

WESTERN ART MUSEUMS AND THE LEGACY OF IMPERIALISM: THE SUCCESSES, SHORTCOMINGS, AND FUTURE OF THE ART REPATRIATION MOVEMENT

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Modern international cultural property law recognizes the vitalness of legal exportation of art and artifacts. These international agreements, however, fail to address the millions of objects stolen, looted, and ultimately hoarded in western Europe during the centuries of colonization and imperialism that preceded them. The resulting international system is one in which theft of cultural property is simultaneously accepted and condemned; illicit export of cultural property is strictly prohibited, but no remedies are offered for regions that lost up to 90% of their cultural property prior to 1970. While some European countries, such as the Netherlands and France, are making small efforts to return items they extracted during their colonial eras, and other countries, such as Great Britain, have offered assistance in locating recently stolen artifacts, these efforts are not sufficient to fix the ongoing harm caused by their retention of art and artifacts stolen centuries ago, many of which still turn a profit for the western countries in which they reside.

The international community has a responsibility to make a stronger effort at requiring the return of stolen cultural property and to pursue alternate solutions when governments refuse. Source countries, as sites of research and knowledge, have leverage in these discussions that has yet to be fully utilized. This Comment explores the intertwined histories of imperialism and artifact theft, critiques modern efforts to reduce illicit property exportation and the retroactive shortcomings of these efforts, and analyzes the roles that source countries, market states, and museums play in these negotiations.

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“One may perhaps have some reason for amassing gold and silver; in fact, it would be impossible to attain universal dominion without appropriating these resources from other peoples, in order to weaken them. In the case of every other form of wealth, however, it is more glorious to leave it where it was, together with the envy which it inspired, and to base our country’s glory, not on the abundance and beauty of its paintings and statues but on its sober customs and noble sentiments. Moreover, I hope that future conquerors will learn from these thoughts not to plunder the cities subjugated by them, and not to make the misfortunes of other peoples the adornments of their own country.”¹

I. INTRODUCTION

When Nigeria opened the doors to its first national art museum in 1968, visitors viewed black-and-white photographs of the great Benin Bronzes—intricate Nigerian sculptures that the British looted from a palace along the shore of West Africa in 1897.² If Nigerian museumgoers wanted to view the Bronzes themselves, they would have to obtain visas to travel to London, where the British Museum has them on

1. Kirstin E. Petersen, *Cultural Apocalypse Now: The Loss of the Iraq Museum and a New Proposal for the Wartime Protection of Museums*, 16 MINN. J. INT’L L. 163, 170 (2007) (quoting Polybius, who lived 264–146 BCE).

2. Christine K. Knox, *They’ve Lost Their Marbles: 2002 Universal Museums’ Declaration, the Elgin Marbles and the Future of the Repatriation Movement*, 29 SUFFOLK TRANSNAT’L L. REV. 315, 330–31 (2006).

display.³ When Athens hosted the 2004 Olympics, the Greek government hoped to display the Elgin Marbles—a famous series of sculptures that adorned the Parthenon during the era of Ancient Greece—but failed to win a multi-decade repatriation battle with the British Museum, which has possessed them since 1808.⁴ During the eighteenth and nineteenth centuries, colonizing European forces transferred hundreds of thousands of culturally and religiously significant artifacts—from the Aztec headpiece of Montezuma,⁵ to the Egyptian Rosetta Stone,⁶ to revered Senegalese sculptures⁷—to their own major national museums. Presently, hundreds of thousands of items of cultural property—“property of great importance to the cultural heritage of every people”⁸—lie scattered throughout Western art institutions after illegal export from their countries of origin.⁹

Major shortcomings in international cultural property law have allowed Western states to continue to own and profit from priceless artifacts stolen centuries ago—prior to the development of a coherent and robust international public policy governing art preservation and deploring illicit property transfer.¹⁰ Because international law cannot be applied retroactively to these centuries-old actions, former colonies and other victims of imperialism have no choice but to hope for domestic change in colonizing states or to resort to bilateral negotiations to try to

3. *Id.*

4. *Id.* at 329.

5. Marta Rodriguez Martinez & Jorge Dastis, *Mexico's First Lady Embarks on 'Impossible' Mission in Austria to Retrieve Headdress of Aztec King*, EURONEWS, <https://www.euronews.com/2020/10/14/mexico-s-first-lady-embarks-on-impossible-mission-in-austria-to-retrieve-headress-of-azte> (Oct. 14, 2020).

6. Aisha Y. Salem, *Finders Keepers?: The Repatriation of Egyptian Art*, 10 J. TECH. L. & POL'Y 173, 178 (2005).

7. Le Monde & AFP, *Un projet de loi sur la restitution définitive d'œuvres d'art à l'Afrique examiné en conseil de ministres* [A Bill on the Final Restitution of Works of Art to Africa Examined by the Council of Ministers], LE MONDE, (July 16, 2020, 10:11 AM), https://www.lemonde.fr/afrique/article/2020/07/15/restitutions-d-uvres-d-art-a-l-afrique-un-premier-projet-de-loi-etudie-en-conseil-des-ministres_6046252_3212.html.

8. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Hague Convention]. Cultural property includes “monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; 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 or of reproductions of the property defined above.” *Id.* The term even encompasses buildings used to “preserve or exhibit . . . cultural property . . . in the event of armed conflict.” *Id.*

9. See Knox, *supra* note 2, at 319 (explaining history of international looting by European countries).

10. See Thomas Meena, *Night at the Museum: The Value of Cultural Property and Resolving the Moral and Legal Problems of the Illicit International Art Trade*, 31 LOY. L.A. INT'L & COMPAR. L. REV. 581, 581 (2009) (emphasizing that modern nations have continuously demonstrated their dominance by exhibiting cultural property of conquered states); see also Vivek K. Hatti, *India's Right to Reclaim Cultural and Art Treasures from Britain Under International Law*, 32 GEO. WASH. J. INT'L L. & ECON. 465, 480–81 (2000) (articulating that ownership disputes are currently handled using law that was contemporaneous with seizure of property).

reobtain their cultural heirlooms.¹¹ Unfortunately, source countries¹² often fail to win these negotiations against more powerful, wealthy European states and institutions.¹³

Modern international law and its accompanying discussions acknowledge the historical injustice of imperialist looting, forceful exportation, and theft of cultural property, but—in part due to the passage of time since the thefts occurred—fail to find a binding legal remedy for states¹⁴ and nations¹⁵ continuing to suffer from the loss of their cultural heritage.¹⁶ This Comment will examine the international community's current understanding of cultural heritage, art preservation, and legal property transfer, while also examining how these factors color our understanding of the actions committed by colonizing states in the late eighteenth and nineteenth centuries.¹⁷ This Comment then examines the shortcomings of the international community's robust—but largely nonbinding—response to growing demands for repatriation, and how individual states such as France and the Netherlands are taking it upon themselves to return a limited number of illicitly obtained artifacts, despite no binding international obligation to do so.¹⁸ This Comment will also suggest various solutions that source countries can undertake in collaboration with museums that do not involve literal art repatriation, but nonetheless facilitate a more equal exchange of cultural property than the systems currently in place, such as profit sharing and replacing ownership with renewable loan agreements.¹⁹

Part II of this Comment outlines the history and development of the Western

11. Attorney Gen. v. Trs. of the British Museum [2005] EWHC (Ch) 1089 (UK); *see also* Maria Granovsky, *A Permanent Resolution Mechanism of Cultural Property Disputes*, 8 PEPP. DISP. RESOL. L.J. 25, 27 (2007) (discussing different types of cultural property disputes).

12. This Comment uses the term “source countries” to refer to geographic areas that were victims of foreign artifact extraction.

13. *See, e.g.*, Meena, *supra* note 10, at 583 (explaining competing interests between former colonies and colonizers).

14. This Comment uses the term “states” to refer to recognized sovereign geographic areas with a national government that can conduct relations with other sovereign countries.

15. This Comment uses the term “nation” to refer to a geographic region with a common history and culture that exists within a state or multiple states.

16. *See* Hatti, *supra* note 10, at 466 (explaining the development of international law in terms of cultural property and the dearth of successful attempts to return such property to previously colonized countries in Asia, Africa, and Latin America).

17. *See id.* at 466 (analyzing legal case for cultural property repatriation from Britain to India under international law); *see also* Josh Shuart, *Is All “Pharaoh” in Love and War?: The British Museum’s Title to the Rosetta Stone and the Sphinx’s Beard*, 52 U. KAN. L. REV. 667, 671 (2004) (examining legal aspects of cultural artifact repatriation through lens of imperialism and military conquest).

18. *See* Le Monde & AFP, *supra* note 7 (explaining French government’s proposed bill to repatriate Senegalese statues); *see also* RAAD VOOR CULTUUR, SUMMARY OF REPORT ADVISORY COMMITTEE ON THE NATIONAL POLICY FRAMEWORK FOR COLONIAL COLLECTIONS (2020), <https://www.raadvoorcultuur.nl/documenten/adviezen/2020/10/07/summary-of-report-advisory-committee-on-the-national-policy-framework-for-colonial-collections> (making policy recommendations with regard to repatriation of cultural objects under Dutch law).

19. *See* Granovsky, *supra* note 11, at 36–40 (suggesting various compromises between art institutions and source countries).

art museum as an institution that stores and displays looted²⁰ objects.²¹ It will examine the historical concept of pillaging as a just aspect of war and the early formation of cultural property-related domestic laws and treaties.²² Part III will explore the creation of international cultural property regulation and the legal consequences for dealing illicitly obtained work, most of which were not established until the mid-twentieth century.²³ This includes actions such as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954²⁴ and the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.²⁵ This section will also examine the benefits and shortcomings of these conventions as they apply in practice.²⁶ Part IV will compare and contrast the differing theories on cultural property that dominate international discussion of the topic.²⁷ Part V highlights recent domestic efforts to repatriate artifacts in France and the Netherlands. These unilateral initiatives, while limited in scope and success so far, demonstrate a reckoning among the governments of some colonizing states regarding the historical acquisition of their art and artifacts as well as an interest in righting a historical wrong, although that interest appears immaterial compared to the total wrongs that could be corrected.²⁸ Part VI will focus on suggested solutions, exploring repatriation and other options for members of the international community to consider.

