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Fair and Just Decolonial Solutions: Application of the Washington Principles to the Context of Disputed Colonial Objects

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FAIR AND JUST DECOLONIAL SOLUTIONS: ADAPTATION OF THE WASHINGTON PRINCIPLES TO THE CONTEXT OF DISPUTED COLONIAL CULTURAL OBJECTS

*Emma Peters**

Outstanding Note of the Year 2023

ABSTRACT:

Museum collections around the world contain objects that colonial forces unjustly took during times of occupation and colonization. Although some museums are beginning to return these disputed objects, cultural institutions and states are not utilizing international instruments designed in part to facilitate these returns, such as the 1970 UNESCO Convention and 1995 UNIDROIT Convention. Thus, a patchwork of possible paths for returning disputed colonial cultural objects has emerged, preventing formerly colonized claimants from successfully arguing for the return of their cultural heritage and hindering museums from cooperating with requests for return. This Note argues that the international community should adapt the Washington Principles on Nazi looted art to apply soft-law standards to the return of colonial-era looted cultural objects. Through this process of adaptation and adoption, the international community will be

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able to formulate a framework to achieve fair and just solutions in the return of colonial cultural objects.

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I: INTRODUCTION

Deep within the walls of the Cleveland Museum of Art,¹ tucked away within the first floor of the 1916-era building, items

1. See African Art, CLEV. MUSEUM ART, <https://www.clevelandart.org/art/departments/african-art> [<https://perma.cc/EK4R-AQX8>].

in the arts of Africa gallery rest on their pedestal-like displays, gazing out at viewers through panes of protective glass. The display of this collection is in a state of flux, as the curatorial staff balances the slow pace of exhibition adjustments with the need to refresh anthropological, outdated wall text.² Even though parts of the gallery currently reflect a past approach to the presentation of African art, one corner of this room takes a comparatively contemporary and transparent approach to a group of objects. These are the famed, and often controversial, Benin Bronzes.³ The two bronze plates, along with a commemorative ancestral head and architectural decorative works, are unique in their presentation.⁴ These are some of the only works where the museum presents their provenance and path from the western coast of Africa to north-east Ohio.⁵

The British Army forcibly removed many of these items from their original setting in the Oba's palace⁶ during the punitive 1897

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2. Interview with Kristen Windmuller-Luna, Curator Afr. Art, Clev. Museum Art, in Cleveland, Ohio (Nov. 15, 2021) (on file with the author).
 3. For an example of one of the Benin bronzes held by the Cleveland of Art, see *Plaque*, CLEV. MUSEUM ART, <https://www.clevelandart.org/art/1999.1> [<https://perma.cc/H4LC-4TSA>].
 4. See generally *Art from the Benin Kingdom*, CLEV. MUSEUM ART, <https://www.clevelandart.org/magazine/cleveland-art-winter-2021/art-from-the-benin-kingdom> [<https://perma.cc/2P7D-U5E8>].
 5. Take, for instance, the Cleveland Museum of Art's given provenance of the Idiophone/staff (ahianmwẹn-ọrọ) from the Benin Kingdom. This item was likely commissioned in the 1800s and was held by the Ọba Ovọramwẹn in the Royal Palace in Benin City from 1857 through 1897. In 1897, the British launched their punitive siege on Benin. The Idiophone/staff was then brought to London or France and was likely sold to either Louis Carré and/or Charles Ratton. Louis Carré then sold the Idiophone/staff to the Cleveland Museum of Art in 1938, where it has remained ever since. *Idiophone/Staff* (ahianmwẹn-ọrọ), CLEV. MUSEUM ART, <https://www.clevelandart.org/art/1938.5> [<https://perma.cc/LJM4-9NDN>]. The Cleveland Museum of Art provides didactic information on the 1897 Siege of Benin, acknowledging the days long British campaign of “attacking and looting.”
 6. See, e.g., *Museum Insights: The Raid on Benin, 1897*, SMITHSONIAN NAT'L MUSEUM AFR. ART, <https://africa.si.edu/exhibitions/current-exhibitions/visionary-viewpoints-on-africas-arts/the-raid-on-benin-1897/> [<https://perma.cc/RQ3T-SSSS>].

