



2014

# Nigeria and Mali: The Case for Repatriation and Protection of Cultural Heritage in Post-Colonial Africa

Elizabeth A. Klesmith

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjicl>

 Part of the [African History Commons](#), [Arts and Entertainment Commons](#), [Foreign Law Commons](#), [International Law Commons](#), [International Trade Commons](#), and the [Transnational Law Commons](#)

## Recommended Citation

Klesmith, Elizabeth A. (2014) "Nigeria and Mali: The Case for Repatriation and Protection of Cultural Heritage in Post-Colonial Africa," *Notre Dame Journal of International & Comparative Law*: Vol. 4: Iss. 1, Article 1.  
Available at: <http://scholarship.law.nd.edu/ndjicl/vol4/iss1/1>

This Note is brought to you for free and open access by the Law School Journals at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of International & Comparative Law by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# Nigeria and Mali: The Case for Repatriation and Protection of Cultural Heritage in Post-Colonial Africa

Elizabeth A. Klesmith<sup>†</sup>

I	Introduction . . . . .	47
II	What is Cultural Heritage? . . . . .	48
	A Definition . . . . .	48
	B Significance of Cultural Heritage and the Arguments for Repatriation and Protection . . . . .	50
	C Argument against Repatriation . . . . .	51
	D Practical Implications for the Return of Cultural Heritage .	53
III	International Mechanisms for the Protection and Return of Cul- tural Heritage . . . . .	53
	A Conventions . . . . .	53
	1 Declaration of London of 1943 . . . . .	53
	2 1954 Convention on the Protection of Cultural Property . . . . .	54
	3 1970 UNESCO Convention . . . . .	55
	4 1995 UNIDROIT Convention . . . . .	57
	B Customary International Law . . . . .	59
	1 Bilateral and Regional Agreements . . . . .	59
	2 United Nations General Assembly Resolutions . .	60
IV	Case Studies . . . . .	61
	A Successful Protection or Repatriation of Cultural Heritage	61
	1 <i>Autocephalous Greek-Orthodox Church of Cy-</i> <i>prus v. Goldberg and Feldman Fine Arts, Inc.</i> . . . . .	61
	2 <i>McClain I and II</i> . . . . .	63
	3 <i>The Republic of Turkey v. The Metropolitan</i> <i>Museum of Art</i> . . . . .	64

---

<sup>†</sup> Attorney, Tuesley Hall Konopa LLP; B.A., Grand Valley State University, 2011; J.D., Notre Dame Law School, 2014; Senior Articles Editor of the *Notre Dame Journal of International and Comparative Law*, 2013–2014; admitted to the Indiana Bar, 2014. The author would like to thank Colleen Klesmith for her constant and unfailing love and support, Dr. Steeve Buckridge and Dr. Jacques Mangala for instilling in the author a passion for international relations and continuing scholarship, and Professor Mary Ellen O’Connell, without whom the idea for this article would never have been conceived.

B	Unsuccessful Attempts at Repatriation and Protection of Cultural Heritage . . . . .	65
1	The Bamiyan Buddhas . . . . .	65
2	<i>Peru v. Johnson</i> . . . . .	66
V	Emerging Country Concerns . . . . .	67
A	Nigeria . . . . .	67
B	Mali . . . . .	72
VI	Conclusion . . . . .	75

### Abstract

Writing in early 2013, Elizabeth A. Klesmith explores the challenges of African nations in protecting their cultural heritage in the post-colonization era. She identifies two major challenges to the preservation of African cultural heritage: the multi-billion dollar global trade in illicit heritage and, in certain parts of Africa, the threat of destruction of cultural treasures during bouts of sectarian violence. Klesmith discusses these challenges utilizing case studies concerning the cultural treasures of Nigeria and Mali. In the case of Nigeria, the country is striving to reacquire artifacts looted from the Benin Kingdom in the late nineteenth century and recently purchased by the Museum of Fine Arts Boston. At the time of this writing, the nation of Mali was at the height of sectarian violence that resulted in the destruction of thousands of cultural artifacts and manuscripts and threatened further destruction.

Arguing that it is essential for post-colonial African nations to retain and protect their cultural antiquities, Klesmith surveys the landscape of international law regarding cultural antiquities. She then give examples of past attempts at repatriating or protecting cultural artifacts, some successful (Cyprus, Colombia, Turkey) and some unsuccessful (Afghanistan, Peru). Ultimately, Klesmith concludes Nigeria and Mali have the right to the repatriation and protection of their cultural heritage, and the international community has an obligation under existing law to support their efforts.

## I INTRODUCTION

“Cultural heritage is the mirror of a country’s history, thus lying within the very core of its existence, since it represents, not only specific values and traditions, but also a unique way a people perceives the world.”<sup>1</sup> The protection of cultural heritage in Africa and throughout the world has grown increasingly important with decolonization. Now, in a world of globalization, the protection of cultural identity has become an even greater priority to state governments throughout the world. This is furthered by the fact that the illicit trade in cultural heritage, as of 2003, was “estimated to be worth up to US \$2 billion a year, second only to the illicit trade in drugs and weapons.”<sup>2</sup>

The past fifty years have shown great growth in the creation of measures for the protection of cultural heritage. Domestic laws and regulations, as well as bilateral, regional, and multilateral treaties show how important this protection has become to both source and destination countries. International organizations such as the United Nations have also made significant strides in the fight to safeguard and repatriate cultural treasures and to protect cultural heritage from destruction in war torn countries.

African states in particular have recently come to the forefront in the battle to retain cultural heritage. The current struggle facing these nations stems from the carving up of Africa during colonial times and the Berlin Conference of 1884. Many African states struggling to find a sense of stability in their newfound independence from colonial masters are turning to a shared culture to unite them as a people. This effort has been severely threatened, however, by the illicit international trade in stolen antiquities and cultural heritage.

One of the most recent state requests that has been made for the repatriation of cultural heritage occurred in the summer of 2012, when Nigeria demanded that the Museum of Fine Arts Boston (MFAB) return a recently acquired collection of artifacts. Nigerian cultural heritage is widely traded on the international art market, due in large part to the fact that it has been in the hands of former colonialists since the nineteenth century. The items at issue in the Boston Museum case were purportedly looted from the Benin Kingdom by the British during the Benin Massacre of 1897. MFAB has as of yet refused to repatriate the Nigerian artifacts.

While the case of the Benin Kingdom artifacts represents complicated issues of repatriation, the ongoing political turmoil in Mali illustrates the difficulties inherent in preserving cultural artifacts during times of war. Northern Mali has been under siege by Tuareg and Islamist militants since early 2012. The fighting has already caused great destruction of religious artifacts and structures, and the United Nations Education, Scientific and Cultural Organization (UNESCO) is greatly concerned that the trend will continue at the expense of Malian cultural heritage.

---

<sup>1</sup> U.N. GAOR, *supra* note 1.

<sup>2</sup> Craig Forrest, Comment, *Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage*, 4 MELB. J. INT’L L. 592, 593 (2003).

This note will trace the legal arguments for and against Nigeria and Mali's claims to their cultural heritage. Section II begins with a definition of cultural heritage. This section seeks to explain the different arguments for and against repatriation of cultural artifacts and antiquities. These public policy arguments are instrumental in demonstrating why it is essential that post-colonial African nations retain their cultural antiquities.

Section III provides an examination of the international mechanisms and norms in place to assist countries in their repatriation attempts. Through a discussion of international conventions and customary international law, this section will provide the tools necessary to analyze Nigeria's claim to the Benin Kingdom artifacts and the steps required of the international world to safeguard Mali's cultural heritage from plunder and destruction.

Section IV involves case studies of both successful and unsuccessful repatriation and preservation events. The similarities and differences of these cases to the current situations in Nigeria and Mali will show why Nigeria's request of the MFAB must be honored, and why Mali's artifacts must be protected.

Lastly, Section V provides a background to understand why Nigeria is seeking the return of its antiquities, and why it has a right to that return, as well as why there must be a concerted international effort to protect Malian cultural heritage that has been placed in danger by the Tuareg and Islamist militant occupation. It will ultimately seek to show that Nigeria's Benin Kingdom artifacts must be repatriated, and that the international community has a duty to do all possible to stop the looting and destruction of cultural heritage in Mali.

## II WHAT IS CULTURAL HERITAGE?

### A DEFINITION

One of the main complications inherent in suits for the return of cultural property is "tension in the international community between acquisitive nations and source nations over a range of issues concerning protection and repatriation of cultural property."<sup>3</sup> A great deal of this stems from the variations in the definitions of cultural heritage. For purposes of this note, the terms "cultural heritage," "cultural antiquity," and "cultural property" will be used interchangeably. In order to understand the arguments for and against state preservation and protection of cultural heritage, it is important to know just what this term means. Cultural heritage "is generally understood to describe objects inherited from past generations that relate to a society's cultural development. It includes monuments, groups of buildings," artwork, etc.<sup>4</sup>

Cultural heritage may be distinguished from what has been termed "natural patrimony."<sup>5</sup> According to Kanchana Wangkeo, natural patrimony includes

<sup>3</sup> Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033, 1037 (1993).

<sup>4</sup> Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 *YALE J. INT'L L.* 183, 188 (2003).

<sup>5</sup> *Id.*

items that are “culturally valuable to the citizens of a nation, which is often reflected by the fact that the state extends legal protections to the property. However, people from other states may not be interested in its fate at all, so that it would not qualify as cultural heritage.”<sup>6</sup> Cultural heritage can also include intangible items, such as music and dance, but the focus of this note will be on those items that are tangible, and are thus able to easily be removed illegally from their country of origin.

“Cultural property was first recognized as a distinct concept in the context of wartime plunder, and its earliest protection under international law was only during episodes of international armed conflict.”<sup>7</sup> This is exemplified by the London Declaration of 1943, and 1954 Hague Convention on the Protection of Cultural Property (Hague Convention) discussed below. The “cultural aspect of cultural property is demonstrated in the cultural significance of such items to the people who created them.”<sup>8</sup> Without this cultural aspect, there would be much less of a push for protection in the first place and repatriation at a later date because the items in question would be less culturally important to their source nation.

Cultural property is also distinct from normal property in that it often cannot be owned by one person alone.<sup>9</sup> A person can be a custodian of cultural property, but its ownership lies with the ethnic group that created it. Because of this, “[c]ultural property is integral to the esteem that people hold for themselves and their past. It is . . . integral to their identity.”<sup>10</sup> As such, cultural property is essential to a group of people trying to reclaim their past; people who need to know from whom they came in order to shape who they will become and what their place will be in the international arena.

