

A STEP BACK FOR TURKEY, TWO STEPS FORWARD IN THE REPATRIATION EFFORTS OF ITS CULTURAL PROPERTY

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ABSTRACT

In recent years, Turkey has increasingly sought the repatriation of important cultural properties it believes are best understood and belong within its borders. Claiming rights to all sorts of cultural property, irrespective of when the cultural property left the country, and without regard to whether the property is truly of Turkish heritage, Turkey has taken a hard line approach by threatening to prevent museums all over the world from conducting research in Turkey and excavating and exporting cultural property from Turkey to other places in the world. Considering the important and complicated issues raised by Turkey, and the country's desire to repatriate cultural property it believes to be part of its cultural heritage, Turkey should engage museums with a softer tone, a more nuanced eye, and with the openness to enter into voluntary agreements much in the same way Italy has successfully done in the past.

INTRODUCTION

The illicit trade of cultural property remains a pervasive problem for the international community.¹ The battle over the ownership of cultural property is typically waged between countries of origin and foreign museums. The countries of origin, where the cultural property physically originated, argue cultural property should be repatriated because it was obtained illegally by foreign museums. In response, the museums contend they have properly acquired the property on display and have sufficient documentation to support their claims. This debate boils down to one major question: who actually owns the centuries-old cultural property in question, especially in light of many countries shifting borders?

Countries have adopted both international agreements and national laws to protect against the illicit trade of cultural property and to provide ways for countries to seek repatriation of cultural property no longer within their

1. See Dianne Penn, *General Assembly Reviews Efforts to Curb Illegal Trade in Cultural Property*, UNITED NATIONS RADIO, <http://www.unmultimedia.org/radio/english/2012/12/general-assembly-reviews-efforts-to-curb-illegal-trade-in-cultural-property/> (Dec. 12, 2012) (reporting on the current illegal trade situation and introducing a draft resolution on returning illegally taken cultural property to the rightful country).

borders.² The main international agreement governing the repatriation of cultural property between countries is the UNESCO Convention. Simply put, this agreement established a bright-line rule that governs when museums and art galleries are in legal possession, and in turn have appropriately acquired, cultural property. Under the UNESCO Convention, a foreign country has a claim for any cultural property that was illegally exported out of its country after 1970 and, thus, that property shall not be acquired by museums or art galleries;³ any cultural property that was outside of its country of origin prior to 1970 is not subject to the requirements of the UNESCO Convention, preventing countries of origin from having legal remedies in seeking the repatriation of cultural property.

Turkey is a country of rich cultural heritage with an increasing interest in establishing itself as a cultural powerhouse.⁴ In recent years, Turkey has increasingly demanded the repatriation of cultural property it believes belongs in the country. Turkey is noted as being part of a cultural nationalist⁵ vanguard, its recent actions symptomatic of the country's renewed search for a national identity. Turkey is now stepping up its efforts by aggressively going after museums and seeking the return of all cultural property it believes belong in Turkey, irrespective of when the property left the country, including instances where Turkey cannot prove when the cultural property left Turkish soil. In doing so, Turkey cites an Ottoman-era law passed in 1906, which bans the export of cultural artifacts. Turkey has been somewhat successful in repatriating cultural property, such as when it convinced Germany's Pergamon Museum to return a 3,000 year-old sphinx.⁶ However, Turkey's strategy of demanding the return of objects without any accompanying evidence to support its claims has made museums wary of trusting Turkey's assertions and returning the property at issue. By aggressively going after museums in this fashion, Turkey is effectively ignoring the guidelines set up by the UNESCO convention, of which it is a signee. Another complicating factor raised by Turkey's claims is that Turkey has, in the past, claimed legal ownership of property that Turkey has arguably looted from other countries. All of this begs the question who is the legitimate owner of these cultural property and what steps can a country take to ensure the repatriation of its cultural property.

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2. See *infra* Parts I and II (discussing 1954 Hague Convention, UNESCO, and UNIDROIT).
 3. There are a few caveats to this UNESCO's requirement, mainly that countries usually have to show proof of when the cultural artifact was removed from the country.
 4. See Dan Bilefsky, *Seeking Return Of Art, Turkey Jolts Museums*, N.Y. TIMES, Oct. 1, 2012, at A1 (discussing Turkey's campaign to reclaim Turkish cultural artifacts from Western European and American museums).
 5. Countries that are cultural nationalist believe that cultural property belongs, and is best understood, in its country of origin. For a general discussion on cultural nationalism see John H. Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831, 831-32 (1986)
 6. See Bilefsky, *supra* note 4.

This paper will engage in a careful discussion on whether Turkey has a legitimate claim to the cultural property it is demanding repatriation of under the 1906 Ottoman-era law declaring that “all antiquities found in or on public or private lands were state property and could not be taken out of [the] country.”⁷ This law remained in full force and effect until 1973, when a new law was passed, again declaring that all antiquities so found were property of the state.⁸ This paper will then conclude by arguing that Turkey’s current efforts will, in large part, ultimately prove unsuccessful. Instead, Turkey would be better served by mimicking Italy’s successful cooperative and nuanced model of repatriating cultural property.

BACKGROUND

A. *Defining Cultural Property*

A universal definition of cultural property does not exist because of a lack of international agreement with respect to passing uniform and binding law.⁹ However, certain international agreements have sought to define cultural property. The 1954 Hague Convention, written under the backdrop of protecting cultural property during times of war, defines cultural property as:

“[M]ovable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; buildings whose main and effective purpose is to preserve or exhibit the movable cultural property . . . such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, movable cultural property . . . centers containing a large amount of cultural property.”¹⁰

In contrast, the UNESCO Convention, which is generally more concerned with the illicit trade of cultural property, defines cultural property as: rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; property relating to history, including the history of science and technology and military and social history; products of archaeological excavations; elements of artistic or historical monuments

7. Sibel Özel, *Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey*, 38 INT’L J. LEGAL INFO. 177, 179 (2010).

8. *Id.*

9. See Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT’L LAW. 235, 239 (1996) (“The numerous and varied definitions given to cultural property contribute to the lack of uniformity in cultural property protection laws.”).

10. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention] (codifying international law agreement solely regarding cultural property).

or archaeological sites which have been dismembered; antiquities more than 100 years old, such as inscriptions, coins and engraved seals; objects of ethnological interest; property of artistic interest; rare manuscripts; old books, documents and publications of special interest postage, revenue and similar stamps; archives, including sound, photographic and cinematographic archives; articles of furniture more than 100 years old; and old musical instruments.¹¹ The UNIDROIT Convention somewhat broadened the definition by defining cultural property as “includ[ing] those objects which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to the Convention.”¹² Specifically, the UNIDROIT Convention removed the word “property” from the definition and replaced it with the word “objects.” Essentially, the UNIDROIT definition expanded what types of objects can be protected, but only if they first fall under a part of the UNESCO list. In light of the claims made by Turkey, in that it is seeking many different types of cultural artifacts, this paper will use the broader definition of cultural property adopted under the UNIDROIT convention.

