PAYING FOR THE PAST: ESTABLISHING A COURT OF ARBITRATION FOR CULTURAL PROPERTY DISPUTES

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INTRODUCTION

> *[Y]ou—everyone—must, or anyway may have to, pay for your past; that past is something like a promissory note with a trick clause in it which, as long as nothing goes wrong, can be manumitted in an orderly manner, but which fate or luck or chance, can foreclose on you without warning.*
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> - William Faulkner [1]

Throughout history, cultural property has been coveted, looted, traded, and destroyed in the name of "civilization." As modern society confronts past crimes, repatriation of plundered objects has become an important step towards reconciliation. But when both those who committed the wrongs and those who suffered them are long dead, would divesting an innocent, often unsuspecting, current possessor right the wrong? Or would the subsequent seizure itself be unjust?

This discussion is not new, but academic and media coverage of cultural property disputes has increased, especially within the last decade.[2] Awareness and concern for cultural protection has also intensified within the international community, generally.[3]

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[1] WILLIAM FAULKNER, REQUIEM FOR A NUN 140 (Vintage Books ed., Random House 1975) (1951).

[2] Analytics show that the number of publications referencing the phrase "cultural property" more than doubled from 3,323 in 2010 to 7,092 in 2020. *Dimensions Data Analysis Application*, DIGITAL SCIENCE & RESEARCH SOLUTIONS, INC., https://app.dimensions.ai/analytics/publication/overview/timeline?search_mode=content&year_from=1980&year_to=2021&search_text=%22cultural%20property%22&search_type=kws&search_field=full_search [https://perma.cc/JS4Z-44W5] (last visited Oct. 3, 2022).

[3] Barbara T. Hoffman, *Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 1 (Barbara T. Hoffman ed., 2006).

Museums, which are often the custodians of disputed property, "ha[ve] become a lightning rod in the global debate."[4] Although museums that possess disputed artifacts are easy targets of criticism, the perceived historical wrong likely occurred in the distant past, long before the museum took possession. Often, museums take extensive measures to prevent an unethical acquisition,[5] but the good faith efforts do not necessarily immunize them from future claims.[6] Take, for example, the Metropolitan Museum of Art's ("Met") purchase of an Egyptian coffin. In 2017, the Met acquired a golden sarcophagus relying, in good faith, on a

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> In the past 50 years, but particularly in the past several decades, it has become apparent that culture matters and that protecting it is the concern not only of a people, and of sovereign nations but of the international community. That concern is sustained by the emergence of principles that increasingly place weight on the concept of "common interests" to balance and to redefine traditional notions of state sovereignty and private property rights with respect to the protection of cultural heritage.

Id.

[4] Josh Shuart, Comment, *Is All "Pharoah" in Love and War? The British Museum's Title to the Rosetta Stone and the Sphinx's Beard*, 52 U. KAN. L. REV. 667, 672 (2004).

[5] For an in-depth discussion of the scope and quantity of background information required for objects museums consider for acquisition, see Ildiko P. DeAngelis, *How Much Provenance Is Enough? Post-*Schultz *Guidelines for Art Museum Acquisition of Archaeological Materials and Ancient Art*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 398 (Barbara T. Hoffman ed., 2006).

[6] This problem is not unique to museums and has also affected private citizens. In October 2017, Helen Fioratti was astonished when the New York District Attorney's office seized a coffee table that had been in her possession for the last forty-five years. James C. McKinley Jr., *A Remnant from Caligula's Ship, Once a Coffee Table, Heads Home*, N.Y. TIMES (Oct. 19, 2017), https://www.nytimes.com/2017/10/19/arts/design/a-remnant-from-caligulas-ship-once-a-coffee-table-heads-home.html [https://perma.cc/9N8C-DCJ7]. It was determined that the 2,000-year-old mosaic, which Fioratti had converted into a coffee table, was once a fixture on Emperor Caligula's ship. *Id.* Fioratti, unaware of the item's significance, originally purchased the artifact from an aristocratic Italian family and had no reason to doubt their ownership. *Id.* In fact, the family also believed they maintained rightful ownership of the piece. Claudio Lavanga & Saphora Smith, *Artifact from Caligula's Ship Found to Be a Coffee Table in New York Apartment*, NBC NEWS (Oct. 20, 2017, 10:14 AM), https://www.nbcnews.com/news/us-news/piece-caligula-s-ship-found-new-york-apartment-n812511 [https://perma.cc/3JXS-EV27]. Fioratti, despite paying thousands of dollars for the artifact, did not fight the seizure due to the enormous cost of doing so. *Id.*

license stating the object was legally exported.[7] Two years later, the documents were revealed to be forgeries.[8] The Met forfeited the property and was left with very little recourse for recovering the nearly $4 million lost on the transaction.[9]

The Met case is just one variation of a recurrent issue in cultural property disputes: there is no clear "bad guy."[10] Some claims, like those stemming from murder, recent theft, or looting, may have a straightforward solution. In many cases, however, both the current possessor and the claimant are innocent parties with reasonable claims to ownership. In these instances, the path to an equitable resolution should not be determined by a bright-line rule because such a rule could not contemplate all possible cultural, moral, and legal considerations.[11] Over time, international law has made several attempts to address this problem. With each iteration, the most crucial component, equity, is still lacking. Every item of cultural property is unique, and so too are the circumstances surrounding its acquisition and possession. A uniform solution that disregards the individual facts of each exceptional claim is bound to produce an unjust result. Therefore, it is necessary to devise a solution that can balance these critical, and oftentimes conflicting, factors.