Karen Goepfert has provided a helpful description of the different types of cultural heritage that are subject to repatriation requests. According to Goepfert, cultural heritage falls into three major categories: “stolen objects,” “objects acquired from illicit trade,” and “objects claimed historically by colonizing or otherwise dominating powers.”<sup>11</sup>

Objects in Goepfert’s first category are often protected by private international law, as “[a]ll national legal systems prohibit and punish theft, and the courts of all nations are open to actions by foreign as well as domestic owners to recover their stolen property.”<sup>12</sup> Therefore, if it can be proven that an item of cultural heritage has a distinct owner, there are paths outside of international conventions that may be pursued for repatriation attempts. These paths often make repatriation a simpler task because “the taint of ownership resulting from prior theft or illicit traffic tends to make requests for the return of these items less

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

<sup>7</sup> Joseph P. Fishman, *Locating the International Interests in Intranational Cultural Property Disputes*, 35 *YALE J. INT’L L.* 347, 348–49 (2010).

<sup>8</sup> Mastalir, *supra* note 3, at 1038.

<sup>9</sup> *Id.* at 1039.

<sup>10</sup> *Id.*

<sup>11</sup> Karen Goepfert, Note, *The Decapitation of Rameses II*, 13 *B.U. INT’L L.J.* 503, 504 (1995).

<sup>12</sup> Forrest, *supra* note 2, at 606.

problematic and easier to resolve,” as “[c]ountries requesting the repatriation of these items tread on firmer legal ground, since the tarnished title held by the museum or custodial country provides helpful leverage in securing their return.”<sup>13</sup> Many antiquities, however, are believed to belong to a people, or culture, and not to a specific person. It is in these situations especially where the mechanisms of international law become necessary to safeguard cultural heritage.

Public international law also becomes implicated after illegal exportation, as it is often difficult to prove to whom an illicitly traded artifact originally belonged. In such situations, some states have declared “that all cultural heritage illegally exported will be confiscated and forfeited to the state.”<sup>14</sup> Although Goepfert’s three classifications of cultural heritage often overlap, it is her second and third classifications of cultural heritage which are addressed by the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, and which will be discussed below as they are especially relevant in the context of Africa.

Another distinction between cultural and ordinary property is that cultural property is not defined purely along state lines. When the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, “it asserted the need for protection of cultural property based on its importance to nonstate groups.”<sup>15</sup> Nearly a decade later, it held “in the *Kordic & Cerkez* case that a state’s deliberate destruction of the cultural institutions of particular political, racial or religious groups was a crime against humanity as defined in Article 5(h) of the ICTY statute,” because the destruction of religious items amounted to “an attack on the very religious identity of a people.”<sup>16</sup> Therefore, as Joseph Fishman has determined, “preservation of cultural property is a far cry from an exclusively domestic concern,” and “existing norms empower the international community to condemn intentional destruction of cultural property even if located within the sovereign territory of the acting state.”<sup>17</sup>

## B SIGNIFICANCE OF CULTURAL HERITAGE AND THE ARGUMENTS FOR REPATRIATION AND PROTECTION

As previously stated, there is a strong need for national unity in developing countries. Many successful new states have accomplished this feat by uniting around a common culture or ancestry. This theory of nationalism is one of the strongest arguments in favor of the preservation of cultural heritage and its repatriation. In Africa, for example, colonizing countries split up indigenous groups and did everything in their power, largely successfully, to stamp out the existing culture. There is therefore a “need for ex-colonies to develop their own national iden-

<sup>13</sup> Goepfert, *supra* note 11, at 505.

<sup>14</sup> Forrest, *supra* note 2, at 606.

<sup>15</sup> Fishman, *supra* note 7, at 360.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 368–69.

tity,” and this can be done very successfully through “association with and study of cultural objects and antiquities created by their indigenous populations.”<sup>18</sup> Removing antiquities from their original locations however, defies this motive by removing the context surrounding the items, and redefining the objects as part of Western rather than African culture, thus turning them into “commodities to be traded on the world’s markets.”<sup>19</sup>

Cultural heritage is vitally important for many reasons. It provides a great educational tool for the study of past societies and cultures, is often attractive to collectors because it is aesthetically pleasing, and has great economic value due to the extensive global antiquities market.<sup>20</sup> Beyond this, however, cultural heritage provides a “tangible link” to the past.<sup>21</sup> This link has become vital to many African nations, which “have turned to relics as a source of historical pride in the wake of decolonization,” thus creating an emotional connection with the artifacts that makes people very passionate about their proper possession.<sup>22</sup>

Dealers and auction houses also have a significant interest in the recognition of proper ownership in antiquities. Once ownership has been legally decided, the groups will have freer access to cultural items, and will avoid negative publicity and scandals surrounding the illegal acquisition of such items.<sup>23</sup> It would therefore be beneficial to the Museum of Fine Arts Boston to acknowledge Nigerian ownership of its artifacts, as it could then exhibit the items on loan from Nigeria in the future without the taint of illegality and scandal.

### C ARGUMENT AGAINST REPATRIATION

Two of the greatest difficulties faced by those who struggle to prevent the illegal import and export of cultural heritage are the international legal principles of state equality and state sovereignty. Under international law, “no state is required to declare illegal the importation of cultural heritage illegally exported from the state of origin. The United Kingdom, for example, has long refused to enforce foreign public law,” and has repeatedly struck down suits against those claimed to have participated in the illicit trade of cultural heritage.<sup>24</sup> On one occasion, the government went so far as to state that “[i]t is not possible for [Her Majesty’s] Government to take measures against individuals or organizations unless the law of the United Kingdom is broken.”<sup>25</sup> This creates a great barrier to repatriation indeed. Fortunately for many source states, however, the overall international trend has been in favor of repatriation, and a norm of cultural international law has emerged wherein states set aside extreme notions of territoriality and sovereignty in favor of maintaining good international relations.

<sup>18</sup> Goepfert, *supra* note 11, at 513.

<sup>19</sup> PATRICK J. O’KEEFE, *TRADE IN ANTIQUITIES: REDUCING DESTRUCTION AND THEFT* 7 (1997).

<sup>20</sup> Wangkeo, *supra* note 4, at 190.

<sup>21</sup> *Id.* at 189.

<sup>22</sup> *Id.*

<sup>23</sup> O’KEEFE, *supra* note 19, at 7.

<sup>24</sup> Forrest, *supra* note 2, at 597; see *King of Italy v. Marquis Cosimo de Medici Tornaquinci*, (1918) 34 T.L.R. 623.

<sup>25</sup> Forrest, *supra* note 2, at 597 (internal citation omitted).



Few states wish to alienate themselves in the international sphere and be painted as supporters of illegal activity concerning cultural heritage.

Cultural internationalism is also a strong barrier to repatriation of cultural antiquities. According to this school of thought, “cultural heritage belongs to all mankind because each group of persons makes cultural contributions to the culture of the world.”<sup>26</sup> It does not matter, therefore, where the cultural property is currently located, but that it is preserved and remains accessible to the world at large. Cultural internationalists believe that it is therefore vital that cultural property be displayed in prominent locations where it can properly be preserved. The thought is that many source nations—due to their youth, lack of funds, and recurrent instability—are unable to properly protect “fragile works from the elements and the natural cycle of decay.”<sup>27</sup>

Cultural internationalism has one vital flaw, however. It is that those to whom the cultural artifact means the most—those whose ancestors created it and who base their identity in part upon its cultural significance—will be the least likely to benefit from this scenario. It is true that those living in major cities throughout the world will become educated about a foreign culture, but they are not the only concern. Citizens of developing nations will often be unable to make the journey to New York or London to see their history on display. How can a people preserve their culture if they do not have access to the very artifacts that helped shape it?

Another criticism that has been made of the preservation, protection, and repatriation of cultural heritage is that “it deals in culture and yet distorts and mummifies culture in its dealings within. Cultural property not only misses the point, but perpetuates potentially harmful notions about cultures and groups in the name of trying to protect and preserve them.”<sup>28</sup> Culture is an ever evolving body, however. It changes with the times as borders fluctuate, as do the people within them. “Cultures are made of continuities and changes, and the identity of a society can survive through these changes. Societies without change aren’t authentic; they’re just dead.”<sup>29</sup> This criticism therefore is actually more supportive of the view that antiquities should be protected and retained by their source countries. A country and its people can more easily combat stereotypes if they understand the historical reasons behind them. In addition, seeing cultural heritage in its domestic setting will bring context that cannot be gained when seen through a foreign eye in a foreign land. In this way, cultural heritage does not distort and mummify culture but brings it to life and sheds light on where a people have been and where they are headed.

---

<sup>26</sup> Goepfert, *supra* note 11, at 507.

<sup>27</sup> *Id.* at 510.

<sup>28</sup> Naomi Mezey, Essay, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2026 (2007).

<sup>29</sup> *Id.* at 2038–39 (internal quotation marks omitted).

#### D PRACTICAL IMPLICATIONS FOR THE RETURN OF CULTURAL HERITAGE

Unfortunately, as scholars have pointed out, there are practical hurdles that stand in the way of the return of cultural heritage. Patrick O’Keefe, for example, believes that “recovery of an antiquity that has been unlawfully exported or stolen and taken outside the country is really only feasible when it is of considerable value.”<sup>30</sup> This is due to the fact that litigation surrounding stolen antiquities is often very expensive. Developing countries often will not have the funds necessary to see that their cultural artifacts are returned to them. There are also often difficulties with compiling the evidence necessary to prove the circumstances surrounding the artifacts’ illegal export from the country, including the identification of witnesses to the illegal acts.<sup>31</sup> In the case of Nigeria (see below), the items of cultural heritage were removed from the country at the turn of the nineteenth century. There are no witnesses living who can prove exactly who took what item from where.<sup>32</sup> It is therefore extremely important that destination countries play an active role in researching where cultural heritage items that end up within their borders originated. The world has grown too small with globalization for a more developed country to write off a less developed country’s claims to its cultural heritage without facing serious negative effects on its international relations.

### III INTERNATIONAL MECHANISMS FOR THE PROTECTION AND RETURN OF CULTURAL HERITAGE

#### A CONVENTIONS

##### I DECLARATION OF LONDON OF 1943

One of the first international agreements dealing with cultural antiquities was the Declaration of London of 1943. This document “declared that the allies [during World War II] would no longer recognize the transfer of property in occupied countries even if it appeared legal.”<sup>33</sup> The London Declaration is of great importance in the context of Mali because it “reserved each signatory’s right to declare invalid any transfer or dealings in property from territories under foreign occupation or control.”<sup>34</sup> Under this Declaration, even if the transaction appeared to be legal and voluntary, an occupied state still reserved the right to declare the relinquishment of cultural heritage involuntary and thus, illegal.<sup>35</sup> The London Declaration implicates customary international law as many states began to enact domestic legislation after its passage, including states such as Sweden and Switzerland, who were not parties to the Declaration.<sup>36</sup> It was

<sup>30</sup> O’KEEFE, *supra* note 19, at 26.