B. Differing Perspectives on the Protection of Cultural Property

Whether one believes that Turkey is the rightful owner of all the cultural property it claims depends much on whether one takes an internationalist or nationalist perspective on who owns a particular antiquity.¹³ Leading scholar of art and law Professor John Henry Merryman illustrates the differences in two prominent approaches on determining who owns cultural property in an oft-cited law article.¹⁴ Merryman explains, “one way of thinking about cultural property is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”¹⁵ This view is known as “cultural internationalism,” and identifies market forces as the best way to govern the movement of cultural property because “everyone has an interest in the preservation and

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11. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].
 12. Convention on Stolen or Illegally Exported Cultural Objects, art. 2, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention]. *See also* Forbes, *supra* note 9, at 240 (noting that “the drafters of the UNIDROIT Convention recognized the dangers of an exhaustive definition that might exclude objects worthy of protection . . .”).
 13. *See generally* Carol A. Roehrenbeck, *Repatriation of Cultural Property—Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*, 38 INT’L J. LEGAL INFO. 190 (2010) (discussing the philosophical development and history of cultural internationalism and cultural nationalism).
 14. *See* Merryman, *supra* note 5, at 831-32 (comparing and contrasting cultural internationalism and cultural nationalism by analyzing the historical roots and enactment of the Hague Convention in 1954 and UNESCO Convention in 1970).
 15. *Id.* at 831.

enjoyment of all cultural property, where it is located.”¹⁶ Under this view, cultural property belongs to the global community and the country that is best situated to care for a specified piece of cultural property should take possession of it.¹⁷ The idea driving cultural internationalist is that everyone has an interest in the preservation and enjoyment of cultural property, regardless of its provenance, mired past, or to whom it originally belonged.

Merryman further describes a second way of thinking about cultural property, which “is as part of a national cultural heritage.” This so-called “cultural nationalism” gives nations “a special interest, implies the attribution of national characters to object, independently of their location or ownership, and legitimizes national export controls and demands for the ‘reparation’ of cultural property.”¹⁸ It offers a contextual perspective to cultural property, advocating that cultural property is best understood in its original context.¹⁹ Under this view, a “nation’s cultural property belongs within the borders of the nation where it was created. In support [of this], nationalists emphasize national interests, values, and pride.”²⁰

A cultural nationalist would likely view Turkey’s repatriation efforts in a more sympathetic light, and quite possibly, as legitimate means to regain control of its heritage; while a cultural internationalist would see Turkey’s efforts as a country merely using its political clout, in a non-legitimate way, to force museums’ hands. Outside of the international conventions, as will be discussed below, Turkey’s legal right to repatriate its property depends on which of the above views is adopted.

I. INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

The concern for protecting cultural property dates back centuries—the first codified attempt to protect cultural property is largely considered the Lieber code, which was concerned with the protection of cultural property during times of war by regulating the conduct of invading countries.²¹ According to the Red Cross, the Lieber Code or Instructions were “prepared

16. See Roehrenbeck, *supra* note 13, at 190 (discussing the philosophical development and history of cultural internationalism and cultural nationalism).

17. See Merryman, *supra* note 5, at 836-7 (discussing Hague 1954 as “. . . a charter for cultural internationalism.”); Roehrenbeck, *supra* note 13, at 190 (“Adherents of Cultural Internationalism support the idea that everyone has an interest in the preservation and enjoyment of all cultural property wherever it is located. Thus, the cultural property belongs to the global community, and the country with the better resources to care for another country’s cultural property should retain possession.”).

18. See Merryman, *supra* note 5, at 832.

19. *Id.* at 843, 846 (defining cultural nationalism).

20. *Id.*, at 834.

21. See David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL’Y 1, 3 (2004) (discussing the history of legislative efforts to recognize and protect cultural property); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 572-73 (1995) (tracing the earliest protection of cultural property in the U.S. to the 18th century).

during the American Civil War by Francis Lieber” and later promulgated by President Abraham Lincoln.²² This code was binding only on the forces of the United States but “corresponded to a great extent to the laws and customs of war existing at that time.”²³ Generally, the Lieber Code mainly attempts to codify the laws of war, but touches on the treatment of cultural property during war.²⁴ As Professor Merryman points out, “the Lieber Code and its progeny all dealt comprehensively with the obligations of belligerents.”²⁵ The focus of similar instruments then shifted from protecting cultural property in times of war to the protection of cultural property in general.²⁶

As alluded to previously, there are three major international agreements dealing with the protection of cultural property: (1) the Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954²⁷ (the “Hague Convention”) under the auspices of United Nations Educational, Scientific, and Cultural Organization (“UNESCO”); (2) the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970²⁸ (the “UNESCO Convention”); and (3) the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects²⁹ (“UNIDROIT Convention”). This paper will give context to Turkey’s repatriation claims through a brief explanation of the three multilateral agreements. It will then conclude that Turkey’s best claim to repatriating its cultural property is through the UNESCO Convention. As will be discussed subsequently, outside of the UNESCO Convention Turkey will have to seek other legitimate avenues, much in the way same way Italy has, in successfully negotiating the return of its cultural property.

A. *The Hague Convention*

The Hague Convention, drafted in 1954, is an international treaty that requires signatory countries to protect cultural property in times of war.³⁰

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22. *Instructions for the Government of Armies of the United States in the Field*, THE INTERNATIONAL COMMITTEE OF THE RED CROSS (Apr. 24, 1863), available at <http://www.icrc.org/ihl/INTRO/110>.
 23. *Id.*
 24. *Id.* at art. 34.
 25. Merryman, *supra* note 5, at 834.
 26. *See id.* at 835-36 (discussing progression during 19th Century from protection of cultural property during war time to protection of cultural property in general).
 27. 1954 Hague Convention, *supra* note 10.
 28. UNESCO Convention, *supra* note 11 (“Considering that it is incumbent on every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export”).
 29. *See* UNIDROIT Convention, *supra* note 12 (The Parties to the Convention “[a]ssembled in Rome at the invitation of the Government of the Italian Republic from 7 to 24 June 1995 for a Diplomatic Conference for the adoption of the draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects.”).
 30. *See* 1954 Hague Convention, *supra* note 10, at art. 3; Forbes, *supra* note 9, at 244 (“As the first international convention to deal solely with the protection of cultural property, the Hague Convention limits that protection to times of war.”).

Over 100 countries have signed on to the treaty and many countries have taken steps to support its status as customary law.³¹ Despite signing the treaty in 1954, the United States refused to ratify it until 2009, in part because it would limit the capacity to use nuclear weapons.³² Significantly, the preamble to the Hague Convention defines cultural property as belonging to the global community, which has an interest in preserving and enjoying all cultural property, regardless of location.³³ The preamble is premised on the idea of cultural internationalism³⁴ and the implications of this language are of great importance and will be discussed later on.

Despite the strong language in the preamble, only Article 28 makes any mention of sanctions that hold individuals or countries liable for violating the Hague Convention.³⁵ Additionally, an important notion stemming from this article is that individuals acting on orders from the government can also be held responsible for committing crimes against cultural property.³⁶ This dramatically shifted the way cultural property was protected. Prior to this, only governments could be held responsible for committing these crimes; those governments were then responsible for holding their citizens accountable.³⁷

Unfortunately, the Hague Convention never gained much traction in the international community. This may be due to the lack of an effective enforcement provision.³⁸ Lacking such a provision allowed countries to sign the Hague Convention without “fear of the burdens that might arise in the event of actual enforcement.”³⁹ Also, the Convention only emphasized

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31. See David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT’L L.J. 349, 353 (1993) (discussing the development of cultural property law through conventions prior to the 1954 Hague Convention).
 32. *Id.* at 353.
 33. 1954 Hague Convention, *supra* note 10, at introduction (“Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind . . .”). See also Merryman, *supra* note 5, at 836 (noting that the 1954 Hague Convention recognized the preservation of the cultural heritage as of great importance for all peoples of the world and that it is important that this heritage receive international protection).
 34. HOWARD M. HENSEL, *THE LAW OF ARMED CONFLICT* 60 (2007).
 35. See 1954 Hague Convention, *supra* note 10, at art. 28 (requesting each party to “take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.”).
 36. Merryman, *supra* note 5, at 836 (stating “[t]he innovation here . . . was that other nations imposed responsibility on an individual official of the offending belligerent power for acts against cultural property committed in its name.”).
 37. *Id.* (outlining the previous agreements’ stipulations of individual liability).
 38. Zoë Howe, *Can the 1954 Hague Convention Apply to Non-Sate Actors?: A Study of Iraq and Libya*, 47 TEX. INT’L L.J. 403, 413 (2012).
 39. Meyer, *supra* note 31, at 357 (stating “[b]ecause the Convention does not have effective sanction enforcement provisions, states are able to announce their accession to Convention principles without much fear of the burdens that might arise in the event of actual enforcement”).

protection of cultural property during times of war, which limited its applicability.⁴⁰ Nonetheless, the Hague Convention helped solidify the protection of cultural property during times of war.