In short, this Note will argue that a dedicated tribunal for the arbitration of cultural property disputes will achieve the most equitable resolution by impartially weighing the individualized circumstances of each dispute. Part I details the origins of protections for cultural property and provides an overview of the modern ideological perspectives on its rightful ownership. Part II analyzes the shortcomings of the current methods available to source nations seeking the return of their cultural property.

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[7] Colin Moynihan, *Met Museum to Return Prize Artifact Because It Was Stolen*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/arts/design/met-museum-stolen-coffin.html [https://perma.cc/4L9C-SCHV].

[8] *Id.*

[9] *Id.*

[10] See Elisabetta Povoledo, *Collector Returns Art Italy Says Was Looted*, N.Y. TIMES (Jan. 18, 2008), https://www.nytimes.com/2008/01/18/arts/18collect.html [https://perma.cc/D6ZV-P4JC], for another dispute that exemplifies the good faith purchaser problem.

[11] For an interesting discussion of the disadvantages of applying a bright-line rule rather than a case-by-case analysis in criminal sentencing, see William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 331 (2014).

Finally, Part III proposes the formation of a Court of Arbitration for Cultural Property to remedy those inadequacies described in Part II.

I. EVOLUTION OF MODERN CULTURAL PROPERTY LAW

A. Tale as Old as Time: Origins of Cultural Property Regulation

For millennia, those victorious in battle considered it their absolute right to claim property as spoils of war.[12] Seizing cultural treasures from the conquered region was not only lawful but expected.[13] Of course, plundering was a profitable endeavor, but its advantages were not merely pecuniary. Removing cultural property served as evidence of triumph and aided the subjugation of conquered peoples by removing tangible links to their culture.[14]

This was the prevailing view for centuries, but the concept of protecting cultural property is not entirely modern. In fact, current laws that govern cultural heritage ownership "owe much to Roman antecedents."[15] In the second century B.C.E., the historian Polybius debated the Roman penchant for plundering art.[16] Though the right to spoils of war was recognized by Roman law, Polybius questioned the practice saying, "As to whether in doing so they acted rightly and in their own interest or in the reverse, there is much to be said on both sides, but the more weighty arguments are in favor of their conduct having been wrong then and still being wrong."[17]

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[12] Kate Fitz Gibbon, *Chronology of Cultural Property Legislation*, *in* WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 3, 3 (Kate Fitz Gibbon et al. eds., 2005).

[13] *Id.*

[14] Brian Bengs, Note, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503, 511 (1996).

[15] MARGARET M. MILES, ART AS PLUNDER: THE ANCIENT ORIGINS OF DEBATE ABOUT CULTURAL PROPERTY 8 (2008) [hereinafter PLUNDER].

[16] Margaret M. Miles, *Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art*, 11 INT'L J. CULTURAL PROP. 28, 30 (2002) [hereinafter *Cicero*].

[17] *Id.* at 30-31 (quoting 4 POLYBIUS, THE HISTORIES 25 (W.R. Paton trans., E. Capps et al. eds., 1927)).

Polybius's ideas were further developed and disseminated by Cicero in his famous *Against Verres* speeches.[18] Cicero was chosen to prosecute Gaius Verres for maladministration during his tenure as propraetor[19] of Sicily.[20] Though the main charge Verres faced was extorsion, Cicero dedicates a large portion of his speech to a detailed account of Verres's indiscriminate plundering of sacred temples, public buildings, and private homes.[21] He juxtaposed Verres with a virtuous conqueror who would "respect what today we would call cultural property: religious and historical items of especial importance to their owners."[22]

Cicero's speeches are significant because they are the first example of an extensive analysis on the purposes and importance of art.[23] Although his ideas had little effect on contemporary views on cultural property,[24] they became increasingly influential over time.[25] Because of the author's prestige, the writings reached a wide audience, gaining particular significance during the European Enlightenment.[26] It was during the Enlightenment that "[t]he speeches became a rallying point in public debates about appropriate ownership of art,"[27] which provided the foundation for the first large-scale wartime repatriation of art.[28]

In the late eighteenth century, Napoleon's campaigns in the Italian Peninsula resulted in extensive despoliation of local treasures.[29] Bonaparte had grand plans for a national museum[30] in Paris filled with the finest European art.[31] When the Duke of

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[18] *Id.* at 31.

[19] A propraetor, or proconsul, was a Roman magistrate that governed a province. Jona Lendering, *Propraetor*, LIVIUS, https://www.livius.org/articles/concept/propraetor/ [https://perma.cc/JR9T-NAEZ] (last updated Nov. 23, 2018).

[20] *Cicero*, *supra* note 16, at 29.

[21] *Id.* at 34.

[22] *Id.* at 31.

[23] *Id.* at 30.

[24] *Id.* at 31 (explaining that the absolute right of conquerors to spoils of war remained unquestioned for centuries).

[25] PLUNDER, *supra* note 15, at 8.

[26] *Id.*

[27] *Cicero*, *supra* note 16, at 28.

[28] PLUNDER, *supra* note 15, at 11.