<sup>31</sup> *Id.* at 27–28.

<sup>32</sup> Pictorial evidence and recorded accounts have made this task slightly easier, however.

<sup>33</sup> *Court of Restitution Appeals Report*, HARVARD LAW SCHOOL LIBRARY (2013), <http://www.law.harvard.edu/library/digital/court-of-restitution-appeals-reports.html>.

<sup>34</sup> Goepfert, *supra* note 11, at 521.

<sup>35</sup> *Id.* at 522.

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

after the adoption of this Declaration that a clearly visible norm of international law began to emerge in the cultural heritage context.

## 2 1954 CONVENTION ON THE PROTECTION OF CULTURAL PROPERTY

The first international treaty dealing solely with the protection of cultural property was the 1954 Hague Convention.<sup>37</sup> This Convention, which was “predicated on the assignment of multinational significance to the cultural identity of a single nation,” stated that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”<sup>38</sup> The Convention was originally adopted following World War II, “in response to a new style of war in which cultural property was intentionally targeted by the Nazis.”<sup>39</sup>

The Hague Convention came into force in 1956, and by 2012 there were 125 states parties to the Convention.<sup>40</sup> The United States became a state party in 2009, but the United Kingdom has still withheld its full support.<sup>41</sup> One key obligation contained within the Protocol to the Convention provides that states parties will

undertake to prevent the exportation of cultural property from an occupied territory in time of war. However, if such property is exported to a party state’s territory from any occupied territory, directly or indirectly, it is to be taken into custody and returned after the war to the previously occupied territory.<sup>42</sup>

The body of the Hague Convention further states that:

[A] State party to the Convention must respect cultural property in its own territory as well as that of other states; must refrain from any use of the property and its immediate surroundings for military purposes, and must refrain from directing any act of hostilities against it. The only situation in which this rule may be waived is where military necessity imperatively requires it.<sup>43</sup>

Even occupying forces in a country must therefore support the efforts of the national authorities to preserve antiquities if they are parties to the Convention.<sup>44</sup> In essence, all states parties to the Convention have a duty both to refrain from

---

<sup>37</sup> *Id.* at 518.

<sup>38</sup> Fishman, *supra* note 7, at 389–90 (internal citation omitted).

<sup>39</sup> Mezey, *supra* note 28, at 2009.

<sup>40</sup> JEANETTE GREENFIELD, *THE RETRUN OF CULTURAL TREASURES* 224 (3d ed. 2007); Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention].

<sup>41</sup> Hague Convention, *supra* note 40.

<sup>42</sup> GREENFIELD, *supra* note 40, at 224.

<sup>43</sup> Lyndel V. Prott, *Protecting Cultural Heritage in Conflict*, in *ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE* 25 (Neil Brodie et al., eds., 2008) (Lyndel Prott is an international legal consultant and the former Director of the Cultural Heritage Division, of UNESCO).

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

damaging cultural heritage during times of conflict and to make every effort to stop those who participate in and profit from the destruction.

3 1970 UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT, AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY (1970 UNESCO CONVENTION)

The 1970 UNESCO Convention was enacted to “implement a system of import and export controls to stem the illicit traffic in cultural heritage.”<sup>45</sup> One main tool provided by the Convention is its definition of cultural property. Cultural antiquities clearly fall within the items protected by the Convention as, included in the definition of cultural property are:

- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; [and]
- (e) antiquities more than one hundred years old, such as inscriptions, coins, and engraved seals.<sup>46</sup>

In addition, the Convention provides that objects that have been identified as cultural property “must also have a sufficient connection to the state which is claiming interest in it, and must form part of its cultural heritage.”<sup>47</sup>

One reason the UNESCO Convention is so helpful for countries in their repatriation attempts is that it successfully navigates around state sovereignty and equality barriers. The definitional list of cultural property, for example, is not exclusive, and the Convention meets a compromise with state sovereignty by allowing states to “restrict the definition” of cultural property as it applies within those broad categories.<sup>48</sup> The United States is just one of the countries which have taken advantage of this compromise, and has designated that “objects do not become cultural property until they have been removed from or are threatened with removal from their cultural context.”<sup>49</sup>

Under the Convention, if an item of cultural heritage “is exported illegally, the state of importation will regard the importation as illegal.”<sup>50</sup> Each state party must “undertake . . . to implement measures consistent with national legislation to prevent its museums and similar institutions from acquiring illegally exported cultural property.”<sup>51</sup> In addition, states such as Mali:

whose cultural patrimony is in jeopardy from the pillage of archaeological or ethnological materials may call on the other state parties

<sup>45</sup> Forrest, *supra* note 2, at 598.

<sup>46</sup> O’KEEFE, *supra* note 19, at 22–23.

<sup>47</sup> GREENFIELD, *supra* note 40, at 224.

<sup>48</sup> Mastali, *supra* note 3, at 1040–41.

<sup>49</sup> *Id.* at 1041.

<sup>50</sup> Forrest, *supra* note 2, at 599.

<sup>51</sup> GREENFIELD, *supra* note 40, at 224.

to participate in a concerted international effort to carry out concrete measures including controls on exports and imports and trade of the objects in question . . . [and] to admit action for the recovery of lost or stolen items of cultural property brought by the rightful owners.<sup>52</sup>

This provision also allows for state sovereignty because the state of importation has an obligation under its own laws and policies to return the stolen items. The law of the home state is therefore, in a way, domesticated within that of the receiving state.<sup>53</sup> Ultimately, after the adoption of the Convention, “the acquisition of antiquities ceases to be legitimate unless accompanied by an official export license.”<sup>54</sup>

The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), also created by UNESCO and dealing with immovable cultural property such as monuments, took further steps to protect cultural heritage.<sup>55</sup> Article 5 of this Convention states that each state party must endeavor “to take the appropriate . . . measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.”<sup>56</sup> In essence, the World Heritage Convention takes the 1970 UNESCO Convention one step further by declaring that states are prohibited from destroying relics which they have determined qualify as cultural property under the Convention.<sup>57</sup>

The United States Senate ratified the 1970 UNESCO Convention in 1972 with one reservation and six understandings, including the declaration that the Convention “was neither self-executing nor retroactive.”<sup>58</sup> The United States subsequently enacted legislation implementing the Convention in 1982, and officially solidified its acceptance in 1983.<sup>59</sup>

The Convention on Cultural Property Implementation Act, enacted in 1982 by the 97th Congress, domesticated the 1970 UNESCO Convention by granting “the President the authority to impose import restrictions but only in certain circumstances and only after considering the views of concerned interest groups.”<sup>60</sup> This authority must be determined on a case-by-case basis, and the cultural heritage material in question must be “of cultural significance; and at least 250 years

---

<sup>52</sup> *Id.* at 224–25.

<sup>53</sup> Forrest, *supra* note 2, at 599 (Australia took this idea seriously by implementing the Protection of Movable Cultural Heritage Act 1986, which “provides that foreign cultural heritage exported contrary to the state of origin’s export laws will be considered as an unlawful import into Australia.”).

<sup>54</sup> Souren Melikian, *How UNESCO’s 1970 Convention is Weeding Looted Artifacts Out of the Antiquities Market*, ART AUCTION (Aug. 31, 2012), <http://www.artinfo.com/print/node/822209>.

<sup>55</sup> GREENFIELD, *supra* note 40, at 225.

<sup>56</sup> Wangkeo, *supra* note 4, at 198.

<sup>57</sup> *Id.*

<sup>58</sup> GREENFIELD, *supra* note 40, at 167.

<sup>59</sup> *Id.* at 167, 225.

<sup>60</sup> THE ETHICS OF COLLECTING CULTURAL PROPERTY 131–32 (Phyllis Mauch Messenger ed., 2d ed. 1999).

old.”<sup>61</sup> In addition, in order to get this protection from the United States, a state party to the Convention must submit a formal written request to the President.<sup>62</sup>

The United States’ ratification of the Convention is greatly important not only because it makes it less difficult for countries to obtain repatriation of their illicitly traded artifacts, but also because Article 9 of the Convention provides that “a state whose cultural patrimony is in jeopardy from pillage of archaeological or ethnographical materials may call upon [other parties to the Convention] to participate in a concerted international effort to determine and to carry out the necessary concrete measures” to prevent the destruction and loss of cultural heritage.<sup>63</sup> States such as Mali, for example, in which there is an ever-present threat of destruction to cultural heritage by invading forces, may therefore call on the United States to aid them in stopping this tragedy. The participation of a global superpower such as the United States sends a message to the rest of the world of just how important this cause is.

#### 4 THE UNIDROIT CONVENTION ON STOLEN OR ILLICITLY EXPORTED CULTURAL OBJECTS (1995 UNIDROIT CONVENTION)

The International Institution for the Unification of Private Law (UNIDROIT) decided to undertake the creation of the 1995 Convention upon the urging of UNESCO and the Hague Conference on Private International Law.<sup>64</sup> This Convention was a departure from the normal practices of the organization because it did not deal primarily with commercial issues, but with heritage issues, and many of the countries that would benefit from the Convention, such as recently independent states, were not member states of UNIDROIT.<sup>65</sup> The Convention deals specifically with both stolen and illegally exported cultural heritage, establishing a system for the return of objects to the true owner in the case of stolen objects, or otherwise, to the state of export.<sup>66</sup> It “demands the return of any stolen cultural object—the definition of which relies on the same categories of cultural property as those set out in the 1970 UNESCO Convention.”<sup>67</sup>

Unfortunately for many African countries, the 1995 Convention is of little assistance to them as it is “not retroactive and [only affects] objects stolen or illegally exported after the entry into force of the Convention for both countries concerned.”<sup>68</sup> However, the Convention is applicable to the ongoing conflict in Mali, and therefore provides a tool to help the people reclaim their cultural heritage and prevent it from being looted in the first place. Another barrier to repatriation exists in the fact that the Convention mandates the return of unlaw-

---

<sup>61</sup> *Id.* at 132.

<sup>62</sup> *Id.*

<sup>63</sup> GREENFIELD, *supra* note 40, at 167.

