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A Comparative Look at Nazi Plundered Art, Looted Antiquities, and Stolen Indigenous Objects

Marc Masurovsky

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A Comparative Look at Nazi Plundered Art, Looted Antiquities, and Stolen Indigenous Objects

Marc Masurovsky[†]

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[†] Marc Masurovsky is the cofounder of the Holocaust Art Restitution Project (HARP).

I. Introduction

The dispersal of Jewish collections during the Nazi years interestingly compares with the recycling of looted cultural property from conflict zones and the plunder of ritual objects from indigenous groups worldwide. There should be a common response by the international community to cultural plunder and crimes committed against culture, within the framework of State-sponsored persecutions of entire groups. And there should be common standards for prevention, seizure, and restitution. This Article explores these issues.¹

The historical and geopolitical context of illegal removals of art objects, antiquities, and artifacts has varied greatly from one geographic area to the next—Nazi plunder was confined to the European continent;² Japanese plunder was limited to nations in eastern Asia.³ Antiquities and artifacts—aesthetic, ceremonial, and

¹ For a general overview of Nazi-looted art, 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); Simon J. Frankel, *The HEAR Act & Latches 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 latches). For a broader discussion of looted art and the legal issues involved in restoring cultural heritage objects to their rightful owners, see generally 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 and American criminal law); Leila Amineddoleh, *The Politicizing of Cultural Heritage*, 45 N.C. J. INT'L L. 333 (2020) (discussing the repatriation of cultural heritage, and the political calculations involved); 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 and U.S. domestic laws on looted art to the context of plundered archaeological artifacts); 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 laws and how they work to assist in the recovery of looted cultural patrimony).

² See Anne Rothfeld, *Nazi Looted Art: The Holocaust Records Preservation Project*, NATIONAL ARCHIVES (last reviewed Dec. 12, 2017), <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html> [<https://perma.cc/D6V9-CMRN>]. See generally COMM'N FOR THE COMPENSATION OF VICTIMS SPOILIATION, REPORT TO THE PUBLIC ON THE WORK OF THE COMMISSION IN 2009 (2009) (explaining the Commission's progress in compensating victims of plundered art across Europe).

³ See THOMAS JOSEPH LAWRENCE, WAR AND NEUTRALITY IN THE FAR EAST 220–27 (1st ed. 1904); *Fourth Plenary Meeting of the League of Nations*, 169 LEAGUE OF NATIONS O.J. Spec. Supp. 45, 47–49 (1937); Daniel H. Lew, *Manchurian Booty and International Law*, 40 AM. J. INT'L L. 584, 584–88 (1946). See also Diana Lary, *The Ending of the*

sacred—have been systematically extracted from their contexts within the boundaries of “source nations” and indigenous communities worldwide.⁴ The international community has responded to these crimes as separate from one another, rather than as symptoms and manifestations of a far larger problem.⁵ By contrast, states, in seeking to control or marginalize entire groups and communities within their boundaries, attack their culture; assault their beliefs, rituals, and traditions; damage or destroy their sites; and seize their objects for ideological or other purposes.⁶ The end result is the same: the impoverishment and alienation of entire groups and communities, due to the disappearance and destruction, or attempted destruction, of their cultures through theft, expropriation, resettlement, or extermination.⁷

Second World War in China, CAMBRIDGE U. PRESS (Aug. 19, 2015), <http://www.cambridgeblog.org/2015/08/the-ending-of-the-second-world-war-in-china/> [<https://perma.cc/5A4J-9DVU>].

⁴ Kathleen Sharp, *The Theft of the Gods*, PAC. STANDARD MAG. (Nov. 16, 2017), <https://psmag.com/magazine/the-theft-of-the-gods-stealing-sacred-hopi-ceremonial-objects> [<https://perma.cc/3MQT-VB3T>] (explaining the plunder and trafficking of Hopi artifacts).

⁵ See Rothfeld, *supra* note 2.

⁶ See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 293–94 (7th Cir. 1990) (holding that the Cyprus church was entitled to possession of looted mosaics); Theresa Papademetriou, *Cyprus: Destruction of Cultural Property in the Northern Part of Cyprus and Violations of International Law*, THE LAW LIBR. OF CONG., GLOBAL LEGAL RES. CTR., 9, 31, 40–46 (Apr. 2009), <https://www.loc.gov/law/help/cultural-property-destruction/cyprus-destruction-of-cultural-property.pdf> [<https://perma.cc/TU7F-SDXZ>] (explaining the plunder of religious sites in Cyprus during the 1974 Turkish invasion); Simon Maghakyan & Sarah Pickman, *A Regime Conceals its Erasure of Indigenous Armenian Culture*, HYPERALLERGIC MEDIA (Feb. 18, 2019), <https://hyperallergic.com/482353/a-regime-conceals-its-erasure-of-indigenous-armenian-culture/> [<https://perma.cc/D454-WSNJ>] (examining the Azeri campaign in Nagorno-Karabakh in 1988 by Armenia against Azerbaijan). See also ROBERT BEVAN, *THE DESTRUCTION OF MEMORY: ARCHITECTURE AT WAR 72–84* (Reaktion Books, 2d ed. 2016) (detailing the Armenian Genocide); Wesley A. Fisher, *Restitution of Art, Judaica, and Other Cultural Property Plundered in Serbia During World War II*, CONF. ON JEWISH MATERIAL CLAIMS AGAINST GER. & WORLD JEWISH RESTITUTION ORG. (Aug. 30, 2014) (examining the cultural plunder by the EinsatzstabReichsleiter Rosenberg (ERR) in Former Yugoslavia).

⁷ See BEVAN, *supra* note 6, at 17–28. “But there has always been another war against architecture going on – the destruction of the cultural artefacts of an enemy people or nation as a means of dominating, terrorizing, dividing, or eradicating it altogether. The aim here is not the rout of an opposing army – it is a tactic often conducted well away from the front line – but the pursuit of ethnic cleansing or genocide by other means, or the rewriting of history in the interests of a victor reinforcing his conquests.” *Id.* at 18.

These illicit acts were committed against the right of peoples to develop and nurture their culture through artistic production, rituals, celebrations, and customs, as many of the objects looted from them were destined for international art markets and cultural institutions in so-called “market nations.”⁸ Governments and art market professionals have struggled to balance the return of looted cultural objects to their purported rightful owners with the protection of the property rights of the current possessors.⁹ Nations refuse to confront their past¹⁰ and a multibillion dollar global art market operates in total impunity.¹¹ Museum leaders and art world denizens nurture elitist conceptions of art and culture according to which “source nations” are incapable of caring for their cultural heritage, and serve as the “protectors” and “caregivers” to the objects that have entered private and public collections in market nations.¹²

II. Nazi Anti-Jewish Persecution and the Holocaust (1933-1945)

From January 30, 1933 to May 9, 1945, the Nazi State waged a relentless war against the Jews of Germany and Europe.¹³ From its

⁸ See, e.g., Sharp, *supra* note 4 (explaining how some of the Hopi’s “most sacred religious items are fetching exorbitant prices on an international black market, which is estimated to be worth as much as \$4 billion a year”); *Goldberg*, 917 F.2d at 281–84 (explaining how the Cyprus mosaics ended up in Germany); 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/6E6Q-GRWJ>] [hereinafter Povoledo 2008] (explaining the travels of the Euphronios krater); Elisabetta Povoledo, *Italy Still Wants the Getty Bronze, and Perhaps More*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/arts/getty-museum-italy-artifacts-bronze.html> [<https://perma.cc/3JT5-ARQX>] [hereinafter Povoledo 2019] (explaining the travels of the “Victorious Youth” statue).

⁹ See Povoledo 2008, *supra* note 8; Povoledo 2019, *supra* note 8.

¹⁰ See Povoledo 2019, *supra* note 8.

¹¹ Alex Greenberger, *Report: Global Art Market Shows Signs of Growth for Second Year in a Row*, ARTNEWS (Mar. 8, 2019, 1:00 AM), <http://www.artnews.com/2019/03/08/art-basel-ubs-report-2019/> [<https://perma.cc/X5N6-KFL8>].

¹² JAMES CUNO, WHO OWNS ANTIQUITY?: MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 21–26, 30–35 (Princeton Univ. Press, 2010) (referring to the concept of universal museum, and conservative retentionist stance); see also James Cuno, *Culture War: The Case Against Repatriating Museum Artifacts*, 93 FOREIGN AFF. 119, 123–24, 127–28 (Nov.–Dec. 2014).