[29] *Cicero*, *supra* note 16, at 41

[30] Napoleon was not the last dictator to make such an attempt. Stalin and Hitler enacted similar schemes to create universal museums in Russia and Austria. *Id.*

[31] *Id.*

Wellington defeated Napoleon at the Battle of Waterloo, it was expected that the treasures amassed in the Louvre would be exported to England as spoils of war.[32] Instead, Wellington defied tradition and chose to return the artwork saying, "The Allies . . . could not do otherwise than restore [the contents of the museum] to the countries from which . . . they had been torn during the disastrous period of the French revolution and the tyranny of Bonaparte."[33]

Wellington's restoration efforts profoundly impacted a young survivor of Waterloo named Francis Lieber.[34] Lieber later emigrated to the United States, became a notable legal scholar, and was commissioned by President Lincoln to draft a legal code of conduct for Union forces.[35] The Lieber Code was the first to provide protected status to cultural property during wartime and "has been the basis for all subsequent international agreements on the topic."[36] The Duke of Wellington's bold decision, informed by Ciceronian ideals, had a direct and traceable influence on future international laws protecting cultural property in wartime.[37]

B. Modern Ideological Perspectives

The modern cultural property[38] debate is dominated by the competing ideologies of cultural nationalism and cultural

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[32] PLUNDER, *supra* note 16, at 330.

[33] *Id.* at 332 (quoting a letter from the Duke of Wellington to Lord Castlereagh). Notably, Wellington's private behavior conformed to his public position. *Cicero*, *supra* note 16, at 43. When Napoleon's brother Joseph was facing certain defeat, he fled, leaving behind a trove of Spanish loot that Wellington later acquired. *Id.* Once the Spanish monarchy was restored, the Duke offered to return all the stolen art in his possession, but King Ferdinand allowed him to keep it. *Id.*

[34] *Cicero*, *supra* note 16, at 44.

[35] *Id.*

[36] *Id.*

[37] PLUNDER, *supra* note 15, at 349.

[38] The modern debate surrounding cultural property is so hotly contested that even the decision to call it "cultural property" rather than "cultural patrimony" has implications. Bengs, *supra* note 14, at 504 n.2. "The different terms serve as paradigms which create a distinct concept in the mind of the audience." *Id.* "Cultural patrimony" implies ownership derived from birthright while "cultural property" suggests ownership under traditional property law. *Id.* "Since a universal definition has proved to be such a problem, it should come as no surprise that the substantive issues have sparked even greater debate." *Id.* at 505.

internationalism.[39] These opposing theories have formed because of the inevitable conflict between the desire for reconciliation and the "broader aspiration for international appreciation of other cultural traditions."[40] "Source nations" that seek the return of their cultural objects advocate for cultural nationalism, and states that hope to retain the property, known as "market nations," identify as cultural internationalists.[41] Each theory has persuasive arguments and admirable goals. Still, their reliance on a bright-line rule to resolve disputes rather than the unique facts of each case fails to deliver an equitable solution to repatriation claims.[42]

Cultural nationalism emphasizes justice and asserts that a source nation has a superior and superseding claim "to cultural objects associated with its people or territory."[43] This theory advocates for repatriation of lost artifacts and encourages retention of objects by restricting legal trade to limited circumstances.[44] Two principles are generally cited as justification for cultural nationalism: (1) Cultural objects serve as an important link between a people and their past; and (2) Cultural objects lose significance when they are removed from their original context.[45]

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[39] Shuart, *supra* note 4, at 672.

[40] Paige S. Goodwin, Comment, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 676 (2008).

[41] Shuart, *supra* note 4, at 672 nn.28 & 32.

[42] Madeline Chimento, Comment, *Lost Artifacts of the Incas: Cultural Property and the Repatriation Movement*, 54 LOY. L. REV. 209, 222 (2008).

[43] JOHN HENRY MERRYMAN, *The Public Interest in Cultural Property*, *in* THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 94, 107 (2000).

[44] Chimento, *supra* note 42, at 217.

[45] Shuart, *supra* note 4, at 674-75. Professor Patty Gerstenblith described the loss associated with removal of artifacts:

> Looting destroys the stratigraphic association and archaeological context not only of the highly marketable, unique pieces that make their way onto the international art market, but also of the many other types of less saleable objects, such as everyday pottery, faunal and floral remains, and other evidence of past life. Such objects appear in large numbers and without documented provenience on the international art market and subsequently in private and museum collections.

Cultural nationalists argue that cultural property is uniquely significant to national identity and establishes an irreplaceable link to a shared past.[46] Their perspective is that when people are disconnected from artifacts, they are deprived of vital knowledge and appreciation of their history.[47] This claim, however, is "more an assertion than a reason" because "[i]t appeals to sympathies and emotions rather than logic by emphasizing actions taken by countries or people in the past that are now seen as illegal or immoral."[48] The idea that artifacts are best understood in their original context similarly lacks a logical basis when applied to repatriation.[49] Archaeologists agree that looting inhibits education because the artifact is removed from its context, which is crucial to proper understanding.[50] Though looting prevention ensures the preservation of valuable data, it is not logical to conclude that returning a looted object will restore the context that was lost. Furthermore, most restored artifacts are transferred from one museum to another to an almost identical setting.[51]

In contrast, cultural internationalism views artifacts as "components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction."[52] The theory advocates for the legal trade of cultural property to facilitate global cultural understanding.[53] There are three main arguments offered in support of this theory: (1) Returning cultural objects to source nations would limit global access and education; (2) Source nations are not always able to

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Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMPAR. L. 409, 446 (2003).

[46] Shuart, *supra* note 4, at 674-75.

[47] Chimento, *supra* note 42, at 216.

[48] *Id.* at 217 (quoting John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1912 (1985)).

[49] Shuart, *supra* note 4, at 675.

[50] Megan B. Doyle, Note, *Ownership by Display: Adverse Possession to Determine Ownership of Cultural Property*, 41 GEO. WASH. INT'L L. REV. 269, 276 (2009).

[51] *Id.*

[52] JOHN HENRY MERRYMAN, *Two Ways of Thinking About Cultural Property*, *in* THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 66, 66-67 (2000).