<sup>64</sup> Lyndel Prott, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects—Ten Years On*, 14 UNIF. L. REV. 215, 215 (2009).

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

<sup>66</sup> Forrest, *supra* note 2, at 601.

<sup>67</sup> O’KEEFE, *supra* note 19, at 23.

<sup>68</sup> Prott, *supra* note 64, at 217.

fully exported artifacts only if specific circumstances are met.<sup>69</sup> The Convention requires that a state requesting the return of its cultural artifacts establish that:

the removal of the object from its territory significantly impairs one or more of the following interests:

- (a) the physical preservation of the object or of its context;
- (b) the integrity of a complex object;
- (c) the preservation of information of, for example, a scientific or historical character;
- (d) the traditional or ritual use of the object by a tribal or indigenous community,

or establishes that the object is of significant cultural importance for the requesting State.<sup>70</sup>

The removal and destruction of cultural heritage in Mali implicates many of the aforementioned interests, however, and the UNIDROIT Convention can therefore be very helpful in protecting its cultural antiquities.

Restitution of cultural heritage is also made easier under the UNIDROIT Convention because “the purchaser in good faith [of an item of cultural heritage] will not get better title than the original owner, but be compensated instead.”<sup>71</sup> For example, this provision strikes a balance between a museum that purchased or received a collection of cultural heritage in good faith, and should therefore not be penalized, and the rightful owner of the items in question, who deserves to have his or her cultural property returned to him or her.

There are time limits within the Convention, however, which may create a barrier to repatriation in some situations. Article 3, for example, “provides that restitution claims shall be brought within three years of the claimant knowing the location of the object and the identity of the possessor, and in any case within fifty years of the time of the theft.”<sup>72</sup> This requirement is softened for objects which were “part of a monument or archaeological site or public collection,” in which case only the three year requirement applies.<sup>73</sup>

Similar three-year time limits apply regarding cultural objects which were illicitly exported from their home countries. In what has been deemed a rather radical move, if brought within this statute of limitations, “Article 5 provides that one state may require the court or competent authority of another state to order the return of a cultural object illegally exported from the territory of the requesting state . . . [in effect meaning] the enforcement of foreign patrimony and export laws.”<sup>74</sup> As one of the newest international conventions

<sup>69</sup> O'KEEFE, *supra* note 19, at 24.

<sup>70</sup> *Id.*

<sup>71</sup> GREENFIELD, *supra* note 40, at 235.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

dealing with cultural heritage, however, the 1995 UNIDROIT Convention has the fewest number of state parties. International superpowers such as the United States and Great Britain have as of yet refrained from becoming parties to this Convention.<sup>75</sup>

## B CUSTOMARY INTERNATIONAL LAW

A discussion of the mechanisms in place to protect cultural heritage would not be complete without mention of the emerging norms of customary international law. “Customary international law is developed through uniform and consistent state practice over a period of time and by a sense of legal obligation, or *opinio juris*.”<sup>76</sup> Customary international law in the cultural heritage context can be seen through the growing state practice of entering into bilateral and regional treaties on the subject, as well as the increasing number of granted repatriation requests by states.<sup>77</sup> The norm of repatriation is also evinced by a number of United Nations General Assembly Resolutions.

### I BILATERAL AND REGIONAL AGREEMENTS

Not only do almost all states have “legislation regulating and protecting cultural heritage at the national level,” but many states have begun to enter into bilateral and regional agreements with each other on the subject.<sup>78</sup> The European community “has the most extensive treaty regime for protecting cultural heritage,” comprised of four regional agreements.<sup>79</sup> These agreements are focused on safeguarding and encouraging “the development of European culture,” and provide for the “integration of archaeology into state planning policies.”<sup>80</sup>

Formerly communist countries have also exhibited a dedication to the protection of cultural heritage through customary international law by enacting the Agreement Concerning Cooperation and Mutual Assistance with Regard to Holding and Restitution of Cultural Property Illicitly Carried Across State Borders.<sup>81</sup> In addition, the United States has entered into treaties with Ecuador, Guatemala, Mexico, and Peru to “recover and return stolen cultural property to the country of origin,” and with Greece to “combat illicit trafficking of artifacts.”<sup>82</sup> Agreements such as these evince a decided international preference for safeguarding cultural heritage, a trend which has risen to the status of customary international law.

<sup>75</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 ILM 1322 [hereinafter UNIDROIT Convention].

<sup>76</sup> Goepfert, *supra* note 11, at 520.

<sup>77</sup> Case studies concerning successful and unsuccessful repatriation attempts are discussed *infra*, Section III.C.

<sup>78</sup> Wangkeo, *supra* note 4, at 196.

<sup>79</sup> *Id.* at 199.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 VILL. SPORTS & ENT. L.J. 19, 25–26 (1998).



## 2 UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

Following the adoption of the 1970 UNESCO Convention and subsequent legislation, the United Nations (UN) began to issue a series of resolutions and recommendations concerning cultural heritage and formed an intergovernmental committee to deal with related issues.<sup>83</sup> One such resolution was adopted by the UN General Assembly in November 1977. This resolution:

- (1) [Invited] all Member States to sign and ratify the [1970 UNESCO Convention] . . . ;
- (2) [Called upon] all Member States to take all necessary steps to prevent, on their territories, any illicit traffic in works of art coming from any other country, especially from territories which were or are under colonial or foreign domination and occupation;
- (3) [Affirmed] that the restitution to a country of its *objets d'art*, monuments, museum pieces, manuscripts, documents and other cultural or artistic treasures constitutes a step forward towards the strengthening of international co-operation and the preservation and future development of cultural values.<sup>84</sup>

The overwhelming acceptance of these resolutions by the international community is a strong indication of the growing acceptance of the justness of repatriation.

The most recent General Assembly Resolution regarding cultural heritage was adopted in December 2012.<sup>85</sup> Anastassis Mitsialis of Greece introduced to the General Assembly Document A/67/L.34, a draft resolution dealing with the restitution of cultural heritage.<sup>86</sup> In making his argument for the adoption of the draft resolution, Mitsialis stated that, “[d]espite concerted international efforts to tackle the problem, illicit traffic in cultural property continued to pose a serious threat to cultural heritage of States . . . [a threat which] was higher in situations of crisis and conflict, when cultural objects were often smuggled outside their countries of origin.”<sup>87</sup> The proposed draft resolution therefore “condemned recent attacks to world cultural heritage sites and called for an immediate end to such acts by reminding State Parties to the Convention of their obligations.”<sup>88</sup> Cesare Ragaglini of Italy stated that “the General Assembly’s consensus adoption of this resolution will send a clear message that protection of cultural assets and their return to their States of origin must remain high on the United Nations agenda,” and that “[h]e was pleased to see new language in the text that considered trafficking and illicitly exported cultural properties as a

<sup>83</sup> Goepfert, *supra* note 11, at 523.

<sup>84</sup> GREENFIELD, *supra* note 40, at 229 (internal citation omitted).

<sup>85</sup> U.N. GAOR, *supra* note 1.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

‘serious crime.’”<sup>89</sup> The draft resolution on the restoration of cultural heritage, calling “for the need to enhance international cooperation” to ensure the proper protection and repatriation of cultural antiquities was adopted without a vote on December 12, 2012.<sup>90</sup> Overall, these General Assembly Resolutions show the growing trend toward international preservation, protection, and repatriation of cultural heritage.

#### IV CASE STUDIES

Many of the cases surrounding repatriation of cultural heritage deal with major museums around the world. A majority of the world’s greatest museums are members of the International Council of Museums (ICOM) and therefore subscribe to the ICOM Code of Ethics.<sup>91</sup> As members, these museums are required to enact policies against the looting of cultural artifacts and to prevent the acquisition of artifacts acquired through such means.<sup>92</sup> As of 2006, however, the Metropolitan Museum of Art in New York had “no written and published policy on acquisitions.”<sup>93</sup> Consequently, this museum, as well as several other prominent museums throughout the world, has been party to many lawsuits involving repatriation requests for illegally acquired items of cultural heritage. This section shows several successful and unsuccessful repatriation attempts, as well as efforts to preserve and protect cultural heritage from looting and destruction.

##### A SUCCESSFUL PROTECTION OR REPATRIATION OF CULTURAL HERITAGE

###### I *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*

“With 9,000 years of recorded civilization, Cyprus had an immense cultural heritage, with an obligation to protect and bequeath that heritage to future generations.”<sup>94</sup> The Kanakaria mosaic of Cyprus, which was at issue in this case, is a colored glass depiction of a young Jesus Christ sitting in the lap of his mother, the Virgin Mary. The Eastern Orthodox Church sanctified the mosaic as a holy relic.<sup>95</sup> This culturally significant artifact has survived since the early sixth century A.D., yet it was put into jeopardy when war broke out between the Greek and Turkish Cypriots in the 1970s.<sup>96</sup> The struggle between these two ethnic groups ultimately led to the forcible removal of the mosaic by ax from the

---

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Colin Renfrew, *Museum Acquisitions, Responsibilities for the Illicit Traffic in Antiquities*, in *ARCHAEOLOGY, CULTURAL HERITAGE, AND THE ANTIQUITIES TRADE 247* (Neil Brodie et. al eds., 2006).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> U.N. GAOR, *supra* note 1.

<sup>95</sup> *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 279 (7th Cir. 1990).

<sup>96</sup> *Id.* at 280.

Kankaria Church in Cyprus, a process that resulted in the mosaic being broken up into many pieces.<sup>97</sup>

Four of these pieces made their way into the hands of Peg Goldberg, an American art dealer with Goldberg and Feldman Fine Arts, Inc., while on a trip to the Netherlands in 1988.<sup>98</sup> The Dutch art dealer responsible for a great part of the transaction told Goldberg that the mosaics belonged to “a Turkish antiques dealer who had ‘found’ the mosaics in the rubble of an ‘extinct’ church in northern Cyprus.”<sup>99</sup> The Republic of Cyprus subsequently learned of the acquisition of the mosaic pieces by Goldberg, which they had been actively seeking since the looting of the Kankaria Church. The government then immediately requested repatriation of the pieces, and when Goldberg refused, they brought suit against Goldberg for the return of the mosaics in the Southern District of Indiana.<sup>100</sup>

One important takeaway from the *Autocephalous* case is the Court’s application of Indiana’s discovery rule. Under this rule, “the statute of limitations commences to run from the date plaintiff knew or should have known that she suffered an injury or impingement.”<sup>101</sup> Therefore, the Court determined that “Cyprus’ cause of action did not accrue until Cyprus learned . . . that the mosaics were in Goldberg’s possession in Indiana.”<sup>102</sup> The Court further determined that “a necessary precondition to the application of the discovery rule” was that “Cyprus exercised due diligence in searching for the mosaics.”<sup>103</sup> In so holding, the Court relied on principles from the famous property case of *O’Keeffe v. Snyder*, which held that “a plaintiff cannot be said to have ‘discovered’ his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that ‘other’ is.”<sup>104</sup> The Court ultimately found that “although the Republic of Cyprus may not have contacted all the organizations Goldberg in hindsight would require, it took substantial and meaningful steps, from the time it first learned of the disappearance of the mosaics, to locate and recover them.”<sup>105</sup>

Cyprus also faced opposition in that Goldberg maintained that the Republic’s case did not meet the requirements of an action for replevin under the relevant Indiana law. In order to sustain its action, Goldberg argued that Cyprus had to prove its “title or right to possession, that the property is unlawfully detained, and that the defendant wrongfully holds possession.”<sup>106</sup> The Court found for Cyprus, however, concluding that:

1) the Kanakaria Church was and is owned by the Holy Archbish-

---

<sup>97</sup> *Id.* at 281.