Ultimately, this Comment will argue that due to the shortcomings of modern international cultural property law, market states—countries that hold and display others' cultural property²⁹—must consider expanding their domestic efforts beyond

20. While the term “looting” can apply to any theft by a state, non-state organization, or individual, this Comment focuses on looting in the context of state-sanctioned colonial endeavors. While all forms of looting harm the source country's cultural heritage and source countries are significantly harmed by looting committed by individual actors, this Comment will focus primarily on looting that occurred during colonial invasion and occupation and on how that *specific* type of resulting harm can be rectified.

21. See Meena, *supra* note 10, at 581 (discussing how modern nations have historically defined their power by displaying cultural objects confiscated from people they conquered).

22. See generally Carol A. Roehrenbeck, *Repatriation of Cultural Property—Who Owns the Past?: An Introduction to Approaches and to Selected Statutory Instruments*, 38 INT'L. J. LEGAL INFO. 185 (2010).

23. See, e.g., Roehrenbeck, *supra* note 22, at 193–97 (discussing complicated application of international law to cultural property theft).

24. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358 [hereinafter First Protocol to 1954 Hague Convention].

25. 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 Transfer of Cultural Property Convention].

26. See generally Roehrenbeck, *supra* note 22.

27. See John Henry Merryman, *Introduction*, in IMPERIALISM, ART, AND RESTITUTION 10–12 (John Henry Merryman ed., 2006) (introducing principles that could guide decisions about source nations' claims for restitution of cultural objects acquired from imperialism).

28. See Le Monde & AFP, *supra* note 7 (explaining France's plan to restore stolen art); see, e.g., RAAD VOOR CULTUUR, *supra* note 18 (outlining the Netherlands' proposal for art repatriation).

29. Roehrenbeck, *supra* note 22, at 189. “Market states” are states generally located in the

unilateral decisions to return select artifacts. If they continuously fail to do so, source countries—countries that produce a high volume of valuable cultural property³⁰—should leverage their bargaining power as the holders of cultural heritage and excavation sites to increase their chances of successful repatriation. Despite a general understanding that stealing from colonies—or weaker European neighbors—was morally compromised,³¹ the time for broader changes to the international legal system to align with this normative recognition is past due.

II. BACKGROUND

A. Imperialism and the Role of Museums

For thousands of years, the seizure of cultural property served as a method to establish domination over conquered people.³² In war and conquest, pillaging acted as a means to pay soldiers, assert victory, and demonstrate superiority over the losing side.³³ Ancient Romans generally viewed looting and pillaging as an expected element of war; people took for granted that in times of conflict, winners stole valuables and destroyed the property of the defeated.³⁴ Over 1,000 years later, Napoleon took this philosophy one step further by actively seeking out cultural centers to conquer,³⁵ prioritizing the exportation of cultural artifacts to advance his goal of international French supremacy.³⁶ This strategy was shared by another colonizing force—Great Britain—which enthusiastically expanded its control over South Asia and Africa in the same century, stealing or destroying tens of thousands of artifacts in the process.³⁷ Like in Napoleonic France, this destruction was

global West that house looted art, often using state-funded institutions. *Id.*

30. *Id.* “Source countries” are states that are susceptible to massive cultural extraction. *Id.* These states are often less wealthy than market states and are usually their former colonies. *Id.* This Comment uses the general terms “state” and “country” interchangeably.

31. G.A. Res. 3187 (XXVIII) (Dec. 18, 1973), http://www.unesco.org/culture/laws/pdf/UNGA_resolution3187.pdf.

32. See Salome Kiwara-Wilson, *Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 375, 387 (2013) (“[R]estitution was developed from an absolute rule of ignoring any vanquished state’s property rights. The enemy’s property was considered *res nullis*, ownerless from the moment of the declaration of war, thereby allowing the conqueror to claim it once they possessed it. This concept of war booty, or prize, was eventually undermined by the medieval concept of a ‘just war.’”).

33. Petersen, *supra* note 1, at 169.

34. See Kiwara-Wilson, *supra* note 32, at 387 (noting that once war was declared, an enemy’s property was considered “ownerless” and could be claimed as a “prize” by conquerors); see also Roehrenbeck, *supra* note 22, at 191 (explaining that victors of war retained cultural property that belonged to the defeated).

35. Petersen, *supra* note 1, at 167.

36. *Id.*

37. Saby Ghoshray, *Repatriation of the Kohinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage*, 31 FORDHAM INT’L. L.J. 741, 741 (2008); Estelle Shirbon, *Cambridge College, Paris Museum Return Looted African Artefacts*, REUTERS (Oct. 27, 2021, 3:56 AM), <https://www.reuters.com/article/us-britain-nigeria-beninbronze-idAFKBN2HH0SN>; see also Hatti, *supra* note 10, at 471–72 (discussing destruction of cultural property during Anglo-Ethiopian War in 1867).

intentionally twofold: the loss of the physical objects themselves and the diminishment of the conquered peoples' intangible cultural identity.³⁸

This wartime tradition demonstrates a profound socio-psychological understanding of looting—by draining a region of its cultural heritage and transporting other peoples' historical artifacts into their own museums, conquerors reinforced the power dynamic between themselves and the conquered.³⁹ The theft of cultural property as an element of colonialism creates “cultural wounds of deep significance to the civilization from which it was taken.”⁴⁰ Even a cursory examination of the history of conquest demonstrates that throughout human civilization, the theft of cultural property served as an element of war used by the victors to express superiority over the other side.⁴¹

When invading colonizers seize cultural property—whether through physical, forceful “looting” or via coercive sales and unbalanced “negotiations”—they frequently bring it back to their own country for storage and display.⁴² The storage centers for stolen artifacts are art museums.⁴³ In fact, cultural behemoths such as the Louvre and the British Museum were established in their current forms in the nineteenth century, when they became locations for their colonizing states to show off their gains from expansion and military victory abroad.⁴⁴ As European imperialism flourished, citizens of states such as Great Britain and France developed an intrigue for “exotic” items from colonies.⁴⁵ To meet this demand, museums began functioning as storage for thousands of foreign cultural objects.⁴⁶ In cities such as London and Paris, “the appetite for ancient Egyptian valuables and curiosities was so insatiable that museums were prepared to ship entire rooms, friezes and tombs from across the Mediterranean.”⁴⁷ England's insatiable desire to cultivate its museum collections led to “the blossoming Egyptology wing at London's British Museum, where today five million annual visitors marvel at ‘the largest and most comprehensive collection of [Egyptian antiquities] outside Cairo.’”⁴⁸ Antiquities

38. Ghoshray, *supra* note 37, at 742.

39. *Id.*

40. *Id.* at 772.

41. Kiwara-Wilson, *supra* note 32, at 387.

42. See Katharine N. Skinner, *Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. L. 673, 674 (2013) (discussing misconceptions about looting).

43. See Meena, *supra* note 10, at 581 (noting museums in Western society display conquered cultural property as a show of cultural wealth).

44. See Shuart, *supra* note 17, at 668–69 (explaining how public galleries in cities like London and Paris evolved into major museums as Europeans' appetites for seeing African artifacts grew); see also Petersen, *supra* note 1, at 167 (noting that the Louvre first exhibited stolen cultural property from Belgium only one year after opening).

45. See Shuart, *supra* note 17, at 668–69 (describing how craving for Egyptian artifacts in major European cities was so intense that museums were willing to ship entire rooms, friezes, and tombs from across the Mediterranean).

46. See Petersen, *supra* note 1, at 167 (explaining new looting phenomenon in which conquering nations deplete museums of conquered nations to fill their own museums).

47. Shuart, *supra* note 17, at 668–69.

48. *Id.*

traders were encouraged to obtain rare antiquities with the assurance that “[w]hatever the expense of the undertaking, it would be most cheerfully supported by an enlightened nation, eager to anticipate its rivals in the prosecution of the best interests of science and literature.”⁴⁹ A massive excavation of artifacts ensued in Egypt, sub-Saharan Africa, Central and South America, the Middle East, and Southeast Asia; its cultural toll on these regions is nearly impossible to overstate.⁵⁰

Art museums are not neutral spaces that merely respond to external governmental decisions. On the contrary, major Western art institutions have powerful incentives to vehemently oppose any international custom or policy that would threaten their holdings.⁵¹ For example, even though public opinion overwhelmingly supports the repatriation of art stolen by Nazis to its original owners, numerous art museums actively oppose repatriation efforts because the museums had received the artwork “in good faith.”⁵² As the conversation around art repatriation continues, one must remember that not only Western governments, but also Western art museums, continually reassert the position that they have no legal obligation, or even a moral duty, to return the looted art that they continue to possess.⁵³

B. Preliminary Efforts to Decrease Cultural Property Damage and Theft

In the late nineteenth century, ethical codes of conduct surrounding warfare began to restrict what combatants did and did not have the right to do to their opponent’s cultural property.⁵⁴ In 1883, the Lieber Code, which governed the actions of soldiers in the American Civil War, became the first wartime code of conduct that mentioned the preservation of cultural property.⁵⁵ This code banned unnecessary

49. *See id.* at 669 (quoting a letter from Sir William Hamilton to Henry Salt).

50. *See* Meena, *supra* note 10, at 582 (discussing Southeast Asia); Roehrenbeck, *supra* note 22, at 193 (discussing Middle East); Farah Nayeri, *France Vowed to Return Looted Treasures. But Few are Heading Back.*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/arts/design/restitution-france-africa.html> (discussing sub-Saharan Africa); Shuart, *supra* note 17, at 667 (discussing Egypt); RAAD VOOR CULTUUR, *supra* note 18, at 1–4 (discussing South America). In fact, a study commissioned by President Emmanuel Macron of France estimated that as of 2019, between 90–95% of African cultural property resides outside the African continent. Christopher F. Schuetze, *Germany Sets Guidelines for Repatriating Colonial-Era Artifacts*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/arts/design/germany-museums-restitution.html>; *see also* Nayeri, *supra* note 50 (stating that 73,000 sub-Saharan artifacts are owned by the British Museum).

51. *See* Skinner, *supra* note 42, at 686 (discussing reasons museums fight against restitution, including statute of limitations and non-binding ethical guidelines).

52. *See id.* at 678 (explaining museums’ abilities to defend restitution claims by showing they are not at fault and did not know art was illegally obtained).

53. *See id.* at 686 (explaining why museums have a vested interest in fighting claimants seeking restitution for artwork looted during the Holocaust).

54. *See, e.g.,* Roehrenbeck, *supra* note 22, at 194 (providing examples of ethical codes of conduct regarding treatment of cultural property during warfare).

