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Lost to the Ages

INTERNATIONAL PATRIMONY AND THE PROBLEM FACED BY FOREIGN STATES IN ESTABLISHING OWNERSHIP OF LOOTED ANTIQUITIES

INTRODUCTION

On April 28, 2017, a nine-inch tall, five-thousand-year-old marble statute known as the “Guennol Stargazer”¹ sold at auction for \$14.5 million dollars.² The auction itself, hosted at Christie’s in New York, brought in a staggering \$22.6 million dollars in total sales of twenty-eight different rare antiquities.³ Undoubtedly, antiquities are highly valuable and deeply desirable. This conclusion may explain why, the day before the sale of the Stargazer, the Republic of Turkey filed a claim against Christie’s in an action to recover the Stargazer and declare it the property of Turkey.⁴ Turkey argued in pursuit of replevin and conversion that the Stargazer “was looted from Turkey [sometime] in the 1960s,” and that ownership is predicated on a 1906 Ottoman Decree.⁵ The 1906 Decree provides Turkey (via the Ottoman Empire) ownership rights over any “immovable and movable antiquities situated on land and Estate belonging to the Government.”⁶

¹ *The Guennol Stargazer—An Iconic Work of Art from the 3rd Millennium BC*, CHRISTIE’S (Apr. 5, 2017), <http://www.christies.com/features/The-Guennol-Stargazer-8195-3.aspx> [<https://perma.cc/V3AA-SN57>].

² Suzan Mazur, *Klejman or Hecht?—Who Sold the Guennol Stargazer to Tennis’s Alastair Martin?*, HUFFINGTON POST (Sept. 19, 2017), https://www.huffingtonpost.com/entry/klejman-or-hecht-who-sold-the-guennol-stargazer-to_us_59c03f89e4b082fd4205b935 [<https://perma.cc/D5SY-ERSK>].

³ *The Exceptional Sale*, CHRISTIE’S (Apr. 28, 2017), <http://www.christies.com/salelanding/index.aspx?intsaleid=26907&lid=1&saletitle=> [<https://perma.cc/42HZ-LW9Y>].

⁴ Complaint for Declaratory Relief, Injunctive Relief, and Damages and Demand for Jury Trial at 1, Republic of Turkey v. Christie’s, Inc., No. 17-cv-3086-AJN (S.D.N.Y. Apr. 27, 2017), ECF No. 1 [hereinafter Turkey Complaint].

⁵ *Id.* at 4–7. Replevin and conversion are common law doctrines that address the return of stolen property. See discussion *infra* Section III.B.

⁶ Ergun Özsunay, *Protection of Cultural Heritage in Turkish Private Law*, 6 INT’L J. CULTURAL PROP. 278, 278 (1997).

Christie's disputes Turkey's ownership claim through the 1906 Decree.⁷ First, Christie's argues that "no U.S. court has ever found the 1906 Ottoman Decree to be valid."⁸ Second, Christie's contends that the 1906 Decree has never been consistently enforced either in or outside of Turkey.⁹ No ruling has yet been made on the 1906 Decree, although this is not the first time it has appeared before the federal courts.¹⁰ No American court, however, has decided on the validity of the 1906 Decree.¹¹ Should the *Turkey v. Christie's* court agree with Christie's, Turkey will have no enforceable claim to the Stargazer in U.S. courts. The larger ramifications of such a decision would cause difficulties for many, if not all, of the foreign nations pursuing ownership claims to cultural heritage through patrimony laws.¹²

Turkey's plight is not unique. Another auction house, Sotheby's, pulled an eighth-century statuette of a horse, on May 11, 2018—days before the horse was set to be auctioned for \$150,000 to \$250,000.¹³ Sotheby's pulled the artifact from the sale after receiving a letter from the Greek government asserting that the bronze horse was the property of Greece and demanding its immediate return.¹⁴ To support this claim, Greece presented evidence that the present owners bought the statue in 1973 from a

⁷ Defendant Christie's Inc.'s Memorandum of Law in Opposition to Republic of Turkey's Motion for a Preliminary Injunction at 1, *Republic of Turkey v. Christie's, Inc.*, No. 17-cv-3086 (S.D.N.Y. June 9, 2017), ECF No. 37 [hereinafter Christie's Opposition Brief].

⁸ *Id.* at 18.

⁹ *Id.* at 18–20.

¹⁰ This is not the first time Turkey has attempted to predicate recovery of antiquities on the 1906 Decree. In the 1980s–1990s, Turkey was embroiled in a suit against the Metropolitan Museum of Art (the "Met") in an attempt to recover a large collection of antiquities known as the Lydian Hoard. See *Republic of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44, 45 (S.D.N.Y. 1990); Alessandro Chechi, Anne Laure Bandle, & Marc-André Renold, *Case Lydian Hoard—Turkey and Metropolitan Museum of Art*, PLATFORM ARTHEMIS, ART-LAW CENTRE, U. OF GENEVA, 3–5 (2012), <https://plone.unige.ch/art-adr/cases-affaires/lydian-hoard-2013-turkey-and-metropolitan-museum-of-art> [<https://perma.cc/WGL8-PHK9>]. Like *Turkey v. Christie's*, Turkey predicated its ownership claim on "Turkish law." *Metro. Museum of Art*, 762 F. Supp. at 45. Whether the ownership laws were valid, however, was an issue never addressed by the court, as further evidence was uncovered in discovery indicating that the directors responsible for purchasing the Lydian Hoard were aware of its illegal provenance, and in order to avoid further costs, the museum settled the case out of court without a ruling on the 1906 Decree's validity. Chechi et al., *supra* note 10, at 4–5.

¹¹ See Christie's Opposition Brief, *supra* note 7, at 17 (characterizing the 1906 Ottoman decree argument as "one of first impression in this country.>").

¹² Patrimony laws, as referred to in this Note, are any laws of a sovereign nation that establish protections for cultural heritage. Frequently, but not always, patrimony laws include a decree establishing all cultural artifacts within a country as property of that country's government. See discussion *infra* Part II.

¹³ Eileen Kinsella, *Amid a Wave of Repatriation, Sotheby's Stands Its Ground Against Greece's Claim to an 8th-Century Bronze Horse*, ARTNET (July 2, 2018), <https://news.artnet.com/art-world/sothebys-strikes-back-against-greekrepatriation-claim-1311500> [<https://perma.cc/23PZ-LN4W>].

¹⁴ *Id.*

dealer, who was eventually accused of trading in looted antiquities.¹⁵ Sotheby's and the owners filed suit against Greece, seeking a declaration that Greece has no valid ownership rights in the horse and that the present owners held it in good faith.¹⁶

Looted antiquities and cultural property have been a problem for culture-rich nations for centuries. Modern international protections for these objects only truly began in 1954, with the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954 (1954 Hague Convention).¹⁷ In 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) promulgated the first generalized, unified doctrine for the protection of cultural property.¹⁸ UNESCO defines "cultural property" as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to [an enumerated] categor[y]."¹⁹ The Convention demands that all signatories create rules facilitating the recovery of looted and stolen cultural property from 1970 onward to prevent looting and to expedite restitution.²⁰ To accomplish these goals, the Convention governs the import and export of cultural property and provides guidelines for state parties to protect foreign and domestic antiquities.²¹

Problems arise in implementing these guidelines. One of the most debated articles of the Convention, Article 3, defines as "illicit" the "import . . . of cultural property effected contrary to the provisions adopted under this Convention by the State Parties thereto."²² State parties to the treaty, however, have wide leeway in how they meet their obligations under the 1970 UNESCO Convention. For example, the United States severely limits these protections for the following reasons. First, the United States, while

¹⁵ *Id.*

¹⁶ Complaint for Declaratory Judgment at 2, *Barnet v. Ministry of Culture and Sports of the Hellenic Republic*, No. 18-cv-4963 (S.D.N.Y. June 5, 2018), ECF No. 1.

¹⁷ Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]; see discussion *infra* Section I.A.

¹⁸ See generally Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

¹⁹ *Id.* at 234.

²⁰ *Id.* at 238.