[53] Chimento, *supra* note 42, at 218.

provide adequate protection and care for artifacts; and (3) Cultural property belongs to all mankind as part of a common heritage.[54]

The principles of cultural internationalism, like those of cultural nationalism, seem logical but crumble upon closer inspection because they appeal to emotions rather than reason.[55] The first argument fails because every location is inaccessible to someone. If someone must lose access, it is difficult to assert that nations wrongfully deprived of the object should bear that burden. The second argument may be true in some cases, but it is not an adequate justification unless it can be proven that a source nation could not care for it. Finally, though there are some instances where a viable claim of common universal heritage exists,[56] it could cause the "impractical result of every country in the world having an equal claim to the art and cultural property of other countries."[57] The principals of cultural nationalism and cultural internationalism provide helpful framework for understanding the arguments surrounding repatriation, but neither provides a satisfying solution to the problem.[58]

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[54] Shuart, *supra* note 4, at 677-78.

[55] Chimento, *supra* note 42, at 222.

[56] "The modern-day Greeks . . . see themselves as the cultural descendants of the original owners. In a very general sense, they are; but so too are all the Western European cultures that have grown out of the Graeco-Roman tradition. As Shelley said, 'We are all Greeks.'" Gilead Cooper, *The Brutish Museums*, 27 TRUSTS & TRUSTEES 151, 161 (2021) (book review) (quoting PERCY BYSSHE SHELLEY, HELLAS, at viii (Thomas J. Wise ed., 1886)).

[57] Chimento, *supra* note 42, at 222.

[58] Nadia Banteka, *The Parthenon Marbles Revisited: A New Strategy for Greece*, 37 U. PA. J. INT'L L. 1231, 1258 (2016). Banteka argues that the two ideologies are not mutually exclusive but, when combined, strengthen each other:

> Cultural nationalism will facilitate bringing to light forgotten cultural characteristics while cultural internationalism will disseminate them in order to enhance our knowledge and understanding. Neither movement needs to subsume the other. Instead, they can be combined within a carefully coordinated framework that supports both their agendas and most effectively satisfies the parties through propagating past cultures and civilizations.

Id.

II. AVAILABLE LEGAL REMEDIES FAIL TO PROVIDE AN EQUITABLE SOLUTION

A. Domestic Courts

The main issue that arises when adjudicating cultural property disputes is choice of law.[59] It is not surprising that laws will differ between countries, but "there exists an important dichotomy between property law in civil law nations and common law nations."[60] In civil law nations, such as France and Germany, the good faith purchaser receives very different treatment than in common law states like the United Kingdom and the United States.[61]

Civil law nations maintain a general presumption that a good faith purchaser may acquire good title.[62] Under this system, the original owner bears the risk of loss by theft and sale to a good faith purchaser.[63] In contrast, common law rules dictate that a thief may not pass good title,[64] even to good faith purchasers.[65] Under the common law system, the good faith purchaser bears the risk that the seller might not maintain good title.[66]

Because the rights of good faith purchasers are vastly different in civil and common law nations, determining which law applies often determines the outcome of the case. These instances raise many important questions:

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[59] Doyle, *supra* note 50, at 278.

[60] Bengs, *supra* note 14, at 516.

[61] *Id.*

[62] *Id.* This principle is not universally accepted by all civil law nations. Amy Bitterman, *Settling Cultural Property Disputes*, 19 VILL. SPORTS & ENT. L.J. 1, 29 (2012). Portugal, Denmark, and Norway are civil law nations that permit "unlimited recovery" by original owners. *Id.*

[63] Bengs, *supra* note 14, at 516.

[64] In the United States, there are exceptions to this rule that vary from state to state. Bitterman, *supra* note 62, at 27. Thus, "even in common law jurisdictions[,] looted art cases are not simple, are not generally resolved quickly, and often tax or exhaust the resources of undeniably rightful owners." Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. 27, 44 (1999).

[65] Bengs, *supra* note 14, at 516. This rule is codified in the Uniform Commercial Code. U.C.C. §§ 2-401-2-403.

[66] Bengs, *supra* note 14, at 517.

> [W]hat law should govern . . . ? Is it the law of the place where the work of art is currently located? Is it the law of the place where the current "owner" acquired the item? Is it the law of the place where the work of art originally existed? If that law has been altered by a revolutionary or confiscatory regime, then should the law be that obtaining before the change? What was the law applicable in the place when a *bona fide* purchaser acquired the work of art in good faith from a person in unlawful possession?[67]

Most courts employ the doctrine of *lex situs* when determining the applicable law.[68] *Lex situs* dictates that the governing law is the law of the location in which the transfer of ownership occurred.[69] Critics argue that this rule is advantageous to dealers of stolen and illegally exported property because it allows forum shopping.[70]

> The doctrine of *lex situs* essentially means that once an object is sold to a bona fide purchaser in a civil law nation, it may be freely sold in the international market. Even if the object is proven to be stolen, there is nothing that can be done by the original owner to regain ownership of the object.[71]

The variation of domestic standards regarding cultural property ownership across nations means that the claims "often turn on the sheer happenstance of where the art has come to rest—with certain jurisdictions completely precluding recovery."[72] Thus, ownership turns not on the merits of the claim but on the object's location, over which the victim has no control.[73] The result is a "legal system" that "is neither consistent nor predictable, and does not encourage the voluntary or efficient settlement of claims or protect the rights of looting victims seeking recovery of what is

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[67] Ian Barker, *Thoughts of an Alternative Dispute Resolution Practitioner on an International ADR Regime for Repatriation of Cultural Property and Works of Art*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 483, 485 (Barbara T. Hoffman ed., 2006).