siege of Benin.⁷ During this retaliatory attack, British forces looted thousands of objects and subsequently introduced them into art markets in western Europe. An immense amount of these items eventually landed in the hands of western private collectors and encyclopedic museums.⁸ The stories of these items that the Cleveland Museum of Art's presents underscores two kinds of histories museums must reckon with: the life of an object in their collection before and after its accession.⁹ The latter part of these items' life is one museums sometimes define in part by colonial violence and continuing cultural loss. When a viewer chooses to engage with the bronzes and their interpretive texts, they are forced to wrestle¹⁰ with one of the most pressing and complicated questions facing museums and their audiences today: Are these works stolen? And if so, what in the world are they doing here in this museum?

The Cleveland Museum of Art is not unique in its stewardship of items with documented colonial-era provenance. Museums across the world are filled with disputed colonial cultural objects and are striving to overcome these facets of their elitist—and sometimes imperialist—pasts.¹¹ Regardless of whether museums acknowledge the sometimes-brutal underpinnings surrounding

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7. For more information on the background of the British siege of Benin City, see generally DAN HICKS, *THE BRITISH MUSEUMS: THE BENIN BRONZES, COLONIAL VIOLENCE AND CULTURAL RESTITUTION* 3 (2021).
 8. JOS VAN BEURDEN, *TREASURES IN TRUSTED HANDS: NEGOTIATING THE FUTURE OF COLONIAL CULTURAL OBJECTS* 212 (2017).
 9. For more information on the dual lives of the Benin Bronzes, specifically, see generally HICKS, *supra* note 7, at xiv.
 10. Other than the Benin bronzes and other items stolen in the British siege of Benin, nearly every other object in the Cleveland Museum of Art lacks in-gallery text about their provenance. Although the museum provides provenance information on their website for other objects, this lack of gallery-based information enables visitors to make their way through the museum without stopping to consider the ways museum objects made their way to their current location. See Katarzyna Januskiewicz, *Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia*, 41 *BROOK. J. INT'L L.* 329, 331 (2015).
 11. Jennifer A. Orange, *Blurring the Boundaries of International Human Rights Law: The Human Rights Work of Museums*, 22 *UCLA J. INT'L L. & FOREIGN AFFS.* 188, 191 (2018).

their acquisitions of colonial cultural objects¹² or silence this aspect of the object's life,¹³ to characterize the continuing presence of these items in collections as merely a "complex problem" would be a grave understatement. Cultural dispossession, specifically in the context of colonialist theft, has resulted in widespread deprivation of visual and material histories as well as cultural legacies.¹⁴ For instance, museums and institutions outside the African continent hold a staggering 90% of the material cultural

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12. This Note is making the conscious decision to refer to these items as colonial cultural objects rather than "art." This choice is not intended to denigrate or ignore the aesthetic and cultural significance of many of these objects. On the contrary, calling these items cultural objects recognizes that notions of and societal importance ascribed to art varies across the world's visual cultures. Although the cultural objects this Note discusses are often held in "art" museums, using the more neutral term "cultural objects" avoids ascribing neo-colonialist aesthetic judgements on items already impacted by colonizing theft. For more information on this semantic tension, see Carolyn Dean, *The Trouble with (The Term) Art*, 65 ART J., Summer 2006, at 24, 25. Furthermore, this Note makes a further choice to use "cultural objects" in lieu of the commonly used "cultural property" or "cultural heritage". Denoting these items as "property" emphasizes "the property law aspects of cultural expressions . . . privileging one characteristic of the object often to the detriment of others." ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS, AND THE RETURN OF CULTURAL OBJECTS 7 (2006). Furthermore, "cultural objects" is preferable to "cultural heritage" since the topic of this Note are "moveable physical manifestations of the culture of an occupied people." *Id.* Jos van Beurden, who also employs the term "colonial cultural objects" in his proposed Adapted Principles, acknowledges that this terminology is an imprecise umbrella term. VAN BEURDEN, *supra* note 8, at 39-40. This Note is written with the understanding and acknowledgement that although "colonial cultural objects" is an imprecise term, it is the most appropriate semantic choice to make in this Note.
13. Museums that fail to mention the colonial violence that led to the forced extraction of the Benin Bronzes include major western institutions such as the Musée de quai Branly and the Metropolitan Museum of Art. HICKS, *supra* note 7, at 217-18.
14. *Id.* at 32.