²¹ *Id.*

²² *Id.* at 236; see also, e.g., Jane Warring, Comment, *Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 253 (2005) (noting the legal debate between civil and common law nations over Article 7(b)(ii)).

a signatory, has codified only parts of the Convention.²³ Second, the United States created a reservation prior to accepting the terms of the Convention, clarifying that it “understands the provisions of the convention to be neither self-executing nor retroactive.”²⁴

Because the 1970 UNESCO Convention is not retroactive, antiquities looted prior to the 1970 signing of the Convention are not protected, which forces any nation seeking recovery to fall back on domestic patrimony laws (such as the 1906 Decree)²⁵ and common law remedies provided by the states, such as replevin and conversion. These claims require plaintiffs to prove a superior title to the property and comply with a statute of limitations of three years from the discovery or from a reasonable time frame the plaintiff should have discovered the theft.²⁶

To ameliorate their stringent ownership requirements, among other reasons, many nations have passed laws like the 1906 Decree to establish ownership over artifacts discovered on their sovereign soil.²⁷ Indeed, the 1906 Decree has been updated twice since the Ottoman Empire became the Republic of Turkey, most recently in 1983.²⁸ But U.S. courts have no obligation to enforce these laws, and plaintiffs like Turkey, seeking recovery in U.S. courts, bear the burden of proving ownership.²⁹ These ambiguities confound efforts to prove ownership of stolen art and antiquities, particularly before 1970.

²³ Notably, the United States has only one significant codification of the 1970 UNESCO Convention: The Convention on Cultural Property Implementation Act (CCP), which implemented Articles 7 and 9 of the UNESCO Convention. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613 (2012)). The CCP is ineffective for countries like Turkey because, among other issues, the CCP functions as an import law, and has no effect on cultural artifacts already in the United States at the time of implementation. See discussion *infra* Section III.A.

²⁴ *Declarations and Reservations: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG. (Nov. 14, 1970), http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES [https://perma.cc/KBJ2-AU27]. This reservation emphasizes what is already established international custom of nonretroactivity per the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art. 28, Jan. 27, 1980, 1155 U.N.T.S. 331, 339.

²⁵ Plaintiff Republic of Turkey’s Memorandum of Law in Support of Plaintiff’s Application for a Preliminary Injunction and Temporary Restraining Order at 6, No. 17-cv-3086 (S.D.N.Y. June 9, 2017), ECF No. 6 [hereinafter Turkey’s TRO Brief] (arguing ownership under 1906 Decree).

²⁶ See *infra* Section III.C.

²⁷ Mark J. Petr, Note, *Trading Places: Illicit Antiquities, Foreign Cultural Patrimony Laws, and the U.S. National Stolen Property Act After United States v. Schultz*, 28 HASTINGS INT’L & COMP. L. REV. 503, 505 (2005).

²⁸ Özsunay, *supra* note 6, at 279–80.

²⁹ 77 C.J.S. *Replevin* § 79 (2018); Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT’L L. & POL. 79, 80 (1998).

As a result of the stringent domestic requirements set by the United States and the weaknesses of international remedies, recovering stolen antiquities from U.S. citizens becomes a daunting challenge for even wealthy countries. Poorer nations face even greater difficulties because often they cannot afford the extensive discovery required to prove ownership and theft before the statute of limitations expires.³⁰ Although there may be resistance by some groups in the United States,³¹ the current domestic pathway towards restitution needs simplification. U.S. policy should be more consistent with the obligations imposed by the 1970 UNESCO Convention.³²

A specialized civil remedy for the restitution of looted cultural property could simplify the process of restitution by placing the burden on foreign states to protect their cultural property on their own terms. Recognition of foreign laws is consistent with the goals of international cultural heritage law and would remove one hurdle on the path to recovery,³³ while simultaneously protecting good faith purchasers from bad faith claims and preserving ownership protections such as laches.

Part I of this note further explores the strengths and weaknesses of restitution on an international scale. Part II examines the competing interests of market nations and source nations, and explains the role patrimony laws play in the settlement of disputes *ex-post*, as well as the protection of antiquities *ex-ante*. Part III reviews the current state of U.S. law concerning the recovery of looted antiquities by foreign nations. Part IV discusses a case from the United Kingdom that steps toward broader recognition of patrimony laws. Finally, Part V asserts that a more immediate solution to rightful restitution requires U.S. courts to recognize foreign ownership claims and synthesize the process of establishing ownership in both domestic and foreign systems; a solution the United States should adopt to better protect the world's cultural heritage.

³⁰ See ALESSANDRO CHECHI, *THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES* 119 (2014).

³¹ I refer here to those in the “art community,” such as dealers, collectors, and museums, whose business relies on the free trade of art and antiquities. See Kaye, *supra* note 29, at 79. The art community's interests, however, are not without consideration, and this note will attempt to propose a solution acceptable to all parties.

³² As of October 12, 2017, the United States has announced its intention to withdraw from UNESCO by the end of 2018. Press Release, U.S. Dep't of State, *The United States Withdraws from UNESCO* (Oct. 12, 2017), <https://www.state.gov/r/pa/prs/ps/2017/10/274748.htm> [<https://perma.cc/T5ZV-R9ZM>]. The United States will remain engaged with UNESCO as a non-member observer. *Id.* Therefore, the obligations imposed by that international convention are still relevant to the study of how the United States should address the restitution of looted antiquities.

³³ See *supra* Part I.

I. INTERNATIONAL PROTECTIONS FOR STOLEN ANTIQUITIES

Culture—and in turn cultural property—is increasingly regarded “as a human centred, socially constructed legacy belonging to all mankind.”³⁴ Vast networks of museums, galleries, collectors, and academics dedicate themselves to the collection, protection, and study of works of art and antiquities.³⁵ Moreover, sales in the art and antiquities market offer valuable financial incentives to the field of cultural heritage.³⁶ Whether for personal reasons, nationalistic reasons, or internationalist reasons, people care about cultural heritage.³⁷

Since cultural heritage is a global concern, several international organizations have attempted to create protections for antiquities, arts, and world heritage sites, as well as remedies for individuals and states who have suffered theft of or damage to their cultural property. The term “cultural property” first appeared in an “international legal context” in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).³⁸ By far the broadest and most well-known international body associated with protecting cultural heritage is the United Nations Educational, Scientific, and Cultural Organization (UNESCO). UNESCO was established with the signing of the Constitution of UNESCO on November 16, 1945.³⁹ In the years since, UNESCO has created two major initiatives to address stolen cultural property: the 1970 UNESCO Convention,⁴⁰ and the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP).⁴¹

³⁴ CHECHI, *supra* note 30, at 10.

³⁵ *Id.*

³⁶ *See, e.g., supra* note 3 and accompanying text. One need only glance at the websites of popular auction houses like Christie’s to see the huge sums spent on art and antiquities.

³⁷ Cultural internationalists argue that cultural heritage belongs to humanity as a whole, and therefore is best kept where it is best cared for and enjoyed by the most people; whereas cultural nationalists believe cultural heritage belongs to the state and people that created it. *See* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 852–53 (1986).

³⁸ 1954 Hague Convention *supra* note 17; CHECHI, *supra* note 30, at 11.

³⁹ United Nations Educ., Sci. & Cultural Org. (UNESCO), *Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO)*, in BASIC TEXTS 5 (2018), <http://unesdoc.unesco.org/images/0022/002269/226924e.pdf> [<https://perma.cc/QXX9-4V4E>].

⁴⁰ *See* 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 231.

⁴¹ Statutes of The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, U.N. Doc. CLT/CH/INS-2005/21, (Oct. 2005).

A. *Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954*

The 1954 Hague Convention was “the first [international] convention to deal solely with the protection of cultural property.”⁴² It focuses on protecting cultural property in times of war.⁴³ Indeed, the 1954 Hague Convention took place in the shadow of the devastating destruction of artifacts and cultural landmarks that had occurred during World War II.⁴⁴ Accordingly, the 1954 Hague Convention decrees how and when military operations are permitted to damage or move these cultural relics.⁴⁵ The 1954 Hague Convention protects the transport of cultural property out of warzones,⁴⁶ and obligates warring states to return protected cultural property to its original state upon cessation of hostilities.⁴⁷

In its preamble, the 1954 Hague Convention provides the reason it undertakes the protection of cultural heritage: “Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”⁴⁸ John H. Merryman, one of the pioneers of art and antiquities law,⁴⁹ suggests that this language supports a doctrine of “cultural internationalism.”⁵⁰ Under the 1954 Hague Convention, cultural property belongs to humanity as a whole, rather than any one state.⁵¹ Cultural internationalists argue that antiquities should remain where they are best protected and available for study and for the enjoyment of the public.⁵²

The 1954 Hague Convention contains no remedies apart from established practice for the restitution of cultural property not returned per its terms, nor does it address the issue of items taken outside a conflict. Writing in 1986, however, Merryman expressed his concern that the doctrine of cultural *nationalism* underlying the 1970 UNESCO Convention is replacing the

⁴² Merryman, *supra* note 37, at 836.

⁴³ *Id.* at 838.

⁴⁴ *Id.* at 836–38.

⁴⁵ *Id.* at 837–38.

⁴⁶ 1954 Hague Convention, *supra* note 17, 249 U.N.T.S. at 250–52. Interestingly, the convention includes an exception to its protections of cultural property in the case of “military necessity.” *Id.* at 244. For a discussion of military necessity, see Merryman, *supra* note 37, at 838–40.