[68] Bengs, *supra* note 14, at 517.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Pell, *supra* note 64, at 44.

[73] *Id.* "This seems particularly unfair to victims of genocide or their heirs who, of course, had no control over the disposition or movement of their art." *Id.*

rightfully theirs."[74] If a judgment is reached, the next major issue is the problem of enforcement.[75] "Judgments of national Courts encounter severe problems in being enforced in the Courts of other jurisdictions."[76] International treaties for the protection of cultural property were enacted as an attempt to resolve the lack of uniformity and enforcement issues.

B. International Statutory Provisions

International laws governing cultural property, though more reason-based than the theories of cultural nationalism and internationalism, still suffer from their own limitations.[77] The three international conventions on cultural property that have been significantly accepted by the international community are: the Hague Convention of 1954, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention.[78]

1. Hague Convention of 1954

The Hague Convention of 1954 was the first to focus on the protection of cultural property.[79] The convention was a result of the international community's recognition of the unprecedented damage to cultural property[80] caused by Germans in World Wars I and II.[81] The most important aspect of the Hague Convention is the language of its preamble:

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[74] *Id.*

[75] Barker, *supra* note 67, at 485.

[76] *Id.* at 483.

[77] "For the most part, international treaties have done little to resolve the present problem. Indeed, the existence of an international convention on point did little to stop the wholesale plunder of Europe during the Second World War." Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 98 (1999).

[78] Shuart, *supra* note 4, at 712.

[79] MERRYMAN, *supra* note 52, at 72.

[80] "The looting of art perpetrated by the Nazis during World War II was not merely incidental to the German war effort, but rather was a deliberate and systematic policy of looting and hoarding irreplaceable art and other cultural objects. . . . [It was] part of the planned process of persecution, dehumanization, and eventual annihilation of the [Jewish] race." Pell, *supra* note 64, at 29-30.

[81] MERRYMAN, *supra* note 52, at 72.

> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection . . . .[82]

The quoted passage is significant because of its "profound implications for law and policy concerning the international trade in and repatriation of cultural property."[83] Specifically, this novel language "exerts an influence that extends beyond the obligations imposed on and accepted by its parties" and represents a new way of thinking about cultural property, which is echoed in subsequent provisions for the protection of cultural property.[84] The convention, though groundbreaking, only provides for the protection of cultural property in war and leaves artifacts obtained in peacetime without protection.[85] Seeking to remedy this, the next significant international agreement for protecting cultural property focused on peacetime.

2. UNESCO 1970 Convention

Decolonization and an expanding international trade of artifacts during peacetime caused a significant shift in attitudes towards cultural property.[86] The UNESCO 1970 Convention, drafted in response to these changes, was the first meaningful international effort to regulate the peacetime trade of cultural property.[87] The purpose of the UNESCO Convention, as stated in Article 2, was to prevent the "illicit import, export and transfer of ownership of cultural property [which] is one of the main causes of the impoverishment of the cultural heritage of [source] countries."[88]

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[82] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

[83] MERRYMAN, *supra* note 52, at 73.

[84] *Id.* at 79.

[85] *Id.*

[86] *Id.*

[87] Bengs, *supra* note 14, at 515.

[88] UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property art. 2, Nov. 14, 1970, 19 U.S.C. § 2601, 823 U.N.T.S. 234.

The United Nations believed that a multilateral convention was the ideal way to regulate the cultural property trade, but it is "widely regarded as futile"[89] due to vagueness[90] and perceived bias.[91] Furthermore, it is not retroactive, which means that any nation with a claim prior to its enactment is left without recourse.[92] Despite its ineffectiveness, the UNESCO Convention remains the primary source of international cultural property law today due to its wide ratification.[93]

3. UNIDROIT Convention

The International Institute for the Unification of Private Law Convention on the International Return of Stolen or Illegally Exported Cultural Objects,[94] known as the UNIDROIT Convention

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[89] Shuart, *supra* note 4, at 714 (quoting Jennifer N. Lehman, Note, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 541 (1997)).

[90] The language of the UNESCO Convention provides much broader protection for cultural property than its predecessor but fails to provide details on how to enforce those protections. William R. Ognibene, Note, *Lost to the Ages: International Patrimony and the Problem Faced by Foreign States in Establishing Ownership of Looted Antiquities*, 84 BROOK. L. REV. 605, 612-13 (2019).

[91] *See* Bengs, *supra* note 14, at 515.

> [T]he UNESCO 1970 Convention was plagued from the start by the conflicting interests of source nations (retaining possession and securing the return of their native cultural property) and market nations (continuing unfettered international trade in cultural property). Each side had an agenda for the convention and the final product was rather one-sided in its provisions. Market nations perceived it as an agreement favoring source nations that would basically destroy the legal trade in order to stop the illegal trade.

Id.

[92] *See* Goodwin, *supra* note 40, at 701.

[93] *Id.* at 699.