B. *The UNESCO Convention*

The UNESCO Convention was the next significant step in the protection of cultural property, markedly changing the mechanism by which protect cultural property is protected.⁴¹ Unlike the Hague Convention, the UNESCO Convention “focuses on private conduct during peacetime and thus complements the Hague Convention by protecting cultural property beyond periods of war.”⁴² The main intention of the UNESCO Convention is to inhibit, or at the very least reduce, the “illicit” trade of cultural objects in the international market.⁴³ As Professor Merryman points out, “[t]he parties agree to oppose the ‘impoverishment of the cultural heritage’ of a nation through ‘illicit import, export and transfer of ownership’ of cultural property (Article 2), agree that trade in cultural objects exported contrary to the law of the nation of origin is “illicit” (Article 3), and agree to prevent the importation of such objects and facilitate their return to source nations (Articles 7, 9 and 13).”⁴⁴ Professor Patty Gerstenblith—a law school Professor and Director of the Center for Art, Museum, and Cultural Heritage Law at DePaul University College of Law—points out that there are two key provisions, at least from the perspective of market nations: Article 7(b) and Article 9.⁴⁵ Both of these provisions deal with imposing import restrictions on cultural property. Article 7 deals more specifically with what is considered stolen cultural property; Article 9 deals with the ability of source nations to call on market nations to deal with particular problems facing these source nations in preventing the removal of cultural property from their territory.⁴⁶

Notably, signatory countries have interpreted the UNESCO Convention as justifying the retention of cultural property within their respective

40. Forbes, *supra* note 9, at 244 (stating that the Hague Convention’s protection is limited to times of war).

41. See Merryman, *supra* note 5, at 844-45 (discussing how the UNESCO Convention’s incorporation of the term “illicit” and its effect on cultural property protection was novel, taking “10 years to enact.”).

42. Forbes, *supra* note 9, at 244.

43. See Merryman, *supra* note 5, at 843 (stating “[t]he basic purpose of UNESCO 1970, as its title indicates, is to inhibit the “illicit” international trade in cultural objects.”); UNESCO Convention, *supra* note 11, at art. 2 (recognizing that “illicit” import is the main cause of “impoverishment of cultural heritage”).

44. Merryman, *supra* note 5, at 843 (quoting and summarizing the UNESCO Convention).

45. Gerstenblith, *supra* note 21, at 619.

46. Merryman, *supra* note 5, at 832 (stating “[i]n source nations, the supply of desirable cultural property exceeds the internal demand . . . In market nations, the demand exceeds the supply . . .”); UNESCO Convention, *supra* note 11, at art. 9 (listing the duties of source and market nations when cultural property is in danger).

territories.⁴⁷ Professor Merryman argues that this “intention is made clear in Article 2 of the Convention, which states: ‘[t]he States Parties to this Convention recognize that . . . the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property. . . .’”⁴⁸ This view is premised on the cultural nationalist perspective.⁴⁹ Consequently, countries view the UNESCO Convention as legitimizing export control laws and the ability of many countries, particularly countries of origin to seek repatriation.⁵⁰ Thus, the main function of the UNESCO Convention is to curb the circulation of cultural property through the provisions of the UNESCO Convention and the laws of signatory countries.

C. *The UNIDROIT Convention*

The UNIDROIT Convention is the most recent international agreement targeting cultural property protection. While it has not been ratified by neither Turkey or the United States, the UNODROIT Convention has been adopted by 33 other countries.⁵¹ It seeks to accomplish two objectives: (1) to deal with technical problems resulting from different national laws; and (2) to further strengthen the fight against the illicit trafficking of cultural property.⁵²

The UNIDROIT Convention differs from the UNESCO Convention in some important respects. For one, while the UNESCO Convention’s protection is limited to cultural property stolen “from a museum or a religious or secular public monument or similar institution in another State Party to this Convention, and as documented under ownership of that institution,”⁵³ the UNIDROIT Convention expands this protection to private individuals.⁵⁴ Therefore, any private cultural property stolen from a private

47. Merryman, *supra* note 5, at 844 (stating “[a]n alternative reading . . . is that these words justify national retention of cultural property.”).

48. *Id.*

49. HENSEL, *supra* note 34, at 60.

50. Merryman, *supra* note 5, at 845 (defining “repatriation . . . [as] the return of cultural objects to nations of origin”).

51. UNIDROIT Convention List of Parties, *available at* <http://www.unidroit.org/english/implement/i-95.pdf> (last visited Nov. 1, 2013) ((listing the Convention’s ratifying parties).

52. Forbes, *supra* note 9, at 246; MARINA SCHNEIDER, UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS: EXPLANATORY REPORT 478 (2001).

53. Forbes *supra* note 9, at 246 (discussing the draw backs of the UNESCO Convention). *See also* UNESCO Convention, *supra* note 11, at art. 7(b)(i) (stating “[parties to this Convention undertake] at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported . . . provided . . . that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.”).

54. Forbes, *supra* note 9, at 246-47 (stating “[t]he UNIDROIT Convention does not require such a designation by the state”).

home and not documented with the state or an institution is covered under the Convention.⁵⁵

Another difference is that the UNIDROIT Convention seeks to fix the discrepancy created by Article 7(b)(ii) of the UNESCO Convention between common law and civil law countries.⁵⁶ Common law countries, like the United States, value the interests of the original owner over the subsequent bona fide purchaser, requiring the return of cultural property without reimbursement.⁵⁷ In contrast, civil law countries—predominantly European nations—allow subsequent bona fide purchasers to acquire title over the original owners, “forever depriving the original owner of title.”⁵⁸ The UNIDROIT Convention reconciled these divergent views by solidifying the protection of the aggrieved, original owner over the bona fide purchaser,⁵⁹ which deviates significantly from civil law. To conciliate civil law countries, Article 4 of this convention provides “payment of fair and reasonable compensation” to good faith purchasers who can prove that they were unaware the object was stolen and “exercised due diligence” by attempting to determine the object’s origin when purchasing it.⁶⁰

Finally, another significant aspect of the UNIDROIT Convention is the distinction it makes between cultural property that is stolen and cultural property that is illegally exported.⁶¹ Article 3 unambiguously states that the possessor of a cultural object which has been stolen *shall* return it.⁶² [Emphasis added]. On the other hand, Article 5 states that a “[c]ontracting State *may* request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of a requesting State.”⁶³ [Emphasis added]. This distinction is significant because “it reflects an awareness and acknowledgment by the UNIDROIT Convention . . . of international

55. *Id.* at 247 (stating “[t]herefore, cultural objects stolen from private homes or any kind of private collections that are neither registered with, nor designated by, the state, and do not originate from traditional communities, can be claimed by the original owners.”); UNIDROIT Convention, *supra* note 12, at art. 2 (describing what is considered to be a “cultural object.”).

56. *Id.* (discussing the crucial role of UNIDROIT to reconcile common law and civil law ownership).

