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## The Politicizing of Cultural Heritage

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# The Politicizing of Cultural Heritage<sup>1</sup>

*Leila Amineddoleh*<sup>†</sup>

I.	Introduction .....	334
II.	Cultural Heritage as a Distinct Type of Property .....	335
III.	Legal Treatment of Cultural Heritage.....	338
	A. International Treatment of Cultural Heritage Through Legal Conventions .....	339
	B. Treatment of Cultural Heritage by Individual Nations .....	342
	C. Treatment of Cultural Heritage in the United States... ..	346
	D. Illicit Trafficking of Cultural Heritage .....	349
IV.	International Repatriation of Stolen Cultural Heritage .....	351
	A. Euphronios Krater – A Veritable “Hot Pot” .....	352
	B. Cypriot Mosaics – Repatriation After Military Occupation .....	359
	C. Cambodian Temples – Repatriation After Civil War.....	363
	D. Golden Egyptian Coffin – A Golden Diplomatic Opportunity .....	365
V.	When Repatriation is to a Non-Ally .....	369
	A. Persian Guard from Persepolis .....	369

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<sup>1</sup> The paper focuses on property with title vested in nations through patrimony laws, not the restrictions placed on ownership of fine art by legal owners, for “cultural heritage,” as defined and restricted by laws in nations such as Italy, France, and Germany. For a discussion of how location affects the determination of title to cultural property, see generally Patty Gerstenblith, *Provenience & Provenance Intersecting with International Law in the Market for Antiquities*, 45 N.C. J. INT’L L. 457 (2020) (discussing the application of international laws on looted art to the context of plundered archaeological artifacts); Karin Orenstein, *Risking Criminal Liability in Cultural Property Transactions*, 45 N.C. J. INT’L L. 527 (2020) (discussing the intersection of laws governing looted art, provenance, and American criminal law).

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i.	A looted Persian item at a prestigious New York art fair. ....	369
ii.	Importance of Persepolis .....	370
iii.	Iran protects Persepolis and safeguards its heritage sites .....	371
iv.	Repatriation of the Persian Guard Relief.....	375
B.	Persian Rhyton – A case in “archaeo-diplomacy”.....	376
VI.	Legal Ownership is Independent of Politics.....	379
A.	Critics of repatriation often claim that objects are safer, better preserved, and more accessible to the public in their new homes.....	379
B.	Iranian cultural heritage items should not be withheld due to any of the justifications against repatriation. ....	384
C.	Claims for ownership of cultural objects have addressed Iran’s classification as a sponsor of terror.....	385
D.	It is dangerous to require foreign nations to use their cultural heritage in a particular way prior to repatriating looted items. ....	390
VII.	Conclusion .....	391

## I. Introduction

In 2018, the New York Supreme Court ordered the return of a bas-relief that was stolen in the 1930s from Persepolis, in Iran.<sup>2</sup> The object portrayed an imperial soldier holding a spear and shield. I celebrated the item’s return as a welcome outcome for an artifact that was illicitly looted from an active excavation site. I was also proud of my role in the repatriation. But almost immediately, negative responses appeared on social media by critics questioning whether it was appropriate to reconstitute property to Iran, a country that they assert is unable to protect its heritage against destruction

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<sup>2</sup> Henri Neuendorf, *A \$1.2 Million Ancient Persian Sculpture Seized from TEFAF New York Must be Returned to Iran, Judge Rules*, ARTNET NEWS (July 24, 2018), <https://news.artnet.com/art-world/ancient-persian-sculpture-iran-1322945> [<https://perma.cc/5AD9-7LEU>]. See Louise Lerner, *Oriental Institute helps in return of stolen Persepolis artifact to Iran*, UCHICAGO NEWS (Oct. 24, 2018), <https://news.uchicago.edu/story/oriental-institute-helps-return-stolen-persepolis-artifact-iran> [<https://perma.cc/BT3W-9YX4>].

and that sponsors terrorism. These arguments against restitution were unpersuasive, as they were respectively inaccurate and irrelevant. Admittedly, the legal dispute surrounding ownership of the artifact was complex, focused on an object that was stolen multiple times over the past eight decades. Tellingly though, no one asserted that the relief was not stolen from a culturally significant site of extreme historical importance.

The controversy surrounding the repatriation highlights the politicizing of culture, the complicated relationship people and nations have with cultural heritage, the exploitation of ownership, and the non-commercial value of shared heritage. Cultural heritage inhabits a space between proprietary and non-proprietary interests leading to the complex treatment of these physical objects as diplomatic and political currencies.

## II. Cultural Heritage as a Distinct Type of Property

The repatriation of antiquities and artifacts can be emotional due to the nature of cultural heritage; objects of heritage are not simply property—they are unlike other objects because they are imbued with cultural significance. For this reason, most people feel they have a stake in the property and they connect to these objects in a transcendent way.<sup>3</sup> In fact, there has been a movement to discontinue the use of the phrase “cultural heritage property” because these physical manifestations of our past are inherently not like other property.<sup>4</sup> In fact, they are treated differently than other physical objects.

The central concern of property law is the protection of the rights of possessors;<sup>5</sup> property is something that can be possessed by one party to the exclusion of all others.<sup>6</sup> Property law has long protected the right of an owner to exclude others from using his or her property.<sup>7</sup> “[T]he right to exclude others” is “one of the most

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<sup>3</sup> See generally Gerstenblith, *Provenience & Provenance Intersecting with International Law in the Market for Antiquities*, *supra* note 1 (explaining the cultural importance of artifacts to people and why they should be preserved).

<sup>4</sup> *Id.*

<sup>5</sup> Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998).

<sup>6</sup> *Id.* at 734.

<sup>7</sup> *Calder v. Bull*, 3 U.S. 386, 394 (1798) (“If anyone has a right to property such right is a perfect and exclusive right.”); see also *Green v. Biddle*, 21 U.S. 1, 20 (1823) (“A

essential sticks in the bundle of rights that are commonly characterized as property.”<sup>8</sup> The concept of “property” is often defended as a fundamental cornerstone in U.S. culture and its traditional legal incidences must be given priority, with owners enjoying the rights to exploit, alienate, and exclude.<sup>9</sup> John Locke’s view on natural rights celebrates the value created by individuals mixing labor with land to make it their own.<sup>10</sup> However, cultural heritage falls outside of Locke’s vision. By removing cultural heritage from the land, untrained individuals (such as looters) are not adding value, but rather extracting value by damaging archaeological context and destroying knowledge and information that may otherwise pass to future generations through the process of proper excavations.

In fact, Thomas Jefferson purportedly relied upon Benjamin Franklin’s view of private property when drafting the Declaration of Independence. The idea was that property is a civil right, not a natural right.<sup>11</sup> This view is evidenced through Jefferson’s statement that “no one has, of natural right, a separate property in an acre of land. . . . Stable ownership is the gift of social law, and is given late in the progress of society.”<sup>12</sup> Even the founding fathers conceived of private property as being intertwined with the needs of society and perceived a need to balance the rights of the owner with the rights of the public.<sup>13</sup> Cultural heritage law seeks to protect heritage for present and future generations, thus leading to restrictions on the rights of the possessor and rules against private

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right of property necessarily includes the right to recover the possession, to enter, to enjoy the rents and profits, and to continue to possess undisturbed by others.”).

<sup>8</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). These words have been quoted in numerous subsequent decisions. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1044 (1992) (Blackmun, J., dissenting); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987).

<sup>9</sup> Lyndel Prott & Patrick O’Keefe, ‘*Cultural Heritage*’ or ‘*Cultural Property?*’, 1 INT’L J. CULTURAL PROP. 307, 309 (1992).

<sup>10</sup> Pamela G. Levinson, *Will the Circle be Unbroken? The Miami Circle Discovery and its Significance for Urban Evolution and Protection of Indigenous Culture*, 13 ST. THOMAS L. REV. 283, 311 (2000).

<sup>11</sup> Heather F. Lindsay, *The Failure of Property Rights to Guard the Integrity of the Individual*, 14 J. LAND USE & ENVTL. L. 149, 156–57 (1998) (quoting BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS 108 (1982)).

<sup>12</sup> *Id.* at 157 (quoting BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS 108 (1982)).

<sup>13</sup> Levinson, *supra* note 10, at 313.

ownership.<sup>14</sup> For this reason, it has been argued that shared remnants of our past and the expression of culture through material objects be labeled as “cultural heritage,” not “cultural property” because individuals cannot exercise the same rights or controls over heritage as they can property.<sup>15</sup>

Cultural heritage has long been treated differently than other property.<sup>16</sup> In 1813, a Canadian court, the Vice-Admiralty Court of Halifax, stated that “The arts and sciences . . . [are] the property of mankind at large, and as belonging to the common interests of the whole species.”<sup>17</sup> Cultural heritage is not simply property, but items that belong to all humanity. This is evidenced in the manner in which courts treat these objects, the laws that regulate their ownership and trade, and the fact that they are not exploited as purely commercial goods.<sup>18</sup> They are remnants of our common past. But even more so, these items encapsulate and represent our shared history. Their value goes beyond monetary considerations and material aspects of the object in a collection; rather, they represent human achievements and history that transcends material considerations. The significance of our shared heritage is so great that the physical heritage objects receive special treatment during times of conflict, as nations have regularly come together to protect cultural heritage during war.<sup>19</sup>

Cultural heritage is also different from property because heritage also may come with a duty to preserve and protect.<sup>20</sup> In some jurisdictions, there is an obligation placed upon owners to handle cultural heritage in a certain way: an obligation to securely

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<sup>14</sup> Prott & O’Keefe, *supra* note 9, at 309.

<sup>15</sup> *See id.* at 307, 309.

<sup>16</sup> *See* Stewart’s Vice-Adm. Rep. 482 (Vice-Adm. Ct. N.S. 1813), *reprinted in* John Henry Merryman, *Note on the Marquis de Somerueles*, 5 INT’L J. CULTURAL PROP. 319, 319 (1996).

<sup>17</sup> *Id.*

<sup>18</sup> Discussion to follow in Sections II and III.

<sup>19</sup> *See, e.g.*, UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict (May 14, 1954); Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (Oct. 18, 1907); Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (July 29, 1899).

<sup>20</sup> Prott & O’Keefe, *supra* note 9, at 307.

protect these objects or historical buildings.<sup>21</sup> Some nations have also placed restrictions on the free exchange of heritage objects on the open market.<sup>22</sup> As discussed in Section III(B), certain objects fall under cultural heritage laws with nations restricting the trade and movement of those items.<sup>23</sup> Rather than material that may be freely traded, objects falling under a nation's cultural heritage laws are fundamentally different. Those objects are either nationally owned by virtue of patrimony laws<sup>24</sup> or protected by laws that require owners to preserve the works or restrict their sale.<sup>25</sup> Due to the classification as national property, the cultural objects cannot be exploited or treated commercially.<sup>26</sup> Rather, the objects are held by the state, or even the current owner, on behalf of the public.<sup>27</sup>

### III. Legal Treatment of Cultural Heritage

There is a public interest in cultural heritage,<sup>28</sup> and the law treats it differently than personal property.<sup>29</sup> It occupies a distinct place in the body of international law, at the intersection of human rights instruments, international law, and a vast legal framework. Extra-judicial instruments evidence the ways cultural heritage is treated differently than personal property and is protected on behalf of mankind.<sup>30</sup>

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<sup>21</sup> See National Historic Preservation Act of 1966, 54 U.S.C. § 300101–320303.

<sup>22</sup> See, e.g., Legge 1 giugno 1939, n.1089, G.U. Aug. 8, 1939, n.184 (It.); Law No. 117 of 1983 (Law on the Protection of Antiquities), *al-Jaridah al-Rasmiyah*, vol. 32 bis, 11 Aug. 1983 (Egypt).

<sup>23</sup> See *infra* Section III(B).

<sup>24</sup> See, e.g., *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (interpreting Egypt's patrimony law); *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (interpreting Italy's patrimony law); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (interpreting Mexico's patrimony law); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (interpreting Guatemala's patrimony law).

<sup>25</sup> See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 559–688 (1995) [hereinafter Gerstenblith, *Identity and Cultural Property*].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See generally John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).

<sup>29</sup> See *infra* text accompanying notes 49–77.

<sup>30</sup> See generally *infra* Section III(B).

A. *International Treatment of Cultural Heritage Through Legal Conventions*

Internationally, cultural heritage has been viewed as an extension of human rights frameworks.<sup>31</sup> Indeed, international law treats attacks against cultural heritage as crimes, including war crimes and crimes against humanity, in some instances.<sup>32</sup> In addition to its purported links with criminal activity, illicit trafficking has moral implications because of the effect it has on individuals and communities.<sup>33</sup> Looting destroys a community's heritage, which contributes to the destruction of its culture, traditions, and ultimate survival.<sup>34</sup> Inherent in the trade of these looted items is the destruction of information that is lost to individual cultures, as well as to history.<sup>35</sup>

Some members of the art market refer to 1970 as the date in which nations acted to protect heritage on a global stage, but efforts to protect heritage predate the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>36</sup> Treaties and international instruments protecting cultural heritage date back as early as the 19th century and have continued through to the current day.<sup>37</sup> Over the decades, other acts have been passed and

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<sup>31</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Dec. 10, 1948.

<sup>32</sup> See generally Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Judgment, ¶ 544 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (alleging the defendants partook in ethnic cleansing in Bosnia which is a crime against humanity); Francesco Francioni, *Public and Private in the International Protection of Global Cultural Goods*, 23 EUR. J. INT'L L. 719, 721–29 (2012) (arguing “damage to cultural property . . . means damage to the cultural heritage of all mankind”).

<sup>33</sup> See Maja Dehouck, *Balancing Markets, Morals and Law: The Fight to Regulate Illicit Trafficking in Cultural Goods and the EU Regulation on the Import of Cultural Goods*, 24 ART ANTIQUITY & L. 1, 37 (2019).

<sup>34</sup> HELAINE SILVERMAN & FAIRCHILD RUGGLES, *CULTURAL HERITAGE AND HUMAN RIGHTS* 16 (2007).

<sup>35</sup> Pierre Lalive, *A Distributing International Convention: UNIDROIT*, 4 ART ANTIQUITY & L. 219 (1999).

<sup>36</sup> See Patty Gerstenblith, *The Meaning of 1970 for the Acquisition of Archaeological Objects*, 38 J. FIELD ARCHAEOLOGY 364, 365 (2013) [hereinafter Gerstenblith, *The Meaning of 1970*].

<sup>37</sup> See generally Ana Filipa Vrdoljak, *Cultural Heritage in Human Rights and Humanitarian Law*, INT'L HUM. RTS. & HUMANITARIAN L. 250 (2011). The United States' Lieber Code from 1853 influenced the Brussels Declaration on the Law of War (1874),



conventions entered into that reflect the importance of cultural heritage to the collective consciousness.<sup>38</sup> These legal instruments indicate that cultural heritage is valued by many generations.<sup>39</sup> Thus, this area of the law merits its own applicable frameworks outside of commercial and property law. More recently, access and ownership to cultural heritage has also been viewed as a type of human right for ethnic, tribal, and religious groups, as well as a nonrenewable resource for a nation, not just as property to be owned and exploited by individuals on a commercial market.<sup>40</sup> According to the World Bank and UNESCO, cultural heritage is also utilized as a way to rebuild communities, particularly in terms of post-colonial eras.<sup>41</sup>

The recognition of the importance of cultural heritage led to the passage of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the “1970 UNESCO

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and led to the first major international meetings in The Hague in 1899 and 1907. The results were the known as the Hague Conventions, and they were among the first formal international proclamations on the laws of war. International militaries did not abide by the conventions during the First World War, but the Hague Conventions have been updated and superseded by other treaties, including the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1935 Washington Treaty, the 1949 Universal Declaration of Human Rights, the 1949 Geneva Convention, the 1954 Hague Convention and Protocols, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1995 UNESCO Convention on Stolen or Illegally Exported Cultural Objects, the 2003 UNESCO Declaration on the International Destruction of Cultural Heritage, and the 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society.

<sup>38</sup> See generally CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE (2010); see also Vrdoljak, *supra* note 37, at 250–302.

<sup>39</sup> *Id.*

<sup>40</sup> Karima Bennoune, *Cultural Heritage is a Human Rights Issue*, UNESCO WIDE ANGLE (Oct. 25, 2016), <https://en.unesco.org/news/karima-bennoune-cultural-heritage-human-rights-issue> [<https://perma.cc/7AE6-XKAS>].

<sup>41</sup> See Sameh Wahba & Barbara Minguez Garcia, *Three Countries Show Why Culture Matters for Post-Conflict and Post-Disaster Reconstruction and Recovery*, WORLD BANK BLOGS (June 27, 2017), <https://blogs.worldbank.org/sustainablecities/three-countries-show-why-culture-matters-post-conflict-and-post-disaster-reconstruction-and-recovery> [<https://perma.cc/DFW9-DW7Y>]; Mechtild Rössler, *World Heritage and Reconstruction*, UNESCO (Jan. 24, 2018), <https://whc.unesco.org/en/review/86/> [<https://perma.cc/DS37-QWM3>].

Convention”).<sup>42</sup> It was the first international instrument dedicated to combating the illicit trafficking of cultural items.<sup>43</sup> Its preamble states that cultural heritage constitutes one of the basic elements of civilization and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history, and traditional setting.<sup>44</sup> The Convention builds upon UNESCO’s 1956 Recommendation on International Principles Applicable to Archaeological Excavations and 1964 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property.<sup>45</sup> The 1970 UNESCO Convention places a responsibility on nations “to establish a licensing system for the export of cultural objects; to protect cultural objects from looting, theft, and illegal export; and for signatories to cooperate in recovering illegally exported cultural objects.”<sup>46</sup> It is the responsibility of each signatory nation to implement the convention through national legislation.<sup>47</sup>

International law, both public and private, distinguishes cultural heritage from other types of property for legal purposes. There is a greater interest in regulating and protecting cultural heritage and property because it is of greater significance for humanity. Yet the “special” treatment of cultural heritage goes beyond legal actions, to include members of the cultural heritage community. Art historians, librarians, archaeologists, and other professionals fulfill a “professional commitment” to preserve information about these objects.<sup>48</sup>

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<sup>42</sup> See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter Convention on Ownership of Cultural Property 1970].

<sup>43</sup> See *id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *id.*

<sup>46</sup> Gerstenblith, *The Meaning of 1970*, *supra* note 36.

<sup>47</sup> See Patty Gerstenblith, *Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations*, in *THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY* 70, 71 (Jane Anderson & Haidy Geismar eds., 2017). The United States ratified the 1970 Convention in 1972, but passed implementing legislation in 1983. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (1983).

<sup>48</sup> See Prott & O’Keefe, *supra* note 9, at 307–08.