⁴⁷ 1954 Hague Convention, *supra* note 17, 249 U.N.T.S. at 285.

⁴⁸ *Id.* at 240.

⁴⁹ Sharon Driscoll, *John Henry Merryman: Art Law Pioneer and Much-Loved Colleague*, STANFORD L. SCH. BLOG (Aug. 5, 2015), <https://law.stanford.edu/press/john-henry-merryman-art-law-pioneer-and-much-loved-colleague> [<https://perma.cc/5PNN-LYZ3>].

⁵⁰ Merryman, *supra* note 37, at 837.

⁵¹ *Id.* at 837.

⁵² *Id.* at 849.

doctrine of cultural *internationalism* implied in the language of the 1954 Hague Convention.⁵³

B. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The 1970 UNESCO Convention introduced guidelines intended to protect cultural heritage and encourage state parties to cooperate in the restitution of artwork and antiquities.⁵⁴ Its protections are much broader than the 1954 Hague Convention and suggests that the “true value [of cultural property] can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.”⁵⁵ In other words, the 1970 UNESCO Convention is concerned that an object loses considerable potential information—and therefore value—when taken out of its historical context to a foreign country.⁵⁶

The Convention operates to a large degree by imposing an obligation on state parties to establish services, remedies, and penalties for protecting cultural heritage.⁵⁷ The Convention, however, does not impose a duty on parties to establish means to ensure “the return of illegally removed antiquities.”⁵⁸ Article 7(b)(ii) suggests guidelines for the restitution of works obtained illegally,⁵⁹ but this Article has been “criticized because the obligation to return is conditional on the payment by the requesting State of ‘just compensation’ to the innocent buyer or to any person who has valid title to the object.”⁶⁰ Critics of the Convention complain that the “just compensation” obligation forces victims of theft to “re-buy” the property stolen from them, and stands as a significant obstacle to restitution for poor nations.⁶¹ These guidelines also circumvent common law standards, in particular *replevin*, which does not award defendants compensation for the return of property.⁶²

In effect, the Convention requires state parties to allocate government resources to enforce the Convention but does not provide details on its enforcement.⁶³ The Convention largely leaves

⁵³ *Id.* at 845–49.

⁵⁴ 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 234.

⁵⁵ *Id.* at 232.

⁵⁶ Merryman, *supra* note 37, at 843–44.

⁵⁷ 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 242–44.

⁵⁸ CHECHI, *supra* note 30, at 101–02.

⁵⁹ 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 240.

⁶⁰ CHECHI, *supra* note 30, at 102 (quoting 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 240).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See generally* 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. 231.

the enforcement procedures to the discretion of state parties. These limitations may be due to the reluctance of state parties to delegate too much power to UNESCO.⁶⁴ Not only that, but ratifying the 1970 UNESCO Convention requires states to restrict the import and export of art and antiquities from other state parties.⁶⁵ The reluctance of some parties is exemplified by the United States' legislation on UNESCO, which, as a result of haggling among interested parties, required ten years to enact.⁶⁶

Because of these limitations, UNESCO has been largely ineffective in resolving cultural heritage disputes and has instead resolved to promote settlement through cooperation.⁶⁷ As an alternative to the domestic requirements, UNESCO offers mediation services to state parties.⁶⁸ Although this has occasionally led to successful resolutions, the mediation service is restricted to hearing claims between sovereign states,⁶⁹ and does not apply retroactively to cultural property stolen before the 1970 UNESCO Convention.⁷⁰

The Convention's failure to address retroactivity left states with no claims if their cultural property was taken by colonizers or illicitly taken prior to 1970.⁷¹ In order to respond to these concerns, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) was created in 1978 to fill the gap created by the 1970 UNESCO Convention.⁷² The Committee assists UNESCO Member States to resolve requests to repatriate cultural heritage "lost as a result of colonial or foreign occupation or as a result of illicit appropriation."⁷³ This

⁶⁴ Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999, 1000 (2013) ("[States] are overly conservative when they create [international organizations] and have failed to take full advantage of IOs to achieve important cooperative gains. They are too scared of the monster.").

⁶⁵ 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. 236–44.

⁶⁶ Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613 (2012)); Merryman, *supra* note 37, at 845.

⁶⁷ CHECHI, *supra* note 30, at 39.

⁶⁸ UNESCO Res. 33, U.N. Doc. C/46 (B), at 3 (Aug. 25, 2005).

⁶⁹ UNESCO Rules of Procedure for Mediation and Conciliation 16/7 U.N. Doc. CLT-2010/CONF.203, at 2 (Oct. 2010).

⁷⁰ See Vienna Convention on the Law of Treaties, *supra* note 24, 1155 U.N.T.S. at 339.

⁷¹ See *Historical Background on the Intergovernmental Committee*, U.N. EDUC., SCI. & CULTURAL ORG. (UNESCO), <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/intergovernmental-committee/historical-background/> [<https://perma.cc/8GGV-FAQ7>].

⁷² UNESCO Gen. Conf. Res. 20 C4/7.6/5 (Nov. 28, 1978); see also *Historical Background on the Intergovernmental Committee*, *supra* note 71.

⁷³ Statutes of The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, U.N. Doc. CLT/CH/INS-2005/21, at art. 3 (Oct. 2005).

language allows the ICPRCP to hear claims arising out of requests for repatriation by states, regardless of the temporality of the theft. Like UNESCO, however, the state parties limit the ICPRCP's powers.⁷⁴ Therefore, it is confined to promoting *cooperation* in dispute settlements, rather than conflict through litigation. Further, to see cases, the ICPRCP must be a last resort; states must have already attempted and subsequently failed to resolve the issue through domestic bilateral negotiations.⁷⁵ As a consequence of these limitations, the ICPRCP has been utilized in only eight cases since its inception in 1978.⁷⁶

C. *Weaknesses of International Dispute Resolution*

International dispute resolution suffers from more than the weaknesses of individual organizations and treaties.⁷⁷ The aforementioned organizations, among others, offer their services as arbitrators in cultural heritage disputes, which sometimes take the form of extralegal arbitration and in other instances litigation in international courts.⁷⁸ The flaws of the international system, however, significantly weaken any international solution and, as a result, make arbitration and international litigation problematic.

International tribunals addressing cultural heritage disputes claim to offer objective adjudication of international problems,⁷⁹ and can do so, much like domestic courts, by applying “well-established rules, available well-reasoned opinions, and streamlined procedures.”⁸⁰ Nonetheless, international tribunals are only available in state-to-state disputes, and are therefore unavailable to other claimants, such as individual actors.⁸¹ Moreover, even in state-to-state disputes, tribunals are sensitive to issues of state sovereignty. In addition, all states must expressly consent to arbitration proceedings before international tribunals.⁸²

⁷⁴ See CHECHI, *supra* note 30, at 102.

⁷⁵ *Id.* at 103.

⁷⁶ *Id.* “The most debated case is still pending: . . . the repatriation of the Parthenon Marbles from the British Museum” in the United Kingdom to Greece. *Id.*; see also IBNA Newsroom, *UNESCO’s ICPRCP Examines Status of Parthenon Sculptures, in Paris*, INDEP. BALKAN NEWS AGENCY (June 1, 2018), <https://www.balkan.eu.com/unescos-icprcp-examines-status-of-parthenon-sculptures-in-paris/> [<https://perma.cc/ZL5C-5LW4>].

⁷⁷ See discussion *supra* Sections I.A., I.B.

⁷⁸ See discussion *supra* Sections I.A., I.B.

⁷⁹ The International Court of Justice has dealt with two cultural heritage disputes. CHECHI, *supra* note 30, at 147–48. Other international tribunals rarely concern themselves with interstate cultural heritage disputes, but have considered the protection of cultural property. *Id.* at 146–66.

⁸⁰ *Id.* at 166.

⁸¹ *Id.*

⁸² *Id.*

Accordingly, without consent, international tribunals cannot arbitrate state-to-state disputes.

Even with consent, international organizations “lack enforcement mechanisms.”⁸³ International courts rely on national judges and legal systems to enforce their decisions; thus, if domestic courts dislike the outcome of a case, they may refuse to enforce it.⁸⁴ Finally, international courts typically operate within specialized legal regimes with important individual goals that are not always consistent with the goals of cultural heritage restitution.⁸⁵ These disparities give claimants a choice not only between domestic legal systems and international systems, but also require a choice of *which* international tribunal to call upon for resolution.