¹³ LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1st ed. 1994).

inception, this State-sponsored assault on men, women, and children of Jewish descent took on deep economic and cultural overtones.¹⁴ The Nazi State established and put into effect a legal and administrative machinery nationwide by which its agents could expropriate Jewish-owned property and transfer it to non-Jewish or “Aryan” ownership and control—a process known as Aryanization.¹⁵ The Nazis marginalized and ostracized Jewish communities, forcing them to rely on their own meager resources, while their wealth and know-how were forcibly removed and redistributed amongst the Aryan segment of the civil society.¹⁶ Hitler’s obsession with culture, echoed by many of his minions—Hermann Goering, Joseph Goebbels, and Alfred Rosenberg, among others—led to an outright assault on cultural institutions.¹⁷ Art professors, artists, dealers and collectors, printmakers, sculptors, decorators, authors, and critics were targeted because they were Jews.¹⁸ Jewish artists and cultural workers were prohibited from producing artistic and creative pieces.¹⁹ Jewish cultural assets increasingly fell under the auspices of Nazi agencies, where they were either incorporated into State collections if the objects conformed to Nazi aesthetic and ideological norms, or they were liquidated through galleries, auction houses, pawnshops inside the Reich, and outside of its borders through a network of art dealers acting on orders of the State.²⁰

¹⁴ See *ERR (Einsatzstab Reichsleiter Rosenberg) Card File and Related Photographs, 1940-1945*, NAT’L ARCHIVES 1 (2005), <https://www.archives.gov/files/research/microfilm/m1943.pdf> [<https://perma.cc/7MG2-8HZ6>].

¹⁵ U.S. Holocaust Memorial Museum, *Aryanization*, U.S. HOLOCAUST MEMORIAL MUSEUM HOLOCAUST ENCYCLOPEDIA (last updated Oct. 24, 2017), <https://encyclopedia.ushmm.org/content/en/article/aryanization> [<https://perma.cc/4RFX-HNMT>] [hereinafter HOLOCAUST ENCYCLOPEDIA].

¹⁶ See Jonathan Petropoulos, *Not a Case of “Art for Art’s Sake”: The Collecting Practices of the Nazi Elite*, 32 GER. POL. & SOC’Y 107 (1994). See also HOLOCAUST ENCYCLOPEDIA, *supra* note 15.

¹⁷ See *generally id.* (explaining the obsession with art by Nazi elites).

¹⁸ Petropoulos, *supra* note 16, at 107–112, 116–18.

¹⁹ FERNANDO BAEZ, A UNIVERSAL HISTORY OF THE DESTRUCTION OF BOOKS: FROM ANCIENT SUMER TO MODERN-DAY IRAQ 211 (Alfred MacAdam trans., N.Y. Atlas & Co. 2008) (“The purpose . . . [of the Nazi art policy] was to stimulate the Aryanization of German culture and to prohibit, for example, atonal Jewish music, the blues, surrealism, cubism, and Dadaism.”).

²⁰ See NICHOLAS, *supra* note 13, at 16; HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART 123–44 (1995); Isabelle Le Masne de Chermont & Didier Schulmann, LE PILLAGE DE L’ART EN FRANCE

Thousands of Jewish artists and cultural workers who lived and worked in inter-war Europe fell prey to State-sponsored persecution at the hands of the Nazis.²¹ The lucky ones fled into exile.²² Most, however, were interned and deported for physical enslavement and eradication within the greater German Reich and the territories occupied or annexed by Nazi Germany.²³ Their cavalry constitutes a “basic and racist human rights violation worthy of consideration as a cultural crime against humanity” within the framework of a genocidal undertaking.²⁴

In effect, the Nazi State’s onslaught against the Jews of Europe consisted of:

- a takeover of victims’ property, real or tangible;²⁵
- a transformation of victims’ real property holdings into “vital space” for the perpetrators’ own kind;²⁶
- the near total destruction of Jewish communities throughout Central and Eastern Europe (much like the massacres of Native Americans in North America and of indigenous communities worldwide by European conquerors and adventurers) to open up new territories and marshal the resources once exploited by the slaughtered Jews;²⁷ and
- the physical exploitation in slave-like conditions, dehumanization, physical and emotional abuse, plunder of private property, and extermination of civilian populations (much like the Japanese onslaught against Chinese and Korean citizens in the 1930s and 1940s).²⁸

The Nazi-sponsored genocide of Jewish communities across continental Europe between 1933 and 1945 fits into a centuries-long

PENDANT L’OCCUPATION ET LA SITUATION DES 2,000 OEVRES CONFIEES AUX MUSÉES NATIONAUX 17 (La Documentation Française 2000).

²¹ See BAEZ, *supra* note 19, at 218.

²² 142 CONG. REC. 38, 380 (1996) (discussing the heroic works of Varian Frey to save numerous Jewish artists during the Holocaust).

²³ Magdalena Leszczyńska, *Story of Rescue - The Zak Family*, POLIN MUSEUM OF THE HISTORY OF POLISH JEWS (Sept. 2010), <https://sprawiedliwi.org.pl/en/stories-of-rescue/story-rescue-zak-family-0> [<https://perma.cc/5EKS-6XKS>].

²⁴ Christine Fischer-Defoy & Paul Crossley, *Artists and Art Institutions in Germany 1933-1945*, 9 OXFORD ART J. 16, 16–29 (1986).

²⁵ NICHOLAS, *supra* note 13, at 132–42.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

string of genocidal and ethnocidal undertakings across the globe that was aimed at physical subordination, the elimination of conquered communities, and the seizure and absorption of the subjugated people's resources.²⁹ The genocide of the Jewish people followed an unprecedented displacement of cultural and other objects without the consent of their rightful owners, through a State-sanctioned array of forced sales, transfers of victims' property under duress, expropriation, Aryanization, confiscation, physical destruction, and recycling of Jewish-owned objects in domestic and international art markets.³⁰

When seen in a larger historical context, the plunder of Jewish assets and Jewish-owned cultural objects mirrors similar premeditated undertakings by colonial powers across the globe against indigenous populations and their communities—more recently, the undertakings have been against “source” or “art-rich” nations.³¹ In so doing, the perpetrator states behave like predatory agents.³² They seize, rob, murder, pillage, and misappropriate cultural heritage for complex reasons.³³ Common to all of these crimes against cultural groups is the hatred and debasement of the “Other” professed by colonial powers in search of territories and resources.³⁴ The glorification of the racial supremacy of the perpetrator group, coupled with acquisitive greed and expansionist dreams, lies at the root of the expropriation, exploitation, and extermination of Jews, Roma, indigenous tribes, Native Americans, ethnolinguistic communities, and tribal groups.³⁵ Racial supremacy as an ideology fuses state and race—it redefines national pride and

²⁹ *See id.*

³⁰ NICHOLAS, *supra* note 13, at 132–42; FELICIANO, *supra* note 20.

³¹ Hugh Eakin, *The Great Giveback*, N.Y. TIMES (Jan. 26, 2013), <https://www.nytimes.com/2013/01/27/sunday-review/the-great-giveback.html> [<https://perma.cc/CRQ8-M4MF>].

³² *Id.* (“Countries like Italy and Greece have used the news media to embarrass museums with alarming stories of rogue curators and nefarious dealers; they have withheld exhibition loans from museums that rebuff them; and they have resorted to aggressive legal action, opening criminal investigations of museum staff and enlisting the help of American federal prosecutors to obtain museum records and seize disputed works.”).

³³ *Id.* (describing art-rich nations). *See also* Fisher, *supra* note 6 (the Former Yugoslavia); Zoe Niesel, *Collateral Damage: Protecting Cultural Heritage in Crimea and Eastern Ukraine*, WAKE FOREST L. REV. (Apr. 24, 2014).

³⁴ *See* Eakin, *supra* note 31.