57. *Id.*

58. *Id.* (stating “[h]owever, the civil law, which is followed by European nations, favors the rights of a subsequent bona fide purchaser who is awarded with title, forever depriving the original owner of title.”).

59. *Id.* at 247-48 (stating “the UNIDROIT Convention establishes a preference for providing protection to the dispossessed owner as opposed to the current possessor”).

60. UNIDROIT Convention, *supra* note 12, at art. 4 (stating “[t]he possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.”).

61. *Id.* at art. 3, 5; Forbes, *supra* note 9, at 250-51.

62. UNIDROIT Convention, *supra* note 12, at art. 3.

63. *Id.* at art. 5.

solidarity and the cultural internationalist view . . . possibly showing the beginnings of an evolution in legal thinking away from the cultural nationalist view.”⁶⁴

II. PROTECTION OF CULTURAL PROPERTY IN THE UNITED STATES

The United States is a market nation—a high consumer of cultural property—and has recognized the importance of cultural property by pledging, alongside other countries, to take steps to adequately protect cultural property.⁶⁵ At the international level, this commitment to the protecting of cultural property is best evidenced by the United States’s adoption and ratification of the UNESCO Convention.⁶⁶ Domestically, the United States “has taken a number of measures to support the retentive policies of source nations.”⁶⁷ Notably, the country has developed a substantive body of law applicable to the return of cultural, including common law principles,⁶⁸ the National Stolen Property Act (“NSPA”),⁶⁹ and the Cultural Property Implementation Act (“CPIA”).⁷⁰

A. *Cultural Property Implementation Act*

In 1972, while considering whether to ratify the UNESCO Convention, the United States decided to give its consent, but only if the Convention was executory in nature.⁷¹ This meant that in order for the Convention to take domestic legal effect, Congress would have to enact implementing legislation.⁷² Subsequently, the CPIA passed giving the UNESCO Convention legal effect in the United States.⁷³ Essentially, the CPIA provides a mechanism for the United States government to establish import

64. Forbes, *supra* note 9, at 251.

65. Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1838 (2009) (“The United States recognizes the importance of cultural property and has pledged to protect it by cooperating with other states.”).

66. *Id.* at 1843.

67. JOHN HENRY MERRYMAN, THE RETENTION OF CULTURAL PROPERTY, IN THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 122, 125 (2000).

68. U.S. law operates under the common law system, where a good faith purchaser cannot acquire good title from a thief. *See* U.C.C. § 2-403(1) (2012) (“A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased.”). Thus, in cases where an antiquity is stolen, or considered stolen because of its illegal export, the foreign source nation may successfully reclaim it upon a showing of ownership.

69. *See* 18 U.S.C. § 2314 (2012).

70. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (2012).

71. Gerstenblith, *supra* note 21, at 623.

72. *Id.* (“Although the Senate unanimously gave its advice and consent to ratification in 1972, the Convention is not self-executing and it has not been ratified for lack of the domestic legal means necessary to carry out its obligations.”).

73. *Id.*

restrictions on cultural property at the request of another party to the UNESCO Convention once other requirements are fulfilled.⁷⁴

Interestingly, the CPIA implemented only two sections of the UNESCO Convention.⁷⁵ Thus, there are two main provisions of the CPIA: the first provision addresses cultural property stolen from public institutions pursuant to Article 7(b) of the UNESCO Convention;⁷⁶ and the second targets the “types of archeological and ethnological materials to which the Article 9 provisions [of the UNESCO Convention] may apply.”⁷⁷ Ultimately, the CPIA’s specific provision implementing Article 7 of the UNESCO Convention prohibits the importation of any article of cultural property that has been stolen from the inventory of a museum or religious or secular public monument or similar institution from any other party to the UNESCO Convention.⁷⁸ Lastly, the implementing provisions governing the applicability of Article 9 of the UNESCO Convention allows, *inter alia*, the United States to enter into bilateral agreements with other countries to impose import restrictions on cultural items coming into the United States.⁷⁹

B. *National Stolen Property Act*

The NSPA, which was enacted in 1948, states that “[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods ... of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud ... [s]hall be fined under this title or imprisoned not more than ten years, or both.”⁸⁰ Congress passed the NSPA as an extension of the National Stolen Motor Vehicle Act of 1919; initially, the NSPA was passed with the intention that it apply only to individuals who steal property in one state and bring it to another state.⁸¹ There is no specific indication that Congress contemplated that the NSPA’s scope extend to

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74. 19 U.S.C. § 2602(a)(1)(A)-(D) (2012). *See also* United States v. Schultz, 333 F.3d 393, 408(2d Cir. 2003) (discussing the applicability of the CPIA.).
75. Gerstenblith, *supra* note 21, at 623 (discussing how the CPIA only explicitly implemented Article 7(b) and Article 9 of the UNESCO convention).
76. *Id.* at 625. *See also* 19 U.S.C. § 2607 (2012) (“No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.”).
77. Gerstenblith, *supra* note 21, at 629 (listing the language of the pertinent CPIA sections governing the applicability of Article 9). *See also* 19 U.S.C. § 2601(2) (2012) (defining ‘ethnological or archaeological material’”).
78. 19 U.S.C. § 2607 (2012).
79. 19 U.S.C. § 2602 (2012).
80. 18 U.S.C. § 2314 (2012); 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, 942 (2002).
81. Vitale, *supra* note 65, at 115 (“Congress passed NSPA in 1934 as an extension of the National Stolen Motor Vehicle Act of 1919, 98 and intended it to reach individuals who stole property in one state in the United States and brought it into another.”).

archaeological material or antiquities from a foreign state. However, in *United States v. McClain*,⁸² the Fifth Circuit adopted a broad definition of property and what constituted theft under the NSPA by using foreign state ownership laws to determine whether the cultural property at issue had been stolen.⁸³ Today, NSPA applies to cultural property that is taken from a foreign state whose government “asserts actual ownership of the property pursuant to a valid patrimony law.”⁸⁴

In considering actions under the NSPA, United States courts consider whether a source country’s national patrimony law “sufficiently vests ownership in the artifact, such that it could be considered ‘stolen,’ and therefore form the basis of a cognizable claim within the courts’ jurisdiction.”⁸⁵ The NSPA also has a scienter requirement limiting liability to defendants who sell or receive property that they know has been illegally excavated in violation of a foreign country’s export laws.⁸⁶ Consequently, proving that the defendant had knowledge of the source country’s national patrimony law is a requirement for successful prosecution under the NSPA. Notably, “because of often ambiguous circumstances surrounding the excavation and provenance of a cultural object, this evidentiary burden of the NSPA often functions as a barrier to source countries seeking the return of their property.”⁸⁷

III. TURKEY’S REPATRIATION OF CULTURAL PROPERTY

As noted above, Turkey is a country of rich cultural heritage.⁸⁸ Over the years, Turkey has developed a reputation as a country that embodies a nationalist perspective when it comes to cultural property.⁸⁹ Consequently, over the last couple of decades, and with increasing aggressiveness, Turkey has sought the return of what it has identified as its “cultural property” by