The international system as a whole suffers from concerns of consent, enforcement, and bias.⁸⁶ Accordingly, any proposal for a new international body faces a difficult hurdle. The states likely to be involved in disputes must agree to its formation.⁸⁷ Rather than contend with these concerns, states like Turkey, which are wealthy enough to afford litigation, have opted instead to pursue remedies in domestic courts.⁸⁸

II. PATRIMONY: “SOURCE” NATIONS VERSUS “MARKET” NATIONS

Unfortunately, due to the flaws in the international system,⁸⁹ organizations such as UNESCO and the ICPRCP can pursue their goals only by relying on member states.⁹⁰ Fortunately, many states do have their own systems of restitution. Some of these align perfectly with international treaties while others are stricter and more independent. Often, the difference depends on whether a state is a “source” nation or a “market” nation. Source

⁸³ *Id.*

⁸⁴ *See, e.g.,* *Medellin v. Texas*, 552 U.S. 491, 498 (2008) (holding that a decision by the International Court of Justice does not constitute binding federal law that preempts state law).

⁸⁵ *See* CHECHI, *supra* note 30, at 167.

⁸⁶ *See* JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 478–83 (8th ed. 2012).

⁸⁷ For example, International Cultural Property Trusts (ICPT) were proposed in 2007 by Marion Forsyth. An ICPT would be an international body that declares itself the owner of all pieces of cultural heritage and antiquities, and then fairly delegates what antiquities go to which nation. *See* Marion P. Forsyth, *International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation*, 8 CHI. J. INT’L L. 197, 204–06 (2007). Such a proposal requires the cooperation of many countries, who must strike a careful balance between surrendering authority and granting power. Guzman, *supra* note 64, at 1000.

⁸⁸ *See supra* notes 4–10 and accompanying text.

⁸⁹ *See supra* Section I.C.

⁹⁰ *See supra* notes 63–66 and accompanying text.

nations are states which have a deep cultural history and thereby produce a supply of artifacts.⁹¹ Market nations are those states that collect the cultural heritage of others for personal, commercial, or academic use.⁹²

Market nations include “France, Germany, Japan, the Scandinavian nations, Switzerland and the United States.”⁹³ The United States and the United Kingdom boast large art markets operated by auction houses, museums, and networks of collectors and dealers.⁹⁴ States with vast, vibrant art markets regard “free trade as the only means for the flourishing of the exchange of artworks and of an international market.”⁹⁵ Accordingly, market nations oppose strict restitution laws in order to protect their art dealers, collectors, and auctioneers, and to encourage the growth of their art markets.⁹⁶

Source nations favor restitution of cultural property and oppose its export.⁹⁷ These include states such as “Mexico, Egypt, Greece and India,” which “are rich in cultural artifacts” that have long since been uncovered and spread throughout the world.⁹⁸ The state parties of the 1970 UNESCO Convention are overwhelmingly source nations which enjoy the increased protection of their cultural heritage.⁹⁹ These and other source nations employ export and patrimony laws in order to ensure the retention and repatriation of artifacts and antiquities.¹⁰⁰

Patrimony and export laws are the shields by which states protect their own cultural heritage.¹⁰¹ The difference between the two is simple, yet highly controversial in restitution cases.¹⁰² Export laws vest no ownership right in cultural property, but instead prohibit certain objects of cultural heritage from crossing state borders.¹⁰³ Patrimony laws, on the other hand, vest ownership of certain objects under certain conditions in the government of the home state, thereby claiming such objects as part of the nation’s

⁹¹ Merryman, *supra* note 37, at 832.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Artsy Editors, *The 15 Most Influential Art World Cities of 2015*, ARTSY (Dec. 15, 2015, 11:13 PM), <https://www.artsy.net/article/artsy-editorial-contemporary-art-s-most-influential-cities> [<https://perma.cc/TP8S-E2D6>].

⁹⁵ CHECHI, *supra* note 30, at 40.

⁹⁶ *Id.*

⁹⁷ Merryman, *supra* note 37, at 832; CHECHI, *supra* note 30, at 40.

⁹⁸ Merryman, *supra* note 37, at 832.

⁹⁹ See *id.* at 843.

¹⁰⁰ See John Henry Merryman, “Protection” of the Cultural “Heritage”?, 38 AM. J. COMP. L. 513, 521 (1990).

¹⁰¹ See CHECHI, *supra* note 30, at 139.

¹⁰² See, e.g., Christie’s Opposition Brief, *supra* note 7, at 19 (“This testimony makes the 1906 decree appear to have no more effect than an export law, in operation if not in its text.”).

¹⁰³ See CHECHI, *supra* note 30, at 66.

cultural heritage.¹⁰⁴ Both laws intend to deter the illegal excavation and removal of antiquities located within a national territory.¹⁰⁵ Consequently, they also seek to recover previously looted material “from subsequent purchasers and to punish the [thieves].”¹⁰⁶

Foreign courts often do not enforce domestic export laws that prohibit transfer of cultural property over state lines.¹⁰⁷ U.S. courts have had difficulty distinguishing export laws from patrimony laws. In fact, “[t]he formal distinction between patrimony laws and export regulations is critical because only the former category enjoys extraterritorial effect.”¹⁰⁸ Furthermore, the enforcement of patrimony laws is not a be-all-end-all solution to the restitution of cultural heritage. The universal and retroactive recognition of foreign patrimony laws, while potentially valuable, can be used as a sword by source nations “to acquire new objects into the national patrimony rather than protect existing but undiscovered objects within the territory.”¹⁰⁹

Additionally, U.S. courts have long recognized foreign patrimony laws, but only subject to the rights of good faith purchasers.¹¹⁰ The current leading case guiding U.S. interpretation of foreign patrimony laws is *United States v. McClain*.¹¹¹ The resulting *McClain* doctrine is used to establish valid ownership of cultural property.¹¹² In order to prove that an object was stolen under the *McClain* doctrine, a foreign country must prove that:

- (1) the object was discovered within its current borders; (2) the pertinent legislation unequivocally vests ownership of such object in the State, even without physical possession, and that it was in force when the object was removed from that country; and (3) the foreign law does not violate the US conception of due process.¹¹³

As evinced by the *McClain* doctrine, foreign states must carefully construct their patrimony laws if they expect to recover stolen

¹⁰⁴ *National Ownership Laws Defined*, 1 ART, ARTIFACT, ARCHITECTURE, & MUSEUM LAW § 6122 (2017).

¹⁰⁵ CHECHI, *supra* note 30, at 66.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 92. This, despite the fact that the UNESCO convention “obliges the States Parties, consistent with the laws of each State, ‘to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable.’” *Id.* (quoting 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 244).

¹⁰⁸ *Id.* at 67.

¹⁰⁹ Luis Li & Amelia L.B. Sargent, *The Getty Bronze and the Limits of Restitution*, 20 CHAP. L. REV. 25, 44, 50 (2017).

¹¹⁰ *Cf.* Kaye, *supra* note 29, at 80–81.

¹¹¹ *United States v. McClain*, 545 F.2d 988, 1000–02 (5th Cir. 1977). *McClain* was an appeal from a conviction under the National Stolen Property Act for the theft of Mexican antiquities. *Id.* at 991–92.

¹¹² CHECHI, *supra* note 30, at 69.

¹¹³ CHECHI, *supra* note 30, at 69 (citing *McClain*, 545 F.2d at 1001–02).

objects.¹¹⁴ In *Government of Peru v. Johnson*, the Central District of California found that Peru's ownership laws were unenforceable because they were not consistently followed and were therefore ambiguous.¹¹⁵ If courts find ownership laws invalid based on "ambiguity," then how can anyone find them valid? The real issue should not be "does this country own this," but "was it stolen?" Proving ownership is an unnecessary hurdle when the main burden should be proving that the object was or was not stolen.

III. CURRENT DOMESTIC PROTECTIONS FOR LOOTED ANTIQUITIES

In United States courts, a foreign country must prove ownership of an allegedly stolen object through patrimony laws in order to succeed in a civil claim of replevin or conversion.¹¹⁶ Civil claims, however, are not the only methods by which foreign states can recover stolen cultural property. As a signatory of the 1970 UNESCO Convention, the United States must cooperate with other state parties in the protection and restitution of cultural property.¹¹⁷

These obligations are complicated because the United States is the second largest art market in the world.¹¹⁸ Accordingly, the United States and other market nations usually oppose strict restitution laws in order to protect the nation's art dealers, collectors, and auctioneers.¹¹⁹ Since UNESCO merely provides guidelines to its member states,¹²⁰ few of the Convention's articles have been codified in U.S. law.¹²¹ Several reasons limit UNESCO's influence in the United States. These include: inadequate federal legislation governing the protection of foreign cultural property, the failure of federal courts to consistently validate foreign patrimony laws, and the common law protections for good faith purchasers such as statutes of limitation.

