Id.* at 489 (The actual number of artifacts removed from Machu Picchu is in dispute, with Peruvian representatives placing the number closer to 46,000); VAN BEURDEN, *supra* note 15, at 85.

84. *Id.*

85. Shyllon, *supra* note 55, at 134.

86. *Id.*; *see also* VAN BEURDEN, *supra* note 15, at 85.

87. Shyllon, *supra* note 55, at 134.

purposes.⁸⁸ Yale also agreed to make substantial financial contributions towards the establishment of “scholarly exchanges” for a minimum of three years.⁸⁹ Additionally, revenue from an international traveling exhibition of the artifacts would be put towards building a museum and research facility in Cuzco, Peru, which was expected to be open in 2010.⁹⁰

A joint statement issued by Yale and the Peruvian government hailed the agreement as “a new model of international cooperation providing for the collaborative stewardship of cultural and natural treasures.”⁹¹ Notwithstanding this optimistic sentiment, the 2007 agreement was never finalized and did not result in the objects’ return.⁹² A key element of the breakdown in the negotiations was the text of the agreement itself, called the Memorandum of Understanding (MoU).⁹³ The “one-sided” document “failed to recognize the arguably colonial manner through which the artifacts were originally acquired and contains several problematic provisions.”⁹⁴ The introduction contains an acknowledgment that the artifacts were valuable to all of humanity, but no acknowledgment that the objects are just as important to the unique heritage of Peru.⁹⁵

From the outset, the MoU reflected an “internationalist perspective of cultural property.”⁹⁶ Additionally, a large portion of the MoU expressed gratitude to Yale for its “stewardship of the artifacts,” acknowledging its conservation, preservation, and research efforts as well as providing a space for an international community of scholars to research the objects.⁹⁷ On the other hand, there was no gratitude expressed toward Peru for allowing the objects to be removed, exported, and studied in the first place.⁹⁸ This lack of recognition completely glossed over the

88. Randy Kennedy, *Yale Officials Agree to Return Peruvian Artifacts*, N.Y. TIMES (Sept. 17, 2007), <https://www.nytimes.com/2007/09/17/arts/design/17peru.html>.

89. *Id.*

90. *Id.*

91. *Id.*

92. Swanson, *supra* note 75, at 486–87.

93. *See id.* at 487.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 487–88.

98. *Id.* at 488.

historical context of its acquisition of the objects, and minimized the importance of the Peruvian government's goodwill.⁹⁹

Perhaps most importantly, the MoU granted legal title of the objects to Peru, but the physical return of the objects would only happen after certain requirements benefiting Yale were met, and further hinged on whether the objects were classified as museum-quality.¹⁰⁰ Finding the overall agreement to be unsavory, Peruvian officials failed to sign the MoU within the sixty-day time period specified, and negotiations once again fell apart.¹⁰¹

In late 2008, Peru filed a lawsuit against Yale in the US, seeking the immediate return of all the artifacts and stressing the original agreement between the Peruvian government and Bingham, which specified that the artifacts would be returned.¹⁰² In its motion to dismiss, Yale contended that Peru was no longer able to assert its right to the artifacts because the statute of limitations had long since expired.¹⁰³

In 2010, Peruvian President Alan García made a direct plea to US President Barack Obama to intervene in the dispute.¹⁰⁴ Additionally, President García threatened to pursue criminal charges if Yale failed to return the objects.¹⁰⁵ The basis of the charges and how they would be filed, however, were not specified.¹⁰⁶ Yale responded to the threats by stating that it believed “a constructive collaboration” was still the best way to resolve the dispute, and that it “owe[d] a duty to academic and cultural institutions everywhere to recognize [the artifacts'] important contributions to the study and understanding of all the world's cultures.”¹⁰⁷

99. *See id.*

100. *Id.* at 488–89.

101. *Id.* at 491.

102. First Amended Complaint, Republic of Peru v. Yale Univ., No. 09-CV-01332 (D. Conn. Apr. 20, 2009), ECF No. 15; Dana Ford, *Peru Sues Yale to Get Back Ancient Incan Artifacts*, REUTERS (Dec. 18, 2008, 2:37 PM), <https://www.reuters.com/article/us-peru-yale/peru-sues-yale-to-get-back-ancient-incan-artifacts-idUSTRE4B966K20081210>.

103. Diane Orson, *Yale Returns Machu Picchu Artifacts to Peru*, NPR (Dec. 15, 2010, 3:10 PM), <https://www.npr.org/2010/12/15/132083890/yale-returns-machu-picchu-artifacts-to-peru>.

104. *Id.*

105. Shyllon, *supra* note 55, at 134.

106. *Id.*

107. *Statement by Yale University*, YALENEWS (Oct. 25, 2010), <https://news.yale.edu/2010/10/25/statement-yale-university>.

After launching a hard-hitting media campaign in early November 2010, President García led protests in Lima that drew thousands of Peruvians, with some even flying to the Vatican and asking the pope to intervene.¹⁰⁸ This aggressive and very public shaming prompted Yale to send representatives to Peru, where attempts at negotiation began anew.¹⁰⁹ On November 23, 2010, following an intervention by US Senator Christopher Dodd, Yale and Peru finally signed a second MoU—governed by Peruvian law—that provided for the return of all the Machu Picchu artifacts to Peru over the following two years.¹¹⁰ Although this new MoU removed a previously insisted-upon provision allowing Yale to retain the artifacts for another ninety-nine years, Yale scholars will still be permitted to study the objects through Peru's University of Cuzco.¹¹¹ An additional Partnership Agreement was entered into on February 11, 2011, in which the parties established the UNSAAC–Yale University International Center for the Study of Machu Picchu and Inca Culture in Cuzco.¹¹²

B. Power Pressure: Turkey and Western Museums

The Ottoman Empire granted German archaeologists permission to excavate several Turkish sites beginning in the early 19th century.¹¹³ Two sphinxes that originally adorned a gate in the Hittite¹¹⁴ capital of Hattusa were subsequently discovered and shipped to Berlin in 1907.¹¹⁵ The sphinxes were in terrible condition as a result of a fire, but a team of European archaeologists expertly restored and reassembled them upon their arrival in Germany.¹¹⁶ Upon the sphinxes' restoration, a plaster mold was created of the sphinx that had not seen as much

108. Orson, *supra* note 103.

109. Shyllon, *supra* note 55, at 134.

110. *Id.*; see also Orson, *supra* note 103.

111. Shyllon, *supra* note 55, at 134.

112. Shyllon, *supra* note 55, at 134–35.

113. Aaron Haines, *The Hattusa Sphinx and Turkish Antiquities Repatriation Efforts*, 8 J. ART CRIME 99, 99 (2012).

114. The Hittites occupied a large swath of Anatolia and surrounding areas from 1650 to 1200 B.C. Their capital city of Hattusa was an armored fortress protected by an elaborate system of walls and gateways. *The Hittites*, METROPOLITAN MUSEUM OF ART, https://www.metmuseum.org/toah/hd/htit/hd_htit.htm (last visited Oct. 2, 2021).