### B. *Treatment of Cultural Heritage by Individual Nations*

Cultural heritage objects are an intrinsic part of a nation's patrimony, with many nations actively protecting artifacts through governmental agencies, such as ministries of culture or foreign affairs.<sup>49</sup> Nations also provide financial resources to protect and preserve heritage, regulate the movement of objects through customs and border controls, patrol areas for security concerns, regulate the trade of legally excavated and exported objects, and police the market for illicitly removed items.<sup>50</sup>

Efforts to protect cultural heritage date back to at least as early as the 16th century in Europe, when the Papal States instituted legislation for these materials.<sup>51</sup> However, in more modern times, decades prior to the passage of the 1970 UNESCO Convention, nations enacted patrimony laws to protect cultural assets. Some nations, like Egypt, have patrimony laws originating from laws predating the foundations of their modern nation states.<sup>52</sup> For example, the Italian peninsula had patrimony laws enacted prior to the unification of Italy in 1861.<sup>53</sup> U.S. courts have had cause to interpret some of these patrimony laws, and have found them enforceable.<sup>54</sup>

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<sup>49</sup> Examples include Greece, Despina Minos-Minopoulos et al., *Civil Protection Reforms and Policies: The Need for Optimal Implementation by the Ministry of Culture and Tourism for Cultural Heritage Protection*, in *THE PROTECTION OF ARCHEOLOGICAL HERITAGE IN TIMES OF ECONOMIC CRISIS* (Elena Korka ed., 2014); Italy, Marianna Marzano & Monia Castellini, *The Reform of the Italian Ministry of Cultural Heritage: Implications for Governance of the Museum System*, 48 *J. ARTS MGMT., L. & SOC'Y* 206 (2018); and Turkey, Levent Boz, *Turkish National Immovable Cultural Heritage Inventory System*, 3 *AGROLIFE SCI. J.* 35 (2014).

<sup>50</sup> See Prott & O'Keefe, *supra* note 9, at 307–08.

<sup>51</sup> See Lindsay Willis, *Looting in Ancient Mesopotamia: A Legislation Scheme for the Protection of Iraq's Cultural Heritage*, 34 *GA. J. INT'L & COMP. L.* 221, 235 (2005).

<sup>52</sup> See *id.*

<sup>53</sup> See Donata Levi, *The Administration of Historical Heritage: The Italian Case*, in *NATIONAL APPROACHES TO THE GOVERNANCE OF HISTORICAL HERITAGE OVER TIME: A COMPARATIVE REPORT* 103, 109–11 (Stefan Fisch ed., 2008).

<sup>54</sup> See, e.g., *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (interpreting Egypt's law); *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (interpreting Italy's law); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) (interpreting Mexico's law); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (interpreting Guatemala's law); David L. Hall, *Cultural Property Law*, 64 *U.S. ATT'Y BULL.* 2, 20–21, 41–42 (Mar. 2016) (providing background on the enforcement of patrimony laws in the US).

Generally, national patrimony laws vest ownership in the sovereign for all undiscovered antiquities within the nation's borders.<sup>55</sup> Unlike property not subject to a patrimony law, cultural heritage property has been declared to be a state asset which may not be privately owned, sold, or exported absent express permission.<sup>56</sup> These laws vary by country, but they typically regulate the following: the declaration of the sovereign as owner of its cultural heritage; the regulation of the exportation of qualifying objects; the prohibition of private ownership of certain objects; and the imposition of civil and/or criminal penalties on those who violate the laws.<sup>57</sup> The concept of national cultural patrimony asserts that cultural objects produced, or first discovered, within national borders belong to that state based on the special relationship between that state's people and their cultural artifacts.<sup>58</sup> The "Lineage Argument"<sup>59</sup> is based on the idea that the objects share a special relationship between that sovereign's people and their heritage; essentially, people of a nation have a more meaningful relationship with its culture than others.<sup>60</sup> Another justification for patrimony laws is that cultural items can only be fully appreciated in the context of accurate information as to their origin, history, and traditional status.<sup>61</sup>

Some assert that maintaining these objects in their homes may

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<sup>55</sup> The word "patrimony," in a domestic context, means property which has descended within the same family or is inherited from one's ancestors. *Patrimony*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>56</sup> *Get the Facts*, CULTURAL PROP. NEWS, <https://culturalpropertynews.org/get-the-facts/#what-is-cultural-property> [<https://perma.cc/XVH7-6TYU>] (last visited Nov. 11, 2019) (defining cultural property).

<sup>57</sup> See Convention on Ownership of Cultural Property 1970, *supra* note 42; Hall, *supra* note 54, at 17–24.

<sup>58</sup> Douglas N. Thomason, *Rolling Back History: The United Nations General Assembly and the Right to Cultural Property*, 22 CASE W. RES. J. INT'L L. 47, 47 (1990) (This argument is referred to in this paper as the "Lineage Argument").

<sup>59</sup> See *id.*

<sup>60</sup> See M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 449 (1994).

<sup>61</sup> *Id.* at 449. This argument is referred to in this Article as the "Historical Context Argument." Although beyond the scope of this Article, a debate has been raging in the cultural heritage realm for decades, if not centuries, about whether works are best seen in the context of where they were created or within a broader context of work history. This debate is often framed as nationalism v. internationalism.

not be in the best interest of these artifacts for humanity.<sup>62</sup> The Lineage Argument is not always persuasive. For instance, the cultural connection and patrimonial line between the people of the modern Arab Republic of Egypt and the Ancient Egyptian civilization is tenuous. The same may be said about the people of Ancient Rome versus today's modern Italian population. It is questionable that current inhabitants of a nation have a superior claim to these objects than humanity at large. Similarly, another criticism relates to the fact that modern nation states do not conform with ancient or historical borders.<sup>63</sup>

The Historical Context Argument is more persuasive in that it is based on the physical object itself, not the origin of the creator or current inhabitants of a sovereign.<sup>64</sup> The argument is focused on the physical, and in some cases archaeological, context of the items.<sup>65</sup> Viewing an artifact in its birthplace or eventual resting place is an inherent feature of the item itself because the location is part of the object's provenance<sup>66</sup> or provenience.<sup>67</sup> The argument relates to the proper home of the object itself, not as the property of the nation or its people exercising ownership or control over it.<sup>68</sup>

As unpersuasive as the Lineage Argument and Historical Context Arguments may be to some critics, national patrimony laws are meritorious. These laws play a significant role in protecting heritage not only for a nation's citizens, but for the global community. Patrimony laws prevent unsanctioned individuals or groups (including criminal looting networks) from digging sites

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<sup>62</sup> See, e.g., John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831, 846 (1986) (discussing the idea that some countries, such as Peru, do not adequately conserve or display their works and they would be better cared for in another place).

<sup>63</sup> See Anna Stilz, *Nations, States, and Territory*, 121 ETHICS 572, 575–78 (2011) (discussing the nationalist theory of territory).

<sup>64</sup> See Merryman, *supra* note 62, at 832.

<sup>65</sup> *Id.*

<sup>66</sup> “The history of ownership of a valued object or work of art or literature.” *Provenance*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/provenance> [<https://perma.cc/M8XM-BPDB>].

<sup>67</sup> “Source or find spot of an archaeological object.” *Provenience*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/provenience#learn-more> (defined as “origin” or “source”) [<https://perma.cc/N7QF-4TQR>].

<sup>68</sup> See Merryman, *supra* note 62, at 832.

within a nation's borders.<sup>69</sup> Further, by placing export and sales restrictions on objects illicitly removed, patrimony laws aim to stifle the trade in plunder by restricting the movement of looted items.<sup>70</sup> Without patrimony laws, layman could initiate excavations and freely exchange the materials on the antiquities market. Not only would this lead to a physical loss of historical objects, but it would result in the destruction of archaeological sites, loss of archaeological context, and the disappearance of important objects from the public realm at a future time in which they are eventually excavated.<sup>71</sup> Instead, patrimony laws place the protection and regulation of these objects in the hands of a government to protect and research the objects within their borders, rather than simply sell them to private buyers.<sup>72</sup>

Patrimony laws also allow governments to promote, properly excavate, and research objects and sites by granting permission to worthy institutions to excavate and work with materials found within their borders.<sup>73</sup> In this way, patrimony laws protect shared cultural heritage not only for its own citizens, but for humanity at large. In some ways, the regulation of cultural heritage objects is like the sovereign regulation of natural resources.<sup>74</sup> The national ownership of cultural heritage is likened to that of a trust for its people.<sup>75</sup> However, national ownership protects heritage not only

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<sup>69</sup> Timothy Potts, *Combatting Illicit Trade: An Assessment*, 11 ART ANTIQUITY & L. 131, 136 (2006). See, e.g., 16 U.S.C. § 470ee(a) (2012) (prohibiting unauthorized "excavation, removal, damage, alteration, or defacement of archaeological resources").

<sup>70</sup> Convention on Ownership of Cultural Property 1970, *supra* note 42, at 232.

<sup>71</sup> See generally U.S. Dep't. of Justice Exec. Off. for U.S. Att'y, *Cultural Property Law*, 64 U.S. ATT'YS BULL. 1 (providing additional information about the importance of cultural property and laws protecting it).

<sup>72</sup> Convention on Ownership of Cultural Property 1970, *supra* note 42.

<sup>73</sup> See *id.*

<sup>74</sup> See *Heritage: Legacy from the Past to the Future*, UNESCO, <http://www.unesco.org/new/en/brasilia/culture/world-heritage/heritage-legacy-from-past-to-the-future/> [<https://perma.cc/34M4-EM4V>] (defining both cultural and natural heritage, as well as the link between them). See generally David Lowenthal, *Natural and Cultural Heritage*, 11 INT'L J. HERITAGE STUD. 81 (2006) (discussing the similarities between nature and culture and how the two should be protected and preserved similarly).

<sup>75</sup> See generally Gerstenblith, *Identity and Cultural Property*, *supra* note 25, at 559–688 (discussing cultural property and the public land trust doctrine which protects natural resources).

for a nation's people, but for all humanity.<sup>76</sup> In this way, title to particular items may be vested in a nation, but the objects can simultaneously hold significance for all humankind through protection, research, and display. For this reason, patrimony laws have positive ramifications for all humanity and the preservation of history by protecting cultural artifacts against looting and destruction. By restricting the free flow of heritage objects, cultural heritage is not simply commercial property. The treatment of cultural heritage can be likened to the trade in endangered species which also face trade and export limitations.<sup>77</sup>

### C. *Treatment of Cultural Heritage in the United States*

Although U.S. law and jurisprudence favors inalienable ownership interests, heritage is treated differently.<sup>78</sup> It evidences the strong commitment to heritage protection in the United States.<sup>79</sup> Even though the United States does not have a conventional national patrimony law *per se*, American policymakers have long recognized the importance of cultural heritage. A nation referred to as a “melting pot” of cultures, the United States has actively protected heritage for over a century and a half. Historic preservation efforts were made by designating properties as historic sites in order to preserve their integrity. One of the first designations occurred in 1850 for Washington's Headquarters State Historic Site in Newburgh, New York,<sup>80</sup> with Washington's Mount Vernon site following in 1858.<sup>81</sup> In the following century, Congress passed, and Theodore Roosevelt signed into law, the Antiquities Act of 1906.<sup>82</sup>

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<sup>76</sup> See generally Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L. 1209 (2004) (describing how an international legal structure around cultural heritage has emerged).

<sup>77</sup> See *MOL, Inc. v. People's Rep. of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984).

<sup>78</sup> See Patty Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership Rights*, 14 ART ANTIQUITY & L. 21, 21 (2009).

<sup>79</sup> See *id.* at 31.

<sup>80</sup> *Washington's Headquarters State Historic Site*, N.Y. ST. PARKS, REC. & HIST. PRESERVATION, <https://parks.ny.gov/historic-sites/17/details.aspx> [https://perma.cc/NES8-TGTD].

<sup>81</sup> *Mount Vernon*, HISTORY, <https://www.history.com/topics/landmarks/mount-vernion> [https://perma.cc/FW9T-MCNK] (last updated Aug. 21, 2018).

<sup>82</sup> *American Antiquities Act of 1906*, NAT'L PARKS SERV.,

The law gave the President the authority to create national monuments from federal lands to protect significant natural, cultural, or scientific features.<sup>83</sup> Although a portion of the law has since been deemed unconstitutional, the Antiquities Act has still been used more than 150 times.<sup>84</sup>

To supplement the Antiquities Act of 1906, Congress passed the Archaeological Resources Protection Act of 1979 (“ARPA”) which was amended in 1988.<sup>85</sup> It governs the excavation of archaeological sites on federal and Native American lands in the United States, and the removal and disposition of archaeological collections from those sites.<sup>86</sup> Testament to the seriousness of the offence, ARPA carries both civil and criminal penalties.<sup>87</sup> Finally, Congress passed the Native American Graves Protection and Repatriation Act (“NAGPRA”),<sup>88</sup> an act requiring federal agencies and institutions receiving federal funding to return Native American “cultural items”<sup>89</sup> to lineal descendants and culturally affiliated Indian tribes and Native Hawaiian organizations. A program of federal grants assists in the repatriation process and the Secretary of the Interior may assess civil penalties on museums that fail to comply.<sup>90</sup> NAGPRA also carries criminal penalties for those involved in the trafficking of Native American cultural heritage.<sup>91</sup> It is also interesting to note that natural resources are often

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<https://www.nps.gov/subjects/legal/american-antiquities-act-of-1906.htm>  
[<https://perma.cc/6QFX-SEUV>].

<sup>83</sup> American Antiquities Act of 1906, 16 U.S.C. §§ 431–433.

<sup>84</sup> See *U.S. v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974); *Designation of Monuments Pursuant to the Authorities Provided in the Antiquities Act: Hearing before the Comm. on Energy and Natural Resources*, 114th Cong. 114 (2016) (statement from U.S. Dep’t of the Interior).

<sup>85</sup> Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa–470mm (2012); Brent J. Hartman, *Extending the Scope of the Antiquities Act*, 32 PUB. LAND & RESOURCES L. REV. 153, 171–72 (2011).

<sup>86</sup> 16 U.S.C. § 470aa(2)(b) (2012).

<sup>87</sup> *Id.* §§ 470ee(d), 740ff.

<sup>88</sup> Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2012).

<sup>89</sup> Cultural items include human remains, funerary objects, sacred objects, and objects of cultural patrimony. *Id.* § 3001(3).

<sup>90</sup> *Id.* §§ 3007–3008.

<sup>91</sup> *Id.* § 3007.



considered a part of America's rich heritage and cultural landscape, and thus laws have also been passed to protect endangered species, national parks, and America's symbol, the bald eagle.<sup>92</sup>

The United States has proven its commitment to heritage protection, as evidenced through the ratification of international instruments. Most significantly, the United States was one of the first market nations<sup>93</sup> to join the 1970 UNESCO Convention.<sup>94</sup> However, the Convention was not self-executing, meaning that the United States needed to enact legislation to implement it into U.S. law.<sup>95</sup> Although it took over a decade, the Convention on Cultural Property Implementation Act ("CCPIA")<sup>96</sup> implemented Articles 7(b)(1) and 9 of the Convention into law. Congress took these actions because it found that increasing demand for archaeological and ethnological materials and antiquities spurred a great increase in the international trade of such objects.<sup>97</sup> Due to the nature of the objects and the valuation of those pieces, only a fixed number of objects existed. To meet the international demand, new objects must be introduced to the market, raising concerns about looting and destruction.<sup>98</sup>

Although many of the international conventions concerning cultural heritage during times of war come out of Europe, the United States was actually one of the first nations to enact a code to protect cultural items during conflict.<sup>99</sup> During the Civil War,

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<sup>92</sup> The Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d (2012).

<sup>93</sup> Although some scholars reject the use of the term, "market nations" refers to those countries that are more often thought of as importers, rather than exporters, of cultural heritage. See Merryman, *supra* note 62, at 832.

<sup>94</sup> Gerstenblith, *The Meaning of 1970*, *supra* note 36, at 364.

<sup>95</sup> *Id.* at 364–65.

<sup>96</sup> Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601–2613 (2012).

<sup>97</sup> See Implementing Legislation for the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, S. REP. NO. 97-564, at 1–4 (1982).

<sup>98</sup> *Id.* at 3.

<sup>99</sup> See Jenny Gesley, *The "Lieber Code" – the First Modern Codification of the Laws of War*, LIBR. OF CONG. (Apr. 24, 2018), <https://blogs.loc.gov/law/2018/04/the-lieber-code-the-first-modern-codification-of-the-laws-of-war/> [<https://perma.cc/TF5B-W54B>] (discussing the Lieber Code and its rules which protect the persons and property in times of armed conflict).

President Abraham Lincoln signed the Lieber Code,<sup>100</sup> outlining military conduct for Union soldiers.<sup>101</sup> It was one of the earliest texts of modern humanitarian law, addressing the treatment of cultural heritage and emphasizing the importance of protecting this material during war.<sup>102</sup> The code provided that property belonging to churches, hospitals or charitable institutions, schools, universities, academies, observatories, museums, or scientific institutions be treated differently than other institutions; namely, that it is not subject to appropriation.<sup>103</sup> The Lieber Code even outlined post-conflict resolutions for appropriation in the form of peace treaties, and notes that “in no case shall [the property removed from these institutions] be sold or given away . . . nor shall they ever be privately appropriated, or wantonly destroyed or injured.”<sup>104</sup> Scholars have credited the Lieber Code with influencing the Hague Conventions and Regulations of 1899 and 1907.<sup>105</sup>

#### *D. Illicit Trafficking of Cultural Heritage*

The illicit trafficking of artifacts is a concern for states attempting to protect their cultural heritage as an extension of their national identity. Yet it goes further than that, as looting damages heritage.<sup>106</sup> Looting harms all citizens because it leads to the destruction and loss of heritage from the populace.<sup>107</sup> Moreover,

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<sup>100</sup> Gen. Order No. 100 of Apr. 24, 1863, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD, PREPARED BY FRANCIS LIEBER, LL.D., AND REVISED BY A BOARD OF DIRECTORS (D. Van Nostrand, 1st ed. 1863) [hereinafter Lieber Code].

<sup>101</sup> *Id.*

<sup>102</sup> See Gesley, *supra* note 99.

<sup>103</sup> See Lieber Code, *supra* note 100, arts. 34–35.

<sup>104</sup> *Id.* art. 36.

<sup>105</sup> Int’l Comm. of the Red Cross, *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, Apr. 24, 1863, ICRC: TREATIES, STATE PARTIES, AND COMMENTARIES, <https://ihl-databases.icrc.org/ihl/INTRO/110> [<https://perma.cc/B8N9-5PTY>].