These legal reasons explain why the United States provides little help for restitution of stolen cultural property. The five pieces

¹¹⁴ See *id.*

¹¹⁵ *Gov't of Peru v. Johnson*, 720 F. Supp. 810, 812–15 (C.D. Cal. 1989), *aff'd sub nom. Gov't of Peru v. Wendt*, No. 90-55521, 1991 WL 80599 (9th Cir. May 15, 1991). Christie's made this argument in its brief in opposition to Turkey's motion for a preliminary injunction. Christie's Opposition Brief, *supra* note 7, at 19–20.

¹¹⁶ See discussion *infra* Section III.B.

¹¹⁷ See 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 242; see also discussion *supra* Section I.B.

¹¹⁸ 2017 Summary—*The Art Market Enters a New Phase*, ARTPRICE (Mar. 2018), <https://www.artprice.com/artprice-reports/the-art-market-in-2017/2017-summary-the-art-market-enters-a-new-phase/> [<https://perma.cc/TF66-NPDZ>].

¹¹⁹ See CHECHI, *supra* note 30, at 40.

¹²⁰ See discussion *supra* Section I.B.

¹²¹ CHECHI, *supra* note 30, at 70–71.

of legislation addressed below, along with various common law remedies, constitute the help U.S. law provides; however, there is presently no statutory civil remedy available to foreign states. Thus, nations such as Turkey remain with the common law remedies that have developed broadly to solve disputes regarding stolen property. These remedies are inadequate because they do not address the specialized interests pertinent to international cultural heritage.

A. *Federal Law*

The National Stolen Property Act (NSPA) of 1934 stands as the earliest federal legislation that addresses restitution of stolen art.¹²² The NSPA provides for possible criminal “prosecution of those involved in the importing, exporting, buying or selling of cultural artifacts that have been illegally obtained.”¹²³ It does so by recognizing foreign nation’s patrimony laws, but is only enforceable where the law vests ownership of the artifacts in the country’s government and not in individual citizens.¹²⁴ As a criminal statute, the NSPA also requires a *mens rea* finding that the possessor maintained control of the illegal property “knowing the same to have been stolen, unlawfully converted, or taken.”¹²⁵

The NSPA has led to only three successful convictions.¹²⁶ In one case, *United States v. Schultz*,¹²⁷ “the Court interpreted the relevant Egyptian Law of 1983 as an ownership law and concluded that the NSPA applied to objects stolen in violation of foreign patrimony laws.”¹²⁸ *Schultz* and the NSPA are therefore notable for opening the door to the judicial recognition of foreign patrimony laws independent of explicit federal recognition of those laws.¹²⁹

This law would be effective for a nation like Turkey if it could prove the “Stargazer—an iconic work of art from the [third] millennium BC”—was stolen.¹³⁰ Even to this day, however, the art world is filled with secrets, handshake transactions, and backroom deals, and therefore evidence of theft is lacking.¹³¹ Furthermore, as a criminal statute—as opposed to a civil

¹²² National Stolen Property Act, ch. 333, 48 Stat. 794 (1934) (codified as amended at 18 U.S.C. §§ 2314, 2315 (2012 & Supp. I 2013)).

¹²³ Petr, *supra* note 27, at 505.

¹²⁴ *Id.*

¹²⁵ 18 U.S.C. § 2315 (2012 & Supp. I 2013).

¹²⁶ Petr, *supra* note 27, at 506.

¹²⁷ *United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff’d* 333 F.3d 393 (2d Cir. 2003).

¹²⁸ CHECHI, *supra* note 30, at 71.

¹²⁹ *Id.*

¹³⁰ See *supra* note 1 and accompanying text.

¹³¹ Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385–87 (1995).

remedy—the NSPA presents little opportunity for foreign nations to bring their claims to the United States on their own terms. In sum, the NSPA offers little aid to foreign nations whose stolen property has long since left the hands of thieves and entered the possession of good faith purchasers. Nonetheless, successful prosecutions such as *Schultz* offer evidence that courts should recognize foreign patrimony laws.

More narrowly, the Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals prohibits the importation of “pre-Columbian monumental or architectural sculpture[s] or mural[s].”¹³² More specifically, the statute requires any pre-Columbian artifact entering the United States to bear an export certificate from the country of origin, which includes a provision for the expenses of the artifact’s return.¹³³

The limited scope of this law means that it affects only cultural property that originated in the Americas, and only where North and South American nations have already enacted export laws. An expansion of this law could provide a blanket import restriction that respects any and all foreign nations export laws. However, such an act would be far too broad to be practical, and would do nothing to assist in the restitution of property that has already entered the United States.

The United States protects its own cultural property through the Archaeological Resources Protection Act (ARPA). ARPA is a criminal statute prohibiting the excavation and removal of archaeological resources on Federal and Indian lands that are at least one-hundred-years-old.¹³⁴ To that end, the law is close to—but not exactly—a U.S. patrimony law. ARPA does not vest ownership of the country’s archaeological resources in the United States by default, but merely criminalizes the unauthorized removal of them.¹³⁵ In fact, ARPA allows any person to apply for a permit to legally excavate federal or Indian lands, provided that “the applicant is qualified,” the activity “is not inconsistent with any other management plan” for that land, and “the activity is undertaken for the purpose of furthering archaeological knowledge in the public interest.”¹³⁶

¹³² Act of Oct. 27, 1972, Pub. L. No. 92-587, Title II, 86 Stat. 1297–98 (codified as amended at 19 U.S.C. §§ 2091–2095 (2012)).

¹³³ 19 U.S.C. § 2092 (2012).

¹³⁴ Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa-470mm (2012 & Supp. II 2014)). On the other hand, despite the plain language purpose of ARPA in protecting the cultural resources of the United States, the law has been applied several times to stolen cultural property of foreign nations. CHECHI, *supra* note 30, at 71.

¹³⁵ *Id.*

¹³⁶ 16 U.S.C. § 470cc (2012 & Supp. II 2014).

Interestingly, anything excavated under an ARPA permit must “remain the property of the United States.”¹³⁷ Thus, despite the fact that it is not a patrimony law, ARPA *does* vest the United States with ownership in *legally* removed resources from federal lands, and can be used to repatriate antiquities to the United States from foreign nations.¹³⁸ Enforcement of ARPA shows the United States’ interest in protecting its own antiquities, evidence of the United States unique position as both an important market nation and source nation.¹³⁹

The Convention on Cultural Property Implementation Act (CCPIA) was passed in 1983 as a direct implementation of the 1970 UNESCO Convention.¹⁴⁰ Its primary purpose is “to exercise import controls over cultural property” and help other parties to the 1970 UNESCO convention recover their cultural property.¹⁴¹ Accordingly, the CCPIA is an import law, not a criminal or civil remedy, and is administered by U.S. customs agencies only in very limited circumstances. In fact, the process by which an import ban is implemented is fairly tedious. First, a foreign state must request restrictions on the import of its “archaeological or ethnological material.”¹⁴² Then, the Cultural Property Advisory Committee, a branch of the U.S. Department of State, must consider several factors regarding the property’s qualifications as “cultural property” before making a recommendation to the State Department.¹⁴³ If the State Department approves, then it implements a bilateral agreement with the requesting nation to prohibit the importation of any goods that have been illegally exported.¹⁴⁴

Once a ban is in place, U.S. customs agents inspect and flag any cultural property from the foreign nation for seizure and forfeiture.¹⁴⁵ The possessor then must prove valid ownership of the property. “If the possessor loses [their] case, the Government will

¹³⁷ *Id.*

¹³⁸ See, e.g., Maddy Hayden, *Mule Creek Man Says He Inherited Native Shield*, ALBUQUERQUE J. (Jan. 27, 2019, 12:05AM), <https://www.abqjournal.com/1273393/mule-creek-man-says-he-inherited-native-shield.html> [<https://perma.cc/6KWF-KR22>].

¹³⁹ Merryman, *supra* note 37, at 832 n.4 (“[T]here is a strong market abroad for works of North American Indian cultures, even though Canada and the United States are thought of primarily as market nations.”).

¹⁴⁰ Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613 (2012)); CHECHI, *supra* note 30, at 71.

¹⁴¹ CHECHI, *supra* note 30, at 71–72.

¹⁴² 19 U.S.C. § 2602 (2012).

¹⁴³ *Id.* §§ 2602, 2605.

¹⁴⁴ *Id.* § 2602.

¹⁴⁵ *Id.* § 2613.

return the property to [its] country of origin,” provided that the country pays the expenses associated with the property’s return.¹⁴⁶

Despite its drawbacks, the CCPIA is currently the United States’ most effective tool for cooperating with foreign states in the prevention and restitution of stolen art and antiquities. Like the NSPA and the Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, the CCPIA provides little (if any) support to foreign nations seeking the recovery of stolen cultural property that entered the United States before its implementation.