115. Haines, *supra* note 113, at 99.

116. *Id.*

damage.¹¹⁷ The original sphinx was shipped back to Turkey, with the other remaining in Germany.¹¹⁸ This sphinx, known as the Hattusa Sphinx or Boğazköy Sphinx, and the plaster copy were then incorporated into a wall of Berlin's Pergamon Museum.¹¹⁹ Beginning in 1938, Turkish officials issued repeated pleas for the sphinx's return, but they were ignored.¹²⁰

In another instance, looters crept into the Uşak region of Turkey in 1966 and stole more than three hundred objects from the graves of wealthy individuals who lived during the rule of the legendary King Croesus of Lydia.¹²¹ Known worldwide as the Lydian Hoard, this fabled haul of Turkish treasures contained "pitchers, bowls, ladles, and incense burners made of gold, silver, and bronze; jewelry of gold, silver, and glass; carved marble sphinxes; and even fragments of paintings that had been ripped from the walls of the tombs."¹²² Shortly after the thefts took place, most of the objects found their way into the collection of the Metropolitan Museum of Art (the Met)¹²³ in New York.¹²⁴ Despite being beautiful, exemplary works of Anatolian civilizations,¹²⁵ the artifacts were mostly kept in storage, where they remained until some items were made part of the Met's "so-called 'East Greek Treasure'" collection in 1984.¹²⁶

Turkey began earnestly pursuing restitution of the Hattusa Sphinx, the Lydian Hoard, and other stolen cultural property in

117. *Id.*

118. *Id.*

119. *Id.*; see also Shyllon, *supra* note 55, at 135.

120. Haines, *supra* note 113, at 99.

121. Lawrence M. Kaye, *The Future of the Past: Recovering Cultural Property*, 4 CARDOZO J. INT'L & COMP. L. 23, 27 (1996).

122. *Id.*

123. Founded in 1870, the Metropolitan Museum of Art occupies two sites in New York City, The Met Fifth Avenue and The Met Cloisters. Per its mission statement, the Met "collects, studies, conserves, and presents significant works of art across all times and cultures in order to connect people to creativity, knowledge, and ideas." *About The Met*, THE METROPOLITAN MUSEUM OF ART, <https://www.metmuseum.org/about-the-met> (last visited Sept. 26, 2021).

124. Kaye, *supra* note 121, at 28.

125. Anatolia (or Asia Minor) is a peninsula located in Asia that today comprises part of Turkey. Anatolian civilizations date to prehistoric times and include the Hittite, Lydian, Hellenistic, and Roman-Byzantine civilizations, among several others. *Ancient Civilizations of Anatolia*, KOÇ ÜNİVERSİTESİ, <https://libguides.ku.edu.tr/anatolianscivilizations/historyofanatolia> (last visited Sept. 27, 2021).

126. Kaye, *supra* note 121, at 28.

the 1980s.¹²⁷ Realizing that asking politely was proving ineffective, the Turkish government embarked on an aggressive campaign to effectuate their return and filed lawsuits against several Western museums, including the Met.¹²⁸ The Met lawsuit was both a colossal effort and expense for Turkey and involved a laborious identification process.¹²⁹ The identifications were a collaborative effort between Turkish and US archaeologists and, surprisingly, the thieves.¹³⁰ Many of the looters who were successfully captured and convicted decided to cooperate.¹³¹

In 1994, the case settled out of court when the Met agreed to return the Lydian Hoard.¹³² The settlement is speculated to have occurred because Turkey was likely to succeed in proving two key elements at trial: its right to the objects in question and that officials at the Met knew the objects originated in Turkey.¹³³ During discovery, numerous documents provided by the Met showed that the museum was aware of the objects' provenance from the very beginning, with one official claiming to have seen the marble sphinxes while on a trip to Turkey prior to them being stolen.¹³⁴ While the objective of the Lydian Hoard's return was ultimately achieved, the lawsuit is estimated to have cost Turkey approximately £1.3 million, a cost-prohibitive figure for developing nations.¹³⁵

The solution to persuading Germany to return the Hattusa Sphinx proved to be less straightforward, as Turkish officials were forced to employ unconventional power pressure plays due to the terms of the original agreement between the Ottomans and Germany being unclear, which prevented them from filing a lawsuit.¹³⁶ Typically, the Turkish government issues annual licenses for 150 archaeological digs across the country.¹³⁷ As

127. Haines, *supra* note 113, at 99.

128. *Id.*; Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990).

129. See Kaye, *supra* note 121, at 28–29.

130. *Id.* at 28.

131. *Id.*

132. *Id.* at 27.

133. *Id.* at 31.

134. *Id.*

135. Shyllon, *supra* note 55, at 131.

136. See Haines, *supra* note 113, at 99.

137. Susanne Güsten, *Turkey Presses Harder for Return of Antiquities*, N.Y. TIMES (May 25, 2011), <https://www.nytimes.com/2011/05/26/world/europe/26iht-M26C-TURKEY->

many digs have been allowed to carry on undisturbed for decades, license renewal was usually a given.¹³⁸ In 2011, however, Turkey threatened to revoke the German excavation license at Hattusa if the sphinx was not returned.¹³⁹ The Turkish government also employed this strategy with other countries holding on to Turkish cultural property, such as France and the US.¹⁴⁰

In an unprecedented move, Turkey revoked two licenses for German and French excavation teams that had been present in Turkey since 1926 and 1950, respectively.¹⁴¹ The Turkish Ministry of Culture and Tourism additionally refused to issue export licenses for pieces meant to be loaned to museums such as the Met, the British Museum, and the Victoria and Albert Museum,¹⁴² which ruined plans for upcoming exhibitions that hinged on the artifacts.¹⁴³ In a statement concerning the decision, Turkish Cultural Minister Ertuğrul Günay alluded to Turkey's newfound economic and cultural power as the impetus for moving forward with such hard-hitting tactics.¹⁴⁴ With its own universities, archaeological institutions, and teams of educated archaeologists, scientists, and historians, Turkey was poised to take over for Western institutions as scholars of its own storied history and culture.¹⁴⁵ Western archaeologists who were present in Turkey at the time made statements to the press—albeit anonymously, in fear of retaliation from their employers—agreeing that the artifacts would be well taken care of at Turkish institutions.¹⁴⁶

With pressure mounting, Germany begrudgingly agreed to hand over the Hattusa Sphinx, calling it “a voluntary gesture of

RETURN.html#:~:text=ISTANBUL%20%E2%80%94%20After%20years%20of%20pleading,Turkey%20has%20started%20playing%20hardball.