55. *See* Francis Lieber, *General Orders No. 100: The Lieber Code*, AVALON PROJECT, art. 35, https://avalon.law.yale.edu/19th_century/lieber.asp (last visited Jan. 20, 2021) (“Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified

destruction of “[c]lassical works of art, libraries, scientific collections, or precious instruments.”⁵⁶ In 1899, the Hague Convention with Respect to the Laws and Customs of War on Land prohibited pillage and seizure by invading forces during times of war.⁵⁷ Soon afterwards, the 1907 Hague Convention Respecting the Law and Customs of War on Land banned property destruction in times of conflict, stating that, “[i]n addition to the prohibitions provided by special [c]onventions, it is especially forbidden: . . . [t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”⁵⁸ Just over a decade later, the 1921 Treaty of Trianon required Hungary to return cultural property to ceded states following the dissolution of the Austro-Hungarian empire.⁵⁹ However, most of these codes were non-binding and did not have a mechanism of punishment for noncompliance.⁶⁰ Additionally, colonizing states that signed on to the 1907 Hague Convention, such as the United Kingdom and France, kept the possessions that they had already obtained during their imperialist ventures in the nineteenth century, further limiting the scope of these conventions.⁶¹ These treaties nonetheless demonstrated a burgeoning international response to demands for the protection of the cultural property of other states.⁶²

III. POST-WORLD WAR II CULTURAL PROPERTY PROTECTION

Despite the shifting norms of the early twentieth century, looting continued in both colonized regions and war zones.⁶³ For example, during World War II, the Nazi army succeeded in destroying about 500,000 works of art and caused the transfer of over 1,000,000 cultural objects, which actions prompted renewed international discussions of cultural property protection.⁶⁴ Conversations regarding enforced protection of art during armed conflict, due in large part to the sheer volume of art looted by Nazis from Holocaust victims, eventually culminated in the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).⁶⁵ This convention created “the first comprehensive

places whilst besieged or bombarded.”).

56. *Id.*

57. Roehrenbeck, *supra* note 22, at 194. The Hague Convention of 1899 did not contain an enforcing body but nonetheless reflected shifting international values regarding property destruction and seizure as a given element of warfare. *Id.*

58. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2277, (*available at* <https://ihl-databases.icrc.org/ihl/INTRO/195>) [hereinafter 1907 Hague Convention].

59. Hatti, *supra* note 10, at 470–71.

60. *See, e.g.*, 1907 Hague Convention, *supra* note 58 (providing list of regulations regarding laws and customs of war on land).

61. *See, e.g.*, Ghoshray, *supra* note 37, at 749–50 (explaining chain of events that led to British seizure of Kohinoor Diamond in 1849, which Britain still has possession of today).

62. *See* Roehrenbeck, *supra* note 22, at 193 (discussing steady movement away from looting philosophy to adoption of protective principles of cultural property).

63. *See* Hatti, *supra* note 10, at 465 (stating that Britain’s control over India lasted until 1947).

64. Petersen, *supra* note 1, at 163, 169, 175.

65. Roehrenbeck, *supra* note 22, at 195.

international agreement on the protection of cultural property.”⁶⁶ An international dialogue about the correct way to approach historical art repatriation has continued ever since.⁶⁷

Unfortunately, modern restitution efforts are beleaguered by the emotional attachments of the states involved with the artifacts in question as well as by the staunch opinions of many other market states, who believe that they have no true responsibility to return any of the artifacts they store or display.⁶⁸ As a result, negotiations often take years or even decades because they are stunted by tensions between the parties and fundamental—and often emotional—disagreements over the best placement and true propriety of the artifact.⁶⁹ Luckily, conventions and treaties—as well as domestic laws—have done some work to remedy this.⁷⁰ Today, cultural property law in the form of multilateral treaties and international norms includes guidelines on the treatment of property from other states in terms of welfare, illicit exportation, and in some cases, avenues to restitution.⁷¹

A. Multilateral Treaties

Multilateral treaties govern cultural property in times of war and peace.⁷² Since 1954, a growing body of increasingly influential—though still not universally binding—treaties have increased source countries’ bargaining abilities.⁷³ While international developments in the field show promise, they still harbor many shortcomings that limit source countries’ ability to recover items taken prior to the twentieth century.⁷⁴

The first treaty concerning international cultural property law, and in fact, the treaty that coined the phrase “cultural property,” was the 1954 Hague Convention.⁷⁵

66. *Id.*

67. *See id.* at 195–99 (discussing various conventions and measures taken by the international community following the 1954 Hague Convention).

68. *See* Lubna S. El-Gendi, *Illusory Borders: The Myth of the Modern Nation-State and its Impact on the Repatriation of Cultural Artifacts*, 15 J. MARSHALL REV. INTELL. PROP. L. 486, 519 (2016) (“As the United Nations Special Rapporteur in the field of cultural rights, Karima Bennouna, stated, ‘It is impossible to separate a people’s cultural heritage from the people itself and their rights.’”).

69. *See generally* Attorney Gen. v. Trs. of the British Museum [2005] EWHC (Ch) 1089 (UK); *see also* Martinez & Dastis, *supra* note 5 (stating Mexican authorities have claimed jewel since 1991 but are still trying to acquire it as of 2020).

70. *See, e.g.*, First Protocol to 1954 Hague Convention, *supra* note 24 (protecting cultural property during armed conflict); Transfer of Cultural Property Convention, *supra* note 25 (protecting cultural property from illegal trade).

71. Hatti, *supra* note 10, at 467.

72. *Id.*

73. *See* Alexander Herman, *Fifty Years on, Unesco’s Convention Against Illicit Trafficking of Cultural Artefacts Still Shines Bright*, THE ART NEWSPAPER (Nov. 13, 2020, 2:58 PM), <https://www.theartnewspaper.com/comment/fifty-years-on-unesco-s-convention-still-shines-bright> (explaining that although the 1970 UNESCO Convention has become more powerful as other looting countries have joined, it still lacks binding legal authority).

74. *See id.* (noting 1970 UNESCO Conventions’ inability to apply retroactively).

75. First Protocol to 1954 Hague Convention, *supra* note 24, art. 1.

This convention followed the massive scale of destruction by the Nazi army, and as a result, focused predominantly on the protection of cultural property in the context of armed conflicts.⁷⁶ Member states echoed cultural internationalist concerns in its preamble.⁷⁷ This placement is notable because it demonstrates that the treaty's focus is protecting art from destruction during times of armed conflict, rather than keeping it within its country of origin.⁷⁸ The convention also states that looting is permissible as a "military necessity" but fails to define the scope of the term; thus, it does not make looting cultural property definitively illegal.⁷⁹ Eighty countries signed the 1954 Hague Convention, but there were notable absences, like Great Britain, which refused to sign the treaty until 2017.⁸⁰ This treaty was essential to defining cultural property and giving its protection international importance; however, it is not retroactive, nor does it fully delegitimize the destruction or looting of foreign cultural property.⁸¹

The 1999 Second Protocol to the 1954 Hague Convention (Second Protocol) is more operational than the first and allows signatories to request international assistance in safeguarding their cultural property.⁸² It also urges member states to pass national legislation to close the loophole in the 1954 Hague Convention that allowed for looting out of military necessity, further delegitimizing looting under any circumstances, even during armed conflicts.⁸³

The single most critical treaty with regards to the protection of cultural property, however, is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).⁸⁴ This treaty encouraged signatories to enact domestic legislation preventing the import of illicitly obtained property.⁸⁵ Critically, this treaty also made commonplace the requirement of export permits in order to transport cultural property outside of a state's borders.⁸⁶ Domestic laws already

76. See *id.* art. 4 ("The High Contracting Parties undertake to respect cultural property . . . by refraining from any use of the property . . . for purposes which are likely to expose it to destruction or damage in the event of armed conflict . . .").

77. See 1954 Hague Convention, *supra* note 8, pmb1. ("Being convinced that damage to cultural property belonging to any people means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world . . .").

78. See *id.* art. 3 (discussing signatories' responsibility to safeguard any cultural property from foreseeable armed conflict).

79. See *id.* art. 4(2) (stating parties' ability to waive protective obligations only in cases of military necessity).

80. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two (1954 and 1999) Protocols: Status of Ratification, UNESCO (Nov. 2020), <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/List-State-members-electoral-group-EN-Final-2020.pdf>.

81. Salem, *supra* note 6, at 181.

82. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 32–33, Mar. 26, 1999, 2253 U.N.T.S. 172.

83. *Id.* art. 15(2).

84. Transfer of Cultural Property Convention, *supra* note 25.

85. *Id.* art. 2.

86. *Id.* art. 7.

existed to try to prevent this, but enforcement was much less effective prior to the 1970 UNESCO Convention's permit requirements.⁸⁷ For the first time in history, this treaty prompted museums to vet the artifacts they received for proof that they were legally exported.⁸⁸ A failure to do so could result in the museum's loss of ownership of the artifact, as source countries had an internationally recognized legal recourse for the theft of their cultural property.⁸⁹

In 1995, the International Institute for the Unification of Private Law (UNIDROIT) drafted the Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention).⁹⁰ This Convention sought to fill gaps left by the 1970 UNESCO Convention by creating a framework allowing individual natural persons to bring restitution claims for stolen art and clarifying the process by which source countries could make restitution claims.⁹¹ It outlines basic rules for the return of stolen cultural property and explains who may bring restitution claims.⁹² In an attempt to convince more market states to participate as signatories, however, it gave claimants a heavy burden of proof and imposed statutes of limitations on restitution claims.⁹³ This compromise succeeded in binding some of the major egregious perpetrators of artifact theft to international law—France signed the UNIDROIT Convention due to these changes and signed the 1970 UNESCO Convention about two years later.⁹⁴ Unfortunately, the burden of proof and statute of limitation rules severely limit the ability to make successful claims, especially regarding any thefts predating the conventions.⁹⁵

B. Museum Codes of Ethics

These international conventions, and the 1970 UNESCO Convention in particular, prompted museums to reconsider the ethics of their acquisition strategies not only from a moral standpoint but also out of concern for repercussions from the international community.⁹⁶ As a result, the International Council of Museums (ICOM) Code of Ethics for Museums, originally published in 2004, followed these

87. See Hannibal Travis, *The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq*, 15 TEX. WESLEYAN L. REV. 601, 635 (2009) (noting that most institutions do not require proof of legal acquisition if acquired before 1970).

88. Transfer of Cultural Property Convention, *supra* note 25, art. 7.

89. *Id.*

90. See Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (showing date of drafting).

91. See *id.* (describing purpose of UNIDROIT Convention).

92. *Id.*

93. *Id.* art. 3, 5.