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82. *United States v. McClain*, 545 F.2d 988, 1000-01 (5th Cir. 1977) (stating that “a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered “stolen,” within the meaning of the National Stolen Property Act.”).
 83. *Id.* at 994-97 (analyzing Mexican law to conclude that states must declare ownership of an article before it can be considered stolen).
 84. *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003).
 85. Jessica E. Morrow, *The National Stolen Property Act and the Return of Stolen Cultural Property to its Rightful Foreign Owners*, 30 B.C. INT’L & COMP. L. REV. 249, 255 (2007).
 86. John A. Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 U.C. DAVIS ENVIRONS ENVTL. L. & POL’Y J. 1, 65 (2004) (noting that the NSPA requires “knowing” selling or receiving of illegally excavated articles in order to face prosecution).
 87. Morrow, *supra* note 85, at 255.
 88. Bilefsky, *supra* note 4, at A1 (discussing the region’s rich cultural history).
 89. See Jason Farago, *Turkey’s Restitution Dispute with the Met Challenges the ‘Universal Museum,’* GUARDIAN NEWS (Oct. 7, 2012), <http://www.theguardian.com/commentisfree/2012/oct/07/turkey-restitution-dispute-met> (discussing how nationalism is driving Turkey’s aggressive campaign to get all of its cultural property returned).

arguing that these cultural artifacts belong to them because cultural objects are best understood in their country of origin and thus should be returned.⁹⁰ Operating within this paradigm, and admittedly in circumstances where Turkey's claims are, at times, legitimate, Turkey has successfully negotiated the repatriation of cultural property; examples of this include the return of the Lydian Hoard,⁹¹ the Weary Hercules,⁹² and a 3,000 year-old Sphinx.⁹³

In a clear-cut case for Turkey, the Metropolitan Museum of Art (the "Met"), in 1993, returned the Lydian Hoard collection, which was allegedly excavated from tombs near Sardis, near Hermus river valley in Turkey, after the Turkish government brought suit against the Met, alleging that the pieces were illegally excavated and wound up in the United States in violation of Turkey's export laws.⁹⁴ Turkey achieved the return of the Lydian Hoard collection after presenting the Met with convincing evidence that the collection had been stolen from Turkey.⁹⁵ This case is much easier to justify on Turkey's behalf due to the undisputed documentation provided by Turkey.

Another case where Turkey claimed legitimate ownership over a cultural property was the case of the top half of the Weary Hercules, which was returned to Turkey in 2011 after two decades of intense negotiation.⁹⁶ Turkey alleged that the top half of the statue was removed from an archaeological dig and was smuggled out of the country forty years previously.⁹⁷ One piece of pivotal proof the Turkish government offered was proving that the bottom half of the piece, which they possessed since the entire statue had been unearthed in southern Turkey in 1980, before the top half was stolen by looters, matched the top half held at the Boston Museum of Fine Arts.⁹⁸

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90. *See id.* (noting the recent trend of states to demand repatriation based on nationalistic beliefs of ownership).
91. *See* Carol Vogel, *Metropolitan Museum to Return Turkish Art*, N.Y. TIMES, <http://www.nytimes.com/1993/09/23/arts/metropolitan-museum-to-return-turkish-art.html> (last visited Nov. 1, 2013) ("The collection, known as the Lydian Hoard, consists of pitchers, bowls, ladles and incense-burners as well as jewelry of gold, silver, carnelian and glass from the reign of King Croesus of Lydia, a kingdom in western Asia Minor that flourished in the seventh and sixth centuries B.C.").
92. Selcan Hacaoglu, *Boston Museum Returns Top Half of Hercules Statue to Turkey*, THE DAILY STAR LEBANON, Sept. 27, 2011, at 16 (The Weary Hercules is a 1,900 year old statue of a tired Hercules leaning on his club. The statue was split into halves and the top half was stolen from Perge, Turkey).
93. Bilefsky, *supra* note 4, at A1 (discussing Turkey's effort in getting the return of a 3,000 year old sphinx from Germany).
94. Vogel, *supra* note 91 (explaining the provenance of the artifacts and how Turkey determined the illegality of their transfer).
95. *Id.* (noting evidence obtained from thieves, authorities, and museum officials that the artifacts were illegally obtained).
96. Hacaoglu, *supra* note 92, at 16 (noting that the piece had finally been delivered).
97. Owen Matthews, *Reclaiming Hercules*, NEWSWEEK INT'L (April 18, 2012) <http://www.highbeam.com/doc/1G1-285874088.html> (noting that the Boston Museum of Fine Arts voluntarily returned the artifact).
98. *Greek God Hercules Reunited With His Bottom Half as Museum Agrees to Send Back 'Looted' Bust to Turkey*, THE DAILY MAIL (July 22, 2011, 11:09 AM), <http://www.dailymail.co.uk/news/article-2017629/Weary-Herakles-reunited-half->

Again, this case presents another example of a legitimate repatriation claim Turkey made that included undisputed evidence.

A more problematic case is that of the 3,000 year-old Sphinx that was returned to Turkey in 2011.⁹⁹ The 3,000 year-old Sphinx was from Hattusa, the capital of the Hittite Empire in what today is modern-day Turkey.¹⁰⁰ The Sphinx had been on display in a German museum since 1934, and prior to Germany agreeing to give the 3,000 year-old Sphinx to Turkey, legal ownership of the Sphinx had been in dispute for decades because neither country could produce documents that established legitimate ownership.¹⁰¹ It was only after Turkey threatened to prohibit German archaeologists from excavating in Turkey that the German museum capitulated and agreed to deliver the Sphinx to Turkey.¹⁰² Admittedly, while this case is a little less problematic than other cases considering that the cultural property can be traced back to a region within Turkey's border, the main problem remains to be that Turkey failed to prove when this cultural property left Turkey.

The more recent case of the 3,000-year-old Sphinx highlights the recent trend of Turkey ramping up its efforts in seeking the return of cultural property that it believes belongs to the country and part of the region's rich cultural history.¹⁰³ Turkey's latest fiasco with the Met,¹⁰⁴ in which Turkey asked the Met to return cultural artifacts that are part of the Norbert Schimmel collection ("Schimmel collection")¹⁰⁵ donated to the Met by Norbert Schimmel, illustrate this point.¹⁰⁶ In the summer of 2012, Turkey filed a criminal complaint in a Turkish criminal court to further investigate the suspected pieces in the Schimmel collection.¹⁰⁷

In 2012, flexing its political muscle, and much like the case of the 3,000-year-old Sphinx, Turkey gave museums, like the Met, an ultimatum: either return the cultural property being requested, or else be banned from

looted-bust-returns-Turkey.html (discussing that the halves were matched when plaster casts of each half of the statue were matched together).

99. See Eric Kelsey, *Germany's Pergamon Museum Returns Ancient Sphinx of Hattusa to its Home in Turkey*, ARTDAILY.ORG (August 1, 2011), http://artdaily.com/index.asp?int_sec=2&int_new=49494#UwIxnnddXuc (last visited Feb. 17, 2014).

100. *Id.*

101. *Id.*

102. *Id.* See also, Bilefsky, *supra* note 4, at A1.

103. Bilefsky, *supra* note 4, at A1.

104. *Id.* (discussing Turkey's accusations of the Met's improper retention of the artifacts and conditioning upon their return future loans of artworks).

105. *Exclusive: Turkey Seeks the Return of 18 Objects from the Metropolitan Museum of Art*, CHASING APHRODITE (Mar. 20, 2012), <http://chasingaphrodite.com/2012/03/20/exclusive-turkey-seeks-the-return-of-18-objects-from-the-metropolitan-museum-of-art/>.

106. See Grace Glueck, *Norbert Schimmel, Collector, Dies; Specialist in Antiquities was 85*, N.Y. TIMES, Feb. 22, 1990, at B11 (discussing some of the major pieces in the Schimmel collection).