138. *Id.*

139. Haines, *supra* note 113, at 99–100.

140. Güsten, *supra* note 137; Shyllon, *supra* note 55, at 135–36.

141. Güsten, *supra* note 137.

142. The Victoria and Albert Museum houses an art and design collection spanning over 5,000 years and includes 2.3 million objects across a variety of categories, including painting, sculpture, architecture, ceramics, textiles, and more. *About Us*, VICTORIA AND ALBERT MUSEUM, <https://www.vam.ac.uk/info/about-us> (last visited Nov. 7, 2021).

143. Shyllon, *supra* note 55, at 135.

144. *See* Güsten, *supra* note 137.

145. *Id.*; *see also* Haines, *supra* note 113, at 100.

146. Güsten, *supra* note 137.

friendship.”¹⁴⁷ The Cultural Minister of Germany, Bernd Neumann, stated that he believed the return of Hattusa Sphinx to be a “unique case” that “would not create any kind of precedent for other restitution demands,” a declaration clearly meant to discourage additional claims from Turkey and other wronged nations.¹⁴⁸ Despite Germany’s reluctance, Turkey’s power play struck a chord with several Western museums, which then voluntarily surrendered numerous artifacts back to the Turkish government.¹⁴⁹

C. When Diplomacy Fails: Greece, the United Kingdom, and the Battle for the Parthenon Marbles

Perhaps the world’s most famous cultural property feud is that between Greece and the British Museum over the Parthenon Marbles.¹⁵⁰ Built over 2,500 years ago as a temple to the ancient goddess Athena, the Parthenon is held in high esteem by Greeks “as both a cultural treasure and as a tangible link to the Golden Age of Ancient Greece.”¹⁵¹ The Parthenon has endured as a symbol of Greece for centuries, surviving natural disasters, wars, and unceremonious removal of its striking sculptures by outsiders.¹⁵²

One such interloper was Thomas Bruce, 7th Earl of Elgin, who was appointed British Ambassador to the Ottoman Empire in 1799.¹⁵³ Lord Elgin claimed that the Ottomans, who occupied Greece at the time, granted him a permit in 1801 that allowed

147. *Id.*

148. Haines, *supra* note 113, at 100–01.

149. See Shyllon, *supra* note 55, at 135–36. For example, in 2011, the Museum of Fine Arts in Boston decided to give a 1,900-year-old marble statue, known as the *Weary Hercules*, back to the then-Prime Minister of Turkey while he was visiting the US. *Id.* at 136. The following year, the Museum of Archaeology and Anthropology at the University of Pennsylvania agreed to indefinitely lend twenty-four objects found at the site of Troy to Turkey. *Id.* at 135.

150. See generally Michael J. Reppas II, *The Deflowering of the Parthenon: A Legal and Moral Analysis on Why the “Elgin Marbles” Must be Returned to Greece*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 911 (1999) (discussing the decades-long feud between the UK and Greece over the British Museum’s possession of Parthenon Marbles). The Parthenon Marbles are sometimes referred to as the Elgin Marbles, but this Note will proceed with the former title.

151. *Id.*

152. *Id.*

153. *Thomas Bruce, 7th Earl of Elgin*, THE BRITISH MUSEUM, <https://www.britishmuseum.org/collection/term/BIOG57526> (last visited Sept. 27, 2021).

him to take possession of Greek artifacts.¹⁵⁴ Over the next decade, Elgin shipped nearly half of the Parthenon's sculptures, as well as some from other ancient Greek sites, back to England.¹⁵⁵ In 1816, the British Museum purchased the Parthenon Marbles from Elgin and has staunchly retained possession of them ever since.¹⁵⁶

In anticipation of the Parthenon Marbles' eventual return, Greece completed construction of a museum in Athens in 2009.¹⁵⁷ Over the last several decades, Greece has made various overtures to the British Museum for the Marbles' return and has repeatedly petitioned UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) to intervene and assist with mediation, most recently in 2013.¹⁵⁸ Later that same year, UNESCO informed both the British Museum and the UK government that Greece was seeking an opportunity for mediation.¹⁵⁹

Museum officials took over a year and a half to reply to UNESCO's letter and steadfastly rejected any attempt at mediation because UNESCO does not have authority over anything that is not a "government body."¹⁶⁰ Four arguments have been consistently asserted in the Museum's defense: (1) Elgin's permit was valid under existing international law; (2) acquiescing to Greece's request would open the floodgates for a worldwide deaccessioning of museum collections; (3) the Marbles are protected from the pollution in Athens, which has caused discernible damage to the sculptures that remain at the Acropolis; and (4) the Marbles are now irreparably intertwined with the cultural heritage of the UK.¹⁶¹

In 2015, shortly after the UK's rejection of mediation, prominent human rights attorney Amal Clooney and her fellow barristers at Doughty Street Chambers¹⁶² in London provided the

154. Shyllon, *supra* note 55, at 139.

155. *Id.* It is worth noting that even during this period of colonialism, some British citizens still considered an action such as this to be looting. *Id.*

156. Reppas, *supra* note 150, at 924, 915; Shyllon, *supra* note 55, at 139.

157. VAN BEURDEN, *supra* note 15, at 67.

158. *Id.*; Shyllon, *supra* note 55, at 140.

159. Shyllon, *supra* note 55, at 140.

160. *Id.*; VAN BEURDEN, *supra* note 15, at 67.

161. Reppas, *supra* note 150, at 916.

162. Doughty Street Chambers is an internationally renowned law firm in the UK whose cases often intersect with human rights and civil liberties. *See*

Greek government with a 150-page dossier recommending that it file a lawsuit against the British Museum in the international court at The Hague.¹⁶³ Clooney and her colleagues had been contacted by the Greek government three years earlier in an effort to explore the country's legal options for the Marbles' return.¹⁶⁴ In the intervening years, the Greek government changed hands to a different political party, and the new officials were less keen on pursuing litigation.¹⁶⁵ Cultural minister Nikos Xydakis rejected the barristers' proposal, declaring that diplomacy and politics would pave the way to restitution.¹⁶⁶

Although Xydakis may have been sincere in his support for diplomacy, Greece was also in no position to engage in any costly legal battles. At the time, Greece was in the middle of navigating a crippling financial crisis—the national debt level was an all-time high, and much of the government's energy was devoted to bartering with international creditors.¹⁶⁷ While Greece was on the receiving end of a two-stage international bailout totaling more than €240 billion, most of the money went towards paying off the country's international debt, leaving little room for a lengthy, expensive court case.¹⁶⁸

About Us, DOUGHTY STREET CHAMBERS, <https://www.doughtystreet.co.uk/about-us> (last visited Sept. 26, 2021).

163. Helena Smith, *Greece Drops Option of Legal Action in British Museum Parthenon Marbles Row*, THE GUARDIAN (May 13, 2015, 12:13 PM), <https://www.theguardian.com/artanddesign/2015/may/13/greece-drops-option-legal-action-british-museum-parthenon-marbles-row#:~:text=Greece%20drops%20option%20of%20legal%20action%20in%20British%20Museum%20Parthenon%20marbles%20row,-This%20article%20is&text=Greece%20has%20ruled%20out%20taking,world's%20most%20bitter%20cultural%20disputes> [hereinafter Smith I].