94. See *Status*, Convention on Stolen or Illegally Exported Cultural Objects, UNIDROIT, <https://www.unidroit.org/instruments/cultural-property/1995-convention/status/> (last visited Nov. 6, 2021) (providing list of all parties and corresponding dates of signing).

95. Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 90, art. 3, 5.

96. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 242–45 (2001) (discussing need for museum ethical codes to go beyond legal minimums and ensure legitimacy of cultural property while also considering educational and scientific value to international community).

state-led conventions.⁹⁷ The ICOM Code of Ethics for Museums outlines the procedures that museums must undergo when acquiring new artworks and artifacts, including an “acquisitions policy” that each museum should create and then follow.⁹⁸ Today, the vast majority of major museums are members of the ICOM and thus should follow the ICOM Code of Ethics for Museums, regardless of whether or not their home state has binding legislation regarding artifact transfer.⁹⁹

These ICOM-recommended acquisitions policies are expected to prevent museums from obtaining artwork that they know has been illegally exported from its source country in 1970 or later.¹⁰⁰ The scope of such policies is limited, however, in that claims require hard evidence of looting, which is rare to find.¹⁰¹ Further, although the ICOM code prohibits museums from collecting art that they *know* is looted, it does not prevent them from obtaining artifacts that merely have an unclear or poorly documented background.¹⁰² Additionally, despite this framework’s impact on museum acquisition decisions, it does not work as a technical basis for repatriation.¹⁰³ Even though the ICOM Code of Ethics for Museums is adopted by the museum industry, and not by state governments themselves, it is an important development in modern-day museum accountability and one of the most widely adopted uniform guidelines for artifact collection.¹⁰⁴

While these treaties, codes, and accepted practices have advanced cultural repatriation efforts, the most obvious remaining limitation is their lack of retroactive application, as insisted upon by participating market states.¹⁰⁵ Unfortunately, most countries with massive museum collections would likely refuse to sign a treaty with binding retroactive elements, knowing that their collections—and thus the primary value of their cultural institutions—would immediately decline if they were legally obligated to return all property that they illicitly received.¹⁰⁶ Museums in market states with large collections already strongly opposed the 1970 UNESCO Convention,¹⁰⁷ because it gave source countries some recourse to retrieve their stolen cultural items, at least for property obtained after 1970.¹⁰⁸

Market states already generally oppose to restitution for post-1970s claims to

97. Neil Brodie & Colin Renfrew, *Looting and the World’s Archaeological Heritage: The Inadequate Response*, 34 ANN. REV. ANTHRO. 343, 350 (2005).

98. *Id.*

99. Unfortunately, while most major museums worldwide should adhere to the ICOM Code of Ethics for Museums, the situation has not significantly improved in the absence of any binding legislation. *Id.*

100. *Id.* at 350.

101. *Id.*

102. *Id.* at 151–52.

103. See Skinner, *supra* note 42, at 703 (discussing many U.S. courts’ refusals to use guidelines as basis for restitution).

104. Brodie & Renfrew, *supra* note 97, at 351.

105. See Meena, *supra* note 10, at 599 (referring to UNIDROIT Convention’s inability to add retroactivity clause).

106. *Id.*

107. Roehrenbeck, *supra* note 22, at 195–96.

108. Transfer of Cultural Property Convention, *supra* note 25.

ensure the ongoing value of their cultural institutions. Moreover, because Western states hoarded cultural property obtained during their imperialist expansions—from the eighteenth through the early twentieth centuries—enormous collections are largely untouched by the treaties whose retroactive recourse does not extend back to that era.¹⁰⁹ This means that most artifacts—hundreds of thousands of them—remain completely unaffected by the 1970 UNESCO Convention and the current international framework on repatriation.¹¹⁰ Negotiations could not discuss applying terms retroactively without completely alienating all market states.¹¹¹

Additionally, the scope of these treaties has been limited by the low number of signatories.¹¹² Since these treaties are only binding to those who become party to them, their potential for repatriation was severely limited by important market states' refusal to join.¹¹³ Although the 1970 UNESCO Convention and the UNIDROIT Convention both tried to recruit more market states to participate, market states' strong aversion to repatriation permeated efforts to mitigate the historic harm of cultural property theft by European states.¹¹⁴ Notably, the 1954 Hague Convention has 131 signatories, but the Second Convention has only 77 signatories.¹¹⁵ Only sixty-one countries attended the 1970 UNESCO Convention, and although France and Great Britain both eventually signed, France did not do so until 1997, and Great Britain delayed until 2002.¹¹⁶

C. The Conventions in Practice

While an international framework exists for post-1970 claims of looting and theft, the vast majority of claims of wrongdoing prior to 1970 are settled via discussions between state officials.¹¹⁷ These legal negotiations make rulings based only on the laws that existed at the time of property transfer.¹¹⁸ This means that in the course of negotiations, all pre-1970 actions of imperial states are judged by the norms that existed at the time of the act, not at the time of the current judgment.¹¹⁹ Additionally, legal remedies are limited by rules regarding burdens of proof, contract

109. *Id.*

110. *Id.*

111. *Id.*

112. Petersen, *supra* note 1, at 180.

113. *See id.* (noting that although Iraq was required to follow Hague Convention protocols during the U.S. invasion of Iraq, the United States was not because, unlike Iraq, the United States had not ratified the Hague Convention).

114. Hatti, *supra* note 10, at 468–69.

115. *Armed Conflict and Heritage: States Parties*, UNESCO, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/states-parties/> (last visited Feb. 12, 2021).

116. Transfer of Cultural Property Convention, *supra* note 25. As of October 2021, the treaty has 141 signatories. *Id.*

117. *See* Hatti, *supra* note 10, at 483 (discussing negotiations between India and Britain during colonial era).

118. *See id.* at 475–80 (examining pertinent laws in the mid-eighteenth to mid-nineteenth centuries in India and Britain to determine acquisition of cultural property).

119. *Id.*

laws, and statutes of limitations, most of which favor market states.¹²⁰ For instance, the multi-decade negotiations surrounding the return of the Elgin Marbles—removed from Greece by the British in the early 1800s—demonstrate the struggles that source countries face when attempting to force repatriation of artifacts taken during centuries-old imperialist campaigns or under quasi-legitimate but coercive bargaining methods.¹²¹ On the other hand, repatriation negotiations over artifacts that were illicitly exported after the 1970 UNESCO Convention, such as the negotiations between Italy and the Paul J. Getty Museum (Getty), demonstrate international cultural property law's potential to facilitate successful artifact repatriation.¹²²

1. Great Britain's Successful Retention of Colonial Plunder

While in Greece between 1800 and 1803, Scottish artist and nobleman Lord Elgin exported what would become known as the Elgin Marbles—about 250 feet of marble sculptures that used to surround the inner chamber of the Parthenon¹²³—and brought them back to Britain for study and safekeeping.¹²⁴ At the time, Ottoman soldiers occupying Greece made their barracks in the Parthenon and broke off pieces of the sculptures to sell or trade, and the marble sculptures had virtually no protection.¹²⁵ Elgin, horrified by this destruction, requested and eventually received permission from the occupying Ottoman forces to export the marbles to England.¹²⁶

Centuries later, when trying to convince the British to return the marbles, Greek officials made lengthy and emotional appeals referencing cultural nationalist concepts.¹²⁷ They argued that the marbles belonged in their contextual location of the Parthenon and that they hold special significance to the Greek people, meaning that they should be returned to Greece.¹²⁸ They also argued that the trade should not be recognized because Lord Elgin had only gotten permission from invading forces to remove the marbles, rather than the Greek government, of whose culture the marbles were a key part.¹²⁹ Despite these claims, Great Britain insisted that the transfer was both legal and ethical¹³⁰ because cultural property disputes assign blameworthiness based on the domestic and international laws that existed at the

120. See Ghoshray, *supra* note 37, at 744 (summarizing defects in international law).

121. See Knox, *supra* note 2, at 329 (discussing Greece's failed repatriation attempts).

122. See Jason Felch & Ralph Frammolino, *The Return of Antiquities a Blow to Getty*, L.A. TIMES (Aug. 2, 2007, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2007-aug-02-me-getty2-story.html> (explaining significance of Getty Museum's late acquisitions).

123. *The Glorious Parthenon*, PBS: NOVA (Jan. 29, 2008), <https://www.pbs.org/wgbh/nova/article/glorious-parthenon> (describing Parthenon's aesthetic structure and construction process).

124. See Knox, *supra* note 2, at 326–29 (describing controversy over Elgin Marbles).

125. John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1906–07 (1985).

126. William St Clair, *Imperial Appropriations of the Parthenon*, in IMPERIALISM, ART AND RESTITUTION 65, 77–78 (John Henry Merryman ed., 2006).

127. Merryman, *supra* note 27, at 98, 102–05.

128. St Clair, *supra* note 126, at 65, 95–96.

129. Knox, *supra* note 2, at 327–28.

130. See *id.* at 327 n.69 (summarizing British arguments).

time of the armed conflict, invasion, or excavation of the property in question, rather than the current mindset of the international community.¹³¹ To this day—and despite enormous international attention—the British government has yet to return these sculptures, reasoning that no legal basis exists to justify their repatriation.¹³²

Similar events occurred regarding the Kohinoor Diamond, which was removed from India in a coercive deal handled by the British during an invasion,¹³³ and the Benin Bronzes, which were looted from Nigeria also during a British invasion.¹³⁴ The Kohinoor Diamond technically was “given” to the British as a part of the Sikh Empire’s surrender.¹³⁵ It still resides in the Tower of London, despite over two decades of ownership claims not only from India but also from Pakistan and Afghanistan.¹³⁶ In fact, India has directly and repeatedly petitioned the British government for its return, but to no avail.¹³⁷ Great Britain rejected these claims, alleging that the transfer was (1) legal at the time of its occurrence, (2) documented in the surrender treaty, (3) justified by its safety in its ongoing presence in Great Britain, and (4) impossible to change now, due to a statute of limitations.¹³⁸ Likewise, Great Britain still retains title to the Benin Bronzes since it removed them as part of a “punitive expedition” in 1897, despite numerous legal efforts on the part of the Nigerian government for their repatriation.¹³⁹ The Nigerian government’s repeated efforts to retrieve their cultural heritage have been unsuccessful largely due to the passage of time, a lack of binding retroactivity in international law, and the market state’s excuse that the Bronzes are safer and available to a larger quantity of visitors where they are now.¹⁴⁰

These cases demonstrate that once enough time has elapsed since the taking of cultural property—and under currently prevailing logic of internationalism in Great Britain—former colonies have little to no recourse to lawfully recover items taken under colonial rule. First, once a statute of limitations runs out, it bars source countries from legal recourse under the market state’s laws.¹⁴¹ Further, the imperialist mindset believing that the item is safer and better cared for in a Western state factors heavily into British arguments for their retaining these objects.¹⁴² This mindset contradicts the provisions that apply to items illicitly trafficked under the

131. *Id.*

132. *See id.* (summarizing Greece’s non-legal arguments for repatriation).