<sup>106</sup> Neil Brodie & Colin Renfrew, *Looting and the World’s Archaeological Heritage: The Inadequate Response*, 34 ANN. REV. ANTHROPOLOGY 343, 344 (2005) (“[D]istressingly a significant proportion of the ongoing destruction [of heritage] is brought about by looters, acting from commercial motives . . .”).

<sup>107</sup> Monica Hanna, *Losing Heritage, Losing Identity*, AL RAWI: EGYPT’S HERITAGE REV. 5 (2013), <https://rawi-magazine.com/articles/losingheritage/> [<https://perma.cc/5AEC-5XWB>] (“The value of Egyptian heritage lies in commemorating

scholars point to the link between the black market for antiquities and other criminal activities, including money laundering,<sup>108</sup> organized crime,<sup>109</sup> corruption,<sup>110</sup> armed violence,<sup>111</sup> and terrorism.<sup>112</sup> Lack of provenance or incomplete provenance further complicates matters, as an object circulating on the market may have arrived unlawfully but eventually becomes available for lawful transactions as its looted past becomes obscured.

The antiquities market's self-regulation and opacity also contribute to the trade in illicit antiquities.<sup>113</sup> The nature of theft

the country's past and defining its collective identity and cultural memory. With widespread looting and destruction, both culture and identity become diluted. People use spaces and objects both to define themselves and to teach new generations about the failures and successes of the past, all of which have formed the reality of their present.”).

<sup>108</sup> Konstantinos-Orfeas Sotiriou, *The F Words: Frauds, Forgeries, and Fakes in Antiquities Smuggling and the Role of Organized Crime*, 25 INT'L J. CULT. PROP. 223, 227 (May 2018) (Table 1, “Cases, objects, and indications of organized crime” noting money laundering indicia). See *Looting and Laundering Art, Antiquities, and Financial Crimes*, ANTIQUITIES COALITION (Nov. 6, 2018), <https://theantiquitiescoalition.org/looting-and-laundering-art-antiquities-and-financial-crimes/> [<https://perma.cc/TCC8-3Z3X>].

<sup>109</sup> Sotiriou, *supra* note 108, at 224.

<sup>110</sup> Simon Mackenzie, *The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organised Crime in the International Antiquities Market*, in CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY 69, 69, 76–77 (Stefano Manacorda & Duncan Chappell eds. 2011).

<sup>111</sup> See *id.* at 83.

<sup>112</sup> See Mathew Bogdanos, *Thieves of Baghdad: The Global Traffic in Stolen Iraqi Antiquities*, in CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY 143, 161–62 (Stefano Manacorda & Duncan Chappell eds.) (“We do not have hard numbers – the traffic in art for arms is too recent and shadowy a phenomenon – and some of the investigations remain classified because of the connection to terrorists. But this illicit trade has become a growing source of revenue for the insurgents; ranking just below kidnappings for ransom and “protection” money from local residents and merchants.”). See Federico Lenzerini, *Terrorism, Conflicts and the Responsibility to Protect Cultural Heritage*, 51 THE INT'L SPECTATOR 70 (2016).

<sup>113</sup> Bogdanos, *supra* note 112, at 166 (“Fourth, museums, archaeologists, and dealers should establish a strict and uniform code of conduct . . . . If they refuse such self-regulation, then Congress should impose regulation . . . . Until then, I continue to urge academics, curators, and dealers to abandon their self-serving complacency about – if not complicity in – irregularities of documentation.”); see also Giovanni Nistri, *The Experience of the Italian Cultural Heritage Protection Unit*, in CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY 183, 183–84 (Stefano Manacorda & Duncan Chappell eds. 2011) (describing how an Italian auxiliary law enforcement agency allows merchant associations access “to selective consultation [of a ‘Database of illegally removed cultural artifacts’] . . . with a view to improving market

makes it difficult to identify the culprits. But more than that, the lack of information about artifacts recently dug up from the ground (in some cases, objects not seen for millennia) make it a challenge to identify the pieces, their origin, and the legality of their excavation. The illicit trade in cultural heritage is hard to investigate and prosecute due to plausible deniability as a defense.<sup>114</sup> Antiquities are subject to looting and illegal export in order to feed the art market. Sellers may provide false provenance information and documentation with the object to disguise their origins and fool purchasers.<sup>115</sup> Unscrupulous traders employ numerous methods to avoid detection and rely on the lack of provenance and due diligence standards to defeat accusations.<sup>116</sup> Law enforcement agencies are often undereducated in these matters and are impotent to stop the illicit antiquities trading, which continues to grow.<sup>117</sup> The costs range from economic to cultural and even to human, as people engaged in illegal digging have died during the process.<sup>118</sup>

#### IV. International Repatriation of Stolen Cultural Heritage

Culturally and artistically significant objects have been repatriated for centuries. Often cited as the first legal case related to cultural heritage looting, *In Verrum* (“Against Verres”) was a series of speeches made by Cicero in 70 B.C.E.<sup>119</sup> The speeches were made during the trial against Gaius Verres, the former governor, for the despoiling of temples and the theft of art and

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transparency”).

<sup>114</sup> Sarah Birnbaum, *Hobby Lobby Ignored ‘Red Flags’ About Stolen Iraqi Artifacts*, PUB. RADIO INT’L (July 6, 2017), <https://www.pri.org/stories/2017-07-06/hobby-lobby-ignored-red-flags-about-stolen-iraqi-artifacts> [<https://perma.cc/T5MZ-3GKP>].

<sup>115</sup> See Samuel Hardy, *Illicit Trafficking, Provenance Research and Due Diligence: the State of the Art*, 1, 11–12 (UNESCO Res. Study, Mar. 30, 2016), [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Hardy\\_2016\\_UNESCO\\_antiquities\\_traffic\\_king\\_review\\_materia.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Hardy_2016_UNESCO_antiquities_traffic_king_review_materia.pdf) [<https://perma.cc/KX79-J7NA>] (“[C]riminals can also physically produce all sorts of fake provenance documentation, from falsely reassuring labels, which attribute objects to certain cultures or guarantee authenticity but do not guarantee legality, to false declarations on customs documents.”).

<sup>116</sup> See *id.*

<sup>117</sup> See Bogdanos, *supra* note 112, at 165.

<sup>118</sup> See D. H. BERRY, *CICERO: POLITICAL SPEECHES* (2006).

<sup>119</sup> See *id.*

statues for his private collection.<sup>120</sup> History is rife with leaders involved in pillage, including leaders who plundered during conflict, like Napoleon<sup>121</sup> and Hitler.<sup>122</sup> However, the past few decades have witnessed legal claims made by foreign sovereigns for the return of looted cultural heritage objects, not necessarily as war plunder, but as objects that entered collections through the art market. Although the presence of looted objects on the market has occurred for centuries, the increasing number of legal cases brought by sovereign governments indicates that cultural heritage disputes are not merely between private parties in a given case, but rather are of concern to the general public and sovereign nations, respectively as descendants and trustees of heritage items. In addition, it is a testament to the broader issues related to diplomacy, international relationships, and shared human history.

*A. Euphronios Krater – A Veritable “Hot Pot”*<sup>123</sup>

One of the most highly publicized antiquities disputes, and perhaps most significant for its precedential merit, involved the Republic of Italy and the Metropolitan Museum of Art (the “Met”). In November 1972, the Met acquired the Sarpedon Krater, better known as the “Euphronios Krater” because it was painted by the

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<sup>120</sup> See generally 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 (Jan. 2002).

<sup>121</sup> See Dorothy Mackay Quynn, *The Art Confiscations of the Napoleonic Wars*, 50 AM. HIST. REV. 437 (1945) (describing the “convoy of art treasures confiscated by Napoleon”).

<sup>122</sup> See Howard N. Spiegler, *Introduction and Overview of Nazi Looted Cases*, 17 CAN. CRIM. L. REV. 3 (2012). For a general overview of Nazi plunder and individual attempts to recover looted artwork, see generally Donald S. Burris, *Restoration of a Culture: A California Lawyer’s Lengthy Quest to Restitute Nazi-Looted Art*, 45 N.C. J. INT’L L. 277 (2020) (providing an overview of Nazi looting and a chronology of American legal cases pertaining thereto); see also Marc Masurovsky, *A Comparative Look at Nazi Plundered Art, Looted Antiquities, & Stolen Indigenous Objects*, 45 N.C. J. INT’L L. 497 (2020) (discussing looted indigenous art and Nazi plunder, as well as the sociological implications thereof); Simon J. Frankel, *The HEAR Act & Laches After Three Years*, 45 N.C. J. INT’L L. 441 (2020) (discussing conflicting court decisions relating to Holocaust-era looted art, the 2016 HEAR Act, and the equitable doctrine of laches).

<sup>123</sup> Former director of the Metropolitan Museum of Art, Thomas Hoving, whether jokingly or not, referred to the krater as the “hot pot.” Randy Kennedy, *Thomas Hoving, Remaker of the Met, Dies at 78*, N.Y. TIMES (Dec. 10, 2009), <https://www.nytimes.com/2009/12/11/arts/design/11hoving.html> [<https://perma.cc/E9ES-KFDE>].

famed Euphronios.<sup>124</sup> The work, dating from around 515 B.C.E., is decorated with a scene depicting the death of Sarpedon, son of Zeus, attended by Hypnos (Sleep), Thanatos (Death), and Hermes (the Messenger), all rendered in the red-figure style.<sup>125</sup> The reverse features Athenian youths preparing for battle.<sup>126</sup> Due to the rarity and quality of the object, the museum paid \$1 million for the work, at the time the highest price paid by a museum for an antiquity.<sup>127</sup> Then director Thomas Hoving described it as “a work that would force the history of Greek art to be rewritten.”<sup>128</sup> He announced that the object had been purchased from a private English collector but he declined to reveal the identities of the vase’s dealer and previous owner.<sup>129</sup> Almost immediately, suspicions were raised because people were skeptical that a vase painted by the famed artist could have remained unknown for half a century in a private collection.<sup>130</sup> At the time of the museum’s purchase, dealer Robert Hecht<sup>131</sup>

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<sup>124</sup> Elisabetta Povoledo, *Ancient Vase Comes Home to a Hero’s Welcome*, N.Y. TIMES (Jan. 19, 2008), <https://www.nytimes.com/2008/01/19/arts/design/19bowl.html> [https://perma.cc/C2SV-X5CL].

<sup>125</sup> Sarah Keim, *The Euphronios Krater Controversy*, PENN ST. U. MUSEUM STUD. 2015 (Feb. 1, 2015), <https://sites.psu.edu/museumstudies2015/2015/02/01/the-euphronios-krater-controversy/> [https://perma.cc/VUH5-TQK5].

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Neil Brodie, *Euphronios (Sarpedon) Krater*, TRAFFICKING CULTURE (last modified Sept. 6, 2012), <https://traffickingculture.org/encyclopedia/case-studies/euphronios-sarpedon-krater/> [https://perma.cc/VK8L-JKJ3] (citing THOMAS HOVING, MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART 318 (1993)).

<sup>129</sup> *Id.*

<sup>130</sup> See Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, is Set to Yield Prized Vase to Italy*, N.Y. TIMES (Feb. 3, 2006), <https://www.nytimes.com/2006/02/03/arts/03muse.html?mtrref=www.google.com&assetType=REGIWALL> [https://perma.cc/N5XX-LVUY] [hereinafter Kennedy & Eakin, *The Met Ending 30-Year Stance*] (“When the Met bought the krater in 1972 for more than \$1 million from a dealer whose practices were already under scrutiny, its appearance stunned the art world and led to front-page headlines about its provenance. Italy almost immediately began an investigation, with help in the United States from the F.B.I.”).

<sup>131</sup> It was later revealed that Hecht often dealt with looted items. See, e.g., Bruce Weber, *Robert Hecht, Antiquities Dealer, Dies at 92*, N.Y. TIMES (Feb. 9, 2012), <https://www.nytimes.com/2012/02/10/arts/design/robert-hecht-antiquities-dealer-dies-at-92.html> [https://perma.cc/YL23-KAA6]; *Hecht’s Footprints: Haverford College Opens up about Source of Their Greek Vases*, CHASING APHRODITE (Nov. 4, 2014), <https://chasingaphrodite.com/2014/11/04/hechts-footprints-haverford-college-opens-up-about-source-of-their-greek-vases/> [https://perma.cc/2HZH-JWBD].

represented himself as acting on behalf of the krater's owner, Lebanese collector and dealer Dikran Sarrafian.<sup>132</sup> Hecht supplied two spurious provenance documents.<sup>133</sup>

In November 1972, the *New York Times* announced the krater's acquisition, but the price and provenance were withheld, with the Met claiming that secrecy was needed to protect a potential source of future acquisitions.<sup>134</sup> Italian authorities were convinced it was looted; they believed the krater had been recently removed from Italy, but authorities were unable to prove the object's origin.<sup>135</sup> (This is a very common problem with demanding the return of looted works because the nature of stolen goods is that thieves conceal information about the theft). Without evidence to prove the object was looted and from where it was taken, the Italian authorities could not demand repatriation.<sup>136</sup>

The truth was revealed in 1995 when, serendipitously, during a seemingly unrelated investigation over illicit trafficking, the Italian Carabinieri discovered evidence of a looting network that linked the krater to a specific looted Etruscan tomb in Cerveteri,

<sup>132</sup> Thomas Hoving, *Super Art Gems of New York City: Hot Pot Part II – Unexpectedly, the Money Source Opens Up*, ARTNET MAG., <http://www.artnet.com/magazine/features/hoving/hoving7-2-01.asp> [<https://perma.cc/GZ7E-LY97>].

<sup>133</sup> First was a letter dated July 10, 1971, written to Hecht, in which Sarrafian declared that he would provide the vase to Hecht for the final sale price of \$1 million. Second was another letter from Sarrafian, dated September 9, 1972, stating that his father obtained the krater in 1920 in London, that it was in fragments, and that it was sent to Switzerland for restoration about three years prior to writing of the letter. Thomas Hoving, *Super Art Gems of New York City: Hot Pot Part III – The Shit Hits the Fan*, ARTNET MAG., <http://www.artnet.com/magazine/features/hoving/hoving7-5-01.asp> [<https://perma.cc/QLL4-5K6M>].

<sup>134</sup> James R. Mellow, *A New (6th Century B. C.) Greek Vase for New York*, N.Y. TIMES (Nov. 12, 1972), <https://www.nytimes.com/1972/11/12/archives/a-new-6th-century-b-c-greek-vase-for-new-york-greek-vase-the-other.html> [<https://perma.cc/8VUE-MHG8>].

<sup>135</sup> See Kennedy & Eakin, *The Met Ending 30-Year Stance*, *supra* note 130 (“When the Met bought the krater in 1972 for more than \$1 million from a dealer whose practices were already under scrutiny, its appearance stunned the art world and led to front-page headlines about its provenance. Italy almost immediately began an investigation, with help in the United States from the F.B.I.”).

<sup>136</sup> See *id.* (noting that Italian repatriation efforts “foundered” in the 1970s, impliedly for lack of evidence).

Italy.<sup>137</sup> The Carabinieri raided the Swiss warehouse of antiquities dealer Giacomo Medici, exposing thousands of stolen objects and the records of their sales to museums and collectors.<sup>138</sup> Giacomo Medici bought the krater directly from the tomb robbers who found the artifact in the Etruscan cemetery of Cerveteri.<sup>139</sup> He then sold the krater to Robert Hecht, an American antiquities dealer, who in turn sold it to the Met.<sup>140</sup>

Contemporaneous with the krater's investigation, Giacomo Medici faced prosecution in Italy for criminal dealings through his looting network.<sup>141</sup> The case threw a spotlight on the illicit antiquities trade and raised awareness of the damage caused by looting.<sup>142</sup> It was also revealed at this time that the artifact was intentionally broken; the miraculously intact artifact that survived for over two millennia was broken into several pieces by smugglers to avoid detection at customs and to be exported from Italy and into the U.S.<sup>143</sup> After authorities discovered the krater's true history, the Italian government forcefully requested its repatriation.<sup>144</sup> Due to Italy's strong patrimony laws,<sup>145</sup> antiquities found within its soil belong to the Republic of Italy; it is illegal to sell or export these objects without permission from authorities. However, this case highlights the challenges for origin nations because it is often difficult to prove from where an object originates and when an object left the country.<sup>146</sup> The burden of proof is on the country

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<sup>137</sup> Brodie, *supra* note 128.

<sup>138</sup> VERNON SILVER, *THE LOST CHALICE* 174 (2009).

<sup>139</sup> *Id.* at 50–51.

<sup>140</sup> *See* Brodie, *supra* note 128.

<sup>141</sup> *See* Neil Brodie, *Giacomo Medici*, *TRAFFICKING CULTURE* (Apr. 10, 2015), <https://traffickingculture.org/encyclopedia/case-studies/giacomo-medici/> [<https://perma.cc/FZ8G-FZXR>].

<sup>142</sup> SILVER, *supra* note 138, at 220–21.

<sup>143</sup> *Id.* at 42–43, 51. Unfortunately, this is a common occurrence; smugglers often deliberately deface or break up artifacts to render them less recognizable and easier to smuggle. Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 *COLUM. L. REV.* 377, 383 (1995).

<sup>144</sup> SILVER, *supra* note 138, at 215.

<sup>145</sup> *See* Lauren Fae Silver, *Recapturing Art: A Comprehensive Assessment of the Italian Model for Cultural Property Protection*, 23 *N.Y. INT'L L. REV.* 1 (2014).

<sup>146</sup> *See* Marion P. Forsyth, *International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation*, 8 *CHI. J. INT'L L.* 197 (2007); *see also* Kavita Sharma, *From the Mayan Machaquila Stele to Egyptian Pharaoh*



making a repatriation claim to show that an object was taken in contravention of its laws after the passage of the applicable law.<sup>147</sup> Italy only met this burden because authorities happened upon records of the looting network, but those types of records are not typically discovered in looting investigations.<sup>148</sup>

In 2005, Italy began a public campaign to reclaim its valuable cultural heritage.<sup>149</sup> The following year, the Met and the Republic of Italy reached an agreement to return over a dozen objects, including the Euphronios Krater, to the Mediterranean nation.<sup>150</sup> Much of the evidence was circumstantial, but the museum's director Phillippe de Montebello thought it 'highly probable' that the krater was looted.<sup>151</sup> In exchange for the return of the objects, Italy agreed to offer the Met long-term loans of works of comparable value.<sup>152</sup> The krater was returned to Italy in January 2008, where it was displayed with other returned objects at the exhibition *Nostoi: Capolavori Ritrovati*, before being exhibited at Rome's museum of Etruscan art, Villa Giulia, and finally returning to its permanent home in Cerveteri in 2014.<sup>153</sup> The return of the krater was celebrated in the U.S. and in Europe through a great deal of publicity, press conferences, and repatriation ceremonies.<sup>154</sup> The artifact has gained wide recognition and is a symbol of the repatriation movement.<sup>155</sup>

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*Amenhotep's Head: United States Courts' Enforcement of Foreign National Patrimony Laws after United States v. Schultz*, 56 HASTINGS L. J. 749 (2005); Eric C. Schneider, *Plunder or Excavation? Observations and Suggestions on the Regulation of Ownership and Trade in the Evidence of Cultural Patrimony*, 9 SYRACUSE J. INT'L L. & COM. 1, 14 (1982).