164. Helena Smith, *Amal Clooney Advises Greece on Return of Parthenon Marbles to Athens*, THE GUARDIAN (Oct. 14, 2014, 2:26 PM), <https://www.theguardian.com/artanddesign/2014/oct/14/amal-alamuddin-advises-on-return-of-elgin-marbles>.

165. Smith I, *supra* note 163.

166. Liz Alderman, *Greece Rules Out Suing British Museum Over Elgin Marbles*, N.Y. TIMES (May 14, 2015), <https://www.nytimes.com/2015/05/15/world/europe/greece-british-museum-elgin-marbles.html>.

167. Smith I, *supra* note 163.

168. Liz Alderman, James Kanter, Jim Yardley, Jack Ewing, Niki Kitsantonis, Suzanne Daley, Karl Russell, Andrew Higgins & Peter Eavis, *Explaining Greece's Debt Crisis*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/interactive/2016/business/international/greece-debt-crisis-euro.html>.

With Britain's exit (Brexit) from the European Union (EU) in January 2020,¹⁶⁹ efforts to effectuate the Marbles' return have been redoubled.¹⁷⁰ A leaked section of the EU's negotiating mandate states that if the UK wants to continue its trade relations with the EU, the Marbles must be given back to Greece.¹⁷¹ In 2019, Greek Prime Minister Kyriakos Mitsotakis requested that the Parthenon Marbles be loaned to Greece in exchange for other cultural objects for the 200th anniversary of Greek independence.¹⁷² In March 2021, UK Prime Minister Boris Johnson rejected the request, stating that he understood "the strong feelings of the Greek people" and Mitsotakis, but the Parthenon Marbles were "legally acquired by Lord Elgin under the appropriate laws of the time and have been legally owned by the British Museum's trustees since their acquisition."¹⁷³

In a decision that may prove to humiliate the UK government, France has agreed to return its portion of the Parthenon frieze to Greece, which has been housed at the Louvre for many years.¹⁷⁴ Greece, in exchange, will lend never-before-seen bronze sculptures to the Louvre.¹⁷⁵ As this dispute drags on and the public becomes more educated about what transpired between Lord Elgin and the Ottomans over 200 years ago, the tide of popular opinion—even within the UK—has turned in favor of Greece.¹⁷⁶

169. See Peter Barnes, *Brexit: What Happens Now?*, BBC (July 13, 2020), <https://www.bbc.com/news/uk-politics-46393399>.

170. See Shane Reiner-Roth, *E.U. Requests Elgin Marbles Return to Greece from British Museum Post-Brexit*, THE ARCHITECT'S NEWSPAPER (Feb. 21, 2020), <https://www.archpaper.com/2020/02/eu-requests-elgin-marbles-to-be-returned-to-greece/>.

171. *Id.*

172. Helena Smith, *Boris Johnson Rules Out Return of Parthenon Marbles to Greece*, THE GUARDIAN (Mar. 12, 2021, 11:08 AM), <https://www.theguardian.com/artanddesign/2021/mar/12/boris-johnson-rules-out-return-of-parthenon-marbles-to-greece>.

173. *Id.*

174. *Id.*

175. *Id.*

176. Shyllon, *supra* note 55, at 140–41. Of those surveyed, 37% of British people think the Parthenon Marbles should be returned to Greece, while 23% vote to keep them in the UK, 32% have no opinion, and 7% are not sure where they stand on the issue. William Jordan, *British People Tend to Think Elgin Marbles Should Be Returned*, YOU GOV (Oct. 18, 2014, 8:19 AM), <https://yougov.co.uk/topics/politics/articles-reports/2014/10/18/british-people-tend-want-elgin-marbles-returned>.

III. NAZI-LOOTED ARTWORK

As demonstrated by the aforementioned cultural property disputes between Peru, Turkey, Greece, and the Western world, the road to restitution is often a long one, fraught with obstacles and precious little regard for the trauma inflicted by colonialism. Additionally, there is no codified recourse for formerly colonized nations, leaving them to resort to a patchwork of diplomatic overtures, legal remedies, and morality-driven coercion.¹⁷⁷ In contrast, many countries have existing frameworks for the restitution of artwork looted by the Nazis under the orders of Adolf Hitler during World War II. While long overdue and far from perfect, these ADR remedies do at least tend to show a more thoughtful consideration for the victims of the genocidal atrocities committed during the war.¹⁷⁸ Section A will provide a brief history behind the mass looting of Jewish and European cultural property during World War II. Section B will outline the frameworks for the restitution of Nazi-looted artworks within the UK and the US.

A. Historical Background

Scholars have estimated that from 1935–1945, the Nazis were responsible for looting at least one-fifth of all the art in Europe.¹⁷⁹ Around 650,000 works, including paintings, drawings, sculptures, and books, were stolen from individuals, museums, and churches.¹⁸⁰ Partially motivated by a desire to eradicate so-called “degenerate”¹⁸¹ art, Hitler ordered the destruction of all abstract and modern works, works that were either created by Jewish artists or depicted Jews, and works that were critical of

177. See VAN BEURDEN, *supra* note 15, at 19.

178. See generally Tabitha I. Oost, *Restitution Policies on Nazi-Looted Art in the Netherlands and the United Kingdom: A Change from a Legal to a Moral Paradigm?*, 25 INT'L. J. CULTURAL PROP. 139 (2018) (analyzing the shift between a strictly legal paradigm to one that considers moral implications of Holocaust victims' suffering).

179. Sophie Gilbert, *The Persistent Crime of Nazi-Looted Art*, THE ATLANTIC (Mar. 11, 2018), <https://www.theatlantic.com/entertainment/archive/2018/03/cornelius-gurlitt-nazi-looted-art/554936/>.

180. *Id.*

181. Artistic styles considered to be degenerate included “Dadaism, Futurism, Cubism, Expressionism, and Impressionism” and even lauded works by artists such as Pablo Picasso and Vincent Van Gogh. Akhavan, *supra* note 26, at 157.

Germany, Nazi ideology, or himself.¹⁸² Artworks met with Hitler's approval were destined for a different fate—the galleries of his ambitious and ultimately unrealized *Führermuseum*, which was meant to be an extravagant cultural center that would propel his hometown of Linz, Austria to worldwide renown.¹⁸³

After exhausting the art supply from cultural institutions and other public establishments, Hitler began targeting private collectors.¹⁸⁴ At first, Jews were forced to declare all valuables to the government, which made it simple for Nazi officials to then confiscate and sell their property.¹⁸⁵ Throughout Europe, Jews were eventually declared stateless and had their property rights ripped away.¹⁸⁶ Many private art collectors had no choice but to sell their pieces for less than market value or abandon them in order to escape Nazi-occupied territories.¹⁸⁷ Much of the proceeds from these sales were put into Nazi-controlled accounts and the original owners were never paid.¹⁸⁸

Post–World War II, the Allies¹⁸⁹ began the staggering task of locating and cataloguing hundreds of thousands of stolen works, which were scattered incongruously throughout Europe.¹⁹⁰ The most valuable works were usually stored in underground mines, which protected them from the elements and the violence of war, but many were found in locations unsuitable for long term storage and were consequently damaged.¹⁹¹ Further complicating matters was the policy enacted by the US government and the Monuments, Fine Arts, and Archives Program, popularly known

182. *Id.* at 156–57.