³⁵ *See id.*

identity as an extension of race.³⁶ The racial state aims to break free of the confines of its territorial boundaries in search of vital space or “*Lebensraum*” available among “inferior” and “weak” neighbors.³⁷ Through military expansionism and colonization, this racial and nationalistic “*Weltanschauung*”³⁸ repeatedly produces catastrophic consequences for the people inhabiting the lands designated for subjugation and conquest by the racial state.³⁹

If the international community accepts cultural crimes as crimes against humanity committed by civilized nations, aimed at the identity and existence of their victims, the international system of redress should treat all instances of cultural crimes on an equal basis, regardless of place, intention, period, and scope. This view is echoed by the Working Group on Looted Art at the June 2009 Holocaust Era Assets Conference (HEAC) in Prague,⁴⁰ which concluded that “the plundering of cultural property was an integral part of the genocide perpetrated against the Jewish people and of the persecution of others, and that it was a war crime and a crime against humanity.”⁴¹

III. Crimes Against Culture; Crimes Against Cultural Rights

What is meant by “art?” By going back to the basics, without any concern for legal and other constructions of “art,” art is an extension of humans, of the artists themselves. Artists produce aesthetic objects as an outward projection of an innermost part of themselves—something that we even cannot name. Through an assemblage of colors, shapes, textures, sounds, and other media, artists give life to a blend of sensory inputs, memories—conscious and not—smells, and feelings—regardless of how dark or light they might be, which become two- or three-dimensional platforms, using tools that help shape that sensory and auditory chaos into something

³⁶ U.S. Holocaust Memorial Museum, *Nazi Racism: An Overview*, U.S. HOLOCAUST MEMORIAL MUSEUM, HOLOCAUST ENCYCLOPEDIA (last visited Nov. 18, 2019), <https://encyclopedia.ushmm.org/content/en/article/nazi-racism-an-overview> [<https://perma.cc/NG2W-GJRG>].

³⁷ Emil L. Fackenheim, *Holocaust and Weltanschauung: Philosophical Reflections on Why They Did It*, 3 HOLOCAUST & GENOCIDE STUD. 197, 201–02 (1988).

³⁸ *Id.* (Weltanschauung means “world view”).

³⁹ *Id.*

⁴⁰ See generally Jiří SCHNEIDER, JAKUB KLEPAL & IRENA KALHOUSOVÁ, HOLOCAUST ERA ASSETS: CONFERENCE PROCEEDINGS PRAGUE, JUNE 26–30, 2009 (2009).

⁴¹ *Id.* at 47–49.

beautiful and expressive.

When art is stolen from Jews, Hopi, or indigenous communities, it is an affront, a violation, a trauma, a loss that can feel irreparable. It is an assault on the painter, the sculptor, the etcher, the artists that produced the forcibly displaced artwork. When the targeted object is used in ceremonies and rites, the removal is a direct attack against the faith and creed, the belief system of the victim. Regardless of its origin, all groups share the same feeling of loss because the theft erases the artist and the creative force behind the object. Instead, it reifies and gives primacy to the object over its creator and owner. The thief becomes more significant than the person who created it, especially if that person was targeted for what she embodies per se in the ideological system that enabled the theft to occur in the first place. Racial supremacy, which highlights nativist and xenophobic thinking, discriminates in favor of the self-styled, self-anointed master group or “race”—oftentimes the white Europeans. It denigrates all those who do not conform to the racialist criteria imposed upon society by the new oppressor.⁴²

The state-sanctioned theft of art objects, as a crime against culture, constitutes a violation of cultural rights, not only of the artists, but of all members of a community shaped by the presence of these objects. It is an assault on the civil society at large, national or transnational, which has fostered and nurtured creative individuals and their artistic output. State-sponsored and systematic attacks, when aimed at cultural workers, institutions, and symbols in order to marginalize the communities, are a cultural crime within an evolving framework leading to genocide. Forced removals of art from the hands of rightful owners constitute a cultural crime, which fits into the framework of a violation of cultural and human rights.⁴³ When conducted on a mass scale and under state sponsorship, forced removal of art should constitute a crime against humanity.⁴⁴

When referring to cultural rights, it is important to understand what is meant by the word “culture.” Culture refers to the accumulated knowledge, beliefs, artistic achievements, laws, and customs that a society embodies.⁴⁵ When culture is transmitted from

⁴² HOLOCAUST ENCYCLOPEDIA, *supra* note 15.

⁴³ See Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence, ¶ 11 (Sept. 27, 2016).

⁴⁴ *Id.*

⁴⁵ UNESCO Convention Concerning the Protection of the World Cultural and

one generation to the next, it is referred to as “cultural heritage.”⁴⁶ The tangible and intangible expressions of that heritage are defined as “cultural property,” which includes works of art, ritual objects, museums, archives, libraries, archaeological sites, and sacred places.⁴⁷ Cultural property, like art objects, is imbued with a people’s origin, history, customs, and rites.⁴⁸ The idea of culture extends to the “way of life associated with the use of land resources, especially in the case of indigenous peoples”⁴⁹ In 2007, access to cultural heritage was reaffirmed as a basic human right in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁵⁰ According to Article 7 of UNDRIP, “[i]ndigenous individuals . . . shall not be subjected to any act of genocide or any other act of violence.”⁵¹ To borrow from the language used to describe the rights of indigenous people in the UNDRIP, the Nazi regime threatened Jewish communities with physical and cultural extinction in the territories that it conquered and occupied, and launched direct assaults on Jewish “spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs.”⁵²

IV. The International Community and Crimes Against Culture

From the turn of the last century until the present, the international community has wrestled to balance the protection of private property rights with the cultural rights of populations caught

Natural Heritage art. 1, Nov. 16, 1972, 1037 U.N.T.S. 151.

⁴⁶ *Id.* art. 4.

⁴⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 art. 1, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Convention].

⁴⁸ *Cultural Property Training Resource Iraq, Types of Cultural Property*, COLO. ST. U., <https://www.cemml.colostate.edu/cultural/09476/chp04-02iraqenl.html> [https://perma.cc/D7V2-GA94].

⁴⁹ Siegfried Wiessner, *Re-Enchanting the World: Indigenous Peoples’ Rights as Essential Parts of a Holistic Human Rights Regime*, 15 UCLA J. INT’L L. & FOREIGN AFF. 239, 271 (2010).

⁵⁰ See G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples, Doc. A/61/295, art. 7 (Sept. 13, 2007) [hereinafter UNDRIP]. See also G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 27 (Dec. 10, 1948) (establishing the original right to cultural heritage which was reaffirmed in the 2007 declaration).

⁵¹ UNDRIP, *supra* note 50.

⁵² *Id.* art. 34.

in the crossfire of armed conflicts or directly targeted by such conflicts.⁵³ The 1907 Hague Convention on the Laws and Customs of War on Land outlawed the confiscation of private property, prohibited acts of plunder [pillaging], and the “seizure of, destruction or willful damage” of public property, including publicly-owned artworks from areas occupied by the aggressors.⁵⁴

By January 5, 1943, Nazi Germany had occupied 15 European nations and they had seized both their state and privately-owned resources and cultural assets. The Allied powers, namely the United States and the United Kingdom, drafted a statement known as “the London Declaration.”⁵⁵ Its framers put the Axis powers (Germany, Italy, Japan and their allies) on notice that the plunder and persecution policies they carried out in the lands their armies occupied had been duly noted and condemned.⁵⁶ As a result of the systematic looting of victims’ property, the declaration warned the governments that non-belligerent or “neutral” nations (Sweden, Spain, Portugal, Switzerland) should not allow their territories to harbor or sell looted art and other assets that were forcibly removed from Jewish victims by the Nazis and their collaborators—even if the transactions were made to appear legal.⁵⁷ The international conference of Bretton Woods in July 1944⁵⁸ reiterated the warning issued to the “neutrals” in January 1943, but this time, those countries convened at Bretton Woods to reshape the postwar international financial order threatened to withhold economic assistance from the neutral nations, should they be guilty of harboring or enabling transfers and sales of assets known to have been plundered from victims of Nazi persecution.⁵⁹

⁵³ *See id.*

⁵⁴ Hague Convention (IV) Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, arts. 36, 46, 47, 56; Ana Filipa Vrdoljak, *The Criminalisation of the Illicit Trade in Cultural Property*, THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 54, 58–59 (Jane Anderson & Haidy Geismar eds., 2016).

⁵⁵ Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, Jan. 5, 1943, 740.00113 European War 1939/592.

⁵⁶ *Id.*

⁵⁷ Vrdoljak, *supra* note 54, at 5–6 (termed “duress sales”).