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

<sup>99</sup> *Id.* at 282.

<sup>100</sup> The Republic of Cyprus was joined in this suit by the Church of Cyprus.

<sup>101</sup> *Autocephalous*, 917 F.2d at 288.

<sup>102</sup> *Id.* at 289.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 289 (citing *O’Keeffe v. Snyder*, 416 A.2d 862, 869–70 (N.J. 1980)).

<sup>105</sup> *Id.* at 290.

<sup>106</sup> *Id.* (internal citation omitted).

opric of the Church of Cyprus . . . ; 2) the mosaics were removed from the Kanakaria Church without the authorization of the Church or the Republic . . . ; and 3) Goldberg, as an ultimate purchaser from a thief, has no valid claim of title or right to possession for the mosaics.<sup>107</sup>

This case is illustrative of one way in which American courts have treated suits for repatriation. It draws on the principles of the 1995 UNIDROIT Convention by not showing undue deference to the purchaser of an artifact at the expense of its rightful owner, and demonstrates how the principles of the 1970 UNESCO Convention and subsequent regulations have been adopted at the American domestic level.

## 2 *McClain I* AND *II*

Another set of cases that can be regarded as providing a guideline for repatriation cases in America is the *McClain* cases. These cases concerned the conviction of five defendants indicted under the National Stolen Property Act (NSPA), 18 U.S.C. §§ 2314, 2315 for conspiring to transport and receive pre-Columbian items of cultural heritage within the United States, which they knew to have been stolen.<sup>108</sup> The *McClain* doctrine derived from these cases has been instrumental in successful repatriation attempts by foreign countries against citizens of the United States.

The NSPA “prohibits the transportation in interstate or foreign commerce [of] any goods, . . . of the value of \$5,000 or more, with knowledge that such goods were stolen, converted or taken by fraud.”<sup>109</sup> The artifacts at issue in *McClain*, which included “terra cotta figures and pottery, beads, and a few stucco pieces,” had been “exported without a license or a permit from Mexico into the United States.”<sup>110</sup> Although the lower court determined that the Mexican government had owned the artifacts for over seventy-two years, the Court in *McClain I* reversed this decision because it believed that a definition of the word “stolen” was necessary to “comport with the NSPA’s purpose of protecting the owners of stolen property.”<sup>111</sup>

The Court in *McClain I* distinguished “between varying types of governmental control over property within the borders of a state.”<sup>112</sup> All property, the Court explained, falls within the state’s police power, but this “power to regulate is not ownership.”<sup>113</sup> A state may only acquire an ownership interest in property if it purchases that property or acquires it through other private means,

<sup>107</sup> *Id.* at 291.

<sup>108</sup> *United States v. McClain (McClain I)*, 545 F.2d 988, 992 (5th Cir. 1977).

<sup>109</sup> *Id.* (internal citation omitted).

<sup>110</sup> *Id.*

<sup>111</sup> Adam Goldberg, Comment, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1040–41 (2006).

<sup>112</sup> *McClain I*, 545 F.2d at 1002.

<sup>113</sup> *Id.*

or uses its sovereign powers to declare itself the owner.<sup>114</sup> It was therefore unclear to the Court whether the property had in fact been stolen from its rightful owners because the jury had made no factual finding concerning ownership.<sup>115</sup>

The defendants were re-convicted in *McClain II*, however, and together, these two cases “establish the core of [the] *McClain* Doctrine,” that “taking possession of cultural objects in violation of foreign found-in-the ground laws can give rise to criminal liability under the NSPA.”<sup>116</sup> As the *Goldberg* Court has stated, however, “[f]oreign found-in-the-ground laws . . . are unenforceable in the United States unless they establish national ownership . . . of cultural objects . . . [which is] clear enough to provide adequate notice of their effect.”<sup>117</sup> In addition, “contested cultural objects must originate from the territory of the nation claiming ownership; and any alleged theft must have occurred after the effective date of the relevant found-in-the-ground law.”<sup>118</sup> Even with these qualifications, however, the *McClain* Doctrine stands as a positive tool which may be used by countries in repatriation attempts against American citizens.

### 3 *The Republic of Turkey v. The Metropolitan Museum of Art*

Turkey is also a constant source country of stolen antiquities due to the great number of Greek and Roman artifacts present there. As of 2002, “[a]n estimated \$200 million in antiquities disappear yearly” from Turkey.<sup>119</sup> Turkey, then the Ottoman Empire, proclaimed by imperial decree in 1906, however, that it was the rightful owner of all of its antiquities.<sup>120</sup> This claim to ownership is solidified even further by Turkey’s Law on the Protection of Cultural and Natural Antiquities of 1983, and its export control law of 1793.<sup>121</sup> Turkey’s claim to ownership of the cultural heritage at issue in this case was therefore put forth in language that was clear and understandable by American citizens, thus comporting with the principles of the *McClain* Doctrine.

In 1990, Turkey successfully attained the repatriation of more than three hundred gold and silver artifacts from the Metropolitan Museum of Art.<sup>122</sup> This collection, known as the Lydian Hoard, had been “plundered from ancient burial tombs” and smuggled out of Turkey in the mid-1960s, sold to dealers, and then subsequently acquired by the Metropolitan Museum of Art.<sup>123</sup> The

<sup>114</sup> *Id.* at 1002–03.

<sup>115</sup> *Id.* at 1003.

<sup>116</sup> Goldberg, *supra* note 111, at 1042.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Sue J. Park, Comment, *The Cultural Property Regime in Italy: An Industrialized Source Nation’s Difficulties in Retaining and Recovering its Antiquities*, 23 U. PA. J. INT’L ECON. L. 931, 943 (2002).

<sup>120</sup> This is the kind of “found-in-the-ground” law required by the *McClain* Doctrine; Park, *supra* note 119, at 943.

<sup>121</sup> *Id.* at 943–44.

<sup>122</sup> Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990).

<sup>123</sup> Press Release, Herrick, Feinstein, Turkey’s Lawsuit Against Metropolitan Museum of Art Ends With Return of Lydian Hoard Antiquities to Turkey 2 (2012) (on file with author), available at <http://www.herrick.com/siteFiles/News/94F46F571AA38025A4D3343547A8B65F.pdf>.

Lydian Hoard represents “the largest and most complete collection of objects of the Lydian civilization,” and is instrumental in understanding the people and culture of that era in Turkey’s history.<sup>124</sup>

The Lydian Hoard was first displayed by the Metropolitan Museum in 1984, and it was at this time that Turkey was able to “identify the Hoard . . . [and] demand[] its return.”<sup>125</sup> The museum refused to return the items, however, prompting Turkey to file suit in 1987.<sup>126</sup> The evidence accumulated by Turkey “clearly indicated that the Lydian Hoard had been taken from a Turkish tomb . . . [and] that the Museum knew that the antiquities had been illegally excavated and smuggled out of Turkey.”<sup>127</sup> This “overwhelming evidence shifted the balance in Turkey’s favor and ultimately led to the return of the Lydian Hoard.”<sup>128</sup> Harry I. Rand of the New York law firm Herrick, Feinstein, which represented Turkey in this suit, stated that “the Metropolitan’s return of the Lydian Hoard to Turkey represents a monumental step in establishing the rights of all nations to protection of their artistic and cultural property from the ravages of plunderers and international traffickers in stolen art.”<sup>129</sup> The return of this cultural heritage “will afford the Turkish people, as well as archaeologists and other scholars, a heretofore unavailable resource for the study and appreciation of the Lydian civilization.”<sup>130</sup>

## B UNSUCCESSFUL ATTEMPTS AT REPATRIATION AND PROTECTION OF CULTURAL HERITAGE

### I THE BAMİYAN BUDDHAS

The circumstances surrounding the destruction of the Bamiyan Buddhas in Afghanistan by the Taliban in 2001 “provides strong evidence of an international norm in favor of cultural heritage preservation.”<sup>131</sup> “On February 26, 2001, the Taliban’s Supreme Ruler, Mullah Mohammad Omar, issued a decree ordering the destruction of all statues in Afghanistan,” because they did not conform to principles of Islamic law.<sup>132</sup> The Bamiyan Buddhas, considered to be “rare examples of monumental Buddhist sculpture” due to their “massive size[,] . . . [and] religious, historic, and artistic significance,” had existed in Afghanistan since the fifth century and were part of the landscape, having been carved into the Bamiyan cliffs.<sup>133</sup> These statues were culturally significant not only as Buddhist symbols and as “an important pilgrimage destination for Buddhist monks,” but also as the site of an important stopping point along the Silk Road, symbol-

<sup>124</sup> *Id.* at 3.

<sup>125</sup> *Id.* at 2.

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

<sup>127</sup> Park, *supra* note 119, at 946.

<sup>128</sup> Press Release, *supra* note 123, at 2.

<sup>129</sup> *Id.* at 3.

<sup>130</sup> *Id.*

<sup>131</sup> Wangkeo, *supra* note 4, at 243.

<sup>132</sup> *Id.* at 245.