183. Anne Rothfeld, *Nazi-Looted Art*, NAT'L ARCHIVES, <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html> (last visited Sept. 27, 2021).

184. Akhavan, *supra* note 26, at 158.

185. Rebecca E. Hatch, *Litigation Under Common Law for Recovery of Nazi Looted Art* (2015), in 141 AM. JURIS. TRIALS 189, § 1 Westlaw (database updated Oct. 2021).

186. Rothfeld, *supra* note 183.

187. Hatch, *supra* note 185, § 1.

188. *Id.*

189. The US, Great Britain, and the former Soviet Union formed a “Grand Alliance that was the key to victory” during World War II. *The Big Three*, THE NATIONAL WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/big-three> (last visited Sept. 27, 2021).

190. Gilbert, *supra* note 179.

191. *Id.*

as the “Monuments Men,”¹⁹² which dictated that all works should be returned to their respective countries of origin and the individual governments would be tasked with finding their rightful owners.¹⁹³

B. Domestic Restitution Frameworks for Nazi-Looted Art

The goal uniting the countries tasked with restoring Nazi-looted works to the heirs of the original owners is the “recognition of past injustice . . . through a tangible way of dealing with past atrocities.”¹⁹⁴ The Nuremberg trials classified the Holocaust as “genocide, war crimes, and crimes against humanity.”¹⁹⁵ This classification has led to the general attitude toward restitution to be “dramatically different in precedent and principle” than has been applied to other looted cultural property.¹⁹⁶ The idea is to effectuate a restoration of dignity, not only among the individual victims and their families, but to the community as a whole.¹⁹⁷

The 1990s saw a global uptick in restitution claims for Nazi-looted works due to a combination of technological advances, declassification of Holocaust-related documents, and artworks resurfacing in auctions and exhibitions that were previously thought to be lost forever.¹⁹⁸ The internet and its online art databases proved to be an incredibly helpful tool for Holocaust victims and their heirs searching for stolen works.¹⁹⁹ Moreover, the prohibitive cost of litigation was mitigated as the global art

192. The Monuments, Fine Arts, and Archives Program was established by Allied forces in 1943 under the Civil Affairs and Military Government Sections of the Allied Armies. *The Heroes*, MONUMENTS MEN FOUND., <https://www.monumentsmenfoundation.org/the-heroes> (last visited Sept. 26, 2021). This heroic group of nearly 345 men and women from fourteen countries was comprised of art historians, curators, artists, librarians, architects, educators, and museum directors who volunteered their services to protect Europe’s cultural property from the terrors of war. *Id.*

193. Gilbert, *supra* note 179.

194. Oost, *supra* note 178, at 142.

195. *Id.* at 143.

196. *Id.*

197. Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 CARDOZO L. REV. 601, 623 (1998).

198. Bert Demarsin, *Let’s Not Talk About Terezín: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT’L L. 117, 121–31, 134–35. (2011).

199. *Id.* at 135.

market soared to new heights, with many of these works now valued at hundreds of thousands—even millions—of dollars.²⁰⁰ The potentiality of a high settlement encouraged more claimants to come forward.²⁰¹

In 1998, Jewish interest groups around the world began concentrated efforts to encourage governments to “properly address the enduring injustice of Nazi era art spoliation.”²⁰² That same year, the US spearheaded the movement to more effectively handle the problem of Nazi-looted works by hosting the Washington Conference on Holocaust-Era Assets (the Washington Conference).²⁰³ Specifically, the Washington Conference Principles on Nazi-Confiscated Art (the Washington Principles) called for the identification of all works taken by the Nazis that have not already been returned to their rightful owners and issued guidelines on how to either retribute or compensate “pre-War owners or their heirs” justly and fairly.²⁰⁴

Following the Washington Conference, several international restitution frameworks were formed.²⁰⁵ For example, the Council of Europe adopted Resolution 1205 in 1999, encouraging governments to issue formal guidelines for the return of Nazi-spoliated works in accordance with the Washington Principles.²⁰⁶ Similarly, in 2009, the Prague Holocaust Era Assets Conference²⁰⁷ also championed adherence to the Washington Principles and gave rise to the Terezín Declaration on Holocaust Era Assets

200. *Id.*

201. *Id.*

202. *Id.* at 131.

203. *Id.* at 137.

204. Chloe Ricke, *The Time is Now: Why the United States Should Follow the United Kingdom's Lead and Implement a Federal Nazi-Looted Art Spoliation Advisory Panel*, 44 GA. J. INT'L & COMP. L. 665, 670–72 (2016); Demarsin, *supra* note 198, at 137; *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEPT. OF STATE, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> (last visited Jan. 9, 2020).

205. *See, e.g.*, Ricke, *supra* note 204, at 672.

206. *Id.*

207. The Prague Holocaust Era Assets Conference took place from June 26–30, 2009 and was organized by the Czech Republic. Forty-six countries participated and discussed various aspects of Holocaust-related issues, including Nazi-looted art, survivor welfare, Jewish cultural property, and memorial sites, resulting in the Terezín Declaration on Holocaust Era Assets and Related Issues. *2009 Terezín Declaration on Holocaust Era Assets and Related Issues*, U.S. DEPT. OF STATE, <https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/> (last visited Oct. 1, 2021).

and Related Issues (the Terezín Declaration).²⁰⁸ Forty-four countries ultimately agreed to follow the Washington Principles and find solutions regarding the fair restitution of Nazi-looted art.²⁰⁹ While there are numerous domestic regimes for the restitution of Nazi-spoliated works, the following Sections will provide a brief overview of those within the UK and the US.

1. The United Kingdom: Spoliation Advisory Panel

The Spoliation Advisory Panel (the SAP) was established in 2000 by the UK government.²¹⁰ The SAP was created to serve as an independent alternative to litigation for individual claimants who would be unlikely to succeed in their quest for restitution of Nazi-looted objects via traditional legal means.²¹¹ Additionally, it counsels the government on issues related to the Holocaust and advances made in provenance research.²¹² Through designation by the Secretary of State, the SAP is able to consider claims from Holocaust victims and their heirs who have a claim to a Nazi-looted artwork where the disputed object is “(a) now in the possession of a UK national collection, or (b) in the possession of another UK museum or gallery established for the public benefit.”²¹³ Upon request from both parties, the SAP is also able to consider claims surrounding an object in a private collection.²¹⁴

Prior to the enactment of the Holocaust (Return of Cultural Objects) Act in 2009 (the 2009 Holocaust Act), museums and other national institutions were forbidden by law to return any of their collection objects for the benefit of the public.²¹⁵ As a result, the only recommendation the SAP could make in favor of a claimant was for an ex-gratia payment to be made in lieu of the

208. Ricke, *supra* note 204, at 672.

209. Akhavan, *supra* note 26, at 172; Ricke, *supra* note 204, at 672.

210. Press Release, Comm’n for Looted Art in Eur., UK Government Renews Its Commitment to Return Nazi-Looted Art to Rightful Owners (July 21, 2017), https://www.lootedartcommission.com/press-releases_subj;SK0IBF72281.