⁵⁸ U.S. Dep’t of State, *The Bretton Woods Conference, 1944*, <https://2001-2009.state.gov/r/pa/ho/time/wwii/98681.htm> [<https://perma.cc/3BQS-Q58Y>].

⁵⁹ *See* Keith Huxen, *Bretton Woods Conference: 75th Anniversary*, THE NATIONAL WWII MUSEUM (Nov. 29, 2019), <https://www.nationalww2museum.org/war/articles/bretton-woods-conference-75th->

After 1945, the fight for restitution and repatriation of looted cultural goods by the survivors of the Nazi/Fascist onslaught paralleled the repatriation debates of looted antiquities and called to repatriate artifacts and cultural property looted worldwide.⁶⁰ Thus, source and market nations were pitted against their enablers in the private art market.⁶¹ When Turkey invaded Cyprus in 1974, the part of the island controlled by the Turkish Army suffered from extensive plunder of cultural objects.⁶² Some mosaics stolen at that time ended up in Indiana.⁶³ In 1978, when Sotheby's London tried to sell five Maori panels illegally extracted from New Zealand, the attorney general of New Zealand protested vehemently, sued to stop the sale, and negotiated for their return.⁶⁴

In a biting piece written in 1979, archaeologist Karen D. Vitelli excoriated the art market for absorbing, without scruples, unprovenanced artifacts:

I would like to point out that the battle against the illicit market in antiquities is not MY battle . . . It is your battle too. All of you. What do YOU do when: you walk into a store that is selling genuine ancient Egyptian scarabs set in 24k gold for your valentine? When you get a mail order catalogue inviting you to "reach out and touch hands with history" by investing in real artifacts accompanied by a "Perpetual Guarantee of Authenticity?"

When a dealer invites you to contribute to a catalogue for his show, authenticating his pieces with your scholarly work? When

anniversary [<https://perma.cc/4UJS-5BD6>].

⁶⁰ Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT. L. 63–67 (2011).

⁶¹ *Id.*

⁶² *Cyprus: Destruction of Cultural Property in the Northern Part of Cyprus and Violations of International Law*, LAW LIBRARY OF CONGRESS (2009), <https://www.loc.gov/law/help/cultural-property-destruction/cyprus-destruction-of-cultural-property.pdf> [<https://perma.cc/3XWV-L7PD>].

⁶³ Raphael Contel, Alessandro Chechi & Marc-André Renold, *Case Kanakaria Mosaics – Autocephalous Greek Orthodox Church of Cyprus and Cyprus v. Goldberg*, ARTHEMIS (2012), <https://plone.unige.ch/art-adr/cases-affaires/kanakaria-mosaics-2013-autocephalous-greek-orthodox-church-of-cyprus-and-cyprus-v-goldberg> [<https://perma.cc/5YHM-GWFJ>].

⁶⁴ Elizabeth Fraccaro, Alessandro Chechi & Marc-André Renold, *Case Maori Panels – New Zealand and Ortiz Heirs*, ARTHEMIS (Nov. 2018), <https://plone.unige.ch/art-adr/cases-affaires/maori-panels-2013-new-zealand-and-ortiz-heirs-1> [<https://perma.cc/6NHD-YMD6>].

a student or personal friend comes to you with several pots acquired on a trip to Mexico last Christmas? When you are invited to publish objects without provenance from your local museum? When you are offered a gift of undocumented or illegally exported objects for your departmental collection? How do you . . . explain the presence of the artifacts that decorate your office, or the sherds that you pass around in your classes? . . . I close with a favorite slogan from the 1960s that strikes me as particularly relevant here: “If you are not part of the solution, you are part of the problem.” Do something.⁶⁵

As of 1989, 141 countries passed laws regulating the export of antiquities, but very few tackled the problems associated with Holocaust-era loot in their local art markets and cultural institutions.⁶⁶

All thefts of cultural objects mirror one another in their outcomes. Illegally extracted art or cultural objects are first removed without consent from the source—be it an individual, a group, a community, or a nation; second, they transit either in the open or covertly across borders; finally, they land in art markets that are mostly located in Western Europe, the Americas, and, now, in Asia and the Middle East.⁶⁷ Any strategy aiming to shift the balance of power between victims and current possessors must address those three stages.

The 1954 Hague Convention picked up where the London Declaration left off in its formulation of an international framework to protect cultural goods during times of war.⁶⁸ In doing so, it provided a generic definition of what States refer to as “cultural property” to be applied whenever one discusses cultural property protection:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of

⁶⁵ Karen D. Vitelli, *The Antiquities Market*, 6 J. FIELD ARCHAEOLOGY 75, 76–77 (1979).

⁶⁶ Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 391 (Mar. 1995).

⁶⁷ *Id.* at 382.

⁶⁸ 1954 Convention, *supra* note 47. The Convention was adopted at The Hague (Netherlands) in 1954 after the widespread destruction of cultural heritage during World War II. The Convention covers movable and immovable objects, such as monuments, archaeological sites, works of art, manuscripts, books and other artistic, historical or archaeological objects.

architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a).⁶⁹

Sixteen years later, the 1970 UNESCO Convention elaborated on the notion of “cultural property” by adding “property of artistic interest” which includes:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; postage, revenue and similar stamps, singly or in collections; archives, including sound, photographic and cinematographic archives; articles of furniture more than one hundred years old and old musical instruments.⁷⁰

Each State designates what is important “for archaeology, prehistory, history, literature, art or science;” thus, the language suggests that only “culturally-significant” objects are protected.⁷¹

On December 18, 1973, the United Nations passed Resolution 3187: “Restitution of Works of Art of Countries Victims of Expropriation.”⁷² It advocated for “the prompt return to a country of its objects d’art, monuments, museum pieces, manuscripts and documents by another country, without charge . . . to strengthen

⁶⁹ *Id.* art. 1.

⁷⁰ UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage art. 1, Nov. 16, 1972, 1037 U.N.T.S. 151.

⁷¹ *Cultural Property Training Resource Iraq, Types of Cultural Property*, *supra* note 48.

⁷² G.A. Res. 3187 (XXVIII) (Dec. 18, 1973). The Resolution passed with 113 votes and no opposition and 17 abstentions.

international cooperation, inasmuch as it constitutes reparation for damage done.”⁷³ This hierarchy of importance assigned to cultural objects echoes the post-1945 focus by Allied nations on the restitution of “treasures” stolen by the Nazis—an elitist expression of a Statist view of culture.

In the 1990s, Rule 38 of the International Committee of the Red Cross (ICRC) reiterated the basic precepts contained in the 1954 Hague Convention.⁷⁴ It emphasizes the “special care” given to cultural property of “importance” and requires States to take measures to protect such property from military campaigns.⁷⁵

To the extent that cultural property is civilian, it may not be made the object of attack (see Rule 7). It may only be attacked in case it qualifies as a military objective (see Rule 10). The Statute of the International Criminal Court therefore stresses that intentionally directing attacks against buildings dedicated to religion, education, art, science, charitable purposes, or historic monuments is a war crime in both international and non-international armed conflicts, “provided they are not military objectives.”⁷⁶

In July 2011, the UN General Assembly passed a resolution which expressed concern “that demand for stolen, looted and illicitly exported or imported cultural property is growing and fuels further looting, destruction, removal and theft of and trafficking in such unique property, and recognizing that urgent and commensurate legislative and administrative measures are required to discourage demand for illicitly acquired cultural property in the market”⁷⁷ Despite all of these well-meaning declarations, the crime of plunder, although recognized as a crime against humanity during the International Military Tribunals of 1946,⁷⁸ rarely rises to that level in the eyes of supranational institutions. The first postwar

⁷³ J.A.R. Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 U. MIAMI INTER-AM. L. REV. 68, 77 (Feb. 1975).

⁷⁴ *Rule 38. Attacks Against Cultural Property*, INT’L COMMITTEE OF THE RED CROSS (2005), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule38 [<https://perma.cc/8FJR-TFV9>].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ G.A. Res. 2011/42, at 2 (July 28, 2011).