[94] The term "UNIDROIT" derives from the French word meaning "one law." Bengs, *supra* note 14, at 509 n.34. The Institute is comprised of the following 63 member states: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Holy See, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Republic of Korea, Romania, Russian Federation, San Marino, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, the

("UNIDROIT"), was developed to remedy the inadequacies of the UNESCO Convention.[95] UNIDROIT aimed to "reduce illicit traffic in cultural objects by expanding the rights upon which return of such objects c[ould] be sought, and by widening the scope of objects subject to its provisions, in comparison to earlier conventions and treaties."[96] It had two stated purposes: "the protection of cultural heritage . . . and the dissemination of culture for the well-being of humanity and the progress of civilisation."[97] Echoing the language of both the Hague and UNESCO conventions, UNIDROIT recognizes the universal importance of cultural property with its policy that "everyone has an interest in the preservation and enjoyment of all cultural property, wherever it is situated, from whatever cultural or geographic source."[98]

UNIDROIT was touted as a more equitable solution because it added protections for diligent purchasers.[99] The new provisions would allow compensation for a good faith purchaser in exchange for the restitution of cultural property to its dispossessed owner.[100] As with its predecessor, however, the UNIDROIT's vagueness proves fatal to its effectiveness.[101] The convention references "due diligence" and "fair and reasonable compensation" without particulars to aid in their application.[102] Without specificity, it is almost impossible to apply the parameters of the convention uniformly and justly.[103]

Like the UNESCO Convention, UNIDROIT suffers from a significant blind spot: any claims that originate before World War

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United Kingdom, the United States, Uruguay, and Venezuela. *Membership*, UNIDROIT, https://www.unidroit.org/about-unidroit/membership/ [https://perma.cc/A3GC-ZRCZ] (last visited Jan. 22, 2022).

[95] Kristina F. Harris, *Seeking an Equitable Standard for Transactions in the International Antiquities Trade: A Critique of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 27 U.C. DAVIS J. INT'L L. & POL'Y 1, 7 (2020).

[96] Harold S. Burman, *Introductory Note* to UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, 1322.

[97] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330, 1330 [hereinafter UNIDROIT Convention].

[98] Doyle, *supra* note 50, at 277 (quoting John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1916 (1985)).

[99] Harris, *supra* note 95, at 7.

[100] *Id.*

[101] *Id.* at 20.

[102] *Id.* (citation omitted).

[103] *See id.*

II are not covered by the agreement. "Although today's legal regimes provide solace for countries whose cultural property was stolen after World War II, nations with longstanding claims are left helpless under the current state of the law. . . . The current legal framework essentially protects nations that hold art stolen before the twentieth century."[104]

For those claims that are covered by UNIDROIT, there are ostensibly two different limits for bringing a claim.[105] The ineffective construction of the convention itself, however, makes the exact limitations on claims almost impossible to determine.[106] The first limitation is three years from the time the owner "knew the location of the cultural object and the identity of its possessor."[107] The second limitation is a fifty-year absolute time limit "from the time of the theft."[108] The convention then details certain objects that are exempt from this absolute requirement, stating that "a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations."[109] It goes on to broadly define "public collection" so that it encompasses every owner but a private citizen.[110] Thus, the exceptions to the absolute limitation are so vague that the vast majority of cultural property items would not be subject to any time limit and could be brought whenever. Further, the statute of limitations on a claim depends on the subjective determination of whether the item is "an integral part of an identified monument . . . or belong[s] to a public collection."[111] These provisions, therefore, create an unjust scenario in which a purchaser, attempting to do their due diligence when acquiring an object, cannot know when that object may be subject to claims.

Neither of the enacted conventions has succeeded in creating a just solution. Although yet another accord could be drafted to address UNIDROIT's shortcomings, it too would fall short because the error lies, not in the drafting of the convention, but in choosing

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104 Goodwin, *supra* note 40, at 701.
105 Bengs, *supra* note 14, at 530.
106 *Id.* at 522.
107 *Id.* at 530 (quoting UNIDROIT Convention, *supra* note 97, at 1331).
108 UNIDROIT Convention, *supra* note 97, at 1331.
109 *Id.*
110 *Id.*
111 Bengs, *supra* note 14, at 531 (citation omitted).

to rely on a convention at all. Like the competing ideologies of cultural internationalism and nationalism, the existing international conventions are unworkable because they attempt to resolve complex disputes with bright-line rules.

4. Private Negotiations

Private negotiations, unlike international conventions, can tailor solutions to a claim's individual circumstances. There are several examples of successful repatriation negotiations, but the best and most frequently cited is the agreement between the Met and the Italian government.

In 1972, the Met purchased a 2,500-year-old Greek piece signed by the famous potter Euphronios[112] for one million dollars.[113] The acquisition was questioned by historians right away, but the Met insisted that it had purchased the artifact in good faith.[114] Italy contacted the FBI in an attempt to connect the piece to a looted Roman tomb but was unable to do so.[115] After twenty-three years, Italian authorities were finally able to connect the Krater to a hoard of stolen antiquities in a criminal investigation.[116] The criminal investigation and press coverage of the disputed artifacts renewed negotiations for the return of the artifact.[117]

Finally, in February 2006, the Met agreed to return the Euphronios Krater to Italy, where it was originally found.[118] This agreement was extraordinary for three reasons: (1) the Met relinquished ownership even though Italy did not have strong evidence that it was stolen; (2) in exchange for the returned Krater, Italy agreed to loan a rotating selection of items of "equivalent beauty and artistic/historical significance, mutually agreed upon"; and (3) the Accord waived any future litigation against the Met.[119]

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[112] Goodwin, *supra* note 40, at 689.

[113] Carol Vogel, *Ciao to a Met Prize Returning to Italy*, N.Y. TIMES, Jan. 11, 2008, at E7. Aaron Kyle Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 623 (2007).

[114] Goodwin, *supra* note 40, at 689.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 690.

[118] *Id.*

[119] Briggs, *supra* note 113, at 642.