211. Oost, *supra* note 178, at 154.

212. Ricke, *supra* note 204, at 687.

213. *Spoliation Advisory Panel*, UK GOV’T, <https://www.gov.uk/government/groups/spoliation-advisory-panel> (last visited Sept. 27, 2021).

214. *Id.*

215. *UK Museums Can Return Looted Art*, BBC NEWS (Nov. 13, 2009, 2:06 PM), http://news.bbc.co.uk/2/hi/entertainment/arts_and_culture/8358902.stm.

item's restitution.²¹⁶ The 2009 Holocaust Act provided statutory recognition to the SAP and allowed UK institutions to deaccession Nazi-looted works and return them to successful claimants.²¹⁷

To arrive at its decisions, the SAP considers legal issues—such as whether the claimant or institution has sufficiently established title to the disputed object—but also assesses the “moral considerations” and “moral strength” of a given claim.²¹⁸ Should the SAP side with the claimant, it may recommend that the object be returned or that the institution financially compensate the claimant for the object in an amount to be determined by the SAP based on the totality of the circumstances.²¹⁹ The SAP may also recommend that when on display, the object must be accompanied by a label explaining its history, provenance, and the claimant's interest in the object.²²⁰ While the principle aim of the SAP is to “achieve a just and fair solution for both the claimant and the institution,” its recommendations are not legally binding.²²¹ Despite being legally unenforceable, any recommendation that has been both accepted by the claimant and subsequently put into effect is expected to serve as the “full and final settlement” of the claim.²²²

The 2009 Holocaust Act initially featured a sunset clause that provided for its expiration on November 11, 2019, which would have once again barred UK institutions from deaccessioning collection works.²²³ This sunset clause was repealed by a 2019 amendment to the Act that extended its provisions, allowing the SAP to continue to hear restitution claims for Nazi-looted objects indefinitely.²²⁴ Theresa Villiers, the Parliament member who

216. *Id.*

217. Oost, *supra* note 178, at 155; see Ricke, *supra* note 204, at 686.

218. Ricke, *supra* note 204, at 687.

219. *Spoilation Advisory Panel Constitution and Terms of Reference* ¶ 17, UK Gov't, <https://www.gov.uk/government/groups/spoliation-advisory-panel#terms-of-reference> (last visited Jan. 3, 2021).

220. *Id.*

221. Oost, *supra* note 178, at 154.

222. Ricke, *supra* note 204, at 687; *Spoilation Advisory Panel*, *supra* note 213.

223. JOHN WOODHOUSE, HOUSE OF COMMONS LIBRARY, BRIEFING PAPER: THE HOLOCAUST (RETURN OF CULTURAL OBJECTS) (AMENDMENT) BILL 2017-19 5-7 (2019) <https://researchbriefings.files.parliament.uk/documents/CBP-8409/CBP-8409.pdf>.

224. The Holocaust (Return of Cultural Objects) (Amendment) Bill 2018, HC Bill [182] Explanatory Notes ¶ 2 (Eng.).

proposed the amendment to the 2009 Holocaust Act, emphasized that the UK Parliament “was right in 2009 to give our national museums the power to restore property lost in these terrible circumstances to its rightful owners.”²²⁵ The repeal was enthusiastically supported by the UK museum community.²²⁶

2. The United States: Holocaust Expropriated Art Recovery Act

Prior to the Washington Conference, the US passed the Holocaust Victims Redress Act in February 1998, which was intended to provide “redress for inadequate restitution of assets seized by the US Government during World War II [that] belonged to victims of the Holocaust, and for other purposes.”²²⁷ This legislation, however, was not effective in assisting claimants because it did not address the technical legal obstacles that barred relief for many seeking restitution, such as statutes of limitations.²²⁸

In 2016, the Holocaust Expropriated Art Recovery Act (the HEAR Act) was passed with the intention of remedying the difficulties victims face because of bureaucratic technicalities that lead to their claims being time-barred.²²⁹ Reaffirming the Washington Principles and the Terezín Declaration, the HEAR Act allows states to bypass their respective statutes of limitations when considering a claim relating to Nazi-looted artworks.²³⁰ The federal statute of limitations set by the HEAR Act gives plaintiffs six years to file a claim from the discovery of both “(1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.”²³¹ The HEAR Act contains a sunset clause that provides for its expiration on January 1, 2027, meaning claims will

225. *Theresa Villiers Takes Forward Draft Bill to Enable Return of Artworks Stolen from Holocaust Victims*, THERESA VILLIERS (Mar. 13, 2018), <https://www.theresavilliers.co.uk/news/theresa-villiers-takes-forward-draft-bill-enable-return-artworks-stolen-holocaust-victims>.

226. *Id.*

227. Demarsin, *supra* note 198, at 134 n. 71; Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998).

228. Akhavan, *supra* note 26, at 172; Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, § 2(6) (2016) [hereinafter HEAR Act].

229. Akhavan, *supra* note 26, at 172; HEAR Act, *supra* note 228.

230. HEAR Act, *supra* note 228, § 2(7).

231. *Id.* § 5(a).

once again be subject to the statutes of limitations set by the states.²³² Benefits to the HEAR Act include a set timeframe in which claimants can bring their cause of action and more time for claimants to investigate in order to provide courts with the necessary discovery.²³³ The Act also provides for the interests of both the claimant and the potential good-faith purchaser through its six-year standard.²³⁴

While the HEAR Act is an improvement as far as legislation concerning Nazi-looted works, its shortcomings do not address some of the most pressing obstacles to restitution for claimants.²³⁵ For example, the law largely still places the onus of due diligence on claimants, which is unfairly prejudicial and “borderline offensive” when considering that these objects were taken amidst genocide and other heinous war crimes.²³⁶ The HEAR Act’s sunset clause could also possibly bar the heirs of Holocaust victims from filing future claims.²³⁷ As many of these lost works have been found only recently through the development of new technology and comprehensive online databases, it is a fair assumption that a significant amount of property has yet to be discovered.²³⁸

IV. A UNIFORM INTERNATIONAL APPROACH TO THE RESTITUTION OF CULTURAL PROPERTY IS NEEDED

The clear commonality between the domestic and international approaches to the restitution of cultural property taken during both the colonialist and Nazi eras is the pervasive lack of jurisprudential regard for the “complexities, inconsistencies, and injustices” that have surrounded this issue for centuries.²³⁹ This deficiency of a clear international standard and solution to the restitution of cultural property not only affects the past, but the present and future as well.²⁴⁰ The cultural property debate has been given new life by the social and political upheavals that took place in the US in 2020. A contemporary example of the

232. *Id.* § 5(g).