<sup>147</sup> Sharma, *supra* note 146, at 762.

<sup>148</sup> Kennedy & Eakin, *The Met Ending 30-Year Stance*, *supra* note 130.

<sup>149</sup> Italy, SAVING ANTIQUITIES FOR EVERYONE, <http://savingantiquities.org/a-global-concern/italy/> [<https://perma.cc/WQ7R-7RZQ>].

<sup>150</sup> Kennedy & Eakin, *The Met Ending 30-Year Stance*, *supra* note 130.

<sup>151</sup> Randy Kennedy & Hugh Eakin, *Met Agrees Tentatively to Return Vase in '08*, N.Y. TIMES (Feb. 4, 2006), <https://www.nytimes.com/2006/02/04/arts/met-agrees-tentatively-to-return-vase-in-08.html> [<https://perma.cc/WAJ6-5UZH>] [hereinafter Kennedy & Eakin, *Met Agrees*].

<sup>152</sup> Kennedy & Eakin, *The Met Ending 30-Year Stance*, *supra* note 130.

<sup>153</sup> The University of Glasgow, *The Metropolitan Museum of Art's 'Hot Pot'*, FUTURE LEARN, <https://www.futurelearn.com/courses/art-crime/0/steps/11865> [<https://perma.cc/L8C5-QRK7>].

<sup>154</sup> See Povoledo, *supra* note 124.

<sup>155</sup> See *id.*

The dispute over the Euphronios Krater is important for many reasons. First, it was an internationally publicized case that shed light on the robust market for looted art. It brought attention to the fact that internationally renowned and reputable institutions play a role in the market for loot. Second, the case demonstrated a nation's determination in reclaiming objects, halting the plunder of objects from its borders, investing resources in uncovering looting networks, and attempting to stop criminal networks. Third, the case led other institutions to cooperate with the Republic of Italy to return loot,<sup>156</sup> and for museums in general to more heavily scrutinize their acquisitions.<sup>157</sup> Finally, the matter revealed a cooperative approach for resolving antiquities disputes. Rather than proceeding through litigation, the Met and Italian officials negotiated a widely lauded loan agreement.<sup>158</sup> By returning looted objects to Italy, the museum received access to long-term loans and other favorable treatment by Italy.<sup>159</sup> This approach demonstrates the value of mutually beneficial agreements and diplomatic attempts to resolve a highly charged dispute.

The repatriation agreement was also informed by the strong relationship between Italy and the United States in general. The Republic of Italy has a memorandum of understanding ("MoU"), a bilateral agreement, with the United States that has been in place,

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<sup>156</sup> *Italian Ministry of Culture Agreement*, MUSEUM OF FINE ARTS BOSTON, <https://www.mfa.org/collections/provenance/antiquities-and-cultural-property/italian-ministry-of-culture-agreement> [<https://perma.cc/VJ5F-YK5K>]; Cass Cliatt, *Princeton University Art Museum and Italy to Sign Agreement Over Antiquities*, PRINCETON U. (Oct. 26, 2007), <https://www.princeton.edu/news/2007/10/26/princeton-university-art-museum-and-italy-sign-agreement-over-antiquities> [<https://perma.cc/J84E-LJ52>]; Kelley N. Schreiber, *Cleveland Museum of Art to Transfer Roman Sculpture of Drusus Minor to the Republic of Italy*, CLEVELAND MUSEUM OF ART (Apr. 18, 2017), <https://www.clevelandart.org/about/press/media-kit/cleveland-museum-art-transfer-roman-sculpture-drusus-minor-republic-italy-0> [<https://perma.cc/Q8RZ-DNKP>]; *J. Paul Getty Museum to Return 26 Objects to Italy*, J. PAUL GETTY MUSEUM (Nov. 21, 2006), [https://www.getty.edu/news/press/center/statement06\\_getty\\_italy\\_meeting111706.html](https://www.getty.edu/news/press/center/statement06_getty_italy_meeting111706.html) [<https://perma.cc/PZ7H-6NYK>].

<sup>157</sup> The case led to the appointment of the first provenance curator in a U.S. institution at the Museum of Fine Arts in Boston. *Italian Ministry of Culture Agreement*, *supra* note 156; Cliatt, *supra* note 156; Schreiber, *supra* note 156; *J. Paul Getty Museum to Return 26 Objects to Italy*, *supra* note 156.

<sup>158</sup> Kennedy & Eakin, *Met Agrees*, *supra* note 151.

<sup>159</sup> *Id.*

and renewed, since 2001.<sup>160</sup> The parties' agreement intends to "reduce the incentive for pillage of irreplaceable archaeological material representing the Pre-Classical, Classical and Imperial Roman periods of Italy's rich cultural heritage."<sup>161</sup> Essentially, the MoU provides for mutual cooperation in fighting the trade of looted objects, as well as technical and financial assistance in halting the movement of these objects across international lines.<sup>162</sup> By placing import restrictions on archaeological materials from Italy, the MoU is intended to deter the trafficking of loot by denying its entry on the American market.<sup>163</sup> "The import barriers result from Italy's request for American assistance pursuant to Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property."<sup>164</sup> In a ceremony in 2016, the Ambassador of Italy to the United States, Armando Varricchio, lauded the bilateral agreements with the U.S. and "emphasized the growing international ethic of diplomacy in the service of culture."<sup>165</sup> However, the mutual assistance between the nations is broader than just antiquities; Italy and the United States have reciprocal assistance received by law enforcement agencies in both nations.<sup>166</sup>

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<sup>160</sup> *U.S.-Italy Cultural Property Agreement*, BUREAU OF EDUC. & CULTURAL AFF., (2001), <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/italy/us-italy> [https://perma.cc/7D8D-G8T8].

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Rick St. Hilaire, *MoUs: Italy Renewed; Egypt Still Pursued; Cambodia and Belize Get a CPAC Interlude*, CULTURAL HERITAGE LAWYER (Jan. 19, 2016), <https://culturalheritagelawyer.blogspot.com/2016/01/mous-italy-renewed-egypt-still-pursued.html> [https://perma.cc/Z6ZF-YR7W].

<sup>165</sup> *Italy and US Celebrate 15th Anniversary of Bilateral Cultural MOU*, ANTIQUITIES COALITION (Mar. 29, 2016), <https://theantiquitiescoalition.org/italy-and-us-celebrate-15th-anniversary-of-bilateral-cultural-mou/> [https://perma.cc/65LS-WMVZ].

<sup>166</sup> Instrument Amending the Mutual Legal Assistance Treaty of November 9, 1982, It.-U.S. (May 3, 2006), S. TREATY DOC NO. 109-13. The United States and Italy have had a Mutual Legal Assistance Treaty in place since 1982.

*B. Cypriot Mosaics – Repatriation After Military Occupation*

Two looting cases in the 1980s revealed the value of Cypriot heritage and highlighted their vulnerability during conflict. A matter involving a private gallery owner demonstrates the importance of due diligence, as well as appropriate cooperation in repatriating objects after litigation.<sup>167</sup> In the late 1980s, dealer Peg Goldberg was ordered to return four rare mosaics to Cyprus.<sup>168</sup> The mosaics were stolen from the Cypriot Church of the Panagia Kanakaria, following the Turkish military intervention in Cyprus of 1974.<sup>169</sup> By the end of 1976, all Cypriots living in the village where the Church is located fled to southern Cyprus.<sup>170</sup> Afterwards, the four mosaics were violently removed from the apse of the Church and ushered onto the black market.<sup>171</sup>

In 1979, the Department of Antiquities of the Republic of Cyprus learned that the mosaics had been stolen, and a fervent campaign to locate the priceless artifacts began.<sup>172</sup> In 1988, American art dealer Peg Goldberg flew to Europe with the intention of purchasing a painting.<sup>173</sup> The sale for the painting fell through, but within days of seeing a photo of the mosaics, Goldberg purchased them for a little over \$1,080,000.<sup>174</sup> Goldberg tried to sell the mosaics by contacting collectors who might be interested.<sup>175</sup> Word got back to the Cypriot church authorities and the Republic of Cyprus that the mosaics were in Goldberg's possession, so they requested their return.<sup>176</sup> The Church even offered Goldberg the reimbursement for the purchase price in exchange for the

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<sup>167</sup> See *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 294 (7th Cir. 1990).

<sup>168</sup> *Id.* at 284.

<sup>169</sup> *Id.* at 281.

<sup>170</sup> *Id.* at 280.

<sup>171</sup> *Id.* at 281.

<sup>172</sup> *Id.*

<sup>173</sup> *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 281 (7th Cir. 1990).

<sup>174</sup> *Id.* at 282.

<sup>175</sup> *Id.* at 283.

<sup>176</sup> *Id.*

restitution.<sup>177</sup> Goldberg refused, so the Church and Republic of Cyprus sued for the return of the mosaics.<sup>178</sup> The case involved complex issues related to international law and statute of limitations, with Goldberg “zealously” arguing that the removal of the mosaics occurred long before the church filed suit, and that the case should be dismissed on those grounds.<sup>179</sup> Ultimately, the case moved forward and, in 1989, the United States District Court of Indiana decided that the four mosaics should be returned to the plaintiffs.<sup>180</sup> The United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court.<sup>181</sup>

The court decided that Cyprus adequately demonstrated the suspicious circumstances of the sale by showing the following: first, that Goldberg knew of the mosaics origin in a conflict zone; second, the mosaics were crudely cut away from a building, and are of unique cultural and economic value; third, the low price of the purchase of \$1.08 million in contrast to the market price of \$20 million; fourth, Goldberg knew little about the salesmen and other intermediaries (who just so happened to have faced criminal charges for other art crimes); and finally, the quick sale for the rare objects occurred in a matter of days.<sup>182</sup> Goldberg failed to prove that she conducted sufficient due diligence, and she likely perjured herself by making statements about her due diligence prior to the transaction.<sup>183</sup> The court found that Goldberg acted in bad faith by purchasing from middlemen that were virtually unknown to her and “fail[ing] to take reasonable steps to resolve” the “suspicious circumstances surrounding the sale.”<sup>184</sup> The sellers were part of a large-scale organized illicit trafficking ring involving Cypriot cultural property.<sup>185</sup>

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 284.

<sup>179</sup> *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 287–90 (7th Cir. 1990).

<sup>180</sup> *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1404 (S.D. Ind. 1989).

<sup>181</sup> *Autocephalous Greek-Orthodox Church*, 917 F.2d at 279.

<sup>182</sup> *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1400–02.

<sup>183</sup> *Id.* at 1403–04.

<sup>184</sup> *Id.* at 1401–02, 1404.

<sup>185</sup> See Jake Hanrahan, *How I Became One of the Most Successful Art Smugglers in the World*, VICE (Oct. 12, 2012), [https://www.vice.com/en\\_us/article/ex5qj4/how-i](https://www.vice.com/en_us/article/ex5qj4/how-i)

This case is particularly important because the court thoroughly analyzed the role of due diligence in acquiring antiquities.<sup>186</sup> An aspect of the analysis addressed the actions of the Cypriot church and the use of diplomatic channels to locate the works.<sup>187</sup> A priest with the church used diplomatic relationships to find the mosaics.<sup>188</sup> His efforts included publication, public speaking engagements, personalized phone calls, and public pleas for the return of the mosaics.<sup>189</sup>

As with the intentional damage done to the Euphronios Krater, looting irreparably damaged the mosaics.<sup>190</sup> Initially, they were “forcibly” removed from their *in situ* location—they were hacked off of a religious building.<sup>191</sup> Then they were “conserved” to make them more marketable to a broader public.<sup>192</sup> The “conservation” involved flattening the mosaics from the curved space of the apse to a flat presentation to appear more marketable in an art gallery.<sup>193</sup>

However, the recovery of the damaged mosaics was still celebrated.<sup>194</sup> The artworks were displayed at the Indianapolis Museum of Art in June and July 1991 with information about their illicit removal.<sup>195</sup> Afterwards, they were returned to Cyprus and welcomed by a crowd of 50,000 people.<sup>196</sup> In fact, the repatriation

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became-one-of-the-most-successful-art-smugglers-in-the-world [https://perma.cc/ATD4-59DF]; TASOULA HADJITOFI, *THE ICON HUNTER: A REFUGEE’S QUEST TO RECLAIM HER NATION’S STOLEN HERITAGE* (2017).

<sup>186</sup> *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1391.

<sup>187</sup> *Id.* at 1380.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1379.

<sup>191</sup> *Id.*

<sup>192</sup> Mark Rose, *Special Report: Church Treasures of Cyprus*, *ARCHAEOLOGY* (July–Aug. 1998), <https://archive.archaeology.org/9807/etc/special.html> [https://perma.cc/PE7M-TTSS5].

<sup>193</sup> *Id.*

<sup>194</sup> William H. Honan, *Judge Orders Art Dealer to Return Rare Mosaics to Church of Cyprus*, *N.Y. TIMES* (Aug. 4, 1989), <https://www.nytimes.com/1989/08/04/arts/judge-orders-art-dealer-to-return-rare-mosaics-to-church-of-cyprus.html> [https://perma.cc/Y3MK-4AXR].

<sup>195</sup> Isabel Wilkerson, *Hoosiers Glimpse a Bit of Byzantium*, *N.Y. TIMES* (July 8, 1991), <https://www.nytimes.com/1991/07/08/us/hoosiers-glimpse-a-bit-of-byzantium.html> [https://perma.cc/4W5E-FJ6C].

<sup>196</sup> See Raphael Contel et al., *Case Kanakaria Mosaics – Autocephalous Greek*

was nationally celebrated.<sup>197</sup> That year, Cyprus released a series of postage stamps featuring the mosaics to celebrate the repatriation.<sup>198</sup> They are now in the Byzantine Museum of the Archbishop Makarios III Foundation.<sup>199</sup>

In another matter involving stolen cultural material from Cyprus, items were recovered and returned to Cyprus amidst great fanfare. In 1983, two 13th century frescoes were offered for sale from an art dealer to Dominique de Menil, a noted philanthropist and art collector.<sup>200</sup> Provenance research revealed that the works were illicitly removed from a chapel outside of Lysi, Cyprus.<sup>201</sup> Using a chainsaw, thieves hacked the frescoes out of the dome and apse of the church in 38 pieces.<sup>202</sup> In a type of ransom exchange, the Orthodox Church of Cyprus permitted the Menil Foundation to buy the frescoes on behalf of the Church for \$520,000.<sup>203</sup> Afterwards, the Menil Foundation entered into an agreement with the church for a three-year restoration of the frescoes, which cost \$530,000.<sup>204</sup> In exchange, the Menil Foundation was granted

*Orthodox Church of Cyprus and Cyprus v. Goldberg*, PLATFORM ARTHEMIS (Jan. 2012), <https://plone.unige.ch/art-adr/cases-affaires/kanakaria-mosaics-2013-autocephalous-greek-orthodox-church-of-cyprus-and-cyprus-v-goldberg/case-note-2013-kanakaria-mosaics-2013-autocephalous-greek-orthodox-church-of-cyprus-and-cyprus-v-goldberg> [<https://perma.cc/NJ4N-GHF2>].

<sup>197</sup> *Id.*

<sup>198</sup> CYPRUS STAMPS, [https://www.cyprusstamps.com/shoponline/prod\\_1208044-Cyprus-Stamps-SG-79497-1991-Mosaics-Kanakaria-Church-MINT.html](https://www.cyprusstamps.com/shoponline/prod_1208044-Cyprus-Stamps-SG-79497-1991-Mosaics-Kanakaria-Church-MINT.html) [<https://perma.cc/3CQ9-JWR2>].

<sup>199</sup> Contel et al., *supra* note 194.

<sup>200</sup> *Byzantine Fresco Chapel, THE MENIL COLLECTION*, <https://www.menil.org/campus/byzantine-fresco-chapel> [<https://perma.cc/JV7T-R925>] [hereinafter THE MENIL COLLECTION]; John Russel, *Dominique de Menil, 89, Dies; Collector and Philanthropist*, N.Y. TIMES (Jan. 1, 1998), <https://www.nytimes.com/1998/01/01/arts/dominique-de-menil-89-dies-collector-and-philanthropist.html> [<https://perma.cc/LHT4-UZDM>].

<sup>201</sup> See THE MENIL COLLECTION, *supra* note 200.

<sup>202</sup> *800-Year-Old Frescoes Leave Texas for Cyprus*, NPR (Mar. 14, 2012), <https://www.npr.org/2012/03/14/148602378/800-year-old-frescoes-headed-home-to-cyprus> [<https://perma.cc/29LM-V896>].

<sup>203</sup> Elisabetta Povoledo, *The Menil is to Return Frescoes to Cyprus*, N.Y. TIMES (Sept. 23, 2011), <https://www.nytimes.com/2011/09/24/arts/design/menil-collection-is-to-return-frescoes-to-cyprus.html> [<https://perma.cc/V68R-8MBJ>].

<sup>204</sup> *Id.*

permission to display the items on a long-term loan in Houston.<sup>205</sup> During this time, the foundation educated the public about the objects and about their home in Cyprus.<sup>206</sup>

A key aspect of the recovery was “that the original spiritual purpose of the frescoes be restored.”<sup>207</sup> Ultimately, a chapel was constructed on the Menil Campus and consecrated especially for the exhibition of the frescoes.<sup>208</sup> The Byzantine Fresco Chapel Museum opened to the public in 1997, and hundreds of thousands of people visited during the fifteen years the frescoes were on view in Houston.<sup>209</sup> In March 2012, the Menil Foundation returned the frescoes to Cyprus.<sup>210</sup> Following a final liturgy led by His Eminence Archbishop Demetrios of America, the Chapel was deconsecrated on Sunday, March 4, 2012.<sup>211</sup> The Byzantine Fresco Chapel “served as a place of peace and contemplation, as well as host to liturgical ceremonies, sacred music, performances, and educational programs.”<sup>212</sup>

### C. *Cambodian Temples – Repatriation After Civil War*

Another spate of cases involved stolen statues from Cambodia. In 2011, Sotheby’s was selling a 10th century statue of an epic warrior. The sale was stopped because the item was purportedly looted in or around 1972 from Koh Ker.<sup>213</sup> In fact, the exact place from where the statue originated could be pinpointed due to a photograph that features the feet from which the statue was taken.<sup>214</sup> After being hacked off from its base, the work purportedly entered the black market and was sold to a Belgian collector in 1975.<sup>215</sup> As

<sup>205</sup> *Id.*

<sup>206</sup> See THE MENIL COLLECTION, *supra* note 200.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> THE MENIL COLLECTION, *supra* note 200.