objects of sub-Saharan Africa.¹⁵ For decades,¹⁶ museum holdings of cultural objects have spurred impassioned global calls for return.¹⁷ Some scholars even argue that museum holdings and displays of these objects perpetuate colonialist violence that spirited away many of these items from their place of origin.¹⁸

Although there are two international instruments¹⁹ dedicated to the protection of cultural heritage and property, the return of

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15. FELWINE SARR & BENEDICTINE SAVOY, THE RESTITUTION OF AFRICAN CULTURAL HERITAGE: TOWARD A NEW RELATIONAL ETHICS 3 (2018), http://restitutionreport2018.com/sarr_savoy_en.pdf [<https://perma.cc/BQ6L-5C5M>] [hereinafter SARR & SAVOY REPORT].
 16. In the case of the Benin Bronzes, specifically, the first formal calls for return of items stolen during the Siege of Benin were in 1936. Emily Gould, *The Benin Bronzes – Recent Developments*, INST. ART & L. (May 7, 2021), <https://ial.uk.com/the-benin-bronzes-recent-developments/> [<https://perma.cc/P4PT-UX2Q>]; see also *id.* at 17 (“In Africa, certain countries or communities (Ethiopia and Nigeria, for example) have pleaded and made claims for well over 50 years for the return of their cultural objects that disappeared during the colonial period.”).
 17. There are few, if any, corners of the globe where people have not called for the return of their cultural objects. See, e.g., Henri Neuendorf, *Senegal and the Ivory Coast Ask France to Return Looted Art in the Wake of a Groundbreaking Restitution Report*, ARTNET NEWS (Nov. 29, 2018), <https://news.artnet.com/art-world/senegal-ivory-coast-france-repatriation-1405822> [<https://perma.cc/6KG3-TCCA?type=image>]; Naomi Rea, *Jamaica Joins a Growing Number of Nations Calling on the British Museum to Repatriate Its Cultural Artifacts*, ARTNET NEWS (Aug. 8, 2019), <https://news.artnet.com/art-world/jamaica-repatriation-british-museum-1619821> [<https://perma.cc/89LC-XTD3?type=image>]; Linda Morris, *This Headdress Is Telling Me It Needs to Go Home: Ancient Artefacts Returned to Australia*, SYDNEY MORNING HERALD (May 7, 2021, 7:30 PM), <https://www.smh.com.au/culture/art-and-design/this-headdress-is-telling-me-it-needs-to-go-home-ancient-artefacts-returned-to-australia-20210503-p57ob6.htm> [<https://perma.cc/ZBL3-UB28>].
 18. See generally HICKS, *supra* note 7.
 19. The two most consequential international instruments governing the protection, acquisition, and return of cultural property are the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 97 Stat. 2329, 823 U.N.T.S. 231

colonial cultural objects to source nations and people groups has largely occurred in a bottom-up pattern.²⁰ Institutions often self-initiate these instances of return, or respond to calls of individuals or people groups, rather than looking to the international instruments at their disposal to facilitate the return of colonial cultural objects.²¹ The diverse driving factors behind institutional return, coupled with the differences in museum governance laws across the world, has left a patchwork of possible paths for returning colonial cultural objects. A lack of effective international guidelines means that depending on what country a museum is located in, claimants face an uncertain path for the return of their wrongfully taken cultural objects.