233. Akhavan, *supra* note 26, at 173.

234. *Id.*

235. *See id.* at 177–80.

236. *Id.* at 178.

237. *See id.*

238. *Id.*

239. *See id.* at 181.

240. *See, e.g.*, Warner, *supra* note 53; Myers & Kulish, *supra* note 53.

power of moral pressure, the death of George Floyd at the hands of Minnesota police²⁴¹ ignited widespread Black Lives Matter (BLM)²⁴² protests against systemic racism across the US.²⁴³ BLM efforts to restore imbalances in social, political, and economic spheres at the hands of racial inequality have caught international momentum and have been especially prevalent in Western European countries struggling with the shadows of their colonialist pasts.²⁴⁴

Moreover, the world is once again facing an antiquities-looting crisis as Islamic extremists plunder Middle Eastern temples and museums for priceless cultural artifacts to sell via the global art market as a source of funding for their terroristic activities.²⁴⁵ Thousands of these stolen objects have found their way into both private and institutional collections across the globe.²⁴⁶ In the

241. On May 25, 2020, 46-year-old George Floyd was arrested by Minneapolis police officers after an employee at a convenience store called 911 and accused Mr. Floyd, a black man, of purchasing his items with a counterfeit \$20 bill. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 3030, updated Sept. 7, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>. Video footage taken by horrified witnesses shows that Mr. Floyd died after white police officer Derek Chauvin kept his knee pressed down on the back of Mr. Floyd's neck for nearly nine minutes, even after Mr. Floyd had lost consciousness. *Id.*

242. Founded in 2013 following the acquittal of George Zimmerman for the vigilante homicide of black teenager Trayvon Martin, Black Lives Matter is a global movement "whose mission is to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes." *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited July 17, 2021).

243. See generally Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html>.

244. See Jen Kirby, "Black Lives Matter" Has Become a Rallying Cry Against Racism and Police Brutality, VOX (June 12, 2020, 7:30 AM), <https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium>.

245. See Warner, *supra* note 53, at 482; see also Myers & Kulish, *supra* note 53.

246. Myers & Kulish, *supra* note 53; see Robert Fisk, *ISIS Profits from Destruction of Antiquities by Selling Relics to Dealers—and then Blowing Up the Buildings They Come From to Conceal the Evidence of Looting*, INDEPENDENT (Sept. 20, 2015, 9:06 PM), <https://www.independent.co.uk/voices/isis-profits-destruction-antiquities-selling-relics-dealers-and-then-blowing-buildings-they-come-conceal-evidence-looting-10483421.html>.

absence of codified international guidelines, these artifacts are poised to suffer the same fate as the numerous cultural objects ripped from their countries of origin that still sit in Western collections today.

Upon a brief examination of the global art industry, the necessity for international standardization becomes even more apparent. The global art and antiquities market continues to evolve into an increasingly lucrative enterprise; in 2019 alone, the market saw profits reaching \$64.1 billion across 40.5 million transactions.²⁴⁷ Despite the COVID-19 pandemic, 2020 saw an estimated \$50.1 billion in arts and antiquities sales.²⁴⁸ Art sales are often shrouded in secrecy and are frequently completed through the use of intermediaries.²⁴⁹ These transactions can involve several different parties and shell corporations, often scattered across multiple countries, which can make it difficult for art dealers and governments to determine the identities of both buyers and sellers.²⁵⁰ Parties also regularly make use of freeports, which are “tax-free and duty-free storage spaces for art and other collectibles.”²⁵¹ Artwork stored at freeports can be anonymously purchased and sold without ever leaving the storage space.²⁵² This level of secrecy and anonymity creates conditions ripe for criminal activity, such as money laundering, sanction evasion, and the illegal trafficking of antiquities.²⁵³

247. Press Release, Art Basel, The Art Basel and UBS Global Art Market Report (Mar. 5, 2020), <https://artbasel.com/stories/art-market-report-1>.

248. *5 Insights from the Art Basel and UBS Global Art Market Report 2021*, in ART BASEL AND UBS ART MARKET MID-YEAR REVIEW 2021 (2021), <https://www.ubs.com/global/en/our-firm/art/collecting/art-market-report.html>.

249. Timothy E. Burroughs, Note, *US and EU Efforts to Combat International Money Laundering in the Art Market Are No Masterpiece*, 52 VAND. J. TRANSNAT'L L. 1061, 1072 (2019); see also Alessandra Dagirmanjian, *Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 687, 705–07 (2019).

250. See Burroughs, *supra* note 249, at 1072–73; Dagirmanjian, *supra* note 249, at 694, 723.

251. Dagirmanjian, *supra* note 249, at 702.

252. Charlie Pogacar, *How Money Laundering Works in the Art World*, ART & OBJECT (May 8, 2020), <https://www.artandobject.com/news/how-money-laundering-works-art-world>.

253. See generally Burroughs, *supra* note 249 (discussing how a standardized international scheme that creates more transparency between art intermediaries and governments would be most effective in combating money laundering through the art market).

Domestic efforts to regulate the art market are already underway in the US and the European Union.²⁵⁴ Due to the rapid commoditization of artwork and antiquities, solutions lean towards subjecting the market to regulations already applicable to financial institutions.²⁵⁵ The proposed regulatory scheme for the art market includes “know your customer” (KYC) requirements and a standardized international network for the purposes of sharing information to aid law enforcement officials.²⁵⁶ KYC requirements compel businesses to perform due diligence checks on their customers.²⁵⁷ Without such conditions, art industry professionals can continue to avoid responsibility for falling prey to money launderers and other criminals.²⁵⁸ While this is a solid start, piecemeal solutions are unlikely to have much of a mitigating effect on the connected issues of illicit activity within the art market and restitution of cultural property.²⁵⁹

Domestic regulations in both areas may be destined for inadequacy for several reasons. First, an absence of international cooperation will impede the effectiveness of even the most comprehensive national schemes, as those wishing to circumvent strict laws can simply take their business to countries with less oversight.²⁶⁰ Second, without a centralized, international network through which to share information, it will be difficult to track the efficacy of domestic regulations and, in cases of illicit activity, for law enforcement to competently catch offenders and locate stolen objects.²⁶¹ Third, the absence of an internationally codified process by which formerly colonized countries (or individuals, in the case of Nazi-looted works) can attempt to negotiate the return of objects scattered across the world creates an untenable position for those who are unable to assert economic power over developed nations. As seen above in the Peru and

254. *Id.* at 1077, 1079 (discussing legislative efforts in the US and the European Union to combat money laundering in the art market). This includes the UK, as the European Union regulations were enacted prior to Brexit. *Id.*

255. *See id.* at 1091; *see generally* Dagirmanjian, *supra* note 249 (examining the effects of applying the Bank Secrecy Act, which imposes strict anti-money laundering standards on financial institutions in the US, to the US art market).