The Met-Italy Accord has been presented as the future of resolving cultural property disputes.[120] The director of the Met said the Accord would "pave the road to new legal and ethical norms in the future" without deprivation of museum visitors' "opportunity to see archaeological material."[121] Though the agreement sets a great example of what can be accomplished through cooperation rather than resorting to litigation, it may not be a model that is replicable.[122]

In his article, Aaron Briggs identifies several factors unique to the Met-Italy Accord that make replication problematic.[123] First, the item was extremely valuable and highly sought after.[124] For other items of lesser importance, Italy likely would not have continued gathering evidence and seeking its return for decades.[125] Second, because the negotiations came at a time when the Met was investing millions in a new exhibit, it was particularly vulnerable and, thus, more likely to consider a settlement.[126] Third, the Italian government maintains a strong stance on the preservation of antiquities, which allowed the Met to consider returning the artifact without fearing that it might be damaged.[127]

Finally, and likely the most difficult factor to replicate, Italy is a nation rich in sought-after artifacts, which gave it considerable leverage.[128] As an institution focused on Greek and Roman antiquities, the Met relied on Italian art to fill exhibits, and the threat of losing access to these sources compelled the museum to negotiate.[129] Because negotiations are voluntary, art-rich nations have more resources with which to lure the opposing party to the

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[120] *See, e.g.*, *id.* at 643. *See also* Joshua S. Wolkoff, Note, *Transcending Cultural Nationalist and Internationalist Tendencies: The Case for Mutually Beneficial Repatriation Agreements*, 11 CARDOZO J. CONFLICT RESOL. 709, 726 (2010).

[121] Goodwin, *supra* note 40, at 691.

[122] *See* Briggs, *supra* note 113, at 643.

[123] *Id.* at 643-47.

[124] *Id.* at 644.

[125] *Id.*

[126] *Id.* The museum was conducting renovations for a new Etruscan art exhibit and "could ill afford to become embroiled in a lengthy court battle, which would promise to be publicly embarrassing." *Id.*

[127] *Id.* at 645.

[128] *Id.* at 646.

[129] *Id.* at 645. "So, the quid pro quo of antiquities for loans was a centerpiece of the Accord and a crucial factor in bringing the Met to the table." *Id.*

table. Thus, the success of the Met-Italy model may "be limited to source nations that have substantial art and antiquity resources or that enjoy high demand for their cultural patrimony."[130]

Although the Met-Italy Accord does not provide the perfect equitable solution for cultural property disputes, it does set a positive example for what can be accomplished through collaboration and mutual respect.

III. A MODEST PROPOSAL

The highly complex and individualized nature of cultural property disputes requires considerations of each claim's specific circumstances to achieve a just result. Private negotiations and courts of arbitration both have the potential to satisfy this requirement. Private negotiations, such as the Met-Italy Accord, have proven successful,[131] but may not be a viable option for the majority of claims because submission to negotiations is voluntary. Furthermore, the contentious nature of cultural property disputes suggests that "[t]he injection of a neutral party" may be necessary "to dissolve the stalemate that so often ensues."[132] Thus, arbitration is likely the most equitable and effective means of settling cultural property disputes.

A. Benefits of Arbitration

Arbitration is a type of dispute resolution that "involv[es] one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding."[133] The most important advantage of arbitration is enforceability because both private negotiations and international conventions lack absolute assurance that any awards can be enforced. In contrast, the New York Convention, accepted by more than 120 countries, "provides that an award of an Arbitral Tribunal in one country can be enforced in any other of the Convention countries, merely by

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[130] *Id.*

[131] *Id.* at 647.

[132] Ann P. Prunty, Note, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing Its Marbles*, 72 GEO. L.J. 1155, 1182 (1984).

[133] Chimento, *supra* note 42, at 226-27.

registering the award in a Court in that country."[134] Another crucial benefit of arbitration is confidentiality. Privacy is an advantage for both individual claimants with "harrowing family histories" and museums who may prefer to keep claims of misconduct out of the public eye.[135]

Finally, the composition of the court could be modeled after that of a successful tribunal, such as the Court of Arbitration for Sport. By using an existing framework that has found success, rather than starting from scratch, the new court could avoid unnecessary pitfalls and focus on more important provisions, such as the factors to consider in adjudicating the claims.

B. Factors Court Will Consider to Determine Ownership

It is essential for the court to establish a balanced framework for resolving repatriation that can be fairly applied. Because artifacts are extremely valuable and are usually very susceptible to damage, any claim would be subjected to the principle of repose. The principle of repose is the idea that "an existing situation should continue unless some reason is given for changing it."[136] This doctrine adheres to the rebuttable property law presumption that a possessor maintains rightful possession.[137] Thus, subjecting claims to the principle of repose would dissuade frivolous claims because the burden would be on the claimant to prove that an artifact was removed illegally.[138] Without this burden shift, the current possessor would be forced to undergo the difficult task of proving a negative (*i.e.*, that the item was not stolen). After the principle of repose, the court would consider the factors below.

1. Legality of the Initial and any Subsequent Removal

The court will first consider the circumstances surrounding an object's initial removal from its country of origin. This factor carries the most weight because it is critical to the continued protection of cultural property that buyers have incentives to follow legal

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[134] Barker, *supra* note 67, at 483.

[135] *Id.* at 483-84.

[136] Chimento, *supra* note 42, at 229 (quoting John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1911 (1985)).

[137] *Id.*

[138] *Id.*

protocols. This element may be overcome, however, if all other factors favor the opposite party. Although determining the legality of a transaction seems straightforward, it is not always so easily established and may require value judgments because applying current societal norms to past transactions could present an *ex post facto*[139] problem. Therefore, acquisitions that were considered legal at the time will be considered legal by the court, unless doing so would be unconscionable. Borrowing from the doctrine of unconscionability in contract law, the court would not honor a "legal" transaction if doing so would be "so outrageous and unfair in its . . . application that it shocks the conscience or offends the sensibilities of the court."[140] If the court determines it was a legal transaction, that weighs heavily in favor of the current possessor retaining the object.