133. *See Ghoshray, supra* note 37, at 748–51 (describing Kohinoor Diamond’s journey from India to Britain).

134. *See Knox, supra* note 2, at 330–31 (giving brief history of Benin Bronzes).

135. Ghoshray, *supra* note 37, at 752.

136. *Id.* at 751–53.

137. *Id.* at 752–54.

138. Knox, *supra* note 2, at 327 n.69.

139. Kiwara-Wilson, *supra* note 32, at 376; *Benin Bronzes*, BRITISH MUSEUM, <https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/benin-bronzes> (last visited Nov. 6, 2021).

140. Kiwara-Wilson, *supra* note 32, at 376; *Benin Bronzes, supra* note 139.

141. *See Ghoshray, supra* note 37, at 756 n.51 (describing the statute of limitations present in law on return and repatriation of cultural objects).

142. *Id.* at 776.

1970 UNESCO Convention and contrasts with Western market states' negative reactions to looting done by actors other than European colonizers.¹⁴³

2. Italian and Afghan Successes in Artifact Repatriation

Bilateral negotiations have achieved some success throughout the decades, particularly when the negotiations occurred between parties to the 1970 UNESCO Convention, but only when the illicit art transfer in question occurred after 1970.¹⁴⁴ In 2007, Italy made multiple successful bids to restore artwork that American museums acquired on the black market in the late twentieth century.¹⁴⁵ In three separate settlements, Italy successfully advocated for and received the repatriation of almost 100 artifacts, including a larger-than-life marble statue of Aphrodite, from the Getty Museum in Los Angeles, the Metropolitan Museum of Art in New York, and the Boston Museum of Fine Arts.¹⁴⁶ Two years of negotiations took place between the Italian Ministry of Culture and a team of lawyers hired by the Getty to come to this agreement, with similarly lengthy discussions taking place at the other two museums.¹⁴⁷

Italy presented the Getty with documentation that the artifacts were looted but also agreed to future cultural collaborations and loans in exchange for the return of the works.¹⁴⁸ These claims were successful because, unlike the Elgin Marbles and similar claims dating back to the eighteenth and nineteenth centuries, the exportation of the artifacts was illegal under international law and contravened museum policies at the time they were exported.¹⁴⁹ The Getty had acquired these works in the 1980s, after the United States ratified the 1970s UNESCO Convention.¹⁵⁰ Italy's repatriation successes demonstrate how the post-World War II international framework regarding cultural property can assist some countries in recovering artifacts smuggled after the ratification of multilateral treaties.¹⁵¹

Afghanistan, like Italy, succeeded in its own repatriation efforts in large part due to the fact that international agreements in effect at the time of the lootings made them illegal when they occurred.¹⁵² Afghanistan's situation differs, however,

143. Compare Felch & Frammolino, *supra* note 122 (discussing Italy's successful recovery of statues from American museums), with Kiwara-Wilson, *supra* note 32, at 407–10 (explaining different types of legal actions Benin could attempt and outlining why Benin has fallen short of successful repatriation).

144. See, e.g., Elisabetta Povoledo, *Getty Agrees to Return 40 Pieces*, N.Y. TIMES (Aug. 2, 2007), <https://www.nytimes.com/2007/08/02/arts/design/02gett.html> (discussing Italy's successful repatriation of artifacts illicitly given to American art museums).

145. See Felch & Frammolino, *supra* note 122 (mentioning Getty Museum; Metropolitan Museum of Art; and Boston Museum of Fine Arts).

146. *Id.*

147. Povoledo, *supra* note 144.

148. *Id.*

149. See Hatti, *supra* note 10, at 475–80 (explaining that at the time the British looted India, both Indian and British customs considered looting an aspect of conquest).

150. See Felch & Frammolino, *supra* note 122 (pointing out significance of its late acquisition).

151. *Id.*

152. See Sabrina Tavernise, *Returned Artifacts Displayed in Kabul*, N.Y. TIMES (Oct. 6,

because unlike Italy's claims, the looting in question occurred during a time of armed conflict.¹⁵³ When Afghanistan fell into civil war in the 1990s, artifacts "began to disappear" from the National Museum of Afghanistan.¹⁵⁴ The museum's director speculated that about 70% of the collection was lost to plunder during this time.¹⁵⁵ Prior to the U.S. invasion in 2001, artifacts were smuggled into Great Britain after being seized by Taliban forces, while others were stolen during the instability that followed.¹⁵⁶ Since then, Afghan authorities have been working to recover their cultural property from around the world.¹⁵⁷ In 2019, with significant assistance from the British government, Afghan officials successfully reacquired hundreds of artifacts that had been smuggled into Great Britain.¹⁵⁸

The repatriation story surrounding the war in Afghanistan stands out because of the role of the British government, which is otherwise well known for its aversion to repatriating art.¹⁵⁹ In this case, however, the artifacts were intercepted at the border—before they got into the hands of a British museum.¹⁶⁰ Also, the looting in this case was done mainly by Afghan civilians,¹⁶¹ and therefore did not negatively implicate the morality of Britain's past or its institutions in the process of repatriation. Most importantly, the looting in question took place after 1970.¹⁶² As such, the British government and museum officials, along with officials in the United States and Norway, collaborated to return tens of thousands of looted items back to Afghanistan following the museum's destruction in the 1990s and early 2000s, to momentous international praise and celebration.¹⁶³ Regardless of victories like this, however, there is still no international law regime that requires involuntary repatriation of artifacts taken during the colonial era.¹⁶⁴

IV. THEORIES OF CULTURAL PROPERTY

As societal norms regarding cultural property rights shifted, two dominant

2009), <https://www.nytimes.com/2009/10/07/world/asia/07afghan.html> (describing wartime looting since 1990s).

153. *Id.*

154. *Id.*

155. *Id.*

156. See Meilan Solly, *Hundreds of Artifacts Looted from Iraq and Afghanistan to Be Repatriated*, SMITHSONIAN MAG.: SMART NEWS (July 9, 2019), <https://www.smithsonianmag.com/smart-news/hundreds-artifacts-looted-iraq-and-afghanistan-repatriated-180972584/> (describing history of a group of repatriated artifacts).

157. *Id.*

158. *Id.*; Naomi Rea, *The British Museum is Helping to Return Hundreds of Looted Ancient Artifacts to Museums in Iraq and Afghanistan*, ARTNET NEWS (July 9, 2019), <https://news.artnet.com/art-world/136british-museum-afghanistan-iraq-artifacts-1595683>.

159. See generally Ghoshray, *supra* note 36.

160. See Solly, *supra* note 156 (noting interception at Heathrow Airport).

161. *Id.*

162. *Id.*

163. *Id.*

164. See Transfer of Cultural Property Convention, *supra* note 25, art.7 (requiring states to prohibit acquisition of property only if it is illegally exported after entry into force of the convention).

theories emerged: cultural internationalism and cultural nationalism.¹⁶⁵ Both agree on the imperative of protecting cultural property, but they strongly disagree on the means to achieve this objective.¹⁶⁶ Market states and their domestic art institutions support the theory of cultural internationalism, which purports that art benefits and belongs to all of human society, while source countries advocate for the theory of cultural nationalism, which emphasizes the connection between cultural property and its location of origin.¹⁶⁷ While discourse within international organizations such as the United Nations has grown more sympathetic to cultural nationalism over time,¹⁶⁸ the power of market states—as well as historic support from major museums—has kept cultural internationalism dominant, and this theory justifies colonial retention of looted art.¹⁶⁹

A. Cultural Internationalism

The theory of cultural internationalism originated as an argument to protect cultural property in times of war.¹⁷⁰ The theory was that states should feel obliged to “prevent destruction and plunder, both within their own borders and in territory occupied during times of war.”¹⁷¹ The premise was that art of each nation and state benefited all of humanity, and in a sense, was the collective pride and responsibility of all humankind.¹⁷² Perversely, Napoleon co-opted this framework to justify his army’s looting and exporting of treasured cultural artifacts.¹⁷³ When domestic critiques of the army’s looting grew, Napoleon’s government responded paternalistically, claiming that they were in fact “saving” the art.¹⁷⁴ They claimed the art would receive better care and maintenance in the more modernized French institutions and that “only the superior French restorers could save [the art]” from its lamentable deterioration in other countries.¹⁷⁵ Cultural internationalism echoes this imperialist mindset by arguing that artifacts enjoy public exposure and safety in Western European institutions—implying they would receive neither if kept in their source country.¹⁷⁶ This iteration of cultural internationalism to justify western retention of non-western art remains in use today.¹⁷⁷

165. See Shuart, *supra* note 17, at 672–74 (contrasting cultural nationalism and cultural internationalism).

166. *Id.*

167. Salem, *supra* note 6, at 175–76.

168. See, e.g., G.A. Res. 3187 (XXVIII), *supra* note 31 (describing promotion of national culture as benefiting international cooperation).

169. See Salem, *supra* note 6, at 176 (explaining internationalist arguments in favor of retention).

170. See Gerstenblith, *supra* note 96, at 201 (discussing internationalist approach’s imposition of obligations on market states both within their borders and in occupied territory during times of war).