107. Bilefsky, *supra* note 4, at A1.

exporting important cultural artworks from Turkey for future exhibitions.¹⁰⁸ This, of course, would have the effect of prohibiting museums from researching, discovering, or displaying important cultural property from Turkey. Indeed, Turkey has remained faithful to this rhetoric by cancelling export licenses for artifacts heading to major museums.¹⁰⁹ These actions put widely adopted museum practices, based largely on the UNESCO Convention, of freely retaining, displaying, and exchanging cultural property, where any available evidence fails to demonstrate the property left the country of origin post-1970, at risk.¹¹⁰ Crafting a workaround, Turkey defends its actions by citing a 1906 Ottoman Empire law claiming that anything removed after 1906 should be returned to Turkey.¹¹¹

The aggressive pursuit of cultural property by source countries is certainly not unprecedented; other countries—Italy, Egypt and Greece—have also engaged in aggressive repatriation of their respective cultural property.¹¹² However, Turkey’s approach remains markedly different from that of other source countries. In addition to making demands for its cultural property without providing any evidence that the cultural property it is seeking was stolen, Turkey is refusing to lend its cultural property to museums while publicly shaming museums that refuse to yield to its demands.¹¹³ While Turkey has every right to request the return of its cultural property within the scope of the aforementioned international conventions, its consistent unsubstantiated demands—taking, for example, the Schimmel collection, where Turkey has failed to provide any evidence that these

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108. *See Id.* (predicating loans of artwork on returning the questioned artifacts or proving that the artifacts were indeed legally obtained).
109. *See* Farago, *supra* note 89 (“This year’s Met mega-exhibition of Byzantine art had to make do without Turkish loans (though the Met’s curators coyly say they never wanted any). So did the British Museum’s spring show about the Hajj: while Turkish museums agreed to lend 35 objects to the BM, the culture ministry shut the lending down. Ankara is also playing hardball with the Louvre, the V&A, the Pergamon and pretty much every other encyclopedic museum in the west.”).
110. Bilefsky, *supra* note 4, at A1 (noting that under the UNESCO Convention, transfers of cultural property prohibited by the convention would begin three months after the signing of the convention’s signing).
111. *Id.* (describing Ottoman law, which prohibits all exportation of cultural artifacts).
112. *See, e.g.,* United States v. Schultz, 333 F.3d 395, 398 (2d Cir. 2003) (seeking return of its cultural property, Egypt declared ownership of all archaeological artifacts found in Egypt after 1983 pursuant to its Antiquities’ Protection Law (Article 6)); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990) (ruling that the Church of Cyprus should recover mosaics taken from one of its churches); Lauren F. Silver, *Recapturing Art: A Comprehensive Assessment of the Italian Model for Cultural Property Protection*, 23 N.Y. INT’L L. REV. 1 (2010) (describing the methods Italy has used to repatriate its cultural property).
113. *See* Tom Mashberg, *No Quick Answers in Fights Over Art*, N.Y. TIMES, July 2, 2013, at C1, available at <http://www.nytimes.com/2013/07/02/arts/design/museums-property-claims-are-not-simply-about-evidence.html?pagewanted=1&r=0> (discussing how Turkey questioned the Getty’s ownership “of several dozen items without providing any evidence.”).

cultural properties were taken out of the country after 1970—threaten to subvert the current art repatriation regime created by these conventions.

IV. THE IRONIES IN TURKEY’S CLAIMS

A. *There is Loot in Turkey’s Museums*

Interestingly, Turkey itself has been openly criticized for its own alleged looting of property that is not necessarily of Turkish origin.¹¹⁴ It is important to note that there is an aura of hypocrisy to Turkey’s claims, as it is suspected that many significant works in Turkish museums were taken from, and arguably belong in, foreign countries. In particular, a “good [fraction] of [these works] . . . come from Lebanon, Greece, the former Yugoslavia and other regions once controlled by the Ottoman Empire.”¹¹⁵

Probably the most famous cultural artwork in a Turkish museum that is burdened by ownership contention is Alexander’s sarcophagus, which arguably should be returned to Lebanon.¹¹⁶ The sarcophagus was discovered in 1887 by a team led by Osman Hamdi Bey in the city of Sidon, Lebanon¹¹⁷ and is currently displayed in Istanbul’s Archeological Museum.¹¹⁸ Turkey claims that the sarcophagus, along with many other ancient artifacts looted by the Ottoman Empire, belongs to Turkey and should stay in Turkish museums.¹¹⁹ According to Murat Suslu, Turkey’s director-general for cultural heritage and museums, “the sarcophagus [is] legally Turkey’s because it had been excavated on territory that belonged to Turkey at the time.”¹²⁰ These kinds of difficulties—whether cultural property belongs to the country where it was uncovered or whether it belongs to the country where citizens identify the most culturally as part of their heritage—raise another issue in Turkey’s blanket claims to cultural property and is exactly the problem that is presented when trying to decide who is the proper owner of an antiquity.

114. Edmond Y. Azadian, *Looters or Landlords?*, ARMENIAN MIRROR-SPECTATOR (Oct. 3, 2012), <http://www.mirrorspectator.com/2012/10/03/looters-or-landlords/> (referring to items such as a sarcophagus associated with Alexander the Great, which was taken from Lebanon when Turkey controlled that land).

115. See Farago, *supra* note 89 (juxtaposing the foreign provenance of the Met’s collection with that of Turkey’s museums).

116. See generally Judith H. Dobrzynski, *Who’s in the Alexander Sarcophagus?*, WALL ST. J., Jun. 27, 2009, at W14 (discussing the discovery of what may be Alexander the Great’s sarcophagus).

117. *Id.* (providing examples of his work as director of Istanbul’s Archeological Museum).

118. *Id.* (stating that the sarcophagus occupies a position of honor in the museum’s collection).

119. *Id.*

120. Bilefsky, *supra* note 4, at A1 (noting that Turkish authorities claim that, as Sidon was part of Turkey’s territory, objects found there legally belong to Turkey).

B. Is Turkey Still Looting?

Aside from the items in contention already in Turkish museums, Turkey faces even stronger accusations that it continues to loot items from other countries, even today. For instance, the U.S. government has accused Turkish nationals in the Turkish-occupied part of Northern Cyprus of illegally excavating and auctioning off a substantial amount of the Cyprus cultural heritage.¹²¹ To rebut these claims, Turkish officials have said that these excavations are legal because the northern part of Cyprus, which is recognized by Turkey as the Turkish Republic of Northern Cyprus (“TRNC”), is an independent state acting pursuant to its sovereignty.¹²² However, no country except for Turkey recognizes the TRNC.¹²³ Indeed, “archaeological excavations in the occupied northern part of Cyprus are prohibited unless they are critical to the preservation of cultural property; in such a case, excavations must be carried out with the cooperation of the national competent authorities of the occupied territory.”¹²⁴ Since the TRNC has not requested the cooperation and involvement of the government of Cyprus, the excavations of cultural property in Northern Cyprus and subsequent auctioning off or shipment to Turkey by the Turkish officials are likely contrary to international law.¹²⁵

V. ANALYSIS

A. *The Problems with Turkey’s Demands*

In brief, Turkey claims a right in all cultural property that it believes was excavated from Turkish soil irrespective of when it left the country. Notably, Turkey has ratified the UNESCO convention, which sets up a framework allowing Turkey to seek repatriation of any cultural property that left the country after 1970.¹²⁶ Turkey, however, has chosen to ignore this requirement and continue with its cultural nationalist rhetoric by citing to the

121. See Theresa Papademetriou, *Cyprus: Destruction of Cultural Property in the Northern Part of Cyprus and Violations of International Law*, LAW LIBRARY OF CONGRESS, 10 (April 2009), available at http://www.loc.gov/law/help/cyprus_final_rpt.pdf (providing a framework for viewing the issue in terms of violation of international law).

122. *Id.* at 3 (claiming that the authorized powers are managing disputed sites and objects with the aims of preservation and protection).