⁷⁸ *Trial of the Major War Criminals before the Int’l Mil. Tribunal*, 1 INT’L MIL. TRIBUNAL 1, 11 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf [<https://perma.cc/MMQ4-6W7C>].

prosecution by an international judicial body of a crime for cultural plunder took place on January 16, 2016 at the International Criminal Court (ICC) in The Hague.⁷⁹ The court invoked Article 8(2)(e)(iv) of the Rome Statute⁸⁰ and the 1954 Hague Convention⁸¹ to try the defendant, Ahmad al-Faqi Al-Mahdi, who stood accused of destroying mausoleums in Timbuktu, Mali.⁸² The Chief prosecutor Bensouda declared that “[t]he charges . . . are about the destruction of irreplaceable historic monuments, and . . . [are] a callous assault on the dignity and identity of entire populations, and their religious and historical roots.”⁸³ Irina Bokova, then-director general of UNESCO, noted that “the destruction of heritage is inseparable from the persecution of people,” making it far more than just a cultural issue.⁸⁴

Strong parallels exist between the Jewish genocide at the hands of the Nazi State and the systematic violence inflicted repeatedly on indigenous communities worldwide. In 2010, the International Law Association (ILA)⁸⁵ attested that cultural violence perpetrated against indigenous peoples strongly resemble those inflicted on

⁷⁹ Bill Chappell, *Demolition of Timbuktu’s Cultural Sites Spurs War-Crimes Trial at The Hague*, NPR (Mar. 1, 2016, 8:06 AM), <https://www.npr.org/sections/thetwo-way/2016/03/01/468683861/demolition-of-timbuktus-cultural-sites-spurs-war-crimes-trial-at-the-hague> [<https://perma.cc/PS7V-QVHW>].

⁸⁰ Rome Statute of the International Criminal Court, art. 8, ICC-ASP/2/Res3 (July 17, 1998), <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> [<https://perma.cc/3RKR-3ZWL>]. The Rome Statute prohibits plunder, the deliberate destruction of cities and towns, and attacks against religious and educational heritage sites and heritage sites dedicated to science.

⁸¹ 1954 Convention, *supra* note 47.

⁸² Chappell, *supra* note 79.

⁸³ Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr. Ahmad Al-Faqi Al Mahdi*, INT’L CRIM. CT. (Mar. 1, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16> [<https://perma.cc/U5Y7-X63Z>].

⁸⁴ *Id.* See also Christoph Doppelhofer, *Will Palmyra rise again? - War Crimes against Cultural Heritage and Post-war Reconstruction*, OHCHR 1 (2016), <https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/Ch.Doppelhofer.pdf> [<https://perma.cc/A7N3-ZDN8>].

⁸⁵ *International Law Association Constitution of the Association*, INT’L L. ASS’N (2016), https://www.ila-hq.org/images/ILA/docs/constitution_english_adopted_johannesburg_2016.pdf [<https://perma.cc/VT5K-KWCG>]. “The objectives of the Association are the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law.” *Id.* at 1.

Jews and their communities by the Nazi State and its collaborators across Europe.⁸⁶ For example, the ILA noted that the cultural violence included “seizure of their traditional lands [real property], expropriation and commercial exploitation of their cultural objects without their consent [forced sales and expropriations], misinterpretation of indigenous histories, mythologies and cultures, suppression of their languages and religions [banning Hebrew and Yiddish, prohibiting access to cultural, religious, and spiritual spaces], and even their forcible removal from their families [ghettoization and deportation] and denial of their identity.”⁸⁷ Two years later, ILA members approved Resolution 5/2012 whereby “[s]tates are bound to recognise, respect, protect and fulfill [sic] indigenous peoples’ cultural identity [in all its elements, including cultural heritage] and to cooperate with them in good faith—through all possible means—in order to ensure its preservation and transmission to future generations.”⁸⁸ The resolution further stated that “[c]ultural rights are the core of indigenous cosmology, ways of life and identity, and must therefore be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous people.”⁸⁹

V. Art Market Response to Cultural Crimes

Apologists of an unbridled free art market often refer to expressions such as “the culture of humanity” and “universal culture” as thinly disguised smokescreens to justify the unethical acquisitions of art objects, ceremonial and sacred artifacts, as well as antiquities—past, present, and future.⁹⁰ What do museums mean by “sharing the cultural wealth of the world”? The expression is repeatedly propounded by so-called cultural universalists—apologists who promote a free and unimpeded trade in cultural objects, regardless of provenance, origin, and legal status.⁹¹ How

⁸⁶ See Siegfried Wiessner et al., *The Hague Conference (2010) Rights of Indigenous Peoples Interim Report*, INT’L L. ASS’N 1, 16 (2010).

⁸⁷ *Id.*

⁸⁸ Resolution No. 5/2012, Conclusions and Recommendations of the Committee on the Rights of Indigenous Peoples, INT’L L. ASS’N (Aug. 26-30, 2012), ¶ 1 (75th Conference of the International Law Association held in Sofia, Bulgaria).

⁸⁹ *Id.* ¶ 6.

⁹⁰ See Cuno, *supra* note 12.

⁹¹ *Id.*

does one tangle with the fact that 80% of the planet is hard-pressed to experience the “cultural wealth of the world” that is amassed in top-tier museums located in only the most advanced industrial nations?

The art trade and cultural institutions seemingly thrive on conflict and mass displacements of artistic, cultural, and sacred objects. The fate of their owners, until recently,⁹² rarely entered into the discussion of value and importance of the objects offered on the art market for sale or display or both. Geopolitical crises and domestic disturbances do very little to affect the availability and value of these objects. In fact, the cultural art becomes more desirable, as more idiotic justifications are conjured up to disregard the illicit origin of the coveted objects. In reality, they aspire to protect and safeguard the cultural art from destruction so that they can be stored and displayed securely in their temples.⁹³

As an expression of that behavior, art dealers, when asked about acquisitions of looted artifacts, indicate that these “removals” protect the artifacts.⁹⁴ That argument was invoked decades earlier by American buyers of “degenerate art” at an auction held at the Theodor Fischer Gallery in Lucerne, Switzerland, on June 30, 1939.⁹⁵ They justified their purchases as an act of rescue because, otherwise, these works which had been de-accessioned from German public collections, might have been destroyed by the very government that had purged them from State collections and offered them for sale on the international art market.⁹⁶

Purchases on the art market by American collectors and dealers have been termed as “laissez faire” and even “sub rosa.”⁹⁷ For some,

⁹² See Mark S. Ellis, *The ICC's Role in Combatting the Destruction of Cultural Heritage*, 49 CASE W. RES. J. INT'L L. 23, 57–58 (2017).

⁹³ *Id.* at 24.

⁹⁴ *Dealers Say Removal of Art Preserves It*, N.Y. TIMES 28 (Mar. 27, 1973), <https://www.nytimes.com/1973/03/27/archives/dealers-say-removal-of-art-preserves-it-some-are-indignant.html> [<https://perma.cc/Q4BT-U6V8>].

⁹⁵ *Exhibition of Works Sold by the Germans at the Lucerne Auction in 1939 Opens in Liege*, ART DAILY (Dec. 8, 2014), <https://artdaily.cc/news/74918/Exhibition-of-works-sold-by-the-Germans-at-the-Lucerne-auction-in-1939-opens-in-Liege#.XeUwPJNKiqA> [<https://perma.cc/9RXX-PDSJ>].

⁹⁶ See Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 KAN. L. REV. 75, 94–95 (2012).

⁹⁷ See Kanishk Tharoor, *Museums and Looted Art: The Ethical Dilemma of Preserving World Cultures*, THE GUARDIAN (June 29, 2015), <https://www.theguardian.com/culture/2015/jun/29/museums-looting-art-artefacts-world->

the United States acts as a “a refuge for contraband artifacts.”⁹⁸ Oscar Muscarella, a former Senior Research Fellow at the Metropolitan Museum of Art, went even further, declaring that there was a “symbiosis” between collectors and looters.⁹⁹ Dealers express their appreciation of the culture of source nations by removing their artifacts by any means at their disposal and bringing them to market in the U.S. and other market nations.¹⁰⁰

Museum directors and their trustees have a checkered history when it comes to addressing claims that they receive for restitution of looted objects found in their collections.¹⁰¹ Depending on their own moral and ethical inclinations, they might greet claims in an empathetic way and seek a resolution which could lead to the physical return of the claimed objects, or, as is often the case, they insist on asserting the legitimacy of their title to such property.¹⁰² The mechanics of the global trade in looted antiquities mimic those

culture [<https://perma.cc/LS44-X9RV>]. The reference to “laissez faire” and even “sub rosa” purchases tracks the critics of western museums who accuse American art museums and art dealers of being complicit in the illicit trade, and at a more general level, of perpetuating the gross inequalities between the west and the rest of the world. Jason Felch, author of *Chasing Aphrodite: The Hunt for Looted Antiquities at the World’s Richest Museum*, “sees a parallel between the trade in antiquities and the drug trade: demand in western countries makes both possible. ‘As long as there’s a lucrative market for looted goods, for objects with uncertain provenance, there will be an illicit antiquities trade.’” JASON FELCH & RALPH FRAMMOLINO, *CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD’S RICHEST MUSEUM* (2011).