<sup>133</sup> *Id.* at 246.

izing “the country’s rich commercial history.”<sup>134</sup> In addition, the statues were artistically and aesthetically significant because they “presented a unique blend of Central Asian, Indian, and Hellenistic influences.”<sup>135</sup> Despite the universal global uproar at the prospect of the Buddhas’ destruction, which flooded in from states, individuals, international and regional organizations, the Taliban “proclaimed [that] the edict . . . [was] irreversible” and the Bamiyan Buddhas were ultimately destroyed.<sup>136</sup>

The destruction of the Bamiyan Buddhas demonstrated that in some situations, the lack of a solid enforcement mechanism for rules of international law can be truly devastating. The Taliban chose not to follow the dictates of the UNIDROIT, 1970 UNESCO, or the Hague Conventions, or any other international mechanism put in place to stop destruction of cultural heritage. There was little that could be done to stop them because they were unmoved by public censure and decreased international relations. There is one positive message that can be gleaned from this case, however. It was apparent throughout the entire situation that the majority of the international community opposed the destruction of the Bamiyan Buddhas and the Taliban’s thwarting of international cultural heritage law. The negative attention received by the Taliban for its actions is sure to deter other countries, especially those who rely on friendly and cooperative international relations to survive and succeed in the international arena, from following the Taliban’s example.

## 2. *Peru v. Johnson*

In 1989, the Government of Peru claimed that it was “the legal owner of eighty-nine artifacts . . . seized by the United States Customs Service.”<sup>137</sup> The Court in this case acknowledged that the smuggling and selling of “many priceless and beautiful Pre-Columbian artifacts excavated from historical monuments” in Peru was “destructive of a major segment of the cultural heritage of Peru.”<sup>138</sup> The Court further stated that Peru was “entitled to the support of the courts of the United States in its determination to prevent further looting of its patrimony.”<sup>139</sup> In this way, the United States Judiciary showed once again its acceptance and dedication to the principles of the 1970 UNESCO Convention by making its courts available to foreign countries with repatriation claims.

Despite the Court’s willingness to hear Peru’s claim, and its belief in the importance of the repatriation of cultural heritage, the Court in *Peru v. Johnson* found that “[t]he plaintiff ha[d] no direct evidence that any of the subject items came from” modern day Peru.<sup>140</sup> This was due to the fact that the “Peruvian Pre Columbian culture spanned not only modern day Peru, but also areas that

---

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 249.

<sup>137</sup> *Peru v. Johnson*, 720 F. Supp. 810, 811 (C.D. Cal. 1989).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 811–12.

<sup>140</sup> *Id.* at 812.

are now within the borders of Bolivia and Ecuador.”<sup>141</sup> In addition, the Court stated that “[e]ven if it were to be assumed that the artifacts came from Peru, in order for the plaintiff to recover them, *it must prove that the Government of Peru was the legal owner at the time of their removal from that country.*”<sup>142</sup> Therefore, citing the rule of *McClain*,<sup>143</sup> that “[t]he state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner,”<sup>144</sup> and that the state must “express[] . . . [this] view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens,”<sup>145</sup> the Court held that Peru was not able to recover the artifacts in question.

## V EMERGING COUNTRY CONCERNS

### A NIGERIA

The year 2012 saw two instances of stolen cultural artifacts that should be returned to their rightful home in Nigeria. Eleven items of Nigerian cultural heritage were returned to Nigerian officials in a repatriation ceremony on July 26, 2012 at the Homeland Security Investigation Offices (HSI) in Manhattan.<sup>146</sup> The repatriated items were artifacts of the Nok culture, which existed around 2,000 years ago in what is now Nigeria.<sup>147</sup> The Nok culture, which lasted approximately 500 years, “disappeared under unknown circumstances.”<sup>148</sup> Nok artifacts are therefore “among the oldest sculptures in West Africa.”<sup>149</sup> One reason that Nok artifacts are so desired and culturally significant is their distinctive artistry.<sup>150</sup> Nok art is quite unique, and “depicts humans and animals with distinctive elongated features and a characteristic bronze/orange tinge—a colour typical of terracotta ‘fired clay’ pieces.”<sup>151</sup> The cultural significance of these items is even greater because they were “the forerunners to styles utilized

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (emphasis added).

<sup>143</sup> *United States v. McClain (McClain I)*, 545 F.2d 988 (5th Cir. 1977).

<sup>144</sup> *Peru v. Johnson*, 720 F. Supp. at 814 (citing *McClain I*, 545 F.2d at 1002).

<sup>145</sup> *Id.* (citing *United States v. McClain (McClain II)*, 593 F.2d 658, 670 (5th Cir. 1979)).

<sup>146</sup> Wynne Parry, *Ancient Statues Smuggled from Nigeria Being Returned Home*, MSNBC-NEWS.COM (July 26, 2012), [http://www.msnbc.msn.com/id/48346178/ns/technology\\_and\\_science-science/t/ancient-statues-smuggled-nigeria-being-returned-home/#.UPzEVyfgCS0](http://www.msnbc.msn.com/id/48346178/ns/technology_and_science-science/t/ancient-statues-smuggled-nigeria-being-returned-home/#.UPzEVyfgCS0); *U.S. Returns Stolen Nok Artifacts to Nigeria in New York Ceremony*, AFRICAN QUARTERS (July 27, 2012), <http://www.africanquarters.com/index.php/sports/item/2840-us-returns-stolen-nok-artifacts-to-nigeria-in-new-york-ceremony.html>; see also *HSI returns stolen and looted antiquities to Nigeria*, ICE.GOV (July 26, 2012), <http://www.ice.gov/news/releases/1207/120726newyork.htm>.

<sup>147</sup> *The US Returns Smuggled Ancient Artifacts Back to Nigeria*, CONNECTNIGERIA.COM (July 31, 2012), <http://connectnigeria.com/articles/2012/07/31/the-us-returns-smuggled-ancient-artifacts-back-to-nigeria/>.

<sup>148</sup> *Id.*

<sup>149</sup> *U.S. Returns Stolen Nok Artifacts to Nigeria in New York Ceremony*, *supra* note 146.

<sup>150</sup> *The US Returns Smuggled Ancient Artifacts Back to Nigeria*, *supra* note 146.

<sup>151</sup> *Id.*



by later African culture in the area.”<sup>152</sup>

Nigeria has enacted laws prohibiting the illegal exportation of Nok cultural artifacts, in large part due to their cultural significance.<sup>153</sup> “In 1979, the Nigerian National Commission for Museums and Monuments passed ‘Decree No. 77, terracottas,’ states that only accredited agents in Nigeria may buy or sell antiquities.”<sup>154</sup> These laws have not stopped the illegal exportation of Nigerian cultural heritage, however, and “in the 1990s, so many reached the European art market” that the value of such items decreased significantly due to an excess of supply.<sup>155</sup>

The recently returned Nok artifacts were discovered during a routine inspection by French customs officers at Charles de Gaulle Airport in Paris.<sup>156</sup> Although unable to seize the items themselves, the French officials alerted HSI and U.S. Customs and Border Protection officers, who seized the artifacts when they entered the country at John F. Kennedy Airport in New York.<sup>157</sup> One issue surrounding the case was that it took two years for the artifacts to be returned to the rightful owners. This was due in large part to the authentication process in place in the United States. “In determining the rightful owners of the artifacts, the American officials sought assistance from French authorities, the Louvre in Paris, Interpol and the International Council of Museums, [and] HSI special agents.”<sup>158</sup> Although lengthy, these authentication procedures have helped to ensure that stolen antiquities are returned to their rightful owners. In fact, “[s]ince 2007, HSI has repatriated more than 2,500 items to more than 23 countries,” including a 3,000 year old Egyptian coffin returned in 2010.<sup>159</sup>

Although the case of the Nok sculptures was solved in Nigeria’s favor, there is another fight over Nigerian cultural heritage that is still ongoing. According to “Umogbai Theophilus, the curator for Nigeria’s National Museum in Benin City . . . Nigerians have been petitioning for the return of their ancient art works for decades, but most of it remains at large.”<sup>160</sup> In June 2012, officials of Nigeria’s National Commission for Museums and Monuments (the Commission) demanded the return of thirty-two artifacts of the Benin Kingdom, located in what is now Southern Nigeria,<sup>161</sup> which had been recently acquired by the Museum of Fine Arts Boston.<sup>162</sup> This was a significant donation to the mu-

<sup>152</sup> *Who Stole Nigerian Artifacts Returned by US?* NIGERIAN VILLAGE SQUARE (July 28, 2012), <http://www.nigeriavillagesquare.com/newsflash/who-stole-nigerian-artifacts-returned-by-us.html>.

<sup>153</sup> Parry, *supra* note 146.

<sup>154</sup> *HSI returns stolen and looted antiquities to Nigeria*, *supra* note 146.

<sup>155</sup> Parry, *supra* note 146.

<sup>156</sup> *Id.*

<sup>157</sup> Parry, *supra* note 146; *Who Stole Nigerian Artifacts Returned by US?*, *supra* note 152.

<sup>158</sup> *Who Stole Nigerian Artifacts Returned by US?*, *supra* note 152.

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

<sup>160</sup> Heather Murdock, *Nigeria to the World: Give Us Our Art Back!*, GLOBAL POST (Jan. 3, 2013), <http://www.globalpost.com/dispatch/news/regions/africa/nigeria/130102/nigeria-benin-colonialism-stolen-art-boston-museum-fine-arts>.

<sup>161</sup> The Kingdom of Benin should not be confused with the country of Benin, formerly known as Dahomey, located in western Africa.

<sup>162</sup> *Nigeria Demands Return of Stolen Artifacts*, BUSINESS DAY (July 19, 2012), <http://www.>

seum, for up until that event, “the museum had only owned a single piece from Benin,” even though its Africa exhibit had been in existence for over twenty years.<sup>163</sup>

Benin pieces are particularly prized among museums due to “their sharp detail and scarcity.”<sup>164</sup> This, however, is also, one of the main reasons why they are of such cultural significance to the Nigerian people. Mallam Yusuf Abdallah Usman, the Director-General of the Commission, has asserted that these artifacts were looted during the Benin Massacre of 1897, and are integral to the history of Nigeria’s people.<sup>165</sup> Usman therefore demanded that MFAB return the items immediately.