123. *Id.* at 1 (emphasizing that Turkey is the only exception to a worldwide lack of diplomatic recognition for the TRNC).

124. *Id.* (laying out the default rule against with the conduct of TRNC and Turkey will be judged).

125. *Id.* at 32 (partly basing the illegality of such actions on the TRNC’s lack of international recognition and Turkey’s failure to ratify the 1999 Protocol to the 1954 Hague Convention which provides the exception upon which Turkey claims to rely).

126. UNESCO Convention List of Parties, available at <http://www.unesco.org/culture/ich/?pg=00024> (last visited Nov. 1, 2013) (listing the countries that have currently ratified or signed the Convention).

1906 Ottoman Empire law.¹²⁷ The continued use of this law is problematic because it does not distinguish between cultural property taken out of the country prior to 1970 and those taken out subsequent to the UNESCO convention ratification. As such, Turkey's continued enforcement of this law despite the UNESCO causes practical problems as it puts museums in an awkward legal position.

An illustration of Turkey's current faulty strategy on art repatriation will be explored by examining Turkey's request for repatriation of objects from the Schimmel collection at the Met and determining whether, under current law, it should be honored. In particular, the items in the Schimmel collection were likely removed from Turkey prior to 1970; however, these items were first recorded in the United States in 1974.¹²⁸ This is an example of a situation where Turkey has claimed that property was wrongfully acquired and must be returned. Although, since many of the items likely left before 1970, the UNESCO criteria are fulfilled (unless there is another reason to regard it as stolen) and the museum had every right to acquire and keep it.¹²⁹ Additionally, even when museums satisfy UNESCO requirements, Turkey still attempts to coerce them into returning pieces it deems illegally exported under the 1906 law. Turkey's strategy in these cases is to place pressure on museums such as the Met and other similarly situated museums by "refusing to lend objects for exhibitions unless antiquities with a[n] [sic] unknown provenance are returned to the country, delaying all licenses for archeological excavations, and publicly denouncing museums as enablers of illicit looting."¹³⁰ Turkey's demands extend to major museums all over the world, including the British Museum,¹³¹ the Cleveland Museum of Art,¹³² the J. Paul Getty Museum,¹³³ and others.¹³⁴

Turkey's request for repatriation of the Schimmel collection is premised on cultural nationalism as demonstrated through the rhetoric they engage in when making the demands from these museums and through Turkey's demands for all cultural property that may have left Turkey, regardless of when that property left the area.¹³⁵ As such, Turkey's reclamation efforts focus on the return of works. It may be said that such restoration enables Turkish citizens to reconnect with their ancestral past. The argument asserts

127. *See supra* text accompanying notes 7-8.

128. Lee Rosenbaum, *Turkey's Repatriation Claims: Met's Schimmel Benefactions Targeted*, CULTUREGRRL (Mar. 20, 2012), http://www.artsjournal.com/culturegrrl/2012/03/turkeys_repatriation_claims_me.html (stating that "most of the objects being sought by Turkey have no documented ownership history other than being in the Schimmel Collection by the mid 1960s or 1970s.").

129. *Id.*

130. Mary Elizabeth Williams, *Turkey Battles Museums for Return of Antiquities following Arab Spring*, CENTER FOR ART LAW (Dec. 10, 2012), <http://www.itsartlaw.com/2012/12/turkey-battles-museums-for-return-of.html>.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See* Farago, *supra* note 89 (discussing how the issues of nationalism and power are driving Turkey's aggressive campaign to get all of its cultural property returned).

that the cultural property is part of Turkish culture and is best understood in its original context. Extending this logic a little further means that any cultural property found on Turkish soil, irrespective of its true origin—whether it come from Assyrian, Armenian, Greek or other nationalities—is best understood on Turkish land.

However, when a particular piece is removed from Turkish soil, it is difficult for Turkey to allege a strong emotional attachment to a work it never knew existed. Furthermore, such arguments will not withstand close scrutiny in light of the fact that the Ottoman Empire included so many different peoples and cultures, and therefore many of the artifacts in question may be identified with other cultures that are not particularly connected with modern-day Turkey. Thus, any moral claim that Turkey might use concerning the Met's Schimmel collection or any similar collection or artifact is tenuous at best, and unlikely to be sufficiently persuasive as to obligate museums and art galleries to return such pieces to Turkey.

What is even more troubling about Turkey's recent demands against the Met is that they are not accompanied with any evidence that these items did in fact come from Turkey.¹³⁶ Making blanket moral statements that the cultural property, like the Schimmel collection, should be returned to Turkey because its of Turkish origin is unlikely to provide incentives to museums to cooperate and will not meet the legal requirements for a case in federal court.¹³⁷ This could in turn hinder other repatriation efforts by making museums less willing to cooperate with source countries generally should Turkey's current strategy become a trend amongst other nations. Since Turkey's claims of ownership of the Schimmel collection are based on nationalism, unpersuasive emotional attachment, and no evidence, the Met is under no obligation to return the collection without any reason (i.e. evidence) demonstrating the collection was stolen; it has fulfilled its obligations under the UNESCO and UNDROIT conventions.

B. A "More Nuanced" Approach: A Focus on Mutually Beneficial Bilateral Agreements

As demonstrated through the example of the Schimmel collection, a more nuanced approach is needed for Turkey's future repatriation efforts to be successful. This is supported by the trend in legal scholarship that argues for nuanced policies for the positions in antiquities debates.¹³⁸ To find a new approach, Turkey should look to models of current successful art repatriation strategies, such as the one utilized by Italy in the formation of a new Turkish repatriation policy.

136. See Bilefsky, *supra* note 4, at A1 (stating that Turkish officials had not "yet uncovered that the objects had been illegally smuggled out.").

137. *Id.*

138. Alexander A. Bauer, *New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 *FORDHAM INT'L L.J.* 690, 695 (2007) (arguing that nuanced policies may "represent a pragmatic way forward.").

Italy is a worthy model of art repatriation due to its success in repatriating a substantial amount of its cultural property. Italy's success can be accredited to various factors including: legal and non-legal strategies--especially its long history of protecting cultural property;¹³⁹ a combination of laws that regulate exports and vest Italy with ownership interest in cultural property;¹⁴⁰ Italy's specialized police force,¹⁴¹ which has also been instrumental in repatriating cultural property, particularly through investigating and obtaining critical evidence that lead to imposition of civil sanctions, penal charges, and pressure for museums to form repatriation agreements;¹⁴² and, lastly, Italy's ability to cooperate with other governments and foreign museums alike.¹⁴³

Italy's cooperation with foreign governments and museums has taken various forms. For example, Italy has brought successful claims in the United States under the NSPA.¹⁴⁴ Additionally, as mentioned above, the CPIA, authorizes the United States to enter into bilateral agreements with other countries to impose import restrictions on cultural items coming into the United States. After petitioning for such restrictions, Italy entered into a Memorandum of Understanding ("MOU"),¹⁴⁵ which forbids the importation of certain cultural property from Italy while it agrees, *inter alia*, to use its best efforts to facilitate loans and research opportunities with American museums and universities.¹⁴⁶ Notably, the United States has only entered into these kinds of agreements with a limited number of countries.¹⁴⁷

139. Silver, *supra* note 112, at 20.

140. *Id.* at 22 (stating Italy's that combination of export regulations and state ownership is powerful).

141. *Id.* at 40 (discussing how the Italian military, the Carabinieri, through its specialized police force—Tutela Patrimonio Culturale—has been instrumental in investigating cultural property thefts, allowing the government to prosecute individuals in Italy, bring claims in other countries, and forge agreements with museums).