⁹⁸ Nafziger, *supra* note 73, at 71.

⁹⁹ Oscar White Muscarella, *The Ethics of Collecting Cultural Property: Whose culture? Whose Property?*, 95 AM. J. ARCHAEOLOGY 2 (1991) (reviewing PHYLLIS AUCH MESSENGER, *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* (1989)).

¹⁰⁰ Tharoor, *supra* note 97. For example, in April 2015, homeland security agents “relieved the Honolulu Museum of Art of seven ancient Indian artefacts believed to have been acquired through Subhash Kapoor, a New York-based art dealer.” *Id.* Then, in May 2015, Italian authorities recovered 25 looted artefacts retrieved from the United States with some objects smuggled by the dealer Giacomo Medici who was “convicted in 2004 for selling thousands of stolen pieces of Greco-Roman art from Italy and the Mediterranean.” *Id.*

¹⁰¹ See PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY* 80–95 (Hachette Book Group, 2006).

¹⁰² See Jason Farago, *To return or not: Who should own indigenous art?*, BBC (Apr. 21, 2015) <http://www.bbc.com/culture/story/20150421-who-should-own-indigenous-art> [<https://perma.cc/WX4X-K55F>] (discussing the complexity of repatriating works in a British Museum Aboriginal Australian art exhibition to the culture that produced them).

of the international narcotics trade.¹⁰³ The chain of illicit removal, recycling, and fencing on the global marketplace is fully operational. The trade is adaptable to external pressures, it employs untold numbers of individuals, it requires complicities at all levels—across borders and at the borders—and it benefits from a toxic culture of “omerta” (don’t ask-don’t tell), which ensures the privacy and confidentiality of transactions and masks the origin of illicitly removed objects. Markets are organic structures which can only exist if there is a balance, however tenuous, between offer and demand. Buyers of looted cultural objects are everywhere, and the market can barely keep up with the demand from individuals with disposable incomes and deep pockets worldwide, who want these objects for many reasons.

The international art, artifacts, and antiquities market has cast a blind eye towards instability worldwide, and specifically, the insurgent movements which overtake archaeological sites and pillage them. Eventually their illicit activity produces a fresh supply of unprovenanced decontextualized objects of variable quality and importance.¹⁰⁴ These objects are “rescued” by a complicit marketplace which extends its compassionate arms to embrace orphaned objects so that they can be nurtured in a foster global institution.¹⁰⁵ Market-fueled addiction for cultural objects regardless of origin has consequences. Like all addictions, the collateral damage produced by such obsessive demand is irreversible and irreparable, all in the name of social status, surplus profit, ego-driven self-importance, and competition with peers on the world stage.

¹⁰³ See Borodkin, *supra* note 66 (explaining the parallels between illegal antiquities and narcotics trafficking).

¹⁰⁴ See, e.g., Steve Swann, *Antiquities looted in Syria and Iraq are sold on Facebook*, BBC (May 2, 2019), <https://www.bbc.com/news/world-middle-east-47628369> [<https://perma.cc/9EYB-LKXW>]; Amr Al Azm, *The Pillaging of Syria’s Cultural Heritage*, MIDDLE EAST INST. (May 22, 2015), <https://www.mei.edu/publications/pillaging-syrias-cultural-heritage> [<https://perma.cc/FHR5-DKV9>].

¹⁰⁵ See, e.g., Tom Mashberg, *The Met Reviews Items It Received From a Dealer, Now a Looting Suspect*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/2019/08/18/arts/design/india-met-museum-accused-looter.html> [<https://perma.cc/2VXJ-DP88>]; 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/2LLM-FDMW>].

To add fuel to the fire of colonial takings by European powers prominently displayed in Western museums, Kwame Opoku, a “Modern Ghana” contributor, declared that Europeans do not “admit in principle that looting of artifacts [sic] was wrong and that they now have to be restituted. Restitution, in their opinion, would also lead to admitting that the various massacres and genocides as well as the colonial impunity that enabled the various raids and looting were also wrong.”¹⁰⁶ He went on to note that the Europeans “are all ready to loan us our looted artifacts [sic], including the Benin artefacts.”¹⁰⁷ But they cannot retribute the objects because there may be legal difficulties.¹⁰⁸ Opoku, however, laments that “such lame excuses do not deceive anyone. There are no legal difficulties if there is a will to do the right thing. They have kept these looted artefacts for hundred years”¹⁰⁹

VI. What Can We Do in the Short- and Mid-Term to Safeguard Cultural Artifacts and Sites and to Preempt Cultural Genocide?

One of the most potent challenges to the resolution of cultural crimes in an ethical manner is the refusal or reluctance of academic institutions to inculcate these notions into current and future generations. Most egregious is the absence of any curricular standard for addressing cultural crimes against the Jewish communities of Europe during the Nazi era.¹¹⁰ Such a sin of omission constitutes an act of revisionism.¹¹¹ By not teaching and raising awareness about the cultural losses of Jews during the Nazi era is to deny a crucial aspect of the Nazi and Fascist war against the Jews—that the Nazis used a state-sponsored campaign to eradicate Jewish culture and Jewish identity as a preamble to the extermination of Jews. If we do not teach about these losses, we are

¹⁰⁶ See Kwame Opoku, *Are Europeans Outmaneuvering Africans Again?*, MUSEUM SECURITY NETWORK (Sept. 24, 2019), <https://www.toncremers.nl/kwame-opoku-are-europeans-outmanoeuvring-africans-again/> [<https://perma.cc/42LJ-SSDA>].

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., Menachem Z. Rosensaft, *Croatia Is Brazenly Attempting to Rewrite its Holocaust Crimes Out of History*, TABLET MAG. (Oct. 9, 2017) <https://www.tabletmag.com/jewish-news-and-politics/246116/croatia-rewrite-holocaust-crimes-out-of-history> [<https://perma.cc/D3L9-V3YV>].

¹¹¹ *See id.* (addressing recent accusations of revisionism in Croatia).

no better than those governments which today are busy rewriting their own pasts in order to accommodate and appease the worst elements of their societies. French philosopher Jean Baudrillard wrote that “forgetting extermination is part of extermination.”¹¹²

But this raises several questions that are left unanswered: Can restitution and repatriation take place in a more ethical framework? Should there be another layer of national and supranational organizations with oversight on looted cultural assets, regardless of original owner, and irrespective of value and origin? And with that, should there be a universal jurisdiction to punish crimes of plunder? What are the strategies for protecting source nations from illicit extractions and exports of cultural property? Is there a need to restore a cultural balance of power in the world, which would require a de-centering of commonly held views of culture and art and its ownership and control away from “market nations”?

Desperate situations call for drastic measures. We could turn to the planners of the Allied strategy during WWII who developed an elaborate tool kit with which to countervail Axis influence around the world, including access to resources essential to the conduct of the war. Some of these strategies and countermeasures included the following: economic warfare measures;¹¹³ selective regulating of the antiquities and art trade;¹¹⁴ publication of lists of individuals and companies known to do business directly and indirectly with enemy or hostile agents and representatives;¹¹⁵ beefing up import

¹¹² See Doppelhofer, *supra* note 84, at 8 (quoting Jean Baudrillard, *Siemulacra and simulation*, 49 (1994)).

¹¹³ See *infra*, Section A below; “Economic warfare, the use of, or the threat to use, economic means against a country in order to weaken its economy and thereby reduce its political and military power. . . . Some common means of economic warfare are trade embargoes, boycotts, sanctions, tariff discrimination, the freezing of capital assets, the suspension of aid, the prohibition of investment and other capital flows, and expropriation.” George Shambaugh, *Economic warfare*, ENCYCLOPEDIA BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/economic-warfare> [<https://perma.cc/HS6W-39JK>].