171. *Id.*

172. *Id.*

173. See Petersen, *supra* note 1, at 171 (describing French rationales in response to criticism).

174. *Id.*

175. *Id.*

176. Gerstenblith, *supra* note 96, at 205.

177. See *id.* (presenting anti-restitutionists’ viewpoints that cultural objects should not remain

Importantly—even ironically considering that the theory is meant to protect a country's cultural property from harm—cultural internationalism fails to condemn the historical looting done by Western European states who store and display thousands of other states' and nations' artifacts.¹⁷⁸ Instead, this framework attempts to justify colonial states' retention of looted property by claiming that in modern times, the entire world and the international market benefit from their being displayed in wealthy states.¹⁷⁹ Cultural internationalists believe that, based on supply and demand economics, the art should remain in market states because “the market serves to move objects throughout the world, thereby making them accessible to larger numbers of people.”¹⁸⁰

Multiple flaws exist in this line of reasoning. Namely, this argument assumes there is only “a one-way flow—from areas of the world that are rich in cultural heritage to collections in a few major cities—primarily New York, London, Paris, Zurich and Tokyo.”¹⁸¹ Further, the number of people who can actually access these collections tends to remain small.¹⁸² People in many source countries are not in a financial position “to travel to the centers of the modern art world to see these objects.”¹⁸³ Thus the “19th century colonialism and the 20th century market” has left parts of the world “almost entirely devoid of their cultural heritage.”¹⁸⁴ This framework attempts to justify colonial states' retention of looted property by claiming that the entire world and the international market benefit from displaying this property in wealthy market states, where the works should naturally remain based on broad accessibility facilitated by supply and demand economics.¹⁸⁵

In other words, cultural internationalism prevents people who cannot afford to travel or are unable to obtain visas from accessing their own cultural heritage. Those who support cultural internationalism claim it increases access to art and art education, yet by storing source countries' art in locations that a vast number of people cannot access, it does just the opposite.¹⁸⁶ Therefore, cultural internationalism merely transfers access from the population of the source countries to the populations of wealthy Western states. Internationalists also paternalistically assume that Western institutions have a heightened ability to care for art that source countries presumably (or inherently) do not.¹⁸⁷

in their country of origin and are best protected by private and public collectors).

178. See Meena, *supra* note 10, at 606–07 (explaining museums' internationalist perspective of retaining artifacts they display); see also Stuart, *supra* note 17, at 676 (discussing presumptions in cultural internationalism).

179. Stuart, *supra* note 17.

180. Gerstenblith, *supra* note 96, at 205.

181. *Id.*

182. *Id.*

183. *Id.* at 205.

184. *Id.*

185. Stuart, *supra* note 17, at 676.

186. *Id.*

187. See *id.* at 209 (stating anti-restitutionists' claim about source countries' capacity to care for cultural objects).

B. Cultural Nationalism

Source countries, and victims of foreign extraction of artifacts, support the theory of cultural nationalism.¹⁸⁸ Cultural nationalism is the idea that cultural property should remain in its historical context in the location where the property holds the most cultural significance.¹⁸⁹ Proponents of cultural nationalism argue that artifacts benefit the world most when retained and studied in their original location.¹⁹⁰

Unlike cultural internationalism, cultural nationalism underscores past harm caused by the widespread exportation of artifacts laden with the heritage, history, and often the pride of the source country.¹⁹¹ Proponents of cultural nationalism believe that art and artifacts are crucial to a people's collective and national identities and to their cultural history.¹⁹² They argue that the loss of a significant amount—or any amount—of these works creates irreparable damage and fragmentation to a nation's pride and identity.¹⁹³ Cultural nationalism is the driving mindset behind the repatriation movement, and it is at the core of source countries' arguments for restitution of stolen goods.¹⁹⁴ Advocates for cultural nationalism believe that "the return of cultural property to [source countries] would engender a sense of pride and self-worth that would help them to emerge from the shadow of colonizers and develop their own identities"¹⁹⁵ They further argue that "the display of imperial trophies in foreign museums . . . is offensive and degrading to these cultures."¹⁹⁶

A flaw in cultural nationalism is that it fails to account for the fact that occasionally, cultural property will benefit from the relative safety and care that a market state provides compared to an unstable source country.¹⁹⁷ For a variety of reasons, market states typically possess more capital than source countries and thus have more advanced institutions and technology for art and artifact preservation.¹⁹⁸ Further, source countries suffering from political instability might still identify more strongly with certain cultural property than the market state that stores it does, but that fact does not mean it is in the cultural property's best interest to return it to an unstable source country.¹⁹⁹

188. Meena, *supra* note 10, at 588–89.

189. *Id.*

190. Knox, *supra* note 2, at 323.

191. Meena, *supra* note 10, at 588–89.

192. Knox, *supra* note 2, at 323–24.

193. *See id.* (discussing cultural nationalists' viewpoints underlying arguments supporting the retention of cultural properties in their country of origin).

194. Salem, *supra* note 6, at 176.

195. Stuart, *supra* note 17, at 671.

196. *Id.*

197. *See* Knox, *supra* note 2, at 324 (listing some dangers with protecting cultural heritage of source nations by keeping cultural properties in those source nations).

198. *See* Salem, *supra* note 6, at 178–79 (illustrating argument that source countries have neither the capital nor expertise to preserve artifacts they already own).

199. *See* Meena, *supra* note 10, at 608 ("It is easy to see that in many cases, the return of works to the source nation or retention of the artifacts within the source nation through export bans may endanger the integrity of the work which would be more adequately cared for abroad."); *see*

While the competing perspectives of cultural nationalism and internationalism dominate discussions on art repatriation, a third theory on artifact repatriation comes from archaeologists and historians, who emphasize a system that prioritizes the safety of the objects as well as the most constructive and educational method to learn about them.²⁰⁰ This could mean repatriation is appropriate in some cases in which the site of the artifact is crucial to understanding its context.²⁰¹ In other cases, where the source country's political conditions are unstable or where it lacks the resources to effectively host the object, it could mean retention by the market state is more appropriate.²⁰²

V. DOMESTIC LAWS REGARDING PROPERTY TRANSFER AND REPATRIATION

There are two forms of domestic laws that attempt to protect source countries' right to their cultural heritage.²⁰³ First, source countries can create laws that designate all cultural property discovered within their borders as the property of the state.²⁰⁴ Second, market states can create legislation to facilitate repatriation of formerly looted cultural property.²⁰⁵

A. Source Country Claims to Artifacts Within Their Borders

By the time the 1970 UNESCO Convention began to require signatories to create domestic laws surrounding the exportation of cultural property in 1970,²⁰⁶ dozens of source countries had already enacted similar legislation.²⁰⁷ Such laws, called national patrimony laws, allowed source countries to grant themselves ownership of domestic artifacts within their borders, including those that have yet to be discovered.²⁰⁸ Source countries did this in an effort to protect their right to their cultural heritage, which is highly susceptible to unregulated transport and

also Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2015), <https://www.nationalgeographic.com/history/article/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology> (showing extensive destruction of local cultural sites and artifacts by ISIS in Syria and Iraq).

200. Meena, *supra* note 10, at 590.

201. *Id.*

202. *Id.* at 608; *see also* Curry, *supra* note 199 (showing extensive destruction of local cultural sites and artifacts by ISIS in Syria and Iraq).

203. *See List of National Cultural Heritage Laws*, UNESCO, <https://en.unesco.org/cultnatlaws/list> (listing various nations' domestic laws intended to protect their cultural heritage).

204. *See* Sibel Özel, *Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey*, 38 INT'L. J. LEGAL INFO. 177, 177 (2010) (describing Turkey's cultural property laws and their history).

205. *See* Le Monde & AFP, *supra* note 7 (conveying France's proposed law on restitution and return of cultural properties to Republics of Benin and Senegal).

206. Transfer of Cultural Property Convention, *supra* note 25, art. 5.

207. Jessica Eve Morrow, *The National Stolen Property Act and the Return of Stolen Cultural Property to Its Rightful Owners*, 30 B.C. INT'L & COMPAR. L. REV. 249, 252 (2007).

208. *See id.* (explaining that under national patrimony laws, any property found by a private owner automatically becomes state property and must be given to the government).

exportation.²⁰⁹ An illustration of this premise and its shortcomings is Turkey, which is a source country home to several different ancient civilizations.²¹⁰ In 1906, Turkey wrote a law claiming that any antiquities found within its borders were the sole property of the Ottoman State.²¹¹ This “1906 Decree” mandated that “all antiquities found in or on public or private lands were state property and could not be taken out of country.”²¹² Unfortunately, despite this domestic law, devastating amounts of smuggling still occurred in Turkey, and many of the state’s numerous repatriation efforts have been unsuccessful.²¹³

After the formation of the Republic of Turkey, the 1906 Decree remained in effect until it was replaced by a new law in 1983, following the adoption of the 1970 UNESCO Convention.²¹⁴ After Turkey’s adoption of the 1983 law, the national government of Turkey sued the Metropolitan Museum of Art in New York state court and in an out-of-court settlement, the museum agreed to return stolen Turkish property in 1987.²¹⁵ The claim succeeded because of the existing Turkish law surrounding artifact exportation, and because United States law following the adoption of the 1970 UNESCO Convention prohibited museums from acquiring art that had been illegally exported from its source country.²¹⁶ Thus, while national patrimony laws existed long before this international framework, successful enforcement only increased following the 1970 UNESCO Convention, which bound market states to honor these laws.²¹⁷

Despite the increased impact of domestic laws under the 1970 UNESCO Convention, looting continued until the adoption of ICOM forced museums to vet art more seriously in the early twenty-first century.²¹⁸ This demonstrates two major points regarding the success of national patrimony laws: first, national patrimony laws will be undermined until museums and market states take responsibility for stemming the flow of illicit art; and second, national patrimony laws are limited by the requirement to show evidence in the form of clear proof and documentation of looting, which in many scenarios does not exist.²¹⁹ As a result, national patrimony laws might discourage, but cannot independently prevent, the looting of goods from source countries.

209. *Id.* at 251.

210. *Id.*

211. Özel, *supra* note 204, at 179. Prior to its independence, Turkey was part of the Ottoman State. *Id.*

212. *Id.*

213. *See id.* at 177 (explaining widespread theft in modern-day Turkey); *see also* Tom Mashberg, *No Quick Answers in Fights Over Art*, N.Y. TIMES (July 1, 2013), <https://www.nytimes.com/2013/07/02/arts/design/museums-property-claims-are-not-simply-about-evidence.html> (stating that Turkey’s repatriation efforts are often ignored or rejected).

214. Özel, *supra* note 204, at 179.

215. Brodie & Renfrew, *supra* note 97, at 349–50.

216. *Id.* at 344.

217. *Id.*

218. *Id.* at 349.

219. *Id.* at 350.