<sup>213</sup> United States v. A 10th Century Cambodian Sandstone Sculpture, No. 12 Civ. 2600 (GBD), 2013 WL 1290515, at \*1 (S.D.N.Y. Mar. 28, 2013).

<sup>214</sup> See *id.* at \*3.

<sup>215</sup> Ece Velioglu et al., *Khmer Statue – Cambodia and Sotheby’s and the United States*, PLATFORM ARTHEMIS (June 2014), <https://plone.unige.ch/art-adr/cases-affaires/khmer-statue-2013-cambodia-and-sotheby2019s-and-the-united-states>



way of context, Cambodia experienced a brutal period of conflicts and civil wars in the 1960s and 1970s, during which time the archaeological site of Koh Ker fell victim to extensive looting.<sup>216</sup> The collector's wife consigned the statue for sale at auction in 2010 and imported it into the U.S.<sup>217</sup> In June 2010, an outside Khmer art expert consultant, Emma Bunker, expressed her concerns about the object in an email, stating her belief that the statute was definitely stolen from the Prasat Chen Temple.<sup>218</sup> Later that month, Bunker changed her opinion about the sale and advised Sotheby's that Cambodia generally does not request the return of looted art, stating "it did not appear as if Cambodia, as a general practice, was requesting the return of looted Cambodian art and artifacts."<sup>219</sup>

On the day of the auction, Cambodian officials requested Sotheby's withdraw the lot and return the statue.<sup>220</sup> Sotheby's withdrew the item, but supported the consignor's ownership claims.<sup>221</sup> The U.S. Department of Homeland Security opened an investigation, and the United States filed for forfeiture.<sup>222</sup> After much negative press against the auction house, in December 2013, the U.S. government and Sotheby's signed a settlement agreement

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[<https://perma.cc/ZX9T-FHVK>].

<sup>216</sup> See *Cambodia Profile – Timeline*, BBC NEWS (July 20, 2018), <https://www.bbc.com/news/world-asia-pacific-13006828> [<https://perma.cc/BK7T-6PWV>]; Simon Mackenzie & Tess Davis, *Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network*, 54 BRITISH J. CRIMINOLOGY 722, 727–28 (2014).

<sup>217</sup> Velioglu et al., *supra* note 215.

<sup>218</sup> *Id.* (citing *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600 (GBD), 2013 WL 1290515, at \*3 (S.D.N.Y. Mar. 28, 2013)); see Jason Felch, *Rebuilding Koh Ker: A 3D Reconstruction Restores Context to a Looted Khmer Temple*, CHASING APHRODITE (Apr. 10, 2014), <http://chasingaphrodite.com/2014/04/10/rebuilding-koh-ker-a-3d-reconstruction-restores-context-to-a-looted-khmer-temple/> [<https://perma.cc/73BV-UYZP>]; *A 10th Century Cambodian Sandstone Sculpture*, 2013 WL 1290515, at \*3.

<sup>219</sup> *A 10th Century Cambodian Sandstone Sculpture*, 2013 WL 1290515, at \*3.

<sup>220</sup> Velioglu et al., *supra* note 215.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* For a discussion of the role of civil asset forfeiture in the recovery of looted art and antiquities, see generally Stefan Cassella, *Recovering Stolen Art & Antiquities Under the Forfeiture Laws: Who Is Entitled to the Property When There Are Conflicting Claims*, 45 N.C. J. INT'L L. 393 (2020) (providing an overview of civil asset forfeiture in the cultural patrimony context).

and Sotheby's returned the statue to Cambodia.<sup>223</sup>

The repatriation was celebrated and widely lauded in the international press. Due to that case, the Cambodian government began investigating a number of works taken from the same site, and other institutions voluntarily returned items due to the publicity of the case.<sup>224</sup> Ultimately, a number of works from the same temple complex were returned.<sup>225</sup> Around the time of the Sotheby's return, the Norton Simon Museum repatriated its own looted Cambodian statute to its home.<sup>226</sup> Rather than litigate, the museum offered to return the statue as a "gift."<sup>227</sup>

#### *D. Golden Egyptian Coffin – A Golden Diplomatic Opportunity*<sup>228</sup>

Egypt has a long history of protecting its cultural heritage,<sup>229</sup> with patrimony laws dating back to 1835.<sup>230</sup> The nation has also more recently demanded the return of looted items.<sup>231</sup> Recently, a highly public repatriation ceremony was testament to the diplomatic dimensions of repatriation. In September 2019, the return of the Golden Coffin of Nedjemankh to the Arab Republic of Egypt was

<sup>223</sup> Velioglu et al., *supra* note 215.

<sup>224</sup> *Id.*

<sup>225</sup> Tom Mashberg & Ralph Blumenthal, *Christie's to Return Cambodian Statue*, N.Y. TIMES (May 6, 2014), <https://www.nytimes.com/2014/05/07/arts/design/christies-to-return-cambodian-statue.html> [<https://perma.cc/Y8ZT-8YR3>].

<sup>226</sup> *See id.*

<sup>227</sup> David Ng, *Norton Simon Museum to return contested ancient statute to Cambodia*, L.A. TIMES (May 7, 2014), <https://www.latimes.com/entertainment/arts/la-et-cm-norton-simon-statue-20140507-story.html> [<https://perma.cc/SHM9-MXVU>].

<sup>228</sup> Although the author of this paper served as the cultural heritage expert for this matter, all the information in this article is public.

<sup>229</sup> Egyptian Delegation, *Working Paper Submitted to the Conference Meeting of Open Membership Team of Governmental Experts Concerning Protection from Illicit Trading in Cultural Property Held in Vienna from 24 to 26 November 2009* (Working Paper, Nov. 2009) (on file with the United Nations).

<sup>230</sup> *Id.* at 2.

<sup>231</sup> Ruth Michaelson, *Egypt Urges Christie's to Delay Statue Sale*, THE GUARDIAN (July 3, 2019), <https://www.theguardian.com/world/2019/jul/03/egypt-urges-christies-to-delay-statue-sale> [<https://perma.cc/HE7F-PFAW>]; Jason Koutsoukis, *Egypt Pushes for Return of Antiquities*, THE SYDNEY MORNING HERALD (Dec. 7, 2009), <https://www.smh.com.au/world/egypt-pushes-for-return-of-antiquities-20091206-kcrp.html> [<https://perma.cc/7PAK-BNNC>].

celebrated.<sup>232</sup> In 2017, the Met purchased the prized golden-sheathed artifact, inscribed for a high-ranking priest of the ram-headed god Heryshef of Herakleopolis, for nearly \$4 million.<sup>233</sup> Although shimmering in gold and in pristine condition, its appearance in a museum was the result of plunder—the artifact was looted in 2011, shortly after the start of the Egyptian Revolution.<sup>234</sup> Unfortunately, the museum did not properly research the work to confirm its provenance and to reveal the item's legitimacy on the legal antiquities market.<sup>235</sup>

After the work was looted in 2011, it was traded by dealers in Europe.<sup>236</sup> Parisian dealer, Christophe Kunicki, then sold the magnificent artifact to the Met.<sup>237</sup> He misrepresented that the work had been legally exported from Egypt in 1971.<sup>238</sup> Once the Met had acquired the 1st century B.C.E. artifact, the museum featured it as the centerpiece of “Nedjemankh and His Gilded Coffin,” an exhibition that opened in 2018.<sup>239</sup> Although set to close in April 2019, the exhibition closed in February due to the museum's forfeiture of the object.<sup>240</sup> Afterwards, it remained in the possession

<sup>232</sup> Press Release, Manhattan D.A.'s Office, Manhattan D.A.'s Office Returns Ancient Gold Coffin to Egypt (Sept. 25, 2019), <https://www.manhattanda.org/manhatta-das-office-returns-ancient-gold-coffin/> [<https://perma.cc/2LL9-NZ4F>] [hereinafter Manhattan D.A. Press Release] (noting that Egypt's patrimony laws date back to 1835 with a decree that banned the unauthorized removal of antiquities from the country).

<sup>233</sup> See *id.*; see also Eileen Kinsella, *Last Year the Met Spent \$4 Million on a Golden Sarcophagus. It Turned Out to be Looted. Now They Had to Send it Back*, ARTNET NEWS (Sept. 26, 2019), <https://news.artnet.com/art-world/new-york-returns-ancient-4m-mummy-1661824> [<https://perma.cc/N4V4-PQCM>].

<sup>234</sup> See Peter Szekely, *After New York Visit, Looted Coffin of Ancient Egyptian Priest Goes Home*, REUTERS (Sept. 25, 2019), <https://www.reuters.com/article/us-usa-egypt-coffin/after-new-york-visit-looted-coffin-of-ancient-egyptian-priest-goes-home-idUSKBN1WA35K> [<https://perma.cc/LHU4-SELA>].

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> See Nancy Kenney, *Looted Coffin Acquired by Metropolitan Museum is Headed Back to Egypt*, THE ART NEWSPAPER (Sept. 26, 2019), <https://www.theartnewspaper.com/news/looted-coffin-acquired-by-metropolitan-museum-is-headed-back-to-egypt> [<https://perma.cc/M78S-2KJP>].

<sup>238</sup> See *id.*

<sup>239</sup> See 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/M3PX-CBS5>].

<sup>240</sup> See Manhattan D.A. Press Release, *supra* note 232.

of the Manhattan District Attorney's Office until its return to Egypt in September 2019.<sup>241</sup>

The timing of the repatriation was telling. Although seized in February, the return was coordinated with the United Nations General Assembly meeting seven months later.<sup>242</sup> The return was diplomatic in nature, and officials used the ceremony to address antiquities looting.<sup>243</sup> During the presentation, the Manhattan District Attorney discussed the importance of due diligence and a commitment to recognizing red flags for stolen antiquities, particularly for sophisticated buyers.<sup>244</sup> The District Attorney outlined three problems with the coffin's acquisition.<sup>245</sup> First, the coffin went on the market in 2017, six years after a major geopolitical event, the start of the Egyptian Revolution.<sup>246</sup> As with many political uprisings in antiquities-rich regions, the Egyptian Revolution was accompanied by a well-documented uptick in looting.<sup>247</sup> Second, the magnificent artifact had never been published or studied by scholars.<sup>248</sup> The object is beautiful and in incredible condition, and thus it would have been unusual for academics not to have examined and published information about the piece. How could the coffin have remained unpublished for decades if it were legitimately excavated? And third, the paperwork that accompanied the coffin was forged.<sup>249</sup> The dealer provided the Met with a forged export license dated May 1971 that bore the

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<sup>241</sup> *Id.*

<sup>242</sup> See *U.S. Returns Museum Antiquities Find to Egypt*, AFR. TIMES (Sept. 27, 2019), <https://africatimes.com/2019/09/27/u-s-returns-museum-antiquities-find-to-egypt/> [<https://perma.cc/8DX2-YMGY>].

<sup>243</sup> See *id.*

<sup>244</sup> See Manhattan D.A. Press Release, *supra* note 232.

<sup>245</sup> See Rebecca Rosenberg & Yaron Steinbuch, *Looted Coffin Returned to Egypt After Being Acquired by the Met*, N.Y. POST (Sept. 25, 2019) <https://nypost.com/2019/09/25/looted-coffin-returned-to-egypt-after-being-acquired-by-the-met/> [<https://perma.cc/8SBM-L6WR>].

<sup>246</sup> See *id.*

<sup>247</sup> See Mohamed Ibrahim, *Looting Egypt's Heritage*, WASH. POST (Oct. 18, 2013), [https://www.washingtonpost.com/opinions/looting-egypts-heritage/2013/10/18/8a1effdc-380d-11e3-8a0e-4e2cf80831fc\\_story.html](https://www.washingtonpost.com/opinions/looting-egypts-heritage/2013/10/18/8a1effdc-380d-11e3-8a0e-4e2cf80831fc_story.html) [<https://perma.cc/UZP4-FR5W>].

<sup>248</sup> See Kinsella, *supra* note 231.

<sup>249</sup> See Moynihan, *supra* note 237.

stamp “AR Egypt,” referring to the Arab Republic of Egypt.<sup>250</sup> However, AR Egypt did not even exist at that time. The nation was formally the United Arab Republic until September 1971.<sup>251</sup> This glaring error made it clear that the object left Egypt without legally required permission.

With proper due diligence and verifying documentation, the forged nature of the paperwork could have been uncovered. As noted during the repatriation ceremony, the return of the coffin was related to a larger investigation involving hundreds of looted artifacts on the illicit antiquities market.<sup>252</sup> The ceremony highlighted the fact that, although the coffin is owned by a nation (one that actively protects and regulates its heritage against looting), the coffin has value for all humanity.<sup>253</sup>

The exquisite coffin has since returned to Egypt where it will travel to a number of national museums before moving to its permanent home in the Grand Egyptian Museum after its opening in 2020.<sup>254</sup> As noted by the Egyptian Minister of Foreign Affairs, Sameh Hassan Shoukry, the coffin is returning to its “home,” but it is valuable to all mankind.<sup>255</sup> “It is not the protection of our heritage, but the protection of mankind’s heritage.”<sup>256</sup> As such, the minister invited all “friends” to visit Egypt to see cultural heritage in its home.<sup>257</sup> And although the sarcophagus was sold to the Met for nearly \$4 million, the minister noted that its cultural value is greater than any commercial value.<sup>258</sup>

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<sup>250</sup> See Rosenberg & Steinbuch, *supra* note 243.

<sup>251</sup> *Id.*

<sup>252</sup> U.S. Immigration & Customs Enforcement, *News Release, Ancient gold coffin repatriated to Egypt in New York ceremony*, ICE NEWSROOM (Sept. 26, 2019), <https://www.ice.gov/news/releases/ancient-gold-coffin-repatriated-egypt-new-york-ceremony> [<https://perma.cc/V7RL-RSHE>].

<sup>253</sup> *Id.*

<sup>254</sup> See *id.*; see also Angy Essam, *In Pics: Egypt to Recover Gilded Coffin from Met Museum*, EGYPT TODAY (Feb. 17, 2019), <https://www.egypttoday.com/Article/4/64832/In-pics-Egypt-to-recover-gilded-coffin-from-Met-museum> [<https://perma.cc/2H3X-99FY>].

<sup>255</sup> See Rosenberg & Steinbuch, *supra* note 243.

<sup>256</sup> See *id.*

<sup>257</sup> See generally Szekely, *supra* note 232 (stating that the coffin was “not only for Egyptians” but for “common human heritage”).

<sup>258</sup> See generally *id.* (holding cultural significance, not only for Egypt but from common heritage.).

The diplomatic aspects of the repatriation ceremony were apparent due to its timing during UN General Assembly week. In addition, the ceremony included a speech by a top-ranking delegate, Homeland Security Investigations representatives, and the District Attorney Cyrus Vance himself.<sup>259</sup> A two-page press release, photo opportunities, the large presence of the domestic and international press, and a number of articles in mainstream news accompanied the event.<sup>260</sup>

## V. When Repatriation is to a Non-Ally

Whereas repatriation to allies is often celebrated and lauded for its commitment to cultural heritage, not all returns involve the transfer of title to perceived “friends.” Sometimes U.S. officials and private parties restitute property to non-allies.

### A. *Persian Guard from Persepolis*

#### i. *A looted Persian item at a prestigious New York art fair*

The history of the “Persian Guard Relief” traverses both modern and ancient times. The bas-relief was created as part of a procession of figures in Persepolis, meaning “Persian City” in Ancient Greek. The city, the construction of which dates back to at least as early as 515 B.C.E., is celebrated as one of the ancient world’s outstanding sites for its architectural and artistic achievements, and served as the capital of the Achaemenid Empire.<sup>261</sup> The limestone bas-relief was excavated from the Tripylon (the “triple gate”), located between the Apadana and the Hall of the Hundred Columns.

Fortunately, due to photographic and written evidence, authorities discovered that the Persian Guard Relief was stolen from Persepolis in 1935, during sanctioned excavations conducted by the

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<sup>259</sup> See Helen Holmes, *An Ancient Egyptian Coffin Displayed at the Met This Year is Being Returned to Egypt*, THE OBSERVER (Sept. 27, 2019), <https://observer.com/2019/09/met-museum-stolen-coffin-egypt-manhattan-district-attorney/> [https://perma.cc/NH6P-TGGX].

<sup>260</sup> See Manhattan D.A. Press Release, *supra* note 230; see also Kenney, *supra* note 235; see also Kinsella, *supra* note 231.

<sup>261</sup> See Norman Sharp, *Persepolis*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Persepolis> [https://perma.cc/CL9A-TMVQ] (last updated Oct. 23, 2019).

Oriental Institute at the University of Chicago.<sup>262</sup> One morning, archaeologists returned to the site to discover that someone hacked the relief off the wall and stole it.<sup>263</sup> Authorities were alerted to the theft, and the Iranian government attempted to find the piece, but it disappeared on the global black market.<sup>264</sup> It eventually was sold to a Canadian museum, where it was stolen decades later.<sup>265</sup> The twice-stolen artifact appeared again at the prestigious TEFAF (The European Fine Arts Fair) in New York in the fall of 2017 for sale for \$1.2 million.<sup>266</sup>

In October 2017, Dr. Lindsey Allen contacted me concerning the limestone object: she recognized it as stolen from the archaeological site. I immediately informed authorities about the artifact and its past. Dr. Allen, Lecturer in Greek & Near Eastern History at King's College in London and an expert in the Achaemenid and Persian Empire,<sup>267</sup> spent years examining fragmentary reliefs from Persepolis in museums around the world, and searched archives for their histories. She realized that the relief for sale was the same one looted during the Oriental Institute's excavation. Her expertise was instrumental in identifying the work and recognizing its significance.

### *ii. Importance of Persepolis*

The earliest remains of Persepolis date back to 515 B.C.E., although it may be older or at least pre-date the remains surviving today.<sup>268</sup> The city was constructed during the reign of Cyrus the Great and Darius I for ceremonial purposes, and it was a burial site for seven Achaemenid rulers.<sup>269</sup> During Darius I's reign, Persepolis became the new capital of the Persian Empire.<sup>270</sup> The second phase

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<sup>262</sup> See Lerner, *supra* note 2.

<sup>263</sup> See *id.*

<sup>264</sup> See *id.*

<sup>265</sup> See *id.*

<sup>266</sup> See Neuendorf, *supra* note 2.