256. Burroughs, *supra* note 249, at 1064, 1092.

257. *Id.* at 1064.

258. *Id.* at 1092.

259. *See id.* at 1090.

260. *Id.* at 1085, 1090.

261. *Id.* at 1090.

Yale example, litigation is incredibly expensive and is often not a viable option for cash-strapped countries.²⁶² Moreover, moral pressure alone is frequently not enough, as illustrated by the debate over the Parthenon Marbles, which has now raged on for over 200 years.²⁶³

To harmonize the disjointed international and domestic approaches to the restitution of cultural property, a completely independent international body (the Panel) should be created in order to reconcile cultural property's dual nature as both a tangible expression of the human condition and a commodity. The Panel should be free of political and economic influence to maintain neutrality and mitigate the allure of participating in the antiquities trade within the billion-dollar global art market. Due to the unique characteristics of art and antiquities, the Panel should be composed of an interdisciplinary mix of individuals, such as legislators, lawyers, art historians, cultural heritage experts, museum directors and curators, and archaeologists, as well as governmental representatives from each Member State.

When a dispute arises over a particular piece or pieces of cultural property, the country seeking restitution could petition the Panel to mediate, similar to the current UNESCO model. However, Member States would be obligated as signatories to engage in the mediation process to avoid situations like the UK waiting nearly two years to respond in the negative to UNESCO's request for a meeting regarding the Parthenon Marbles.²⁶⁴ While countries are often reluctant to sign agreements that would bind them to specific legal obligations, as seen with the 1995 UNIDROIT Convention,²⁶⁵ this option may be more attractive because Member States would only be bound to the process of mediation if a claim is initiated against them. If an agreement cannot be reached during the mediation process, the Panel could propose and facilitate an arbitration proceeding. This would afford the two countries an opportunity to iron out a mutually beneficial agreement and avoid a potentially harsh settlement that could result from litigation. If these two steps fail to result in a satisfactory conclusion to the dispute, the Panel should be able to initiate litigation on behalf of the country claiming restitution if the process proves cost-prohibitive for its government.

262. Shyllon, *supra* note 55, at 130.

263. See Reppas, *supra* note 150, at 917.

264. *Id.* at 67.

265. Song, *supra* note 48, at 739.

Litigation costs could either be subsidized by communal funding from Member States or paid in full by the offending party should they lose the case.

Holocaust victims and their heirs could also benefit from this centralized Panel through the creation of a new international agreement that requires Member States to adhere to a minimum standard of principles when handling claims relating to Nazi-looted art. Among these should be the removal of statutes of limitations, the mandatory creation of a dedicated domestic panel to hear claims, the ability of these panels to issue legally binding settlements at the agreement of both parties, and the coverage of attorneys' fees.²⁶⁶

All parties involved in cultural property disputes and eradication of illicit activity in the art market would benefit from an international information database that tracks suspicious persons, transactions, and objects with a questionable provenance history. In the event of a dispute, the onus should be placed on institutions, auction houses, other art intermediaries, and private collectors to demonstrate that *they* exercised due diligence before buying or selling particular artworks or cultural objects and prevent them from feigning ignorance as to an object's origins.²⁶⁷ This will relieve at least part of the discovery burden that currently falls on individuals and countries seeking restitution, or at least make it easier for them to track the history of the disputed object or objects. A database such as this would also improve law enforcement's ability to track looted objects and suspicious transactions, which would prove useful in resolving future disputes over stolen cultural property much more quickly than in the past.

CONCLUSION

As demonstrated by the Quai Branly Museum protestors and the fallout surrounding the British Museum's ill-conceived solidarity statement, widespread public shaming has museums and galleries around the world scrambling for ways to redefine their

266. See Akhavan, *supra* note 26, at 177–80.

267. See *id.* at 178.

relationships to surrounding BIPOC²⁶⁸ communities.²⁶⁹ The court of public opinion is stronger now than ever before, and world's legislators and cultural institutions are now facing judgment.²⁷⁰ Global political and legal communities should evolve to reflect this new societal emphasis on morality and atonement.

While the imperialist era has ended, atrocities continue to be perpetuated against cultural property through terrorist activity and acts of war.²⁷¹ To prevent history from repeating itself, the Western world must examine the injurious paternalistic and dismissive attitudes it overwhelmingly shows to developing nations that wish to repossess the objects of their histories and cultures. Western institutions fighting against the return of cultural objects glorify the virtues of cultural property as tangible expressions of humanity that belong to all people as a justification for keeping these treasures in their collections, but this argument ignores the heart of the plight of formerly colonized nations.²⁷² Current cultural property schemes do not adequately address the needs of those seeking the restitution of looted cultural property. While ADR has proven to be a formidable tool in aiding these groups, a universal set of standardized, international principles can streamline the process and hopefully aid those nations and individuals that have yet to see success. Formerly colonized nations should not have to resort to economic blackmail, moral shaming, or million-dollar lawsuits to simply initiate a dialogue

268. An acronym that stands for "black, Indigenous, and people of color," which may have originated from a 2013 Twitter post. Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html>.

269. See Alex Greenberger & Tessa Solomon, *Major U.S. Museums Criticized for Responses to Ongoing George Floyd Protests*, ARTNEWS (June 2, 2020, 5:52 PM), <https://www.artnews.com/art-news/news/museums-controversy-george-floyd-protests-1202689494/>; see also Alex Greenberger, *Controversy Over Museums' Black Lives Matter Statements Continues as Critics Pillory British Institutions*, ARTNEWS (June 8, 2020, 12:08 PM), <https://www.artnews.com/art-news/news/british-museums-black-lives-matter-statements-controversy-1202690203/>.

270. See Greenberger & Solomon, *supra* note 269; Greenberger *supra* note 269.

271. See Warner, *supra* note 53, at 482; see also Myers & Kulish, *supra* note 53; Ochab, *supra* note 18; *Cultural Property Restitution*, *supra* note 17.

272. Alasdair Soussi, *The Repatriation Debate: Should Museums Return Colonial Artefacts?*, NAT'L NEWS (Sept. 10, 2019), <https://www.thenationalnews.com/arts-culture/art/the-repatriation-debate-should-museums-return-colonial-artefacts-1.908805>; see also Reppas, *supra* note 150, at 916.

with Western nations regarding their cultural items. Holocaust victims and their heirs should not have to suffer further injustice because of statutes of limitations barring their claims or navigate complex litigation processes to simply repossess their looted property. The creation of an independent international body, uninhibited by political and economic loyalties and composed of a diverse group of experts, may prove a fair and equitable solution that balances the interests of both parties in cultural property disputes.

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