This Note argues that the international community should adapt the Washington Principles on Nazi looted art²² to apply soft-law standards to the return of colonial-era looted cultural objects.²³ The adoption of these Adapted Principles will facilitate return of disputed colonial cultural objects by empowering signatory states and their cultural institutions to strive for fair and just solutions, center the voices and needs of source communities and decolonized peoples, recognize new human-rights oriented conceptions of cultural ownership, establish accessible databases for return requests, and employ radical new modes of provenance research. These guidelines will not only work within the current, effective bottom-up approach of return, but eventually create a framework for the international community

[hereinafter UNESCO Convention] and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention.]

20. Telephone Interview with Carsten Stahn, L. Professor, Leiden Univ. (Feb. 11, 2022) (on file with author).
21. *See infra* notes 30-31.
22. Washington Conference Principles on Nazi-Confiscated Art, Dec. 3, 1998.
23. Jos van Beurden, in his book *Treasures in Trusted Hands*, developed a mapping of the Washington Principles to the context of colonial cultural objects. His principles, titled the “Principles on objects of cultural or historical importance, taken without just compensation or involuntarily lost in the European colonial era” [hereinafter Adapted Principles] will serve as the foundation for this Note’s discussion of new soft law solutions. *See* VAN BEURDEN, *supra* note 8, at 252-53.

to concretely adopt through U.N. General Assembly endorsement in the future.

Part II of this Note examines the background of cultural heritage protection and colonial theft. This part begins by exploring the expansive history of cultural theft, what colonial cultural objects are, and how they ended up in encyclopedic museums across the world. Next, this Note investigates the international frameworks in place for protection of colonial cultural objects. This Note then explores the Washington Principles, a set of international soft-law standards available for facilitating the repatriation of Nazi-looted art.

Part III of this Note dives into the ways in which the existing international law frameworks are unsuited for promoting just and fair return of colonial cultural objects. This Note will then move to look at a potential solution for facilitating more fair and just results by exploring the adaptation of the existing Washington Principles. This effective expansion of fair and just solutions into the decolonial context will pave the way for subsequent international solutions building off of the Adapted Principles, solidifying these soft-law solutions as a viable pathway for facilitation of return in lieu of today's ineffective international solutions and patchwork domestic remedies.

Part IV of this Note addresses the continuing issues with soft law solutions for facilitating the return of cultural objects. Although the soft-law solutions of the Washington Principles have accomplished fair and just results, their implementation and execution are highly dependent on the acts of individual states. The Adapted Principles may face similar hurdles, but the decolonial moral underpinnings and significant trends towards return may assist the Adapted Principles in being successful regardless of their non-binding, soft-law status. This part of the Note revisits current steps taken by former colonizing powers to underscore the relevance and contemporary need for an Adapted Principles. By exploring the ways that the Adapted Principles will more so represent an acknowledgement of current trends rather than novel encouragement for return generally, this Note argues that the human rights focused approach of today's patterns of return are embodied in the Adapted Principles, and subsequently, can serve as a framework for international adoption of the Adapted Principles through U.N. endorsement of the principals.

The objects that this Note focuses on are the disputed colonial cultural objects located in museums rather than in the hands of private collectors. Although private ownership of stolen cultural goods is a pressing concern,²⁴ museum ownership and display of colonial cultural objects is distinctly connected to the colonialist violence that led to these objects' eventual display in a uniquely different way. For instance, British museums in the Victorian and Edwardian era housed stolen cultural objects from colonies partially to prime the public to see occupied peoples, usually those living in Africa, as lesser-than and deserving of the violence and cultural destruction imposed upon them by the British.²⁵ While the presentation of colonial cultural objects is magnified and weaponized in the halls of a museum, museums are also uniquely posed to work within the frameworks of international law to lead the way in restitutive justice. Just as practical implementation of the Washington Principles placed part of the onus of "just and fair solutions" on museums,²⁶ the new Adapted Principles discussed in this Note will similarly require museum actors to take action to find just and fair solutions for the colonial cultural objects in their care and make public detailed provenance reports on items with contested ownership.