<sup>267</sup> See Dr. Lindsay Allen, KING'S COLLEGE LONDON, <https://www.kcl.ac.uk/people/lindsay-allen> [<https://perma.cc/SY6X-3Y3K>]; see also Lerner, *supra* note 2.

<sup>268</sup> See Sharp, *supra* note 259.

<sup>269</sup> See *id.*

<sup>270</sup> See Joshua J. Mark, *Persepolis*, ANCIENT HISTORY ENCYCLOPEDIA (Nov. 19,

of the site, built between 490-480 B.C.E., consists of buildings started by Darius but completed in the early years of the reign of his son and successor, Xerxes.<sup>271</sup> In an act by the famed leader (and looter), Alexander the Great sacked and plundered Persepolis in 330 B.C.E.<sup>272</sup> According to Plutarch, the Macedonian warrior removed the city's treasures on the backs of 20,000 mules and 5,000 camels.<sup>273</sup>

Alexander the Great set fire to the city and devastated Persepolis so completely that only the columns, stairways, and doorways remained.<sup>274</sup> The fire also destroyed the great religious works of the Persians written on "prepared cow-skins in gold ink,"<sup>275</sup> as well as their works of art.<sup>276</sup> The palace built for Xerxes, the leader who had planned and executed the invasion of Greece in 480 B.C.E., received especially brutal treatment.<sup>277</sup> The city lay crushed under the weight of its own ruin and was lost to time. It became known to local residents of the area only as 'the place of the forty columns' until 1618 C.E., when archaeologists identified the site as Persepolis.<sup>278</sup> After a dig in 1878, which was organized by a Persian governor, the first archaeological research was executed by the Oriental Institute of Chicago; Ernst Herzfeld and F. Schmidt worked in Persepolis from 1931 to 1939.<sup>279</sup> Ever since, archaeologists from around the world have worked at the site.

### *iii. Iran protects Persepolis and safeguards its heritage sites*

Persepolis was inscribed on the national list of Iranian

2019), <https://www.ancient.eu/persepolis/> [<https://perma.cc/35C5-M4GA>].

<sup>271</sup> *See id.*

<sup>272</sup> *Persepolis Terrace: Architecture, Reliefs, And Finds*, ORIENTAL INST., U. CHI., <https://oi.uchicago.edu/collections/photographic-archives/persepolis/persepolis-terrace-architecture-reliefs-and-finds> [<https://perma.cc/7QLQ-3QQ4>].

<sup>273</sup> *Id.*

<sup>274</sup> *See Mark, supra note 268.*

<sup>275</sup> *Persepolis: Wonder of the Ancient World*, WELCOME TO IRAN, <https://welcometoiran.com/persepolis/> [<https://perma.cc/XLW5-PUJG>].

<sup>276</sup> *See Mark, supra note 268.*

<sup>277</sup> *See id.*

<sup>278</sup> *See id.*

<sup>279</sup> *See Persepolis Terrace, supra note 270.*



monuments as item No. 20 in September 1931, and UNESCO recognized the significance and quality of the monumental ruins.<sup>280</sup> According to UNESCO, Persepolis is among the world's greatest archaeological sites.<sup>281</sup> Renowned as the gem of Achaemenid ensembles in the fields of architecture, urban planning, construction technology, and art, the royal city of Persepolis ranks among the archaeological sites which have no equivalent and which bear unique witness to a most ancient civilization.<sup>282</sup> Located within the boundaries of the property are the known elements and components necessary to express the outstanding universal value of the property, including the archaeological remains of the terrace and of its related royal palaces and buildings. Quite valuably, UNESCO considers the site to be "authentic."<sup>283</sup> There have been no changes made to the general plan of Persepolis. In addition, no modern reconstructions were created at the royal city, and the remains of all the monuments are authentic.<sup>284</sup>

Iran safeguards Persepolis due to its historic significance. In fact, Iran protects all of its cultural heritage, with the nation's first patrimony laws passing in 1930.<sup>285</sup> The trade in Persian objects surged in the 1920s, and so the Iranian nation passed laws in order to stop an exodus of so many significant pieces from the country.<sup>286</sup> The inscribed World Heritage property of Persepolis and its buffer zone, all owned by the Republic of Iran, are currently under the legal protection and management of the Iranian Cultural Heritage, Handicrafts and Tourism Organization (administered and funded by the Republic of Iran). The Iranian Cultural Heritage Organization takes responsibility for the research, conservation, rehabilitation, presentation, and education of the country's rich heritage, and also works to formulate policy for the protection of heritage.<sup>287</sup> The Iran

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<sup>280</sup> See *Persepolis*, UNESCO, <https://whc.unesco.org/en/list/114/> [<https://perma.cc/QTE3-PY59>].

<sup>281</sup> *See id.*

<sup>282</sup> *See id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> National Heritage Protection Act of 3 November 1930 (Iran) [hereinafter Iran Act].

<sup>286</sup> Kamyar Abdi, *Reviewed Work: The Great American Plunder of Persia's Antiquities 1925–1941*, 37 IRANIAN STUD. 737, 738 (2004) (reviewing MOHAMMAD GHOLI MAJD, *THE GREAT AMERICAN PLUNDER OF PERSIA'S ANTIQUITIES 1925–1941* (2003)).

<sup>287</sup> Azqin Azny Aksan, *Iran: Heritage Preservation and Tourism*, in

Heritage Foundation is another organization involved in the protection of heritage; it is a non-government agency promoting and preserving the history and cultures of Iran.<sup>288</sup> Although tourism declined after the Iranian Revolution of 1979 and the Iran-Iraq War, tourism is increasing once again.<sup>289</sup> The nation devotes resources to its heritage sites as part of an effort to increase tourism. UNESCO ranks Iran seventh in the world in terms of possession of historical monuments, museums, and other cultural sites.<sup>290</sup> These sites and locales appeal to tourists and allow the Iranian nation to continue preserving and protecting the sites for the benefit of domestic and international travelers interested in exploring the country's long history.<sup>291</sup>

The work done by national organizations is supported by legislation protecting sites against destruction and looting. Iran's patrimony law<sup>292</sup> protects Persepolis and all of the artifacts within it, including the Persian Guard, because the bas-relief falls under the definition of cultural heritage.<sup>293</sup> When thieves stole the relief in 1935, after the passage of the 1930 patrimony law, Iran had title to it by virtual of the 1930 law. Iran owned the relief and it was subject to national regulations; therefore, there is no possible way the relief left Iran legally, absent permission from the cultural ministry. A basic tenet of property law is that a thief cannot transfer title.<sup>294</sup>

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ENCYCLOPEDIA OF GLOBAL ARCHAEOLOGY 4022, 4023 (Claire Smith ed., 2014).

<sup>288</sup> *Id.* at 4023.

<sup>289</sup> *See id.* The recent growing political tensions between the US and Iran most likely will have a negative effect on tourism, but statistics are not currently available because the events are so recent. Interestingly, threats made by Donald Trump to destroy cultural sites in Iran may increase tourism in the future because it has drawn attention (through social media and news reports) to the cultural richness of the Middle Eastern nation.

<sup>290</sup> *Id.* at 4025.

<sup>291</sup> *See id.*

<sup>292</sup> *See* Iran Act, *supra* note 283.

<sup>293</sup> "Observing Article 3 of this Law, all artifacts, buildings and places established before the end of the Zandieh Dynasty era in Iran, either movable or immovable, may be considered as the national heritage of Iran and shall be protected under State control." Iran Act, *supra* note 283, art. 1.

<sup>294</sup> *Nemo dat quod non habet* is a Latin legal maxim, which literally means "no one can give what he does not have." The general rule is that no one can transfer a better title than he has himself, meaning that if goods are purchased from a thief or a person who is not the owner, then the buyer does not acquire legal title, even if he has paid value in good faith. The ownership right of the original owner is retained. *Nemo dat quod non habet*,

Therefore, any subsequent purchaser also could not gain or transfer title,<sup>295</sup> and thus ownership remains with the nation of Iran.

The Persian nation, the modern Islamic Republic of Iran, has worked to protect Persepolis, registered on the national list of monuments as item No. 20 on September 15, 1931.<sup>296</sup> Relevant national laws and regulations concerning the property include the *National Heritage Protection Act of 1930*<sup>297</sup> (1930, updated 1998) and the 1980 Legal bill on preventing clandestine diggings and illegal excavations. The Iranian nation continues to protect its heritage and has periodically updated its laws to protect these valuable objects. The laws continue to vest ownership of antiquities in Iran, as well as restrict the movement of heritage, require permission for excavations, and place regulations on the sale of heritage.<sup>298</sup> Violations of the law are punishable with substantial penalties, including criminal punishments.<sup>299</sup> The laws are intended to reduce looting and stop thieves from removing objects from Iran's borders. Honoring and enforcing patrimony laws provides nations with title to cultural heritage and prohibits violators from removing and selling the items.

Furthermore, Iranian authorities work to safeguard sites. The government continues to invest in Persepolis; it funds the protection of the site through Persepolis Research Base, a management and conservation office established in Persepolis in 2001.<sup>300</sup> The group is responsible for the investigation, conservation, restoration, reorganization, and presentation of the property.<sup>301</sup> The group offers training and skills upgrades in cooperation with universities and scientific institutes in Iran and abroad.<sup>302</sup> National and provincial

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ICLR, <https://www.iclr.co.uk/knowledge/glossary/nemo-dat-quod-not-habet/> [<https://perma.cc/V93J-SZTP>] (codified in Uniform Commercial Code § 2-403 (stating that a thief cannot transfer title to stolen property)).

<sup>295</sup> *Id.*

<sup>296</sup> *Persepolis*, *supra* note 278.

<sup>297</sup> *See* Iran Act, *supra* note 283.

<sup>298</sup> *See* Regulation No. 18128 on the Importation and Exportation of Cultural Property (20 October 1975) (Iran) (As written in Lyndel V. Prott & Patrick J. Okeefe, *Handbook of National Regulations Concerning the Export of Cultural Property*, UNESCO 107 (1988)).

<sup>299</sup> *Id.* at 108.

<sup>300</sup> *Persepolis*, *supra* note 278.

<sup>301</sup> *Id.*

<sup>302</sup> *See id.*

budgets, as well as site admission fees, provide financial resources for Persepolis.<sup>303</sup> The Islamic Republic of Iran has also joined other nations to protect heritage.<sup>304</sup> Iran joined the 1954 Hague Convention,<sup>305</sup> the 1954 Protocol (First Protocol) to the 1954 UNESCO Convention (Hague Convention),<sup>306</sup> the 1970 UNESCO Convention,<sup>307</sup> the 1995 UNIDROIT Convention,<sup>308</sup> the 1999 Protocol (Second Protocol) to the 1954 UNESCO Convention,<sup>309</sup> and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage.<sup>310</sup>

#### *iv. Repatriation of the Persian Guard Relief*

After the Manhattan D.A. was informed about the Persian Guard, Homeland Securities Investigations seized it at The European Fine Art Fair (TEFAF), one of the world's most prestigious art fairs, in October 2017.<sup>311</sup> The Manhattan D.A. then submitted a turnover request in pursuit of repatriation on May 24, 2018.<sup>312</sup> On July 23, 2018, the New York Supreme Court ordered

<sup>303</sup> *See id.*

<sup>304</sup> *See id.*

<sup>305</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO, <http://www.unesco.org/eri/la/convention.asp?language=E&KO=13637> [<https://perma.cc/R4CC-XDVW>] (dating entry into force by Iran on June 22, 1959).

<sup>306</sup> *Treaties, States Parties, and Commentaries: Islamic Republic of Iran*, INT'L COMM'N OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=IR](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IR) [<https://perma.cc/K5YE-LWSU>] (listing treaties Iran has signed or ratified).

<sup>307</sup> Convention on Ownership of Cultural Property 1970, *supra* note 42 (entered into force by Iran on Jan. 21, 1975).

<sup>308</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (entered into force Dec. 1, 2005).

<sup>309</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212 (entered into force by Iran on May 24, 2005).

<sup>310</sup> UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 2562 U.N.T.S. 3 (entered into force Sept. 16, 2009).

<sup>311</sup> James C. McKinley Jr., *Ancient Limestone Relief is Seized at European Art Fair*, N.Y. TIMES (Oct. 29, 2017), <https://www.nytimes.com/2017/10/29/arts/design/ancient-limestone-relief-seized-european-fine-art-fair.html> [<https://perma.cc/6WSX-UJYG>].

<sup>312</sup> *See In the Matter of an Application for a Warrant to Search the Premises Located at the Park Avenue Armory, 643 Park Avenue, New York, New York 10065*, Sup. Ct. N.Y., County of N.Y., Pt. 62; *see also Fight to Return Plundered Persian Limestone Relief, AMINEDDOLEH & ASSOCIATES LLC* (June 3, 2018),

the Manhattan D.A. to turn over custody of the Persian Guard to the Republic of Iran.<sup>313</sup> It was eventually returned to Iran in September 2018. Strikingly, the repatriation ceremony for the historically and culturally significant \$1.2 million item was small. In attendance were the District Attorney, the Assistant District Attorney, members of the Manhattan District Attorney Office's Arts and Antiquities Trafficking Unit, the attorneys who worked on the case, two experts who assisted with research about the artifact (Dr. Allen and Anne Flannery, the Head Archivist at the Oriental Institute at the University of Chicago), two representatives from Iran, and myself (I served as the cultural heritage law expert).<sup>314</sup> Missing from the ceremony was the press, a press release, photo opportunities, or other celebratory events.

Because of the importance of the artifact, it seems natural that the return of the object would be lauded. After all, the limestone relief was hacked off the wall from Iran's most important archaeological site during an excavation, and thus there was no question that the object was in fact stolen. However, some people in the cultural heritage field took the opportunity to question ownership claims by foreign governments, particularly ones with which the United States does not have positive relations.

### *B. Persian Rhyton – A case in “archaeo-diplomacy”*

The Persian Guard was not the first Persian artifact to return home. In 2000, Hicham Aboutaam, co-owner of Phoenix Ancient Art, hand-carried a silver griffin rhyton on a flight from Switzerland to the United States.<sup>315</sup> The dealer eventually sold the object for \$950,000 in June 2002.<sup>316</sup> However, the commercial invoice submitted to the Customs Service falsely stated that the object's

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<https://www.artandiplawfirm.com/right-for-plundered-persian-relief/>  
[<https://perma.cc/3CJP-P79Y>].

<sup>313</sup> McKinley Jr., *supra* note 309.

<sup>314</sup> As the cultural heritage law expert on this matter, and the person who introduced the matter to the District Attorney's Office after speaking with Dr. Lindsay Allen, I was invited to attend.

<sup>315</sup> Press Release, U.S. Dep't of Justice, Art Dealer Pleads Guilty in U.S. Court to Customs Violation in Iranian Antiquity Case 1, 2 (2004), <https://www.cemml.colostate.edu/cultural/09476/pdf/doj-aboutaam-06-2004-pr.pdf> [<https://perma.cc/F77Z-SJ8Z>] [hereinafter Press Release].

<sup>316</sup> *Id.* at 3.

country of origin was Syria.<sup>317</sup> In actuality, the 700 B.C.E. drinking vessel did not originate in Syria, but in Iran.<sup>318</sup> It was likely found in the Kalmakarra Cave, also known as the Western Cave, located in Iran, close to the Iraqi border.<sup>319</sup> Between 1989 and 1992, villagers and treasure hunters plundered and severely damaged the archaeological rich area.<sup>320</sup>

Aboutaam was arrested in December 2003 for illegally importing the Iranian artifact.<sup>321</sup> He was released on a \$500,000 bail.<sup>322</sup> The dealer pled guilty to a one-count misdemeanor of providing false information to a U.S. customs agent on a commercial invoice, and was fined \$5,000 for his “mistake.”<sup>323</sup> The rhyton was confiscated by U.S. Immigration and Customs Enforcement (“ICE”), and sent to a warehouse in Queens, NY that stores over 2,500 objects.<sup>324</sup>

After over a decade in storage, the rhyton returned to Iran in what the news labeled “archaeo-diplomacy.”<sup>325</sup> The United States used the rhyton as an olive branch. U.S. officials long said they could not return the artifact to Iran until relations between Washington and Tehran were normalized. But former President Obama presented President Rouhani with the valuable item within

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<sup>317</sup> *Id.* at 2.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> Press Release, *supra* note 316. See also *US Returns Silver Griffin Rhyton to Iran*, THE HISTORY BLOG, <http://www.thehistoryblog.com/archives/27259> [<https://perma.cc/2X3U-BY45>].

<sup>321</sup> *Id.*

<sup>322</sup> Barry Meier & Martin Gottlieb, *LOOT: Along the Antiquities Trail; An Illicit Journey Out of Egypt, Only a Few Questions Asked*, N.Y. TIMES (Feb. 23, 2004) <https://www.nytimes.com/2004/02/23/world/loot-along-antiquities-trail-illicit-journey-egypt-only-few-questions-asked.html> [<https://perma.cc/VZ8U-MUUG>].

<sup>323</sup> Press Release, *supra* note 313; Benoit Faucon & Gregori Kantchev, *Prominent Art Family Entangled in ISIS Antiquities-Looting Investigations*, WALL ST. J. (May 31, 2017), <https://www.wsj.com/articles/prominent-art-family-entangled-in-investigations-of-looted-antiquities-1496246740> [<https://perma.cc/69MW-U4FN>].

<sup>324</sup> Melissa Klein, *Rogue’s Gallery — the Queens Warehouse that Holds a Fortune in Stolen Art*, N.Y. POST (June 6, 2010), <https://nypost.com/2010/06/06/rogues-gallery-the-queens-warehouse-that-holds-a-fortune-in-stolen-art/> [<https://perma.cc/73XJ-UBJA>].

<sup>325</sup> Alan Boyle, *Archaeo-Diplomacy: US Gives Million-Dollar Cup Back to Iran*, NBC NEWS (Sept. 27, 2013), <https://www.nbcnews.com/sciencemain/archaeo-diplomacy-us-gives-million-dollar-cup-back-iran-8C11281668> [<https://perma.cc/DSC9-L6GS>].

a few weeks of the U.S. and Iranian presidents speaking directly about reaching a pact on Tehran's nuclear program. At the time, the State Department stated,

The return of the artifact reflects the strong respect the United States has for cultural heritage property—in this case, cultural heritage property that was likely looted from Iran and is important to the patrimony of the Iranian people . . . . It also reflects the strong respect the United States has for the Iranian people.<sup>326</sup>

The State Department also highlighted the importance of the object to all humanity: “It is considered the premier griffin of antiquity, a gift of the Iranian people to the world, and the United States is pleased to return it to the people of Iran.”<sup>327</sup> The statement reflects the idea that, although the work is part of our shared heritage, the nation of Iran is the rightful owner.