142. See Andrew Slayman, *Recent Cases of Repatriation of Antiquities to Italy From the United States*, 7 INT'L J. CULTURAL PROP. 456, 456-60 (1998) (enumerating several illustrations of the Carabinieri's retrieval of cultural items from the United States); Aaron K. Briggs, Comment, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 644 (2006) (discussing the Carabinieri's successful recovery of the Euphronios Krater from the Metropolitan Museum of Art as a result of the considerable evidence collected by the Italian police).

143. See Celestine Bohen, *Old Rarities, New Respect: U.S. Works With Italy*, N.Y. TIMES (Feb. 28, 2001, at E1 (describing Italy's five-year agreement with the United States as "the first of its kind").

144. See e.g., *United States v. An Antique Platter of Gold*, 184 F.3d 131, 134 (2d Cir.1999) (affirming the trial court's forfeiture order for a Phiale of Sicilian origin).

145. See Silver, *supra* note 112, at 42 (discussing the implementation and the recent extension of the MOU).

146. *Id.* at 37.

147. *United States Implementation of the 1970 UNESCO Convention: The Convention on Cultural Property Implementation Act*, ARCHAEOLOGICAL INSTITUTE OF AMERICA, http://www.archaeological.org/pdfs/sitepreservation/CPAC_OverviewAIA.pdf

In addition to Italy's willingness to enter into agreements like the MOUs with foreign governments, Italy is recognized for its cooperative agreements with museums for the return of its cultural property.¹⁴⁸ These agreements are voluntary, and unlike the MOUs previously described, they are entered into through a non-legal avenue.¹⁴⁹ Furthermore, the agreements allow for mutually beneficial outcomes where Italy negotiates to get its cultural property back from the museums and, in return, the museums negotiate future loans and research opportunities.¹⁵⁰

One such example—of a successful voluntary agreement—is Italy's request for return of the Euphronios Krater from the Met. The Euphronios Krater was purchased in 1972 by the Met from Robert Hecht. Italy would face difficulties in court because much of this case depended on whether the Met knew that the Euphronios Krater was stolen under the NSPA.¹⁵¹ Consequently, in February 2006, the Met and the Italian Ministry of Culture signed an agreement,¹⁵² which allowed for the return of the Euphronios Krater, along with other objects, in exchange for long-term loans of works of art of equal value.¹⁵³ These types of voluntary agreements not only give Italy considerable bargaining power, but they also provide a platform to nurture a spirit of cooperation between source countries—like Italy and Turkey—and American museums.¹⁵⁴

The case of Italy highlights important factors that Turkey should take into consideration and could use as a model to further its own repatriation efforts. Expending more resources and effort in gathering evidence and documentation, like Italy's *Carabinieri* specialized art force, which would provide the necessary evidence to strengthen Turkey's claims and delegitimize museum's possession of these antiquities. Ultimately, any of Turkey's claims should be contingent on the particular circumstances of the

(last visited Nov. 1, 2013) (that in over “the twenty-seven years that the CPIA has been in effect, the United States has entered into bilateral agreements with only thirteen nations: El Salvador, Guatemala, Nicaragua, Honduras, Peru, Bolivia, Mali, Italy, Canada, Cambodia, Colombia, Cyprus and China.”).

148. See Briggs, *supra* note 142, at 642 (recognizing that the call for cooperation between Italy and the Met was a novel approach to restitution claims); Paige S. Goodwin, Comment, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 690 (2008) (stating that the Italy-Met Accord set new standards in nations' abilities to make ethical and political claims against museums and would “pave the road for new legal and ethical norms.”).

149. Silver, *supra* note 112, at 43.

150. *Id.* at 44-45.

151. See 18 U.S.C. § 2315 (2012) (requiring that under the NSPA, a party may seek forfeiture if the possessor of the stolen property had knowledge of its status as being stolen).

152. See The Metropolitan Museum of Art-Republic of Italy Agreement, Feb. 21, 2006 (establishing long term loans to the Met in exchange for the Euphronios Krater).

153. *Id.* (listing the terms of the agreement between the Met and the Republic of Italy, including the purpose of the agreement, the requested items and the terms of future loans).

154. See Briggs, *supra* note 142, at 623-24 (discussing the impact of the Met-Republic of Italy agreement).

case and the kind of documentation available to support its position. However, a focus on evidentiary efforts, to the extent possible, could prompt the United States and museums to work with Turkey in a more cooperative manner.

Turkey could also benefit from entering into voluntary agreements with museums. If Turkey were to take a more cooperative stance with the Met and other museums, these museums would likely engage in kind, which would ideally result in a mutually beneficial agreement. For example, the Dallas Museum of Art, after uncovering evidence that certain antiquities in its possession were in fact looted from Turkey, engaged with Turkey to negotiate an agreement for the return of these antiquities.¹⁵⁵ What is significant is that the Dallas Museum did not wait for Turkey to approach it about the antiquities, but rather took the initiative upon itself.¹⁵⁶ Consequently, the Dallas Museum was able to negotiate an agreement that benefitted both parties. A similar mutually beneficial repatriation agreement was reached with the University of Pennsylvania.¹⁵⁷ These mutually beneficial repatriation agreements require Turkey to recognize that it cannot seek to repatriate every piece of antiquity it believes belongs in Turkey. Instead, for those pieces that it seeks to repatriate, Turkey must be able to provide museums with compelling evidence or incentives such as generous loan or research agreements.

CONCLUSION

As it stands, Turkey's request for repatriation from the Met regarding the items in the Schimmel collection, should be denied because Turkey is basing its claim strictly on moral grounds and lacks evidence to prove that these antiquities were taken from Turkey. The basis for Turkey's claims place a risky burden and unwarranted challenges on many museums. Instead, in seeking the return of its antiquities from the Met and other museums, Turkey should focus its efforts on gathering evidence and documentation to support its claims. This approach has worked particularly well for Italy and played a crucial role in the return of the Euphronios Krater and the Weary Hercules. Additionally, Turkey's approach should not publicly shame museums it believes to have Turkish pieces. Instead, Turkey should pressure museums to return artifacts by providing museums with documentation as well as incentives. This will give Turkey more credibility

155. Jason Felch, *Dallas Museum of Art Returns Orpheus Mosaic, Five Other Looted Treasures in Announcing New Art Loans Initiative*, CHASING APHRODITE (Dec. 3, 2012), <http://chasingaphrodite.com/2012/12/03/dallas-museum-of-art-returns-orpheus-mosaic-five-other-looted-treasures-in-announcing-new-art-loans-initiative/> (noting that the Dallas Museum of Art signed an agreement for the return of the Orpheus Mosaic).

156. *Id.*

157. Tom Avril, *Penn Museum Makes Deal with Turkey for 'Troy Gold,'* PITTSBURGH POST-GAZETTE (Sept. 9, 2012), <http://www.post-gazette.com/stories/local/state/penn-museum-makes-deal-with-turkey-for-troy-gold-652494/#ixzz2FXJcM4sO> (reporting that the University of Pennsylvania lent looted antiquities to Turkey for an indefinite period).

in the future and make museums more likely to honor Turkey's repatriation requests. Lastly, Turkey should attempt to reach mutually beneficial repatriation agreements like the ones reached with the Dallas Museum of Art and the University of Pennsylvania. These agreements have proven successful for Italy and may also be so for Turkey.

While Turkey's efforts to collect its cultural property to support and display its Turkish identity are admirable, it should operate within the framework of the international agreements it has signed, such as the UNESCO Convention. And when these agreements are insufficient to meet Turkey's needs, it should use the aforementioned strategies to foster a more cooperative and successful repatriation strategy. Only then will Turkey's efforts be respected and provide a sustainable and successful framework for preserving its cultural heritage.