¹¹⁴ See *infra*, Section B below, discussing measures such as blockades and moratoriums (temporary prohibitions of activity).

¹¹⁵ See *Basic Information on OFAC and Sanctions*, U.S. DEP’T. OF THE TREASURY, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx [<https://perma.cc/4D9N-HN63>] (discussing the role of the Office of Foreign Assets Control, which administers and enforces economic sanctions programs primarily against countries and groups of individuals, including traffickers).

restrictions;¹¹⁶ and strengthening human and signal intelligence capacities.¹¹⁷ Adapted to the current geopolitical needs and concerns, the following should be added: the imposition of short-term moratoria on the trade of specific classes of art objects and antiquities;¹¹⁸ setting up blockades to preempt ground, naval, and air traffic of looted assets from source nations, conflict zones;¹¹⁹ the deployment of defensive military units to protect “culturally significant” cultural sites;¹²⁰ building broad coalition around minimalist goals to preempt looting and plundering;¹²¹ and training local communities to take on some of these tasks as part of their civic duty.¹²²

A. Economic Warfare and Countervailing Strategies Aimed at Choking the Financial and Commercial Capacities of Enemy or Hostile Agents

During WWII, the U.S. and the U.K. initiated measures aimed at establishing barriers to the Axis countries’ ability to trade and obtain cash and commodities needed to supply the Axis war machine. First, the Trade with the Enemy Act (TWEA)¹²³ in the

¹¹⁶ See *id.* See, e.g., *Extension of Import Restrictions Imposed on Archaeological Material from Cambodia*, U.S. CUSTOMS & BORDER PROTECTION; DEP’T. OF THE TREASURY (Sept. 19, 2018), <https://www.federalregister.gov/documents/2018/09/19/2018-20316/extension-of-import-restrictions-imposed-on-archaeological-material-from-cambodia> [<https://perma.cc/DXK3-KDMC>] (an example of departments extending and adding protections to deal with a particular issue in cultural property trade and trafficking).

¹¹⁷ See *infra*, Section C below.

¹¹⁸ See *infra*, Section B, moratoria to be discussed in more detail in following pages.

¹¹⁹ See *infra*, Section B’s discussion of the Allied blockade during World War II.

¹²⁰ See, e.g., Kristoffer T. Mills & Laurie Rush, *Integration of Cultural Property Protection into a Decisive Action Training Exercise*, MIL. REV. (Nov.–Dec. 2017), <https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/November-December-2017/Integration-of-Cultural-Property-Protection-into-a-Decisive-Action-Training-Exercise/> [<https://perma.cc/29BW-ERL>] (discussing the protection of cultural property from ISIS).

¹²¹ See *id.* (discussing cooperative efforts by the U.S. Army with multinational coalition partners to prevent looting).

¹²² See *id.* (discussing “products to support warfighter education and training for cultural property protection, including archaeology awareness playing cards for Egypt, Iraq, and Afghanistan; a pocket guide; and specialized cultural property briefings”).

¹²³ Trading with the Enemy Act of 1917, 50 U.S.C. §§ 1–44 (2019). See also Bethany Kohl Hipp, Comment, *Defending Expanded Presidential Authority To Regulate Foreign Assets And Transactions*, 17 EMORY INT’L L. REV. 1311, 1312 (2003) (“In conjunction

U.S. and its British counterpart¹²⁴ prohibited all financial and commercial relations with anyone directly or indirectly associated with the Axis.¹²⁵ Such an executive order in today's world could prohibit any transaction with individuals or entities directly or indirectly connected with known looters and smugglers.¹²⁶ Second, the U.S. passed specific directives, like Treasury Directive 51072, which regulated the importation into the U.S. of any asset worth \$5,000 or more (in 1944 dollars).¹²⁷ The goal was to prevent the recycling of looted art in the U.S. and its monetizing to the benefit of the Axis powers.¹²⁸ Finally, the U.S. and the U.K. published, respectively, a Proclaimed List and a Black List of individuals, organizations, entities and governments involved directly or indirectly in the looting, smuggling, and recycling on world markets of looted assets.¹²⁹ This list acted as a deterrent and as a tool for governments to monitor the global trade in illicitly-acquired assets including artifacts and art objects.¹³⁰

B. Trade and Other Commercial, Economic, and Financial Barriers

The Allied powers imposed a naval blockade running through the North and South Atlantic Oceans to deter transcontinental traffic of goods, commodities and people, between Europe, Africa, and the

with the U.S. entrance into World War I in 1917, Congress passed the Trading with the Enemy Act (TWEA) to prevent enemy nations from using their assets to harm the United States. The TWEA granted the President authority to generally regulate transactions involving enemy states during wartime emergencies, including the authority to freeze enemy assets located within the United States.”).

¹²⁴ See Trading with the Enemy Act 1939, 2 & 3 Geo. 6 c. 89 (Gr. Brit.).

¹²⁵ See Trading with the Enemy Act of 1917 §§ 1–14.

¹²⁶ See, e.g., Peter E. Harrell, *How to Reform IEEPA*, THE LAW FARE INST. (Aug. 28, 2019), <https://www.lawfareblog.com/how-reform-ieepa> [<https://perma.cc/GE7D-LRWF>] (noting that President Nixon declared a national emergency in 1971 because the inflexibility of the Bretton Woods agreement created a balance-of-payments crisis between the U.S. and Asia). A similar declaration to combat looters and smugglers could be instituted in this situation.

¹²⁷ T. D. 51072 (1944) (amending and rescinding sections 3(a) and 5(b) of the Trading with the Enemy Act); Trading with the Enemy Act of 1917 §§ 3(a), 5(b) (aiming to restrict importing any art object valued at more than \$5,000).

¹²⁸ *Id.*

¹²⁹ See Federal Records of World War II: Civilian agencies, U.S. NAT'L ARCHIVES & RECS. SERV. 717–18, 744 (1950).

¹³⁰ *Id.*

Americas.¹³¹ Blockade measures seek to pre-empt or restrict the transfer of plundered assets removed from crisis areas driven by war and insurgencies to “safe havens.”¹³² Likewise, a moratorium places a temporary freeze on all exports of certain categories of cultural and artistic objects whose provenance ties them to “source” nations where armed conflicts are raging.¹³³ Its purpose is to compel the international community to put into place significantly stricter safeguards that prevent looted cultural material from entering world markets. A moratorium sends clear and unwavering messages to market nations that they cannot have free access to pieces of a cultural heritage that belongs to the culture that produces them, without the consent of that culture’s representatives.

However, when source nations send conflicting messages to market nations about how they value and treat their cultural heritage, they enable those who favor a free global market in art objects, antiquities, and artifacts—sacred and ceremonial—to remain unfettered by narrow concerns arising from misperceptions of lost cultural heritage.

C. Beefing Up HUMINT and SIGINT—The Minimalist Approach

Without information, one navigates blindly until it is too late: the objects have crossed borders and entered markets and museums. A savant mixture of Human Intelligence (HUMINT) agents—sources on the ground—and Signal Intelligence (SIGINT)—electronic, audio, visual intercepts, and scans of suspects and their activities—can act as a powerful tool kit for tracking and neutralizing international, cross-border networks of looters and smugglers of cultural objects worldwide.¹³⁴ As in warfare,

¹³¹ See ROBERT K. MASSIE, *CASTLES OF STEEL: BRITAIN, GERMANY, AND THE WINNING OF THE GREAT WAR AT SEA* (2003).

¹³² See Roger Cohen, *The (Not So) Neutrals of World War II*, N.Y. TIMES (Jan. 6, 1997), <https://www.nytimes.com/1997/01/26/weekinreview/the-not-so-neutrals-of-world-war-ii.html> [<https://perma.cc/VH55-ZGP5>].

¹³³ See, e.g., Sandy Petrykowski, *Amid Regional Instability and Rising Demand, a Historic Agreement Could Protect Priceless Cultural Artifacts*, PBS: NEWS HOUR (Dec. 6, 2016, 5:48 PM), <https://www.pbs.org/newshour/world/amid-regional-instability-rising-demand-historic-agreement-protect-priceless-cultural-artifacts%E2%80%8B> [<https://perma.cc/HA78-AAFY>] (describing an agreement between the United States and Egypt regarding import restrictions on historical artifacts).