Some commentators credited the repatriation to opening communication between U.S. and Iranian officials. Only two days after the rhyton's return, the Iranian President accepted a phone call from President Obama, the first high-level contact made between the two countries since 1979 when militants stormed the U.S. embassy in Tehran.<sup>328</sup> The head of Iran Cultural Heritage, Tourism and Handicrafts Organization, Mohammad-Ali Najafi, expressed his hopes that other cultural exchanges could take place.<sup>329</sup> Unfortunately though, changes in the relationship between the United States and Iran due to sanctions and the Nuclear Deal have marred the possibility of future cultural collaborations.<sup>330</sup> Making

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<sup>326</sup> *Id.*

<sup>327</sup> *US Returns 2,700-year-old Rhyton to Rohani*, IRAN TIMES (Oct. 4, 2013), <http://iran-times.com/us-returns-2700-year-old-rhyton-to-rohani/> [<https://perma.cc/49TD-X5EA>] [hereinafter IRAN TIMES].

<sup>328</sup> Christy Parsons, *The Chalice that Helped Make Possible the Iran Nuclear Deal*, L.A. TIMES (Nov. 30, 2013), <https://www.latimes.com/world/la-fg-iran-griffin-20131130-story.html> [<https://perma.cc/N2PY-LD4Q>].

<sup>329</sup> See IRAN TIMES, *supra* note 325.

<sup>330</sup> Aaron David Miller, *Why are we Headed for a Blowup with Iran? It Began When Trump Scrapped the Nuclear Deal*, USA TODAY (June 17, 2019), <https://www.usatoday.com/story/opinion/2019/06/17/iran-us-blowup-possible-since-trump-quit-nuclear-deal-column/1471389001/> [<https://perma.cc/LJ4N-CPPF>]; Phil Stewart & Michelle Nichols, *Why U.S.-Iran Tensions Could Quickly Escalate into a Crisis*, REUTERS (May 24, 2019), <https://www.reuters.com/article/us-usa-iran-communication-insight/why-u-s-iran-tensions-could-quickly-escalate-into-a-crisis-idUSKCN1SU11V>

matters worse, in January 2020, the U.S. President weaponized heritage by threatening (*via* Twitter) to destroy cultural heritage sites in Iran in a future retaliation for any military strikes the Middle Eastern nation might take against the U.S.<sup>331</sup>

## VI. Legal Ownership is Independent of Politics

The legal concept of ownership is not linked to political positions; owners have the inalienable right to own their property—they have the right to do with that property as they will.<sup>332</sup> Title is not extinguished merely because parties do not enjoy diplomatic relations or positive communications. Patrimony laws vest ownership in sovereign nations, independent of political alliances. The United States has recognized rights of nations internationally due to patrimony laws that vest ownership in countries, independent of political leanings.<sup>333</sup> However, repatriations have been opposed, particularly when the returns are to nations adverse to some U.S. interests.

### *A. Critics of repatriation often claim that objects are safer, better preserved, and more accessible to the public in their new homes*

Current owners (in some cases, it is more accurate to identify them as “possessors,” rather than “owners”) have often justified the right to possess property due to safety concerns. Surprisingly, arguments concerning safe keeping are also asserted in instances in which western institutions themselves damaged the items in question. The British Museum has long asserted that the Parthenon Marbles belong in their current home because the London museum can better preserve the artifacts and protect them against air pollution in Athens. However, new studies suggest that damage greater than air pollution was actually caused by the British

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[<https://perma.cc/4P5A-6755>].

<sup>331</sup> Maggie Haberman, *Trump Threatens Iranian Cultural Sites, and Warns of Sanctions on Iraq*, N.Y. TIMES (Jan. 5, 2020), <https://www.nytimes.com/2020/01/05/us/politics/trump-iran-cultural-sites.html> [<https://perma.cc/J2SR-DTRJ>].

<sup>332</sup> See *Why is the Right to Property an Inalienable Right*, CRITICAL INTERNET JOURNALISM, <https://www.cij.org/human-rights/why-is-the-right-to-property-an-inalienable-right.html> [<https://perma.cc/F6KQ-23SQ>].

<sup>333</sup> See *United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003).



Museum.<sup>334</sup> (Anyway, it is laughable to assert that it is in the best interest of a monument to hack off major portions of it for preservation.) That artifacts are safer with the institutions that removed them is a specious and paternalistic argument because the removal often harmed the objects by divorcing them from their context.<sup>335</sup> Unfortunately, the highly publicized return of the Lydian Hoard has also given support to opponents of repatriation. The Lydian Hoard is a collection of sixth-century B.C.E. gold and silver objects that was illicitly removed from Turkey in the 1960s and eventually purchased by the Met.<sup>336</sup> Turkey sued the museum in 1987, and the Met eventually returned the objects in 1993.<sup>337</sup> After the return of the valuable hoard, a number of items, including the centerpiece of the collection, were stolen while on display in Turkey.<sup>338</sup>

The unfortunate fate of pieces from the Lydian Hoard is often cited as support against repatriation.<sup>339</sup> The rallying cry is that origin nations cannot properly protect their heritage. Yet theft and destruction occur everywhere around the globe. European and American museums and institutions have faced their fair share of loss over the decades. The March 1990 theft from the Isabella Stewart Gardner Museum is often cited as the biggest art crime on U.S. soil, with the museum falling victim to a theft of about half a

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<sup>334</sup> Nick Kampouris, *Study Suggests British Museum has Caused More Damage to Parthenon Sculptures than Athens' Air Pollution*, GREEK REPORTER (Dec. 11, 2019), <https://eu.greekreporter.com/2019/12/11/study-suggests-british-museum-has-caused-more-damage-to-parthenon-sculptures-than-athens-air-pollution/> [https://perma.cc/EAA9-4CDV].

<sup>335</sup> See Alex Tam, *Priceless Treasures and Their Shaky Pedestals*, HARV. POL. REV. (Jan. 1, 2020), <https://harvardpolitics.com/world/art-museum-repatriation/> [https://perma.cc/JK72-8PRG].

<sup>336</sup> Alessandro Chechi et al., *Case Lydian Hoard –Turkey and Metropolitan Museum of Art*, ARTEMIS, ART-LAW CENTRE, U. GENEVA 1, 1 (Feb. 2012).

<sup>337</sup> Jo Ann Lewis, *Met Returns Treasures to Turkey*, WASH. POST (Sept. 23, 1993), <https://www.washingtonpost.com/archive/lifestyle/1993/09/23/met-returns-treasures-to-turkey/d37bdc6f-913f-4dea-a7f4-c3e4b2079575/> [https://perma.cc/3NNE-UY8V].

<sup>338</sup> Sharon Waxman, *Chasing the Lydian Hoard*, SMITHSONIAN MAG. (Nov. 14, 2008), <http://www.smithsonianmag.com/history/chasing-the-lydian-hoard-93685665/?no-ist> [https://perma.cc/8WEC-B86T].

<sup>339</sup> See Constanze Letsch, *King Croesus's Golden Brooch to be Returned to Turkey*, THE GUARDIAN (Nov. 25, 2012), <https://www.theguardian.com/world/2012/nov/25/king-croesus-treasure-returning-turkey> [https://perma.cc/97B4-45CC].

billion dollars' worth of artwork.<sup>340</sup> The crime is still unsolved, and as a result, thirteen valuable works are still missing. Major museums around the world have suffered thefts, whether committed by employees or unaffiliated individuals. In fact, a major cultural museum theft recently made headlines stating, "biggest museum heist in post-World War II German history took place" on November 25, 2019 in Dresden. Thieves targeted the Green Vault, one of the world's oldest museums that first opened to the public in the early 18th century.<sup>341</sup> Thieves purportedly disabled an alarm system by setting fire to a nearby electrical distribution hub, cut through a fence, and broke a window to make off with a number of valuable jewelry pieces.<sup>342</sup> The items, all uninsured, may be worth up to \$1 billion,<sup>343</sup> but, similar to the Lydian Hoard, they have "priceless cultural value."<sup>344</sup>

A more compelling argument against repatriation made today concerns perilous conditions and wide scale destruction occurring in some origin nations. Terrorist organizations, like the Islamic State of Iraq and Syria ("ISIS"), have weaponized cultural items; the group publicly destroys historical objects and significant sites.<sup>345</sup> These groups often record the destruction and then publicly disseminate the footage.<sup>346</sup> The effect is emotionally devastating

<sup>340</sup> Nadja Sayej, *Will Boston's \$500m Art Heist Ever be Solved?*, THE GUARDIAN (Jan. 19, 2018), <https://www.theguardian.com/artanddesign/2018/jan/19/boston-art-heist-isabella-stewart-gardner-museum> [<https://perma.cc/6FF9-LQX8>].

<sup>341</sup> See Leonid Bershidsky, *Art Thefts, Such as Dresden Jewelry Heist, are Here to Stay: Opinion*, INSURANCE J. (Dec. 4, 2019), <https://www.insurancejournal.com/news/international/2019/12/04/550203.htm> [<https://perma.cc/7UPS-C65M>].

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> Bill Chappell, *Thieves Steal Priceless Diamonds in Heist at Dresden's 'Green Vault' Museum*, NPR (Nov. 25, 2019), <https://www.npr.org/2019/11/25/782624563/thieves-steal-priceless-diamonds-in-heist-at-dresdens-green-vault-museum> [<https://perma.cc/29QS-WA8N>].

<sup>345</sup> Alyssa Buffenstein, *A Monumental Loss: Here Are the Most Significant Cultural Heritage Sites That ISIS Has Destroyed to Date*, ARTNET NEWS (May 30, 2017), <https://news.artnet.com/art-world/isis-cultural-heritage-sites-destroyed-950060> [<https://perma.cc/HUE7-73LQ>].

<sup>346</sup> See Kareem Shaheen, *Isis Fighters Destroy Ancient Artefacts at Mosul Museum*, THE GUARDIAN (Feb. 26, 2015), <https://www.theguardian.com/world/2015/feb/26/isis-fighters-destroy-ancient-artefacts-mosul-museum-iraq> [<https://perma.cc/4AB8-BWVK>];

and shocking. In the wake of the footage of destruction and news about looting, some heritage professionals assert that it is appropriate for museums and foreign nations to “save” objects rather than have them fall victim to destruction.<sup>347</sup> Although heartbreaking to watch the dramatic destruction of heritage, buying looted artifacts does not save them.<sup>348</sup> Allowing museums to purchase looted works is dangerous; it only allows institutions to accept or purchase problematic works and it increases the demand for loot.<sup>349</sup> Boston University archaeologist Ricardo Elia noted, “It was only a matter of time before some in the art-collecting community tried to turn this cultural nightmare to their own advantage.”<sup>350</sup> Allowing irresponsible collecting practices permits museums to acquire objects from conflict zones.<sup>351</sup> It is a slippery slope. Who determines when conflict is resolved and when objects can safely be returned home? Who determines when a conflict justifies these unprovenanced acquisitions? Would post-election demonstrations and political rallies qualify as conflicts? Would financial shortcomings and periods of recession justify the refusal to repatriate? Would a terror incident, such as the September 11, 2001 attacks in the United States or continued attacks in London qualify as conflict or danger supporting the removal of cultural

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Andrew Curry, *Ancient Sites Damaged and Destroyed by ISIS*, NAT. GEOGRAPHIC (Nov. 5, 2017), <https://www.nationalgeographic.co.uk/history-and-civilisation/2017/11/ancient-sites-damaged-and-destroyed-isis> [https://perma.cc/X5XS-ZKF5].

<sup>347</sup> Gary Vikan, *The Case for Buying Antiquities to Save Them*, WALL ST. J. (Aug. 19, 2015), <https://www.wsj.com/articles/the-case-for-buying-antiquities-to-save-them-1440024491> [https://perma.cc/ZKS2-897F].

<sup>348</sup> See Ralph Blumenthal & Tom Mashberg, *The Curse of the Outcast Artifact*, N.Y. TIMES (July 12, 2012), <https://www.nytimes.com/2012/07/15/arts/design/antiquity-market-grapples-with-stricter-guidelines-for-gifts.html> [https://perma.cc/XAH3-LZ6E].

<sup>349</sup> This statement is based on research that the trade in illicitly acquired artifacts is demand-driven crime fueled by buyers. For more information, see generally Ricardo J. Elia, *Looting, Collecting, and the Destruction of Archaeological Resources*, 6 NONRENEWABLE RESOURCES 85 (June 1997) (discussing purchasing that yields higher demand for loot).

<sup>350</sup> Tom Mashberg & Graham Bowley, *Islamic State Destruction Renews Debate Over Repatriation of Antiquities*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/arts/design/islamic-state-destruction-renews-debate-over-repatriation-of-antiquities.html> [https://perma.cc/VVD4-ZHDX].

<sup>351</sup> Stephen M. Maurer, *Can the Market Help Preserve Threatened Antiquities?*, WALL ST. J. (Aug. 27, 2015), <https://www.wsj.com/articles/can-the-market-help-preserve-threatened-antiquities-1440624398> [https://perma.cc/67FP-PF7P].

objects?

Museums also justify the retention of pieces with other arguments, such as accessibility. The J. Paul Getty Museum argued that a statue illegally removed from Sicily should remain in California because a greater number of visitors viewed the statue there.<sup>352</sup> The British Museum argues the same for the Parthenon Marbles,<sup>353</sup> the Rosetta Stone,<sup>354</sup> and imperial treasures from China.<sup>355</sup> German authorities use the same justification for ownership of the bust of Queen Nefertiti.<sup>356</sup> These are just a few of the institutions that justify their ownership based upon the number of museum visitors. However, those arguments raise other questions. Who are the visitors accessing these objects? Are the number of British visitors, American visitors, or western visitors of the utmost importance? Should museums instead consider visitors from the source nation or other regions of the world?

Arguments against repatriation are sometimes supported by paternalistic and patronizing arguments, asserting that western collectors and archaeologists “discovered” these objects and have superior knowledge of them.<sup>357</sup> Some institutions and nations assert that if western powers had not removed artifacts, they would have been destroyed in conflicts or disasters that later “erupted in their

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<sup>352</sup> Rachel Donadio, *Vision of Home*, N.Y. TIMES (Apr. 17, 2014) <https://www.nytimes.com/2014/04/20/arts/design/repatriated-works-back-in-their-countries-of-origin.html> [https://perma.cc/R52R-LPYZ].

<sup>353</sup> Naomi Rea, *The British Museum Says It Will Never Return the Elgin Marbles, Defending Their Removal as a ‘Creative Act,’* ARTNET NEWS (Jan. 28, 2019), <https://news.artnet.com/art-world/british-museum-wont-return-elgin-marbles-1449919> [https://perma.cc/JN6K-5RJT].

<sup>354</sup> *Should the British Museum Return the Rosetta Stone to Egypt?*, THE HISTORY BLOG (Mar. 25, 2010), <http://www.thehistoryblog.com/archives/5257> [https://perma.cc/X8CY-JCZ4].

<sup>355</sup> Hyacinth Mascarenhas, *9 Priceless Artifacts Museums Should Return to Their Home Countries*, MIC (Dec. 11, 2013), <https://www.mic.com/articles/76321/9-priceless-artifacts-museums-should-return-to-their-home-countries> [https://perma.cc/KZ4T-62U5].

<sup>356</sup> Tony Paterson, *Germany Refuses to Return Bust to Egypt*, INDEPENDENT (Jan. 26, 2011), <https://www.independent.co.uk/news/world/europe/germany-refuses-to-return-bust-to-egypt-2194486.html> [https://perma.cc/7AX3-2748].

<sup>357</sup> See Nur Sevencan, *Non-Western Art in the Museum: Appreciation or Appropriation*, MEDIUM (Aug. 11, 2016), <https://medium.com/@nursevencan/non-western-art-in-the-museum-appreciation-or-appropriation-4b67390b1a6d> [https://perma.cc/EV3Z-NAPH].

home regions;<sup>358</sup> therefore, the institutions that preserved them have the right to retain them.<sup>359</sup> For example, in reference to the Koh-i-noor Diamond (one of the largest cut diamonds in the world) taken from India in 1849, British historian Andrew Roberts stated,

Those involved in this ludicrous case should recognise that the British crown jewels is precisely the right place for the Koh-i-Noor diamond to reside, in grateful recognition for over three centuries of British involvement in India, which led to the modernisation, development, protection, agrarian advance, linguistic unification and ultimately the democratisation of the subcontinent.<sup>360</sup>

To posit that a museum across the world is a better place for an artifact than its birthplace is to assert the “superiority of one method of collection, one culture, and one society over another.”<sup>361</sup> None of these justifications should trump legal ownership claims by way of national ownership rights established by enforceable patrimony laws.

*B. Iranian cultural heritage items should not be withheld due to any of the justifications against repatriation*

Although Iran is geographically located in the Middle East, there are not any current concerns about the safety of objects repatriated there (outside of the U.S. President’s threats or the usual concerns that museums all around the world face).<sup>362</sup> Whereas a

<sup>358</sup> Laura C. Mallonee, *A Patronizing Argument Against Cultural Repatriation*, HYPERALLERGIC (Apr. 20, 2015), <https://hyperallergic.com/198798/a-patronizing-argument-against-cultural-repatriation/> [<https://perma.cc/LBX3-75TG>].

<sup>359</sup> *Id.*

<sup>360</sup> Anita Anand, *The Koh-i-Noor Diamond is in Britain Illegally. But it Should Still Stay There*, THE GUARDIAN (Feb. 16, 2016), <https://www.theguardian.com/commentisfree/2016/feb/16/koh-i-noor-diamond-britain-illegally-india-pakistan-afghanistan-history-tower> [<https://perma.cc/SC2G-X4E2>].

<sup>361</sup> Tam, *supra* note 335.