Although the exact facts of the Benin Massacre are often debated, the general circumstances were as follows: As the colonial empires in Europe “competed for African resources” in the late 19th Century, “the Benin Oba [king] enacted trade embargos against the British who were growing more powerful in the region.”<sup>166</sup> British forces were dispatched to the Benin Kingdom in response to this action, presumably to attack the city and depose the king.<sup>167</sup> While on their way to the capital, however, the British forces were attacked and slaughtered, prompting the British government to retaliate with the Punitive Expedition of 1897.<sup>168</sup> Also called the Benin Massacre, the Punitive Expedition destroyed the capital, “trashed the palace, overthrew the Oba and forced him into exile. Most of the more than 4,000 pieces of art in the palace were looted.”<sup>169</sup> Although “most of the plunder was retained by the expedition . . . about 2,500 religious artifacts, Benin visual history, mnemonics and artworks were sent to England,” where they were either auctioned off to pay for the cost of the expedition or were put on display in British museums.<sup>170</sup> The Oba’s palace and much of the surrounding area was then devastatingly destroyed by fire.<sup>171</sup> Although the Oba was reinstated in 1913, and the old palace was subsequently restored, there is still very little left in Nigeria to commemorate this kingdom, which dated back to the thirteenth century and remained prosperous for several centuries.<sup>172</sup>

The items of cultural heritage in question are incredibly important to the Nigerian people because “the works give a realistic view of West African history

---

businessdayonline.com/NG/index.php/art-a-life/41483-nigeria-demands-return-of-stolen-artifacts; Mohammed Shehu, *Nigeria Demands Return of Stolen Benin Artefacts From U.S.*, ALL AFRICA (July 19, 2012), <http://allafrica.com/stories/201207190121.html>.

<sup>163</sup> *Museum of Fine Arts Boston Receives Monumental Boost to African Art Collection*, HUFFINGTON POST (June 29, 2012), [http://www.huffingtonpost.com/2012/06/29/boston-museum-of-fine-art\\_n\\_1637819.html](http://www.huffingtonpost.com/2012/06/29/boston-museum-of-fine-art_n_1637819.html).

<sup>164</sup> *Id.*

<sup>165</sup> *Nigeria Demands Return of Stolen Artifacts*, *supra* note 162.

<sup>166</sup> Murdock, *supra* note 160.

<sup>167</sup> Chika Okeke, *Nigerian, American Museums Lock Horns Over ‘Stolen’ Artifacts*, ALL AFRICA, (July 15, 2012), <http://allafrica.com/stories/201207150161.html>.

<sup>168</sup> *Robert Owen Lehman Collection*, MUSEUM OF FINE ARTS BOSTON, <http://www.mfa.org/give/gifts-art/Lehman-Collection> (last visited January 28, 2013).

<sup>169</sup> Okeke, *supra* note 167; *see also* Murdock, *supra* note 160.

<sup>170</sup> Okeke, *supra* note 167.

<sup>171</sup> Murdock, *supra* note 160.

<sup>172</sup> *Robert Owen Lehman Collection*, *supra* note 168; GREENFIELD, *supra* note 40, at 124.

through its people's own traditional artwork. Metalworking was a key component of the King's court during Benin reign, and Benin people were especially fond of working with brass, which symbolized the continuity of kinship because its resistance to corrosion.<sup>173</sup> One hundred sixty bronze heads were reportedly taken from Nigeria during the Punitive Expedition.<sup>174</sup> These bronzes served as the "Benin equivalent to chronological records," with each head representing a former Oba thus "record[ing] a dynasty back to the twelfth century."<sup>175</sup>

Tangible elements of Benin Kingdom history have largely been lost to the African people due to European presence on the continent. Usman explained the MFAB artifacts' cultural importance when he stated that "these artworks are heirlooms of the great people of the Benin Kingdom and Nigeria generally. They form part of the history of the people. The gap created by this senseless exploitation is causing our people, untold anguish, discomfort and disillusionment."<sup>176</sup> In addition to the historical and aesthetic value stressed by Usman, these artifacts are also of great economic value. In 1986, for example, four Benin carvings were "sold to the Royal Museum of Scotland for £300,000."<sup>177</sup> A single bronze figure also "fetched as much as £185,000."<sup>178</sup> This is capital a developing country could find very useful. Nigeria has already stated that it would be willing to loan out some of its cultural heritage if it was returned, so repatriation would not be a barrier to the rest of the world's ability to learn and take pleasure from the antiquities, but also would also provide Nigerians with another valuable source of income.

Many proponents of museums retaining ancient artifacts claim that this allows people of different cultures to learn more about each other and the history of the world. For example, rather than returning the Nigerian artifacts to the people of Nigeria, "Boston's Museum of Fine Arts said it would 'present a number of public programs that further the appreciation of the Kingdom of Benin's renowned arts, cultural heritage, and complex history.'<sup>179</sup> Nigerian officials, however, maintain that "the Boston acquisition[,] along with other collections around the world[,] are the legal property of the Benin royal family."<sup>180</sup> In a recent interview, Usman explained away this justification for retaining items of cultural antiquity. The fact that the items should be returned to their rightful owners in Nigeria does not mean that they will be kept from the rest of the world and "cannot go back to Europe for enjoyment and for the education of the European public and the world at large."<sup>181</sup> Instead, repatriation would mean that

<sup>173</sup> *Museum of Fine Arts Boston Receives Monumental Boost to African Art Collection*, *supra* note 163.

<sup>174</sup> GREENFIELD, *supra* note 40, at 124.

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

<sup>176</sup> *Boston's Museum Of Fine Arts Urged To Return Looted Artifacts To Nigeria*, HUFFINGTON POST (July 20, 2012), [http://www.huffingtonpost.com/2012/07/20/bostons-museum-of-fine-ar\\_n\\_1690062.html](http://www.huffingtonpost.com/2012/07/20/bostons-museum-of-fine-ar_n_1690062.html).

<sup>177</sup> GREENFIELD, *supra* note 40, at 125.

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

<sup>179</sup> Murdock, *supra* note 160.

<sup>180</sup> *Id.*

<sup>181</sup> Edozi Udeze, *Nigeria to Get More UNESCO Sites Next Year*, NATION (Jan. 6, 2012), <http://www.nationonlinenigeria.com>.

the items will go elsewhere on Nigeria's terms. "[T]hey will go legally and be acknowledged as the property of Nigeria, with the confirmation of Nigeria which will form part of the presentation."<sup>182</sup>

The Museum of Fine Arts Boston still refuses to consider Nigeria's repatriation requests, however, and it has justified this refusal by stating that the donation of the Benin Kingdom Artifacts "met all legal standards" because they were donated to the museum by Robert Owen Lehman.<sup>183</sup> In fact, there is a page on their website dedicated to this collection, without mention of any of the controversy currently surrounding the exhibit.<sup>184</sup> "Mr. Lehman, a banker and a great-grandson of a founder of Lehman Brothers, had purchased the Benin sculptures between the 1950s and the 1970s."<sup>185</sup> This legal claim to ownership is similar to that used repeatedly by the British Museum when refusing repatriation requests. The British were considered the "legitimate authority" in Nigeria during the time of Colonialism.<sup>186</sup> Therefore, it has been claimed that many of these artifacts legally belonged to the British when they were removed from the country. Although there is some merit to this argument as a strictly technical matter, there is great debate as to the legitimacy of British control during colonial times. This is perhaps most exemplified by the fact that the Benin chiefs only signed a treaty with Britain in 1894 under the threat of war.<sup>187</sup> It is a principle of international law that an international contract signed under coercion or threat of force is not valid. Therefore, under this principle, Britain was not the legitimate ruler of the Benin people, and their artifacts did not belong to the Crown.

Operating under the assumption that the Benin Kingdom cultural heritage belonged to the people of Benin and the modern state of Nigeria by association, it is plain to see that international law dictates that these items be returned to their rightful home. The Benin Kingdom artifacts fall squarely within the definition of cultural property of the 1970 UNESCO Convention because they are well beyond one hundred years old, and are culturally significant to the Nigerian people, as explained above.<sup>188</sup> Therefore, the United States, as a party to the UNESCO Convention, is duty bound to provide a forum for Nigeria to have its claim heard, and to see that international law is upheld.

In performing its duty to the preservation of cultural heritage, past precedent also shows that the United States should find for Nigeria and compel MFAB to return the Benin Kingdom artifacts to their rightful home. Applying the discovery rule from the *Autocephalous* case, Nigeria has not exceeded its statute of limitations to bring a claim. Although the items have been missing since the

---

//thenationonline.net/new/arts/nigeria-to-get-more-unesco-sites-next-year/.

<sup>182</sup> *Id.*

<sup>183</sup> Okeke, *supra* note 167.

<sup>184</sup> Robert Owen Lehman Collection, *supra* note 168.

<sup>185</sup> Carol Vogel, *ARTSBEAT; Nigeria Seeks Return Of Bronzes and Ivories*, N.Y. TIMES (July 24, 2012), <http://query.nytimes.com/gst/fullpage.html?res=9C04E2DC1E3EF937A15754C0A9649D8B63>.

<sup>186</sup> GREENFIELD, *supra* note 40, at 125.

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

<sup>188</sup> O'KEEFE, *supra* note 19, at 22–23; GREENFIELD, *supra* note 40, at 224.

nineteenth century, Nigeria was not capable of making a claim for their return until it knew of their location.<sup>189</sup> Nigeria demanded the immediate return of the artifacts as soon as it learned that they had been donated to MFAB, and its claim is therefore not precluded by the statute of limitations under the discovery rule. In addition, there is no issue of original ownership of the Benin Kingdom antiquities because, as has already been discussed, they were the rightful property of the Benin Kingdom, which was located within modern Nigeria. They were looted during armed conflict and, as such, must be considered to have been illegally obtained. Ownership has thus been proved under the standards of *Peru v. Johnson*. Lastly, Nigeria's law prohibiting the illegal trade of Nigerian antiquities went into effect decades before the MFAB acquired its current collection, and the museum therefore had knowledge of the shadow of illegality which had been cast over most privately traded Nigerian cultural heritage. As home to approximately one quarter of the world's museums, the United States has a significant interest in upholding the legality of cultural heritage acquisitions.<sup>190</sup> Therefore, just as the Metropolitan Museum of Art was required to return items that had clearly been stolen from Turkey, so must MFAB return Nigeria's Benin Kingdom cultural heritage.<sup>191</sup>

## B MALI

Destruction of cultural antiquities is one of the greatest travesties facing cultural heritage today, as the looting of monuments and other historical sites often comes hand in hand with great destruction. As such, much of the "historic and scientific context [surrounding the artifacts] is lost and often lost too are objects in themselves of little monetary value," even if they possess great historic and cultural value.<sup>192</sup> Many objects are destroyed in the process, and those that do survive are often damaged. It is therefore becoming increasingly important to safeguard a country's history for future generations through the protection of cultural heritage.

One of the states currently with the most need for protection of its cultural antiquities is Mali. The state of Mali contains some of "the best-known archaeological sites in sub-Saharan Africa."<sup>193</sup> Cultural property is particularly at risk in Mali, however, because the state "has been in turmoil since early 2012, when

<sup>189</sup> *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 280 (7th Cir. 1990).