Once the court determines the legality of the initial removal from the source nation, it would then determine the validity of any subsequent exchanges. This is an important step because the artifact may have been legally removed from the source nation, but the current possessor may still have acquired it illegally in an intervening transaction. If the possessor's acquisition was not legal, this would weigh heavily in favor of returning the object to the source nation, even if the source nation was not the party harmed in the illegal transaction.

2. Significance of the Artifact to the Source Country

The second factor weighed by the court will be the cultural property's significance to the source nation. This factor helps ensure extremely important items are returned while also limiting the number of returnable items, preventing museums from losing entire collections. Although cultural significance is a subjective value judgment, these aspects are crucial to the determination: (1) the item's original purpose—giving the greatest weight to those artifacts that have religious or spiritual importance such as those used in religious ceremonies, preserved remains, etc.; (2) if the

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[139] An *ex post facto* law is one "that impermissibly applies retroactively, esp. in a way that negatively affects a person's rights, as by making into a crime an action that was legal when it was committed." *Ex Post Facto Law*, BLACK'S LAW DICTIONARY (10th ed. 2015).

[140] Adams v. John Deere Co., 774 P.2d 355, 357 (Kan. Ct. App. 1989).

object has symbolic significance such as objects that represent liberation from colonial oppression; and (3) whether those seeking repatriation have the strongest claim to the object.

The importance of the final factor is best explained by the Benin Bronzes that are the subject of hotly debated repatriation claims. The objects are bronze masks that were stolen by invading British soldiers in 1897 from the Kingdom of Benin, which is in present-day Nigeria.[141] Many argue that the claimant, Nigeria, should not be the recipient of any returned bronzes for two reasons: (1) they were stolen sixty-three years before Nigeria became an independent nation, and, thus, Nigeria was not dispossessed; and (2) the Kingdom of Benin's ruler, from whom the objects were stolen, has living direct descendants.[142] The court will examine the totality of the historical and contemporary circumstances to determine the strength of the current claimant's right to possession. If the party seeking repatriation does not have the best possible ownership claim, this will factor into the overall decision but will not necessarily be dispositive, especially if those with stronger claims have not made attempts to recover the property.

3. Source Nation's Ability to Preserve and Protect Cultural Property

This factor will carry equal weight with factors four and five. In evaluating the third factor, the court will determine whether, if repatriation occurs, the claimant has the resources to properly preserve and protect the artifact. This factor is important, of course, because cultural property is usually an irreplaceable piece of history. Without this provision, possessors, especially museums, would be unlikely to participate in arbitration. If the court finds the claimant unable to properly care for the artifact, this would weigh against repatriation. This factor alone is not dispositive, especially for retention of an object that was illegally obtained.

4. Current Possessor's Investment

The fourth factor requires the court to consider the extent of the current possessor's investment in the object's acquisition. The

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[141] Cooper, *supra* note 56, at 158.

[142] *Id.*

valuation would include the price paid and any expenses incurred restoring or preserving the artifact. It would also consider non-monetary factors including whether the possessor discovered the object (through excavation or exploration) and, if the current possessor is a museum, whether the item is routinely exhibited. These elements would encourage the continuation of academic discovery, reward institutions for contributing to public education, and prevent a chilling effect on legal and beneficial discoveries. By including routine exhibition in the valuation, this provision also encourages institutions to display their collections, which benefits the public.

5. Interval Between Removal of Item and Demand for Return

The final factor considered by the court is how much time has elapsed between the original removal of the object and the claim for its return. This factor will protect the current possessors in the same way that a statute of limitations protects defendants in criminal cases. As time passes, evidence disappears, witnesses die, and proving a case is much more difficult.

As in the property law doctrine of adverse possession, the clock will start on this element when the source nation knows or should have known that the property was missing. By including the requirement of actual or constructive notice, this factor incentivizes watchful source nations without penalizing them when an object was removed without their knowledge. If fairness dictates, the court may choose to start the clock on the date the claimant discovered the location of the stolen artifact.

The source nation's claim will weaken as time passes, however, there are extenuating circumstances in which the passage of time will not adversely impact the claimant. If the claimant was otherwise aware that the artifact was removed but unable to bring a claim due to war or violence, the elapsed time will not count against them. Consideration will also be given to periods of time where source nations were under non-representative leadership such as times of colonization.

CONCLUSION

Cultural property has tangible, monetary value, but most important is its emotional or spiritual value, which is not objectively quantifiable. Many see these objects as tangible connections to their past, giving the item cultural significance. As society faces injustices committed in the past, repatriation as a form of reconciliation will continue to grow. For some items that were obtained through violence or other nefarious dealings, our sense of justice would require their return. There are some situations, though, where the "bad guy" is not immediately clear. Attempting to right past wrongs by unconditionally returning lost cultural property, while admirable, may produce new wrongs instead of correcting old ones.

It is important, then, when faced with competing claims for priceless objects, to resolve the disputes in a way that fosters education, collaboration, and cultural awareness. A dedicated Court of Arbitration for Cultural Property would provide the most efficient and equitable solution to cultural property disputes because it allows for the consideration of the unique circumstances surrounding each claim. Furthermore, it would foster relationships between possessors and source nations by incentivizing collaboration. By eliminating the bright-line approach and allowing the individualized assessment each priceless artifact deserves, this court could be a solution that benefits the source nation, market nations, and, ultimately, civilization.