<sup>362</sup> At the time of editing this article, it could be asserted that the most troubling danger to Iranian heritage comes from threats made by the United States’ president. See *In Menacing Iran’s Cultural Sites, Trump Threatens to Commit ‘a War Crime,’* FRANCE 24 (Jan. 6, 2020), <https://www.france24.com/en/20200106-in-menacing-iran-s-cultural-sites-trump-threatens-to-commit-a-war-crime> [<https://perma.cc/3N7F-DNZP>]; see also Seung Min Kim & Philip Rucker, *Trump Threatens to Strike Iranian Cultural Sites and Impose ‘Very Big’ Sanctions on Iraq as Tensions Rise*, WASH. POST (Jan. 5, 2020),

great deal has been reported on the destruction of heritage by the “Islamic State,” that state refers to the militant religious leadership of ISIS in Iraq and Syria, not Iran.<sup>363</sup> In fact, it is quite the opposite. The Iranian government invests money protecting its ancient history. In mid-2016, Iran announced plans to restore and create exact replicas of some of the country’s most historic monuments.<sup>364</sup> In partnership with the National Museum and the Vice Presidency for Science and Technology, the nation plans to implement 3D printing and scanning technologies to create important relics.<sup>365</sup>

*C. Claims for ownership of cultural objects have addressed Iran’s classification as a sponsor of terror*

In *Rubin v. Islamic Republic of Iran*, several U.S. courts, including the Supreme Court, examined ownership issues related to Iranian cultural objects. The case stems from a terrorist attack that took place in Jerusalem. In September 1997, three Hamas suicide bombers killed four people and injured around two hundred more. Eight of the victims were U.S. citizens. The Islamic Republic of Iran was hauled into U.S. court under the Foreign Sovereign Immunities Act (“FSIA”).<sup>366</sup> There is a presumption under the FSIA that foreign sovereigns are immune from the jurisdiction of U.S. courts.<sup>367</sup> However, the FSIA includes eight enumerated exceptions that allow plaintiffs to sue foreign sovereigns in U.S. federal courts. Section 1605A of the FSIA allows U.S. courts to hear cases against foreign sovereigns alleging the commission of or support of

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[https://www.washingtonpost.com/politics/trumps-threats-against-iranian-sites-raise-questions-about-the-potential-for-war-crimes/2020/01/05/c03d8de8-2ff2-11ea-898f-eb846b7e9feb\\_story.html](https://www.washingtonpost.com/politics/trumps-threats-against-iranian-sites-raise-questions-about-the-potential-for-war-crimes/2020/01/05/c03d8de8-2ff2-11ea-898f-eb846b7e9feb_story.html) [https://perma.cc/HRS9-4SCH].

<sup>363</sup> ICOMOS lists risks factors for sites in Iran (as the organization does with all nations), but does not include any mention of intentional destruction of heritage committed by government authorities. Rasool Vatandoust & Akbar Zargar, *Iran – ICOMOS World Report on Monuments and Sites in Danger 2001: Heritage @ Risk*, ICOMOS (2001–2002), <https://www.icomos.org/risk/2001/iran2001.htm> [https://perma.cc/6NV5-TXW9].

<sup>364</sup> Alicia Miller, *Iran Calls for Domestic Companies to Help Rebuild Historic Monuments*, 3D PRINTING INDUSTRY (Aug. 15, 2016), <https://3dprintingindustry.com/news/iran-calls-domestic-companies-help-rebuild-historic-monuments-93863/> [https://perma.cc/9V2R-X92E].

<sup>365</sup> *Id.*

<sup>366</sup> 28 U.S.C. § 1330 (1976).

<sup>367</sup> *Id.* § 1330(a); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (11th Cir. 1992).

terrorism. As such, the United States District Court for the District of Columbia heard the victims' case against the Islamic Republic of Iran and found that it was a state sponsor of terror, responsible for the victims' damages. In 2003, the court entered a default judgment of millions of dollars per plaintiff, finding that the attack would not have occurred without material support from Iran. However, the victims struggled to recuperate their damages.

For thirteen years, the plaintiffs unsuccessfully sought to seize assets.<sup>368</sup> To recover damages, Plaintiffs sued in the Seventh Circuit to attach collections of ancient Persian artifacts. The collections contained approximately 30,000 clay tablets and fragments containing ancient writings, recovered by University of Chicago archeologists during excavations in the 1930s (the excavations during which the Persian Guard was stolen).<sup>369</sup> The collections include tablets containing some of the oldest known writing in the world, legally owned by Iran and on loan to or purchased from third parties by the Field Museum of Natural History in Chicago and the Oriental Institute at the University of Chicago. In 1937, Iran loaned the collection to the Oriental Institute for research, translation, and cataloging.<sup>370</sup> The collection is culturally and historically significant, beyond the bounds of the Chicago institutions.

The Seventh Circuit found that plaintiffs holding judgments under the terrorism exception to foreign sovereign immunity are not necessarily entitled to collect them by seizing assets of Iran simply because the judgment is terrorism related; they would have to first "overcome other hurdles to attachment of sovereign assets."<sup>371</sup> The

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<sup>368</sup> See *Rubin v. Islamic Republic of Iran*, 810 F. Supp. 2d 402 (D. Mass. 2011), *aff'd*, 709 F.3d 49 (1st Cir. 2013) (determining that Iranian-owned antiquities in the possession of the Boston Museum of Fine Arts and Harvard University were not blocked assets under the Terrorism Risk Insurance Act and thus not attachable); *Rubin v. Islamic Republic of Iran*, No. Civ.A. 01-1655, 2005 WL 670770 (D.D.C. Mar. 23, 2005), *vacated*, 563 F. Supp. 2d 38 (D.C. Cir. 2008) (granting writs of attachment against bank accounts used by Iranian consulates that were later vacated).

<sup>369</sup> See *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821 (2018).

<sup>370</sup> See *id.*

<sup>371</sup> *Foreign Relations Law – Foreign Sovereign Immunities Act Terrorism Exceptions – Seventh Circuit Holds that FSIA Does Not Provide Freestanding Basis To Satisfy Judgment Against State Sponsors of Terrorism – Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016), 130 HARV. L. REV. 761, 761 (2016).

case wound through the Seventh Circuit<sup>372</sup> and returned to the United States District Court for the Northern District of Illinois for judgment on the merits. Iran and the Chicago institutions moved for summary judgment under the theory that they were immune from attachment under the FSIA. The District Court agreed and the Seventh Circuit affirmed. On appeal, the Supreme Court found that the items in question (cultural artifacts) could not be executed upon because they were not used by Iran for a “commercial activity,” rather, the items were on display and being studied at US institutions. The Supreme Court prohibited the plaintiffs from attaching the property, and the title to the collections remained with Iran.<sup>373</sup>

Tellingly, the United States wrote an *amicus curiae* brief in support of Iran, citing cultural concerns for their support. The brief stated, “[t]he property at issue here consists of ancient Persian artifacts, documenting a unique aspect of Iran’s cultural heritage, that were lent to a U.S. institution in the 1930s for academic study . . . . Execution against such unique cultural artifacts could cause affront and reciprocity problems.”<sup>374</sup> The items in dispute were not commercial property, but unique cultural items. *The New York Times* noted that “[b]oth the Oriental Institute and the State Department took the position that the antiquities were part of Iran’s national patrimony and therefore did not fit the definition of a commercial ‘asset’ that could be seized to satisfy judgment.”<sup>375</sup> Essentially, Iran holds the artifacts in the form of a trust and does not possess transfer rights in them.<sup>376</sup> From a diplomatic perspective, the State Department argued that the artifacts are outside the scope of the FSIA, and seizing cultural artifacts belonging to Iran could damage American relations with other

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<sup>372</sup> See *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011).

<sup>373</sup> See *Rubin*, 138 S. Ct. at 820.

<sup>374</sup> Adam Liptak, *Supreme Court Rules on Terrorism, Whistle-Blowers and Prisoners*, N.Y. TIMES (Feb. 21, 2018), <https://www.nytimes.com/2018/02/21/us/supreme-court-terrorism-whistle-blowers-prisoners.html> [<https://perma.cc/CWL2-4FMZ>].

<sup>375</sup> Barry Meier, *Antiquities and Politics Intersect in a Lawsuit*, N.Y. TIMES (Mar. 29, 2006), <https://www.nytimes.com/2006/03/29/arts/artsspecial/antiquities-and-politics-intersect-in-a-lawsuit.html> [<https://perma.cc/J2T7-EJDD>].

<sup>376</sup> Charlene A. Caprio, *Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act*, 13 INT’L J. CULTURAL PROP. 285, 299 (Aug. 2006).



countries.<sup>377</sup>

If the court had ruled in favor of the plaintiffs, the precedent could have led to a disastrous outcome due to the nature of the property attached.<sup>378</sup> Interestingly though, the courts did not discuss any special, inalienable ownership rights that Iran may have in its cultural heritage property,<sup>379</sup> and they did not address any public policy issues concerning the unique ownership rights for cultural heritage items. In addition, the courts did not consider the long-standing U.S. policy and judicial precedent respecting national ownership rights of source nations under patrimony laws.<sup>380</sup>

The collection of Persian tablets are unique and non-commercial items. The Court found that they were not to be used to satisfy a judgment, but that the items were instead being used for academic research.<sup>381</sup> The artifacts had never been sold or commercially available since the time of their excavation. Their importance transcends monetary interests or even the national interests of the Iranian population. The works are significant for all mankind and should not be used to satisfy a judgment to compensate private citizens. As recently stated by the director of the Oriental Institute, the “irreplaceable [Iranian] artifacts and ancient sites are not only central to the history of Iran, but are central to the history of humanity.”<sup>382</sup>

As argued by Charlene A. Caprio, Iran’s Constitution indicates that sovereign considers certain national heritage property to be inalienable absent necessary authorizations, and may never be

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<sup>377</sup> Robin Pogrebin, *In a Lawsuit Aimed at Iran, Terror Victims Focus on Ancient Artifacts in a Chicago Museum*, N.Y. TIMES (July 18, 2006), <https://www.nytimes.com/2006/07/18/arts/design/18pers.html> [<https://perma.cc/4NBW-NL4A>].

<sup>378</sup> Caprio, *supra* note 376, at 287.

<sup>379</sup> *Id.*

<sup>380</sup> The McClain Doctrine (arising out of *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977)) requires that foreign countries have clear patrimony laws in order to claim that ownership of undiscovered antiquities is vested in the nation state. U.S. courts will recognize ownership vested through these patrimony laws. See *United States v. Schultz*, 333 F.3d 393, 403–04 (2d Cir. 2003).

<sup>381</sup> See *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 827 (7th Cir. 2011).

<sup>382</sup> Christopher Woods, *Iran’s Cultural Heritage Sites Have Long Been Unifying Forces for the U.S. and Iran*, DALLAS MORNING NEWS (Jan. 10, 2020), <https://www.dallasnews.com/opinion/commentary/2020/01/10/irans-cultural-heritage-sites-have-long-been-unifying-forces-for-the-us-and-iran/> [<https://perma.cc/PX8Z-PJ9P>].

transferable.<sup>383</sup> The Persian artifacts may be inalienable by law because Article 83 of the Iranian Constitution [Property of National Heritage] states, “Government buildings and properties forming part of the national heritage cannot be transferred except with the approval of the Islamic Consultative Assembly; that, too, is not applicable in the case of irreplaceable treasures.”<sup>384</sup> Thus, it follows that Iran holds no monetary interest in the collections, and thus an attachment would only result in an unlawful taking.<sup>385</sup> Alternatively, as argued by the lawyers for the University of Chicago, “[t]he antiquities are the unique property, not just of the government of Iran, but of the people of Iran.”<sup>386</sup>

Putting aside the Iranian Constitution, it could also be the case that Iran’s ownership is in the form of a trust, and Iran is trustee overseeing the property for its population. When the government possesses cultural property, it acts as trustee on behalf of the relevant cultural group for protecting and utilizing the object for the benefit of the group. In fact, the University of Chicago lawyers have argued, “The antiquities are the unique property, not just of the government of Iran, but of the people of Iran.” The U.S. attorney representing Iran, Thomas G. Corcoran Jr., wisely observed, “I don’t think Congress intended that 2,500-year-old antiquities should be collected upon.”<sup>387</sup> Rather, the artifacts should be immune from seizure to satisfy a judgment under the FSIA. Cultural heritage professor Patty Gerstenblith stated, “I don’t think this property should be subject to attachment, to satisfying this kind of claim.”<sup>388</sup> Scattering the collection “would be very detrimental from the point of view of scholarship and knowledge.”<sup>389</sup> In fact, the United States specifically recognizes the nature of governments holding heritage in trust. The federal Indian Trust Doctrine

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<sup>383</sup> Caprio, *supra* note 376, at 299.

<sup>384</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] art. 83 [1980].

<sup>385</sup> *See id.*

<sup>386</sup> Caprio, *supra* note 376.

<sup>387</sup> Pogrebin, *supra* note 377.

<sup>388</sup> *Id.*

<sup>389</sup> “When the government possesses cultural property, it acts as trustee on behalf of the relevant cultural group for protecting and utilizing the object for the benefit of the group.” Gerstenblith, *Identity and Cultural Property*, *supra* note 25, at 559–688.

“imposes duties on the federal government to manage Native American property and other affairs in the best interest of Native Americans.”<sup>390</sup>

The lawsuit was ultimately determined in favor of Iran in 2018. In response, the Islamic nation demanded the return of some of the artifacts from the university. Three-hundred items were returned to Iran in the autumn of 2019.<sup>391</sup> The Oriental Institute always intended to return the works to Iran because the nation is the rightful owner.<sup>392</sup> According to the director of the Oriental Institute, the university’s collaboration with Iran was motivated by “mutual respect and a shared goal;” the result is testament to the strength of the partnership, a bright spot in the U.S.-Iranian relations over the past half century.”<sup>393</sup>

*D. It is dangerous to require foreign nations to use their cultural heritage in a particular way prior to repatriating looted items*

It is paternalistic for nations to dictate when cultural objects can return to their rightful homes.<sup>394</sup> Nations that have lost cultural items due to looting are victims. The ability of a sovereign to possess items that it lawfully owns should not require prerequisites prior to repatriation. Whereas, there are instances in which the rightful owner-sovereign wishes to delay repatriation (nations may allow institutions to continue to display or agree to repatriation after a given period of time), and sovereigns are entitled to exercise all rights in the bundle of ownership rights over their property. In *Rubin*, the highest court in the United States refused to attach cultural heritage to satisfy a claim against Iran. The United States Supreme Court did not utilize cultural artifacts to satisfy a terrorism

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<sup>390</sup> *Id.* at 651–52.

<sup>391</sup> *Iran Displays 300 Archaemenid Tablets Returned from US After Judicial Saga*, PRESS TV (Oct. 2, 2019), <https://www.presstv.com/Detail/2019/10/02/607715/Iran-US-clay-tablets-Persian-Achaemenid-Empire-legal-actions-US-Supreme-Court-sanctions> [<https://perma.cc/J3TU-GZ43>].

<sup>392</sup> Woods, *supra* note 382.

<sup>393</sup> *Id.*

<sup>394</sup> Naomi Rea, *France’s President has Promised to Return Africa’s Heritage – Now Macron’s Pledge is Being Put to the Test*, ARTNET NEWS (Mar. 8, 2018), <https://news.artnet.com/art-world/macron-repatriate-african-heritage-1238219> [<https://perma.cc/W9B5-4A6U>]; See James Riding In, *Repatriation: A Pawnee’s Perspective*, 20 A. INDIAN Q. 238, 246 (Spring 1996).

judgment; in the same way, cultural heritage should not be held hostage and alienated from its rightful home due to the lack of diplomatic channels.

## VII. Conclusion

Political motivations and diplomatic strains should not justify the unlawful retention of looted antiquities or the trade in those objects. Title is vested in nations through patrimony laws and other legal mechanisms which must be respected. U.S. courts recognize foreign ownership laws and enforce them, without consideration of political posturing.

At the same time, the importance of repatriating stolen cultural heritage cannot be overstated for legal, political, ethical, and diplomatic reasons. Like collaborative archaeological fieldwork, the protection and return of heritage is a powerful form of cultural diplomacy that fosters a mutual understanding between people invested in heritage.<sup>395</sup> As this area of study involves work with people across disciplines and locations, heritage work is a highly effective means of building relationships and furthering cultural awareness.<sup>396</sup> These considerations have attracted attention in light of recent cultural conflict between the United States and Iran, in part sparked by Donald Trump's January 4, 2020 threats to damage Iran's cultural sites.<sup>397</sup>

Cultural heritage has long been treated differently than other property, and the United States has a long history of protecting heritage sites. In 1982, during U.S. Senate hearings for the implementation of the Conventions on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Congress stated, "[b]ecause the United States is a principal market for articles of archaeological or ethnological interest and of art objects, the discovery here of stolen or illegally exported artifacts in some cases severely strains our relations with the countries of origin, which often include close

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<sup>395</sup> Woods, *supra* note 382.

<sup>396</sup> *Id.*

<sup>397</sup> Dennis Romero & Yuliya Talmazan, *Trump Threatens Attacks on 52 Sites if Iran Retaliates for Soleimani Killing*, NBC NEWS (Jan. 4, 2020), <https://www.nbcnews.com/news/world/trump-threatens-iran-attacks-52-sites-n1110511> [<https://perma.cc/BX6A-55MH>].

allies.”<sup>398</sup> The Senate Report also recognized that archaeological and historical sites in the United States were equally subject to pillage and looting. “The destruction of such sites and the disappearance of the historic records evidenced by the articles found in them has given rise to a profound national interest in joining other countries to control the trafficking of such articles in international commerce.”<sup>399</sup>

Cooperating to return looted items signals the commitment of the United States to fight against theft and plunder. At the same time, returning items to their rightful homes is a sign of respect for other nations and for shared global heritage. In some instances, repatriations have been accompanied by large celebrations and international headlines, as with the Euphronios Krater, the Cypriot mosaics returned by Peg Goldberg, the Golden Coffin of Nadjemankh, and statues returned to Cambodia within the past decade. In other instances, repatriations have been quietly conducted. In the case of the Persian Guard Relief, the return was not applauded or widely publicized in the United States, but it was publicly commended in Iran, with the limestone relief safely entering the country’s national museum and featured throughout Iran since its return.<sup>400</sup>

The return of stolen objects to their rightful owners is something commendable; victims of theft should be made whole. Although repatriations are not always publicly celebrated, cultural heritage can be used as a diplomatic tool. Just as objects from centuries, or even millennia, ago form part of our shared heritage, cultural artifacts can be used today to mend fences, collaboratively preserve our shared history, and build bridges for the future.

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<sup>398</sup> S. REP. NO. 97-564, at 3 (1982).

<sup>399</sup> *Id.*

<sup>400</sup> *Recovered Achaemenid ‘Guard’ to go on Show at Milad Tower*, TEHRAN TIMES (Dec. 14, 2019), <https://www.tehrantimes.com/news/443007/Recovered-Achaemenid-guard-to-go-on-show-at-Milad-Tower> [<https://perma.cc/5LDZ-SXF2>]; Benham Tofighi, *Bas-relief of Achaemenid guard displayed in Tehran*, MEHR NEWS AGENCY (Dec. 18, 2019), <https://en.mehrnews.com/photo/153471/Bas-relief-of-Achaemenid-guard-displayed-in-Tehran> [<https://perma.cc/75MZ-66UT>]; *Recovered Achaemenid relief to go on tour across Iran*, Tehran Times (Oct. 9, 2018), <https://www.tehrantimes.com/news/428319/Recovered-Achaemenid-relief-to-go-on-tour-across-Iran> [<https://perma.cc/9R36-KTZP>].