B. Market State Efforts to Repatriate Illicitly Taken Art

Some market states have responded to pressure from source countries, domestic activists, and the international community, and are actively working to pass binding legislation that would call for the repatriation of artifacts stolen centuries ago, despite no international legal obligation to do so.²²⁰ Notably, France and the Netherlands are both in the process of passing domestic legislation to repatriate art that they looted during their eras of colonial expansion and still store in national museums.²²¹ France's bill is narrow in scope—proposing the return of less than thirty stolen artifacts to Senegal and Benin—despite their possession of tens of thousands of other non-European artifacts.²²² President Emmanuel Macron announced France's commitment to art repatriation in a speech in Burkina Faso in 2017, stating:

I cannot accept that a large part of cultural heritage from several African countries is in France. There are historical explanations for that, but there are no valid justifications that are durable and unconditional. African heritage can't just be in European private collections and museums. African heritage must be highlighted in Paris, but also in Dakar, in Lagos, in Cotonou.²²³

He stressed that restitution of African cultural property would be one of his “priorities” during his time in office.²²⁴ During the summer of 2020, French government officials drafted a bill that would necessitate the repatriation of twenty-six artifacts to Benin and Senegal, both of which are former French colonies.²²⁵ French troops looted these particular objects in 1892.²²⁶ This step is exciting, as it shows that the French government acknowledges France's historical wrongdoings and exemplifies a voluntary attempt to reduce the harm done, without any external binding obligation to do so.²²⁷ At the same time, it undermines the practicality of reforms led by market states by demonstrating how miniscule the number of repatriated items will be if their return is left solely to the discretion of colonizing states.

While France's repatriation bill exemplifies the self-reckoning that many market states face regarding their possession of stolen and looted items, it also highlights the limitations of repatriation efforts when market states can unilaterally

220. Nayeri, *supra* note 50; see also Catherine Hickley, *The Netherlands: Museums Confront the Country's Colonial Past*, UNESCO COURIER <https://en.unesco.org/courier/2020-4/netherlands-museums-confront-countrys-colonial-past> (last visited Oct. 17, 2021) (detailing NMVW's efforts relating to repatriation).

221. Nayeri, *supra* note 50.

222. *Id.*

223. Gareth Harris, *What Restitution Experts Have to Say About President Macron's Pledge to Return African Artefacts*, ART NEWSPAPER (Nov. 29, 2017), <https://www.theartnewspaper.com/news/restitution-experts-react-to-president-macron-s-pledge-to-return-artefacts-housed-in-french-museums-to-africa>.

224. *Id.*

225. Arno Pedram, *France Looks at Law for Returning Colonial-Era Artifacts*, AP NEWS (July 16, 2020), <https://apnews.com/article/7f421d0fcc23d986e37c60971f99bbf0>.

226. *Id.*

227. *Id.*

decide what to return (and what to keep).²²⁸ The first limitation is the scope, which is almost to a point of being infinitesimal—nearly 100,000 African works remain in French museums, many of which have questionable origins at best.²²⁹ Even so, the efforts to repatriate only this small handful of works began in 2017, and not all chambers of the French government have passed the repatriation bill.²³⁰ While the gesture and the symbolism of this proposal inspires cautious optimism, the length of the process, combined with the small quantity of repatriated works, demonstrates the shortcomings of discretionary domestic legislation by market states.²³¹

Meanwhile, in the Netherlands, the national government and several leading museums are currently working together to create a comprehensive system by which a source country can claim any artifact, and if that artifact meets certain baseline criteria, the Dutch government will return it to that source country.²³² As a result, the scope of the Netherlands' repatriation efforts goes much further than France's.²³³ A study commissioned by the Minister of Education, Culture, and Science, and led by Lilian Gonçalves-Ho Kang You, stated that "[t]he Netherlands must . . . be willing to return unconditionally any cultural objects looted in former Dutch colonies if the source country so requests."²³⁴ This study made the bold recommendation of unconditional return, in which the Dutch government would give back "all those cultural heritage objects where it can be demonstrated, with a reasonable degree of certainty, that they came into the possession of the Dutch State subsequent to the source countries suffering an involuntary loss of possession."²³⁵ In other words, if a claimant can produce proof of illicit seizure during a period of colonialism, the Dutch government will be required to return it.²³⁶ Stijn Schoonderwoerd, Director of the Trompenmuseum, one of the largest museums in the Netherlands, also voiced support, saying that they "hope that this advice will be converted into policy in the short term With this, the Netherlands is taking up its responsibility by recognizing the injustice and making it possible to return it. We welcome that."²³⁷ This policy, if passed, could result in the repatriation of up to 100,000 artifacts.²³⁸

A crucial difference between the French and Dutch repatriation plans is the

228. *See generally id.* (noting France's bill currently limits repatriation efforts to "gifts").

229. *Id.*

230. Nayeri, *supra* note 50.

231. *See id.* (mentioning French cultural minister's statement highlighting shortcomings of France's domestic efforts to repatriate artifacts to Burkina Faso).

232. Hickley, *supra* note 220.

233. *Id.*

234. Petir Garda Bhwana, *The Netherlands to Return Colonial Looted Art to Former Dutch Colonies*, TEMPO (July 10, 2020), <https://en.tempo.co/read/1393969/the-netherlands-to-return-colonial-looted-art-to-former-dutch-colonies>.

235. *Id.*

236. Daniel Boffey, *Dutch Museums Vow to Return Art Looted by Colonialists*, GUARDIAN (Oct. 8, 2020, 10:33 AM), <https://www.theguardian.com/world/2020/oct/08/dutch-museums-vow-to-return-art-looted-by-colonialists>.

237. *Id.*

238. *Id.*

cooperation of national museums. In the Netherlands, major museum directors, such as Taco Dibbits, director of the prolific Rijksmuseum, strongly support repatriation efforts.²³⁹ In a 2020 interview, Dibbits stated that the museum is “already working on identifying the genesis of its collection and a formal structure for returns will be welcome,” referring to the anticipated legislation that will govern future repatriation claims.²⁴⁰ Conversely, major museums in France oppose Macron’s attempts at art repatriation, and have dismissed restitution claims from Benin as “impossible” as recently as 2016.²⁴¹ Thus, differing stances of museum directors demonstrate a cultural willingness to repatriate stolen goods, which in turn impacts the ability of the state to pass repatriation laws.²⁴² The proposed domestic laws in France and the Netherlands are limited not only by the willingness of their national governments to repatriate art, but also by the extent of cooperation that museums are willing to offer.²⁴³

Relying on market states to unilaterally manage their own repatriation efforts is too unreliable and capricious to suffice for the entire international system.²⁴⁴ Scattered actions by empathetic—or highly pressured—heads of state cannot, on their own, solve the larger structural issues surrounding art repatriation.²⁴⁵ While individualized attempts at repatriation might be commendable, they lack the most important factor in any fair negotiation: an equal say from both parties involved.²⁴⁶ Relying solely on the whim of market states takes most, if not all, agency away from source countries.²⁴⁷ For example, although the French legislature is still considering the repatriation bill, it may elect to independently reject the proposal.²⁴⁸ Likewise, while the Dutch research commission does in theory grant a significant amount of power to states historically wronged by the Netherlands, repatriation will only occur if the Dutch government independently concludes that the particular artifact in question deserves to be repatriated.²⁴⁹ In this sense, the market states hold all of the

239. *Id.*

240. *Id.*

241. Harris, *supra* note 223.

242. Compare *id.* (discussing how France’s institutions and government hold different views on prospect of repatriation), with Boffey, *supra* note 236 (reporting Dutch institutions’ and government’s proactive stance on repatriation but highlighting that this stance has yet to come to fruition through policy change).

243. *Id.*

244. See Mashberg, *supra* note 213 (noting that states arbitrarily denied Turkey’s claims for repatriation).

245. See, e.g., Nayeri, *supra* note 50 (describing inaction in French repatriation efforts a year after President Macron announced intended return of looted treasures).

246. See Mashberg, *supra* note 213 (“[E]xperts . . . say the calculus of repatriation involves less cut-and-dried measures like the outlook of the museum and its board, the institution’s public relations needs at the moment, the identity of the donor of the disputed item and even the identity of the country that is asking for its return.”).

247. See Özel, *supra* note 204, at 184.

248. See Nayeri, *supra* note 50 (describing proposed repatriation legislation under consideration by French government).

249. See Claire Selvin, *Dutch Museums Voice Support for Government’s Proposed Repatriation Initiative*, ART NEWS (Oct. 13, 2020, 2:17 PM), <https://www.artnews.com/art-news/news/netherlands-repatriation-rijksmuseum-1234573639/> (describing proposed Dutch

power to repatriate the property they looted.²⁵⁰ While the effort and cultural reckoning occurring in these states is remarkable, it is too unreliable to be the primary driver of historically looted artifact repatriation in the international system, and a more comprehensive approach must be established.²⁵¹

VI. SUGGESTED STRATEGIES FOR RESTITUTION AND REPATRIATION

The international community essentially views theft of cultural property as wrong from a moral perspective but right in a legal sense.²⁵² International norms have evolved to stand firmly against acts of looting, stealing, and other forms of property takings under duress or during times of instability.²⁵³ The international community put these norms in writing and backed them up with multiple treaties, establishing a clear position condemning illegal takings of cultural property.²⁵⁴ Still, market states and former imperialist powers legally retain the right to the goods they stole even though they verbally agree with the international community that looting and pillaging is morally unethical.²⁵⁵ This agreement is evidenced by British officials' enthusiasm for repatriating art looted during the 2001 war in Afghanistan²⁵⁶ and by the widespread Western European condemnation of looting by Nazis during World War II.²⁵⁷ Nevertheless, these market states refuse to apply these international norms to their own actions.²⁵⁸ While multilateral treaties provide some repatriation remedies to signatories, no concrete remedies are available under international law to return artifacts taken during eras of colonialism and imperialism.²⁵⁹ As such, the international community should consider creating a uniform restitution policy that permits retroactive claims and promulgates an arbitration system, joined by both market states and source countries.

Despite the absence of any binding obligation under settled international law, France and the Netherlands recently took steps towards repatriating certain looted artifacts.²⁶⁰ This is a culmination of decades of advocacy by source countries, advocates and immigrants in market states, international discussions, and shifting attitudes regarding the right to cultural property.²⁶¹ Other market states are also hinting at efforts at national art repatriation, such as Germany, where government

repatriation process).

250. *See id.* (describing repatriation proposals in various market states).

251. *See* G.A. Res. 3187 (XXVIII), *supra* note 31.

252. Merryman, *supra* note 27, at 10.

253. *Id.*

254. Protection of Cultural Property Convention, *supra* note 24; *see also* Transfer of Cultural Property Convention, *supra* note 25.