<sup>190</sup> GREENFIELD, *supra* note 40, at 154.

<sup>191</sup> Since the date originally set for publication of this article, MFAB has returned eight artifacts to Nigeria that it acquired in 2013. The Lehman artifacts, however remain in Boston. Geoff Edgers, *Museum of Fine Arts Returns 8 Artifacts to Nigeria*, BOSTON GLOBE (June 26, 2014), <http://www.bostonglobe.com/lifestyle/style/2014/06/26/museum-fine-arts-returns-artifacts-nigeria/z2RenPtuhh9qyPoSi05fR0/story.html>.

<sup>192</sup> O'KEEFE, *supra* note 40, at 154.

<sup>193</sup> Holland Cotter, *Imperiled Legacy for African Art*, N.Y. TIMES (Aug. 2, 2012), <http://www.nytimes.com/2012/08/05/arts/design/african-art-is-under-threat-in-djenne-djenno.html>. In Djenne-Djenno, for example, centuries old artifacts can be seen protruding from the ground throughout the area, exhibiting the richness of the history of the Malian culture.

the government's tepid response to the Tuareg uprising prompted junior army officers to topple the government."<sup>194</sup> This coup allowed Tuareg and Islamist militant groups to gain control over half of the country.<sup>195</sup> As of January 24, 2013, there were at least six groups fighting for control of northern Mali.<sup>196</sup>

One major concern surrounding Malian cultural heritage is that of "iconoclasm." "Iconoclasm is the destruction of icons due to the belief that the images are imbued with an unacceptable symbolic significance . . . [and] annihilating the image is a way of destroying the message."<sup>197</sup> "Islamist groups, affiliated with Al Qaeda, have singled out Sufism, a moderate, mystical form of Islam widespread in Mali, for attack" under just such an iconoclastic ideology.<sup>198</sup>

Timbuktu, which "was founded around the fifth century and grew into an Islamic and academic hub in the 15th century," is especially vulnerable to attack on iconoclastic grounds due to its "Koranic schools and manuscript libraries."<sup>199</sup> The destruction of Malian heritage has already begun in Timbuktu as militant Tuareg and Islamist groups have started "leveling the tombs of Sufi saints, objects of popular devotion."<sup>200</sup> Perhaps even more concerning is the threat to the "many thousands of manuscripts, including handwritten documents in Arabic and African languages dating back to the 10th century, . . . [which] are housed in Timbuktu's libraries."<sup>201</sup> These manuscripts "constitute one of the continent's great historical treasures," and it is likely that the militant Tuareg and Islamist groups will seek to destroy all manuscripts that do not comport with their religious or philosophical beliefs.<sup>202</sup> If the information contained within these documents is destroyed, the Malian people will lose an integral part of what has created their cultural identity, and may not be able to unite as a society once the fighting has been resolved.<sup>203</sup>

Fear over the destruction of Mali World Heritage properties has prompted responses by international organizations. UNESCO, for example, recently stated that:

---

<sup>194</sup> Lydia Polgreen, *Faction Splits from Islamist Group in Northern Mali*, N.Y. TIMES (Jan. 24, 2013), <http://www.nytimes.com/2013/01/25/world/africa/faction-splits-from-islamist-group-in-northern-mali.html>.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* Since the date originally set for publication of this article, French forces have started to withdraw from Mali, and the violence has continued. See *Mali: War & Peace in Northern Mali*, ALLAFRICA.COM (Aug. 7, 2014), <http://allafrica.com/stories/201408080389.html>.

<sup>197</sup> Wangkeo, *supra* note 4, at 192.

<sup>198</sup> Cotter, *supra* note 193.

<sup>199</sup> *Id.*; Ricci Shryock, *Timbuktu's Cultural Artifacts at Risk as Mali Crisis Grows*, VOICE OF AMERICA (Apr. 3, 2012), <http://www.voanews.com/content/timbuktus-cultural-artifacts-at-risk-as-mali-crisis-grows-146165505/180665.html>.

<sup>200</sup> Cotter, *supra* note 193.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Although Timbuktu was liberated in early 2013, the area is still very unstable. Sixteen mausoleums have been totally destroyed and at least 4,000 manuscripts damaged. However, over 95% of Timbuktu's manuscripts were smuggled out of the city during its 10 month occupation. Charlie English, *The Book Rustlers of Timbuktu: how Mali's ancient manuscripts were saved*, GUARDIAN (May 23, 2014), <http://www.theguardian.com/world/2014/may/23/book-rustlers-timbuktu-mali-ancient-manuscripts-saved>.

On 4 May 2012, the Cheick Sidi Mahmoud Tomb of Timbuktu, one of the 16 tombs comprising the property inscribed on the World Heritage List, was damaged by the Ansar Dine Group. The door and the windows were torn down, and the white curtain that separates the sepulcher from the place of worship where the faithful pray, was burnt. . . . This degradation of the tomb of this erudite place marks the worsening of threats to World Heritage in Timbuktu.<sup>204</sup>

In addition to these findings, it was also discovered that:

On 10 April 2012, the former premises of the Ahmed Baba Institute of Higher Learning and Islamic Research (IHERI-AB) that constitutes the biggest centre for manuscripts of West Africa, created in 1974 with UNESCO support, were damaged as well as other cultural institutes in Timbuktu by the Ansar Dine group. The IHERI-AB possesses a valuable collection of nearly 30,000 documents with many dating back to the Golden Age of Timbuktu, the cultural crossroads and centre of learning.<sup>205</sup>

The dire nature of these threats to Malian cultural heritage ultimately prompted UNESCO to proclaim that:

This situation is a cause for concern on the part of UNESCO and the international community, all the more so as it exposes the manuscripts to illicit traffic and even destruction that may occur during their transfer, as many of them are originals of great commercial value and also in a fragile and bad state of conservation.<sup>206</sup>

Because the Timbuktu Cultural Mission, “the decentralized service of the State responsible for the management of the World Heritage property,” is not currently functioning due to the political upheaval, the World Heritage Center and Advisory Bodies of UNESCO made the decision to inscribe these Malian properties on the List of World Heritage in Danger for 2012.<sup>207</sup>

The international community has a duty to act to stop the destruction of Malian antiquities.<sup>208</sup> If nothing is done soon the world will be witness to another Bamiyan Buddhas situation in which one political faction destroys irreplaceable cultural heritage. State parties to the 1954 Hague Convention, for example, must fulfill their obligations to do all within their power to “prevent the exportation of cultural property from an occupied territory in time of war.”<sup>209</sup>

<sup>204</sup> UNESCO World Heritage Comm. Meeting, 36th Sess., June 24—July 6, 2012, WHC-12/36.COM/7B.Add 214 (June 1, 2012) [hereinafter World Heritage Committee Meeting].

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

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 216.

<sup>208</sup> Since the date this note was originally scheduled for publication, France did step in and help take Timbuktu back from the rebels. Although thousands of manuscripts were saved, thousands were also destroyed as France continues to withdraw from the country and the violence continues to escalate. The international community must remain vigilant. See *Mali: War & Peace in Northern Mali*, *supra* note 196.

<sup>209</sup> GREENFIELD, *supra* note 40, at 224.

Mali is just such an occupied territory, and state parties must therefore do all that they can to protect its cultural heritage. The United States has already taken steps in this direction by banning the import of unauthorized Malian antiquities.<sup>210</sup>

One issue facing any attempt to stop or prevent the destruction of cultural heritage is that this is an entirely internal struggle and the fighting has not yet crossed international borders.<sup>211</sup> This raises the question: “Do local populations have the right to destroy local sites, even if the international community has deemed them valuable to world heritage?”<sup>212</sup> Under the 1954 Hague Convention, the answer is clearly no. “[A] State party to the [1954 Hague] Convention must respect cultural property in its own territory . . . and must refrain from directing any act of hostilities against it.”<sup>213</sup> Mali is a state signatory to this Convention, and the groups struggling for control of the north of the country therefore have a duty to uphold its precepts.<sup>214</sup>

Lastly, state parties to the 1995 UNIDROIT Convention also have a duty to preserve Malian cultural heritage in its natural setting. As explained above, tombs and manuscripts are under a constant threat of destruction in Timbuktu, and it is this type of cultural heritage the protection and repatriation of which is explicitly provided for in the UNIDROIT Convention.<sup>215</sup> The forty-four state parties and signatories to this Convention thus have a duty to intervene in the Malian struggle for the protection of Malian cultural heritage.<sup>216</sup>

## VI CONCLUSION

The preservation of a state’s history and culture through its antiquities is under constant attack. This is perhaps nowhere more evident than in the context of Africa, the states of which have turned to cultural heritage as a unifying force in their newfound independence. Many items of cultural heritage have been looted from their proper homes and are being traded illicitly around the globe. Belgium, for example, is a “major transit site for African cultural heritage.”<sup>217</sup> Unfortunately, for many countries, the struggle over antiquities does not end with discovery of their location. Questions of ownership and legal acquisition continue to plague the repatriation debate, making it difficult for young nations with little funds and even less international influence to retain their stolen cultural property.

Hope has begun to bloom for developing nations such as Nigeria and Mali, however, as the last fifty to sixty years have shown a decided shift in international law in favor of returning antiquities to their rightful homes. Conventions

<sup>210</sup> Cotter, *supra* note 193.

<sup>211</sup> Shryock, *supra* note 199.

<sup>212</sup> *Id.*

<sup>213</sup> Prott, *Protecting Cultural Heritage in Conflict*, *supra* note 43, at 25.

<sup>214</sup> Hague Convention, *supra* note 40.

<sup>215</sup> O’KEEFE, *supra* note 19, at 24.

<sup>216</sup> UNIDROIT Convention, *supra* note 75.

<sup>217</sup> Forrest, *supra* note 2, at 604–05.



such as the 1954 Hague Convention and 1970 UNESCO Convention, as well as emerging norms of customary international law, now make it possible for states to reclaim vital pieces of their history. Nigeria will likely be successful in its demand for the return of the Benin Kingdom artifacts, and it is the aforementioned network of international mechanisms, in concert with the international cooperation already evinced by their state parties, that will be instrumental in this success. International law also dictates that it is time for the international community to become involved in the Malian conflict to stop the destruction of priceless cultural artifacts. It has been thirteen years since the Bamiyan Buddhas were destroyed, but the lesson taught by their destruction has not been forgotten. The international community was outraged by this loss, and if it does not want to see the destruction of more irreplaceable cultural heritage, state actors must rise up and use the tools of international law to protect Malian antiquities from becoming casualties of war.