While not entirely related to the recovery of looted antiquities, an examination of the government’s treatment of art stolen by the Nazis influences the government’s point-of-view on stolen art. It serves as a catalyst for resolving a broader area of culture property disputes as “it is in the context of the Holocaust-related disputes that innovative solutions on how to develop appropriate norms and processes to resolve clashes of interests have been discussed.”¹⁴⁷ Innovative solutions are necessary to address the conflicting factors in the Holocaust-related cases. These include the human rights violations committed by the Nazis in misappropriating these works, the personal emotions with which plaintiffs approach their claims, and the good faith by which many of the possessors of the works acquired them.¹⁴⁸

The Holocaust Expropriated Art Recovery Act of 2016 (HEARA) was signed in December 2016, and allows civil claims or causes of action for the recovery of artwork or certain other property lost between January 1, 1933, and December 31, 1945, because of Nazi persecution to be commenced within six years after the claimant’s actual discovery of: “(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.”¹⁴⁹ HEARA “temporarily replaces [the various] state statutes of limitations” for restitution in the United States “with a uniform national six-year statute of limitations,” granting potential claimants a longer period to

¹⁴⁶ CHECHI, *supra* note 30, at 72.

¹⁴⁷ *Id.* at 135.

¹⁴⁸ See e.g., *Altmann v. Republic of Austria*, 142 F. Supp.2d 1187, 1192–96 (2001) (outlining the complex history behind a family’s stolen Klimt artworks).; see also Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 160, 215–16 (2007).

¹⁴⁹ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (codified as amended at 22 U.S.C. § 1621 note (2012 & Supp. IV 2016)).

investigate whether an artwork formerly belonged to the claimant, and to determine if they can establish ownership.¹⁵⁰

HEARA was influenced in some degree by the adoption of the Washington Principles on Nazi-Confiscated Art in 1998.¹⁵¹ “With the adoption of the Washington Principles . . . [forty-four] States formally embraced the idea that Holocaust-related claims should be settled on the merits of each case rather than on the basis of technical defenses.”¹⁵² To be sure, Holocaust-related claims bear a special sensitivity both internationally and domestically. Nonetheless, there is no reason other nations and peoples cannot learn from and benefit from the international treatment of the Nazi-stolen art and antiquities.

B. Common Law

No federal statutes provide an avenue for the restitution of foreign cultural heritage that has been in the United States for decades. This leaves foreign states with only common law remedies for such cases such as replevin and conversion. In *Turkey v. Christie’s, Inc.*, Turkey sued for both replevin and conversion.¹⁵³ For this reason and considering New York’s key position as the hub of the U.S. art market, this note will use New York’s common law as the exemplary model case for the whole country, with exceptions noted when relevant.

“Replevin is a [common law] remedy to recover possession of personal property and to recover damages incurred as a result of a defendant’s illegal detention of the property.”¹⁵⁴ In most states, the elements of replevin require the plaintiff to prove that: (1) the personal property in question is “a specific, identifiable item”; (2) the plaintiff has a right or title to the property; (3) the property was unlawfully detained; and (4) “the defendant wrongfully holds possession” of the property.¹⁵⁵

In New York, the settled law requires a plaintiff to “show (1) that it has a superior possessory right to the chattel, and (2) that it made a demand for possession of the chattel from the defendant.”¹⁵⁶ Replevin has been invoked several times in New

¹⁵⁰ Jason Barnes, Note, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT’L L. 593, 595 (2018).

¹⁵¹ CHECHI, *supra* note 30, at 45.

¹⁵² *Id.*

¹⁵³ Turkey Complaint, *supra* note 4, at 5–7.

¹⁵⁴ 77 C.J.S. *Replevin* § 3 (2018).

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., Press Access LLC v. 1 800 Postcards, Inc., No. 11 Civ.1905(KBF), 2012 WL 4857547, at *1 (S.D.N.Y. Oct. 9, 2012).

York in actions to recover stolen art.¹⁵⁷ Foreign nations, as plaintiffs, “must prove that the Government . . . was the legal owner at the time of [the objects’] removal from that country. . . . [which] depends upon the [country’s] laws.”¹⁵⁸ As in *Turkey v. Christie’s*, proving ownership becomes a significant hurdle to overcome, especially when the property at issue was removed from the foreign state before the 1970 UNESCO Convention, or worse, before the state established patrimony laws.¹⁵⁹

Despite these difficulties, plaintiffs have used replevin in several cases to successfully retrieve stolen art or antiquities. One such case is *Bakalar v. Vavra*, in which replevin was used by the heirs of a Jewish collector to seek the return of artwork stolen by the Nazis during World War II from the current possessor.¹⁶⁰ There, the United States Court of Appeals for the Second Circuit held that “under New York law . . . ‘absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods.’”¹⁶¹ The court also noted that “New York law places the burden on . . . the current possessor, to prove that the [work] was not stolen.”¹⁶²

After proving ownership, foreign states still bear the burden of showing that a good faith purchaser does not have a valid title.¹⁶³ For example, in *The Republic of Croatia and Others v. The Trustee of the Marquess of Northampton*, Lebanon, Croatia, and Hungary brought suit in New York seeking restitution of Roman silver in the possession of Lord Northampton.¹⁶⁴ Although the states established their right to possession of the artifacts,¹⁶⁵ they could not provide more than speculative evidence that the goods were illegally removed from their original location.¹⁶⁶ Thus the case was dismissed on the presumption that Lord Northampton held valid title.¹⁶⁷ *Croatia* is evidence that, even when their claims have

¹⁵⁷ See, e.g., *Bakalar v. Vavra*, 619 F.3d 136, 139 (2d Cir. 2010); *Kozar v. Christie’s, Inc.*, No. 30029/10, 2011 WL 1886585, at *6 (N.Y. Sup. Ct. May 18, 2011).

¹⁵⁸ *Gov’t of Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989).

¹⁵⁹ See discussion *supra* Section I.B.

¹⁶⁰ *Bakalar*, 619 F.3d at 137–39.

¹⁶¹ *Id.* at 141 (quoting Michelle I. Turner, Note, *The Innocent Buyer of Art Looted During World War II*, 32 VAND. J. TRANSNAT’L L. 1511, 1534 (1999)).

¹⁶² *Id.* at 147. *Accord* *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991) (“[T]he burden of proving that the painting was not stolen properly rests with the [possessor].”).

¹⁶³ *Republic of Croatia v. Tr. of Marquess of Northampton 1987 Settle.*, 610 N.Y.S.2d 263, 264–65 (App. Div. 1994).

¹⁶⁴ *Id.* at 265; CHECHI, *supra* note 30, at 142.

¹⁶⁵ *Republic of Croatia*, 610 N.Y.S.2d at 265.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 264.

merit, foreign nations face serious obstacles in their attempts to succeed on replevin claims.

Conversion is a common law remedy similar to replevin, except that in a conversion claim the plaintiff must prove that the defendant not only possesses the property unlawfully, but also that properties under defendant's control suffered "alteration of their condition, or the exclusion of the owner's rights."¹⁶⁸ Thus, conversion requires the plaintiff to prove that the defendant's unlawful possession injured the property in some way. Like replevin, conversion has appeared in art-related cases¹⁶⁹ and has many of the same considerations, requiring proof of ownership and evidence that the defendant took the owner's property without permission.¹⁷⁰ Conversion is often argued in addition to or as an alternative to replevin.¹⁷¹

Despite the success of private owners receiving restitution of stolen works, foreign countries have not enjoyed the same luck with replevin claims. Turkey itself has sought restitution of cultural heritage at least three times under actions for replevin or conversion.¹⁷² As the party relying on foreign statutes, Turkey bears the burden of proof.¹⁷³ It must show that its laws awarded title of antiquities to the state at the time of their removal.¹⁷⁴ Turkey has yet to prove this, however, since besides the current litigation, two prior cases resulted in a settlement before a court could render a ruling on the merits.¹⁷⁵

C. *Limitations Protecting Current Owners*

Once a work has been stolen, any subsequent possessor thereof faces the risk of a restitution claim. This is because under the traditional New York common law of property, a thief can never convey good title, regardless of the buyer's lack of knowledge of the

¹⁶⁸ 23 N.Y. JUR. 2D *Conversion, Etc.* § 18 (2018).

¹⁶⁹ See, e.g., *Komolov v. Segal*, 957 N.Y.S.2d 99, 100–01 (App. Div. 2012) (allegations of defendants' removal of two paintings from plaintiff's office sufficient to state a conversion claim).

¹⁷⁰ Compare 23 N.Y. JUR. 2D *Conversion, Etc.* § 18 (2018) with 77 C.J.S. *Replevin* § 3 (2018).