255. Hatti, *supra* note 10, at 494.

256. Tavernise, *supra* note 152.

257. *See* Skinner, *supra* note 25, at 711 ("The problem of Holocaust-era art restitution has been discussed worldwide, and there is a general agreement that there needs to be justice.").

258. Merryman, *supra* note 27, at 7–8, 11.

259. *Id.*

260. Boffey, *supra* note 236; Nayeri, *supra* note 50.

261. G.A. Res. 3187 (XXVIII), *supra* note 31; Transfer of Cultural Property Convention, *supra* note 25, pmb1.

officials signed a largely symbolic nonbinding agreement consenting to work with national museums to give repatriating claimants equal footing to the museums in lawsuits and arbitrations.²⁶² These domestic changes mark a shift in European cultural consciousness and imply that European states and their leaders are increasingly interested in attempting to rectify the wrongs of their colonial pasts.²⁶³

These domestic attitudes, however, do not necessarily align with states' willingness to participate in international cultural property agreements. For example, despite a clear national interest in mitigating the wrongs of colonialism, Germany and the Netherlands were among the last countries to sign the 1970 UNESCO Convention.²⁶⁴ Even after signing, repatriation efforts regarding any looting prior to 1970 can still occur only at the discretion of the market state, leaving the source countries out of decision-making in any official capacity.²⁶⁵

In an ideal world, market states would accept that their retention of stolen cultural property contradicts modern morals regarding colonialism and imperial plunder. So far, market states have been unwilling to negotiate a multilateral treaty that would create a system to remedy the ongoing harms that colonialism and invasion continue to wreak on source countries.²⁶⁶ Market states were reluctant to sign on to the existing framework that only asks them to reexamine cultural property ownership over the past fifty years, even though their theft goes back for at least three centuries.²⁶⁷ While development has been undeniably slow, the recent domestic legislation in France, the Netherlands, and Germany suggests that European states do have a desire to mitigate some of their historic harm and recognize, to an extent, their moral obligation to make up for past misdeeds.²⁶⁸ This important sea change is further evidenced by the fact that after years of hesitation, market states such as France and Great Britain have signed onto the 1970 UNESCO Convention in the past two decades.²⁶⁹ The 1970 UNESCO Convention suggests a willingness to work with source countries to protect cultural property, as international perspectives on imperialism have shifted to increasingly condemn their blanket refusal to restitute stolen property.²⁷⁰

The practical and moral argument for increasing avenues for repatriation of stolen artifacts is further supported by the sheer quantity of cultural property that museums have accrued over the years.²⁷¹ For example, if the Netherlands gives back

262. Schuetze, *supra* note 50.

263. *Id.*

264. Transfer of Cultural Property Convention, *supra* note 25.

265. See, e.g., Salem, *supra* note 6, at 192–93 (explaining Egypt's prospects of regaining cultural property through negotiation).

266. Skinner, *supra* note 42, at 674; Merryman, *supra* note 27, at 7–8, 11.

267. Merryman, *supra* note 27, at 7–8, 11.

268. Schuetze, *supra* note 50.

269. See Herman, *supra* note 73.

270. See Meena, *supra* note 10, at 614 (“[D]issemination of . . . cultural values throughout the world . . . is achieved today, not through motives of imperialism, but in an effort to educate and cultivate the world through the far-reaching exposure of artistic and cultural expression.”).

271. See Merryman, *supra* note 27, at 1–2 (explaining wide range of cultural property housed at British Museum).

90% of its plundered art via repatriation claims, its museums will still contain over 10,000 foreign cultural artifacts—more than enough to educate its populations and visitors on various world cultures.²⁷² The sheer amount of cultural property in existence means that even if the right to make repatriation claims expands, Western institutions will most likely continue owning thousands of artifacts from all over the globe in their collections—just not the artifacts that hold the most significant cultural importance to their source countries, nor artifacts that were stolen via colonial violence.²⁷³ That way, Western institutions can maintain a globally inclusive, multicultural collection, and simultaneously will not deprive source countries of crucial elements of their heritage and history.²⁷⁴

That being said, without a change to the limited—or nonexistent—multilateral efforts of most market states, source countries need to consider organizing among themselves to better leverage their collective bargaining power for art repatriation and restitution.²⁷⁵ Some source countries have already recognized and begun to leverage their individual bargaining powers within larger legal negotiations regarding art repatriation from market states.²⁷⁶ For example, while questioning the ownership of several artifacts at the Getty, Turkey refused to participate in loan exhibitions with the museum for the duration of negotiations over those artifacts.²⁷⁷ In another negotiation, Turkey successfully obtained the return of twenty-four artifacts in exchange for its promise that the institution could continue excavations and research on Turkish land.²⁷⁸ Likewise, when Italy fought for the return of several items from the Getty, they threatened a “cultural embargo” that would restrict Americans’ access to Italian artwork loans.²⁷⁹ When the Getty conceded to return items to Italy, as part of the negotiations, Italy agreed to let it take part in future research projects.²⁸⁰

Alternatively, source countries can appeal to the media to make their lawsuits more high-profile and to garner attention and sympathy from the international community.²⁸¹ Even if their claim holds little legal merit, a well-publicized lawsuit can sway the international community’s opinion closer toward a cultural nationalist mindset.²⁸² They can use it to apply social pressure that may encourage the market

272. See Boffey, *supra* note 236 (discussing volume of looted artifacts shown in Dutch museums).

273. See, e.g., Pedram, *supra* note 225 (describing volume of artifacts remaining in France after recent repatriation efforts).

274. See Kiwara-Wilson, *supra* note 34, at 424–25 (discussing cultural implications of return of artifacts to Nigeria).

275. See Gerstenblith, *supra* note 96 (promoting cooperative approach aimed at achieving restitution for source countries).

276. Mashberg, *supra* note 213.

277. *Id.*

278. *Id.*

279. Povoledo, *supra* note 144.

280. *Id.*

281. See, e.g., Kiwara-Wilson, *supra* note 34, at 424 (describing Nigerian film about repatriation of a mask from the British museum).

282. *Id.*

state to voluntarily return some or all of the contested items.²⁸³

Market states possess artifacts that source countries want returned.²⁸⁴ Some source countries, however, also have resources that market states consider in-demand.²⁸⁵ For example, states such as Turkey and Egypt have crucial excavation sites that Western institutions want to access,²⁸⁶ while others, like Italy and Greece, have ownership over world-famous artworks that Western institutions are interested in borrowing in the future.²⁸⁷ While some source countries have resources that allow them to wield increased bargaining power in some negotiations, they have yet to leverage their power to its fullest potential as a collective.²⁸⁸

Additionally, scholars have proposed options that will allow both the artifact's current market state possessor and its original source country to jointly benefit from its preservation.²⁸⁹ For example, profit sharing would allow a source country to derive some economic benefit from their cultural property, while allow the market state to retain physical custody of the artifacts.²⁹⁰ Profit sharing would keep an artifact in its current location, which might be safer and more accessible to scholars and visitors than the state from which it was looted.²⁹¹ Alternatively, market states can return ownership to the source country but still display the artifacts in their own museums, which is similar to how art loaning operates in the museum industry.²⁹² This system, called a "reciprocal perspective," would create agreements that return official artifact ownership to the source country, while retaining display rights for the market state.²⁹³ This way, instead of permanent static ownership by the market state, the display rights would be a loan that the two states would periodically renegotiate, creating a more equal footing between the market state and source country.²⁹⁴

Resolutions abound as to how to respect a source country's assertion that it has a right to display and profit from its own history and at the same time allow market states to maintain some display rights, which concessions may help bring them to the negotiating table.²⁹⁵ Repatriation literally means the return to the home country,²⁹⁶ but these other proposals—specifically rotating loans, transferring

283. See, e.g., *id.* (describing possible effects of high-profile lawsuit by Benin royal family).

284. See Özel, *supra* note 204, at 177.

285. *Id.*; Mashberg, *supra* note 213.

286. See Özel, *supra* note 204, at 177 ("In its many excavated sites, Turkey is much like an open-air museum.").

287. Mashberg, *supra* note 213.

288. *Id.*

289. Granovsky, *supra* note 11, at 35–37 (discussing alternative dispute resolution options for source countries and market states).

290. *Id.* at 39 (discussing revenue sharing as a gesture of reconciliation).

291. *Id.*

292. See, e.g., Salem, *supra* note 6, at 192–93 (describing alternative "reciprocal perspective" as applied in Egypt).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Repatriation*,

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<https://www.merriam->

official ownership but maintaining display rights, and profit sharing—should be seriously considered on a wider basis. These proposals have the potential to satisfy a source country's desire for acknowledgement of its history as well as their right to financially benefit from their own cultural artifacts, while at the same time granting the market states some concessions.²⁹⁷

VII. CONCLUSION

The international community has made strides to incorporate the ethics of cultural property acquisition into international agreements, museum codes of conduct, and domestic laws. Yet, significant work still remains in order for the international community to truly begin to address the sheer volume of property looted prior to the 1970 UNESCO Convention.²⁹⁸ Although domestic efforts by market states appear noble, they are cumbersome to enact, limited in scope, and too often fail to give any negotiating power to the source country.²⁹⁹ Still, multilateral treaties do not address illicit transfers of cultural property that occurred prior to 1970.³⁰⁰ Because of this failing, virtually no binding work has been done to secure the return of wrongfully taken property to the source countries who had their cultural heritage stolen from them.³⁰¹

In order to rectify these shortcomings, the international community should create a balanced, structured system wherein source countries can make direct claims for the repatriation of cultural property stolen from them by market states long ago. Additionally, source countries should consider stronger collaborations with each other to increase their bargaining power and leverage over market states. At the very least, market states should improve their own efforts to provide restitution, loaning systems, and property rights to the source countries whose artifacts they continue to display.³⁰² Colonialism and imperialism effectively stripped entire regions of the world of their cultural property—a crucial element of a country's national identity. The work to right this wrong has barely begun.

webster.com/dictionary/repatriation (last visited Nov. 13, 2021) (defining repatriation).

297. *Id.*

298. Roehrenbeck, *supra* note 22, at 200.

299. Mashberg, *supra* note 213.

300. *Id.*

301. See Ghoshray, *supra* note 37, at 763–64 (“[T]he spirit of cooperation is a shallow paradigm that has no adjudicatory power of mandating that a participating country return the artifact in question.”).

302. See, e.g., Povoledo, *supra* note 144 (highlighting Italy-Getty agreement as example of improved efforts toward repatriation).