¹³⁴ For a general overview of HUMINT and SIGINT, see *Human Intelligence*

intelligence gathering is a critical component in the fight against cultural plunder.

D. Tightening Up Due Diligence and Documentation Rules for Cultural and Artistic Objects

Cultural institutions, members of the art trade, individual collectors and dealers, and corporate entities have been lax when considering the acquisition of rare and unique objects. Collectively, the collectors are especially careless when the aesthetic and historical values are weighed against a defective provenance due to lack of documentation highlighting that object's path and ownership history.¹³⁵ Although a growing number of museums and auction houses have increased their vigilance and tightened their due diligence activities, most do not pass the "ethical smell test."¹³⁶ In order to preempt the entry of looted antiquities into private and public collections, States must require the submission of proper documentation to support the legitimacy of title for these objects as a precondition to their sale, trade, display, loan, gift, and accession. By doing so, one can prevent a contaminated object from entering a private or public collection or from being traded in so-called "market nations."

E. Military Intervention to Protect Sites That We Deem Critical to Humanity

One way to end the devastations wrought by individuals and organizations bent on reshaping the planet and its societies to their own narrow vision is to recognize that some issues have a larger significance for humanity as a whole. For example, the fight against Nazism and Fascism involved protecting a certain idea of culture rooted in free expression and a recognition that a spirit free to explore and express itself is far more important to the future of civilization than a spirit willing to toe an ideological line for the

Collector Operations, FM 2-22.3, HEADQUARTERS, DEP'T OF THE ARMY (Sept. 2006).

¹³⁵ See, e.g., Tom Mashberg & Max Bearak, *The Ultimate Temple Raider?: Inside an Antiquities Smuggling Operation*, N.Y. TIMES (July 23, 2015), <https://www.nytimes.com/2015/07/26/arts/design/the-ultimate-temple-raider-inside-an-antiquities-smuggling-operation.html> [<https://perma.cc/B2W2-RRLJ>] (describing an international smuggling ring and the U.S. government's investigations into it).

¹³⁶ See Leila Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 729, 774–80 (2014) (describing the failure of museums and institutions to self-regulate).

satisfaction of a single, racially-defined group.¹³⁷ Therefore, armed intervention is the last recourse to protect endangered cultures and their sites in multiple civilizations around the world. If nothing is done, then the societies must rely on digital reconstructions of ancient sites. The manic collection defined as “rescue” of countless artifacts that their caretakers simply have no need for is only saved by recording oral histories which preserve the spirit and essence of these cultures threatened with extinction. However, merely preserving the oral histories would demote the crime of plunder against cultures and violations of cultural rights as collateral damage in the inexorable path to progress.

VII. Justice

Victims of cultural crimes rarely receive justice, but when justice is afforded, the most familiar forms of justice are transactional. Justice is articulated around two basic ideas of repair: restitution and reparation.

A. Restitution

The clearest path to healing the trauma of loss resulting from an act of plunder or a cultural crime is through the physical return of the looted object to its rightful owner.¹³⁸ Although seemingly straightforward, it turns out to be the most complicated, owing to our traditional relationship towards private property rights.¹³⁹ In most instances, the restitution request is mired in lengthy negotiations and litigation over the rights of the current possessors who insist on their “good faith” acquisition of the claimed object.¹⁴⁰

¹³⁷ For a discussion of the relationship between fascism and free expression, see Christopher Hilliard, *Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s-1960s*, 88 J. MOD. HIST. 764 (2016).

¹³⁸ See Derek Fincham, *The Parthenon Sculptures and Cultural Justice*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 943, 983–90 (2013).

¹³⁹ For a full discussion of the tensions between traditional western notions of property rights and the growing repatriation movement, see Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT’L L. & POL. 79 (1998).

¹⁴⁰ See Farah Nayeri, *Return of African Artifacts Sets a Tricky Precedent for Europe’s Museums*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/arts/design/macron-report-restitution-precedent.html> [<https://perma.cc/6T4V-MGFZ>]; Carlo Kino, *Stolen Artwork and the Lawyers Who Reclaim Them*, N.Y. TIMES (Mar. 28, 2007), <https://www.nytimes.com/2007/03/28/arts/artsspecial/28law.html> [<https://perma.cc/6PU2-GL4D>].

B. *Reparation*

The act of justice is a symbolic act of repair for an unfathomable harm to the aggrieved party.¹⁴¹ The notion of reparation, however, connotes a financial transaction in the form of a disbursement of money to the aggrieved party as a symbolic gesture, which is supposed to serve as an implicit acknowledgement of the wrong perpetrated on her and her group.¹⁴² If she agrees to it, she obtains a reparation without any hope of recovery of her looted object.¹⁴³ However, should the object in question resurface and she decides to claim its return, she must reimburse the reparation to the disbursing authority, a procedure in place in Western European nations after 1945.¹⁴⁴

To burrow deeper into the idea of justice for cultural crimes, one must think beyond the transactional model which has dominated the restitution conversation for over half a century. There must be other ways to heal the wounds of the victims and ensure that these crimes are both properly addressed and diminish in frequency. The solution must be preventive at its core. New relationships of power need to be defined, and narratives need to be redrawn and shaped—allowing the voices of the aggrieved to permeate the story and history of displaced objects that sit far from the scene of the crime.

Museums and other institutions serving as learning centers and distributors of cultural knowledge reside within the core of the performance of this non-transactional act of justice.¹⁴⁵ It requires a de-centering of a discourse whereby the host institution is no longer the purveyor of a system of ideas and values that has enabled and justified cultural crimes.¹⁴⁶ For that to happen, new forms of

¹⁴¹ For a discussion of justice as a reparative in the context of criminal justice, see Elmar Weitekamp, *Reparative Justice*, 1 EUR. J. ON CRIM. POL'Y & RES. 70 (1993).

¹⁴² See Janna Thompson, *Cultural Property, Restitution and Value*, 20 J. APPLIED PHIL. 252, 254–57 (Nov. 2003).

¹⁴³ *Id.*

¹⁴⁴ For instance, in France, if a claimant receives some form of monetary compensation to cover her overall losses, she is required to reimburse the State in the event that she obtains the physical return of the lost object regardless of when that restitution occurs. See Nehemiah Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 L. & CONTEMP. PROBS. 347, 351–53, 358 (1951).

¹⁴⁵ See Leah J. Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 841–44 (2007).

¹⁴⁶ See *id.* at 844–74 (discussing the roles of states and non-state institutions in the trade in plundered cultural artifacts).

dialogue must be conceptualized, practiced, and implemented between the hosts of the displaced objects, the aggrieved parties, and the mediating institutions—a new social contract of cultural rights. This is only possible if the idea of cultural rights embraces all groups, communities, and nations regardless of language, culture, ethnicity, belief, and creed against whom cultural crimes have been committed. That means the Holocaust becomes integrated into the larger discourse of human rights violations and cultural crimes, and it must be addressed on the same basis as other crimes committed against peoples and their communities. All parties must work together to form these new compacts and face the institutions that have enabled and profited from the crimes.

VIII. Duty to Memory, to Remembrance

Whether it be the Holocaust, the mass murders and tortures in Cambodia, the fratricidal violence in countless countries, or the near-total extermination of indigenous groups worldwide, there is a collective duty to remember what humans are capable of inflicting on neighbors, friends, relatives, and total strangers. The memory of “bloodlust” serves as a reminder of what victims have lost and what peoples have done unto others. The fear of offending one part of the public and of rattling old skeletons is nothing new; however, it hampers the public discourse on cultural plunder to near-silence.

The history of ownership of objects participates in the duty to memory. Museum leaders, however, are reluctant to encourage a dramatic recasting of how the story of objects in their collections is transmitted to the public, a story that might display how History and Art interact and affect the destiny of works and objects. Twenty years after the publication of the Washington Principles of December 1998,¹⁴⁷ there are still arguments over how the provenance of an object is researched and written. These activities go to the core of remembrance of traumatic events that have shaped and directed the paths taken by objects and their owners through the sinews of history.

¹⁴⁷ Bureau of European and Eurasian Affairs, *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP’T OF STATE (Dec. 3, 1998), available at <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [<https://perma.cc/N5LQ-NH6Q>].