¹⁷¹ See, e.g., *Turkey Complaint*, *supra* note 4, at 5, 7; *Republic of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44, 45 (S.D.N.Y. 1990).

¹⁷² See *Republic of Turkey v. OKS Partners*, 797 F. Supp. 64, 66 (D. Mass. 1992); *Metro. Museum of Art*, 762 F. Supp. at 45; see also *Turkey Complaint*, *supra* note 4, at 5, 7.

¹⁷³ *Biocon Ltd. v. Abraxis Bioscience, Inc.*, No. 16-CIV-6894 (RMB), 2016 WL 5817002, at *3 (S.D.N.Y. Sept. 26, 2016).

¹⁷⁴ See *Govt. of Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal. 1989).

¹⁷⁵ *Christie's Opposition Brief*, *supra* note 7, at 17–18.

seller's right in the property.¹⁷⁶ Art is no exception to this rule.¹⁷⁷ On the other hand, good faith purchasers are not defenseless. Purchasers may secure good title, if they can show that the true owner failed to exercise reasonable diligence in the pursuit of the stolen property.¹⁷⁸

Possessors of cultural property may be unaware that they hold illegally-obtained property. The United States has developed a number of protections for these good faith owners.¹⁷⁹ Laches, for example, is a doctrine that awards diligent owners, but punishes those that have neglected to discover the location of their stolen property.¹⁸⁰ Laches and statutes of limitation protect current owners against "stale claims" and "balanc[e] the rights of theft victims against the interests of good faith purchasers."¹⁸¹

In the United States, these protections vary from state to state. There are three main types of statutes of limitations that apply to stolen property. The most widespread can be considered a "due diligence" limitation.¹⁸² In this case, a six-year statute of limitations accrues starting at the moment the true owner should have discovered the current location and owner of the stolen property had they exercised reasonable diligence.¹⁸³ In California, the six-year statute of limitations accrues on the moment of "actual discovery."¹⁸⁴ New York follows a "demand and refusal rule," wherein the statute of limitations requires suit no more than three years after the true owner demands the return of the object and the possessor refuses to relinquish it.¹⁸⁵

For comparison, some European nations have even stricter laws protecting good faith purchasers and the security of their transactions.¹⁸⁶ France, Germany, and Switzerland, for example, have statutes that begin at the time of the theft, and "allow *bona fide* purchasers to acquire good title once the applicable limitation period has run . . . even if the seller did not have such a title."¹⁸⁷ Italy foregoes the statute of limitations entirely; "title passes immediately

¹⁷⁶ *Kozar v. Christie's, Inc.*, No. 30029/10, 2011 WL 1886585, at *6 (N.Y. Sup. Ct. May 18, 2011).

¹⁷⁷ *Id.*

¹⁷⁸ *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991).

¹⁷⁹ Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2449 (1994).

¹⁸⁰ *Id.* at 2449–50.

¹⁸¹ CHECHI, *supra* note 30, at 89.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ CAL. CIV. PROC. CODE § 338(3)(A) (2019).

¹⁸⁵ CHECHI, *supra* note 30, at 89.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

upon purchase with a valid contract.”¹⁸⁸ Strict interpretation of the statute of limitations protects art collectors and incentivizes true owners to exercise due diligence once a theft is discovered; but too strict a limitation destroys good claims and offers no relief for thefts that occurred long ago.

IV. A SMALL STEP FORWARD: *IRAN V. BARAKAT*

As previously noted, UNESCO and the ICPRCP are two of the major international organizations monitoring the disposition of cultural property.¹⁸⁹ Although both provide mediation services to member states, their services only apply to states, and are of no use against private individuals.¹⁹⁰ Further, both organizations suffer from a reliance on domestic enforcement.¹⁹¹ It follows then, that many states have resorted to domestic litigation, rather than international arbitration. The obstacles foreign states face in domestic court systems vary from state to state depending on each state’s laws and traditions. Switzerland, for example, hosts major art markets,¹⁹² and has some of the strongest protections for good faith purchasers; perhaps explaining why “Switzerland has become a favorite stopping point along the art trade route.”¹⁹³

Similarly, the United Kingdom is home to an impressive art market and many museums.¹⁹⁴ Despite its controversies, however, the United Kingdom recently moved towards broader recognition of foreign patrimony laws.¹⁹⁵ In *Iran v. Barakat*, Iran successfully argued a conversion claim against the London-based Barakat Gallery in the English Court of Appeal.¹⁹⁶ In this case, Iran sued the Barakat Gallery to recover a collection of 5,000-year-old antiquities.¹⁹⁷ Iran claimed the antiquities were illegally taken from excavations in Iran, while Barakat argued that it legally “purchased

¹⁸⁸ *Id.*

¹⁸⁹ See discussion *supra* Section I.B.

¹⁹⁰ See *supra* note 64 and accompanying text.

¹⁹¹ See *supra* note 63–66 and accompanying text.

¹⁹² See Artsy Editors, *supra* note 94.

¹⁹³ Borodkin, *supra* note 131, at 387.

¹⁹⁴ Artsy Editors, *supra* note 94.

¹⁹⁵ For example, the United Kingdom is the current home of the Elgin Marbles, subject of one of the most famous and controversial cases of restitution. *Parthenon Sculptures*, BRIT. MUSEUM, http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures.aspx [https://perma.cc/R6PP-EF2Q]. Indeed, the question of whether the Elgin Marbles ought to be returned to Greece remains hotly contested. See generally John Henry Merryman, *Whither the Elgin Marbles?*, in *IMPERIALISM, ART AND RESTITUTION* 98, 98 (2006) (discussing the continuing controversy over the Elgin Marbles).

¹⁹⁶ *Gov’t of the Islamic Rep. of Iran v. The Barakat Galleries Ltd.* [2007] EWCA (Civ) 1374 [1], [5] (Eng.); see discussion *infra* Section III.B.

¹⁹⁷ *Id.* at [3].

[the property] in France, Germany, and Switzerland.”¹⁹⁸ The court required Iran to prove that it had title to the antiquities, and that Barakat had wrongfully interfered with that title.¹⁹⁹ In establishing title, Iran relied on its own domestic patrimony laws.²⁰⁰ In its groundbreaking decision, the English Court of Appeal applied Iran’s patrimony laws despite Iran’s lack of evidence of actual possession, and in conclusion decided those patrimony laws outweighed any legal title acquired by Barakat.²⁰¹ In the *Barakat* case, unlike similar cases in the United States,²⁰² the English Court of Appeals expanded the recognition of foreign patrimony laws, and recognized a balance of interests between good faith purchasers and source nations.

V. AN ACT RECOGNIZING FOREIGN PATRIMONY LAWS

A. *Foreign States Prefer Domestic Litigation*

As established, the most effective, oft-utilized method of antiquities-related dispute resolution is domestic litigation.²⁰³ No international body currently offers binding dispute resolution.²⁰⁴ The creation of a new body suffers from problems of state consent and uniformity.²⁰⁵ As a result, the vast majority of cultural heritage disputes settle in legal proceedings before domestic courts.²⁰⁶ To be sure, domestic litigation presents its own collection of drawbacks. In the art world, for example, “litigation does not provide the secrecy and the confidentiality that parties to art-related disputes need to protect their relationships.”²⁰⁷

Nonetheless, there are benefits to litigation not found in other dispute resolution methods. First, unlike arbitration, at the end of litigation a definitive and enforceable judgment on the issue applies.²⁰⁸ Second, the decisions of domestic courts impact future disputes. They help to “establish legal precedents,” clarify the limitations of the law, and thereby “deter further wrongs.”²⁰⁹ Finally, domestic courts can have a law-making effect, either “supplementing—or overcoming the failure to act of—legislators.”²¹⁰

¹⁹⁸ *Id.* at [4]–[5].

¹⁹⁹ *Id.* at [6].

²⁰⁰ *Id.* at [7].

²⁰¹ *See id.* at [149]; *see also* CHECHI, *supra* note 30, at 94.

²⁰² *See* discussion *supra* Section III.B.

²⁰³ *See supra* Part II.

²⁰⁴ *See supra* notes 66–70 and accompanying text.

²⁰⁵ *See supra* note 87.

²⁰⁶ CHECHI, *supra* note 30, at 138.

²⁰⁷ CHECHI, *supra* note 30, at 143.

²⁰⁸ *Id.* at 139.

²⁰⁹ *Id.*

²¹⁰ CHECHI, *supra* note 30, at 139–40.

Decisions by domestic judges can fill in blanks and aid in interpreting both domestic *and* international obligations; in fact, “the judgments of domestic courts are of considerable practical importance for determining what is the correct rule of international law.”²¹¹ A domestic solution in the United States is a solution preferred by domestic and international parties, because it recognizes interests on all sides of the issue: the art market and the foreign state, the cultural nationalist and cultural internationalist.²¹² Cultural internationalists and nationalists agree that “an open and licit trade in cultural property” could benefit humanity.²¹³ Yet illicitly obtained goods, even those long since de-contextualized, will always be an issue.²¹⁴ The domestic litigation solution attempts to find a middle ground, on the one hand easing the burden of proof of ownership, while on the other hand providing protections for art dealers and collectors who purchased in good faith and can support their rightful claim.

B. Federal Legislation Recognizing Patrimony Laws in Civil Suits

Federal legislation has helped to secure the restitution of at least some cultural property.²¹⁵ Nevertheless, claimants must meet the demands required by statute or common law. Typically, the largest obstacle parties face when filing claims for restitution is “the burden of providing title.”²¹⁶ Notably, HEARA lightened that burden for stolen Holocaust art by narrowly focusing on works stolen between 1933 and 1945.²¹⁷ In addition, HEARA extended the statute of limitations to allow claimants more time to prove title.²¹⁸

Unlike Holocaust art, however, foreign states seeking the return of stolen works must use common law remedies, and must rely on patrimony laws and export statutes as the basis for their claim.²¹⁹ To make matters more difficult, states which seek the restitution of antiquities excavated in secret from unknown archaeological sites must prove that their national patrimony laws were in place at the time of the theft.²²⁰ Further, they must show

²¹¹ *Id.* at 140.

²¹² Merryman, *supra* note 37, at 852–53.

²¹³ *Id.* at 847.

²¹⁴ *See id.*

²¹⁵ *See* discussion *supra* Section III.A.

²¹⁶ CHECHI, *supra* note 30, at 140.

²¹⁷ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (codified as amended at 22 U.S.C. § 1621 note (2012 & Supp. IV 2016)).

²¹⁸ *Id.*

²¹⁹ *See supra* notes 101–106 and accompanying text.

²²⁰ *McClain*, 545 F.2d at 1003.

that their patrimony laws are more than mere export laws and thus have extraterritorial effect,²²¹ and finally, they must deal with good faith purchaser defenses.²²² These challenges in U.S. domestic courts have a particular impact on foreign nations hoping to establish ownership of antiquities exported prior to 1970.

Rather than relying on common law remedies, foreign states need a civil remedy at the federal level to recover stolen art. The United States has already taken steps to facilitate restitution in certain claims, such as art stolen during the Holocaust.²²³ Like HEARA, this remedy could continue to protect good faith purchasers through statutes of limitations, but might extend the time of that statute to account for theft that took place long before developing countries had the means to pursue the thieves.

Congress should pass a law for the recovery of stolen antiquities, creating a civil cause of action for UNESCO member states seeking restitution of art or antiquities illegally removed from the country prior to the 1970 UNESCO Convention. Such a law would reinforce the United States' obligations to other state parties under UNESCO.²²⁴ The new remedy should require the UNESCO state to (1) prove ownership, (2) prove theft, and (3) prove that it requested for the return of the property and that the request was refused. Taking a cue from *Iran v. Barakat*, the first factor ought to include a recommendation that courts defer to foreign patrimony laws,²²⁵ regardless of the age or amount of practice, unless that law was not in effect when the alleged theft took place. The second factor, then, must counterbalance this broad recognition by requiring more from the claimant.

Drawing on NSPA jurisprudence like *Schultz*,²²⁶ the second prong ought to require the state seeking restitution to show evidence that the work or works were actually stolen or otherwise illegally exported. By requiring actual evidence that the law was broken, the bulk of the state's evidentiary burden will be in proving that there was a bad act, rather than in defending patrimony laws. To be sure, proof of an illegal act that happened decades ago may be hard to come by; but this requirement prevents foreign governments from taking advantage of the law and exercising their patrimony laws to the detriment of genuine U.S. collectors. In a manner similar to the treatment of artworks looted during the

²²¹ See *supra* notes 107–109 and accompanying text.

²²² See *supra* Section III.C.

²²³ See discussion *supra* notes 149–152 and accompanying text.

²²⁴ 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 240.

²²⁵ See *supra* Part IV.

²²⁶ *United States v. Schultz*, 178 F. Supp. 2d 445, 445 (S.D.N.Y. 2002) *aff'd* 333 F.3d 393 (2d Cir. 2003); see also discussion *supra* note 127–129 and accompanying text.

Holocaust, this remedy enables resolutions of cultural heritage disputes on a case-by-case basis, rather than on technical and tenuous defenses such as proving ownership.

Good faith possessors should not lose their defenses, either. Possessors will still be able to assert defenses such as the statute of limitations. The new law should include a provision extending the applicable limitations period to six years as now observed regarding art stolen during the Holocaust.²²⁷ The statute of limitations ought to begin after the claimant's actual discovery of the identity and location of the artwork or property, or (unlike HEARA) the date when the claimant should reasonably have discovered the artwork or property.²²⁸ The reasonable discovery addition further protects good faith purchasers like museums, who may have long possessed the goods, and incentivizes states to be vigilant when they know their cultural heritage has been stolen.

Finally, consistent with UNESCO, this new civil remedy would require the foreign state whose suit succeeds to bear the costs of litigation and the return of the cultural property in question.²²⁹ These costs may be expensive, but this proposal balances the competing interests of cultural internationalists and cultural nationalists by ensuring that²³⁰—even if there is a strong claim—arts, antiquities, and other objects of cultural heritage are not returned to a state that cannot afford to properly care for and protect them. To be sure, these objects belong in the state that they came from, but not if they will simply be destroyed.²³¹

No doubt the financial interests of investors and collectors in the U.S. art world weigh against legislating a path that facilitates the recovery of cultural property by foreign states. As noted in *Schultz*, however, courts have held that the risk to art dealers is not a valid objective to justify avoiding foreign patrimony laws.²³² Instead, there is a general public policy argument in favor of “the general interest in the protection of cultural heritage.”²³³ Consider the case of *Iran v. Barakat*, the U.K. decision in which the English Court of Appeal held that Iran's patrimony laws conferred a title

²²⁷ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524 (codified as amended at 22 U.S.C. § 1621 note (2012 & Supp. IV 2016)).

²²⁸ CHECHI, *supra* note 30, at 89 (comparing “actual discovery” to “reasonable”).

²²⁹ 1970 UNESCO Convention, *supra* note 18, 823 U.N.T.S. at 240 (requiring “just compensation” be paid “to an innocent purchaser”).

²³⁰ Merryman, *supra* note 37, at 852–53.

²³¹ 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, 483 (2016) (discussing the destruction of cultural property during the Syrian civil war).

²³² *United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003).

²³³ CHECHI, *supra* note 30, at 92.

upon the state regardless of Iran's actual possession of the artifact.²³⁴ The Court of Appeal ruled that the general interests of a state in asserting title over its cultural heritage outweighed the technicalities of possession.²³⁵

Similarly, legislation in the United States should acknowledge the general interests of foreign states in protecting and reclaiming their cultural heritage. Possessors should not be able to maintain possession of stolen property by exploiting technicalities such as the construction of foreign patrimony laws. On the other hand, good faith purchasers should be able to rely on common law defenses such as statutes of limitations, and foreign states seeking recovery should shoulder the burden of proving that there was a bad act.

CONCLUSION

The illegal export and trade of art and antiquities has been going on for centuries, and the law is only just now catching up. The 1970 UNESCO Convention was only the beginning of this now rapidly developing area of law. The field contains a wide variety of issues, orbiting the central motivation of the international community to protect, preserve, and restore the cultural heritage of the various nations and peoples of the world. This law—cultural heritage law—is invoked any time an individual, organization, or state seeks to reclaim objects deemed important to artistic, archaeological, historic, or scientific heritage.

When a country has had its cultural heritage stolen, it has had a part of its identity stolen. States protect their heritage through patrimony laws, and the United States ought to respect that. The interest of these nations in protecting, preserving, and recovering their cultural property should supersede common law property rules and the difficulties their application presents to plaintiffs.

To be sure, this stipulation would not decide the outcome of ongoing restitution battles, nor should it. Christie's and the current possessor of the Stargazer have every right to rely on all defenses available to them in their effort to prove valid provenance. Nonetheless, the presently limited recognition of patrimony laws in the United States presents an unnecessary roadblock to the recovery of stolen and looted cultural property. Hence, common law

²³⁴ Gov't of the Islamic Rep. of Iran v. The Barakat Galleries Ltd. [2007] EWCA (Civ) 1374 at [164] (Eng.).

²³⁵ *Id.* at [163].

is presently ill-equipped to govern these controversies. Instead, greater federal recognition of the legitimate rights of foreign states is necessary to protect historical artifacts, like the Stargazer.

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