24. The private market for colonial cultural objects perpetuates many of the same colonialist violences as the museological side of this problem. However, there are distinct differences between the consequences of private and institutional collecting practices of colonial cultural objects. The subject of market trends and acquisition practices of collectors of colonial cultural objects is better suited to be tackled as a stand-alone topic in a future note, or together with the topic of institutional practices in this area in a future note of a larger scale. See HICKS, *supra* note 7, at 137.

25. *Id.* at 233.

26. In the United States, for instance, the American Alliance of Museums and Association of Art Museums and Directors promulgated professional guidelines in response to the Washington Principles requiring museums to proactively look into the provenance of works that were potentially looted by Nazis, rather than sitting idly by waiting for claimants to show up and make requests of their own. Nicholas O'Donnell, *U.S. Museums and Looted Art – Is It Whether you Win or How You Play?*, LOOTEDART (July 9, 2015), <https://www.lootedart.com/news.php?r=RCG5Y8155071> [<https://perma.cc/5CUG-VA3C>]; see also HICKS, *supra* note 7, at 236.

As recently as 2014, scholars noted how return of colonial cultural objects by Western museums was a topic that was usually ignored and rarely practiced.²⁷ Today, the tides are rapidly changing with regards to the institutional return of these disputed objects. As this Note goes to press, France has made the decision to return 26 cultural objects unlawfully seized from the Republic of Benin during Francophone colonization.²⁸ Powerful American institutions such as the Metropolitan Museum of Art²⁹ and the Smithsonian³⁰ are beginning the processes to repatriate Benin Bronzes in their collections back to Nigeria. However, these processes of return are not being fostered by requirements of international law under the UNESCO or UNIDROIT Conventions.³¹ The moral and professional standards driving acts of repatriating colonial cultural objects underscore the need for establishing international soft-law principles to further encourage, guide, and harmonize these institutional acts of return.³²

Although this Note uses the language of “return” (and occasionally “repatriation” or “restitution”), this verbiage denotes more than the actual physical transfer of colonial cultural objects

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27. Jos van Beurden, *How to Break the Deadlock in the Debate About Colonial Acquisitions?*, in ART, CULTURAL HERITAGE AND THE MARKET: ETHICAL AND LEGAL ISSUES 165, 167 (Valentina Vadi & Hildegard E.G.S. Schneider, eds., 2014). Kristen Windmuller-Luna similarly recalled this phenomenon from her own educational experience, stating that the lack of discourse on cultural heritage return was apparent in the art historical classroom in the 2010s. Interview with Kristen Windmuller-Luna, *supra* note 2.
 28. *See generally* SARR & SAVOY REPORT, *supra* note 15.
 29. Sarah Bahr, *Met Museum Announces Return of Two Benin Bronzes to Nigeria*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/arts/design/met-museum-benin-bronzes-nigeria.html?action=click&module=RelatedLinks&pgtype=Article> [https://perma.cc/654V-NCLF].
 30. Matt Stevens, *Smithsonian Moves Toward Returning Benin Bronzes*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/2021/11/05/arts/design/smithsonian-benin-bronzes.html> [https://perma.cc/M9RU-KES8].
 31. *See generally* UNESCO Convention & UNIDROIT Convention, *supra* note 19.
 32. In justifying their return of the Benin Bronzes to Nigeria, the Metropolitan Museum of art highlighted the return as a “commitment to transparency and responsible collecting of cultural property.” Bahr, *supra* note 29.

from one nation across the border to another. Although the physical return of colonial cultural objects may be the ideal end result for some claimants, to universally assume that is the goal for *all* calls for return would unnecessarily and prematurely project neo-colonialist solutions into this discourse. There are other potential outcomes of “return,” including those that may not result in the transfer of ownership to a source claimant, but empower the claimant to loan the colonial cultural object to a museum in another part of the world. The diverse people groups, histories, and cultural objects at play in these discussions preclude assumptions on the impact of “return,” and this Note seeks to validate and acknowledge the breadth of outcomes and impacts “return” has in practice.

As decolonial theory grows both as a classroom staple in art history departments³³ and a popular idea in the cultural zeitgeist,³⁴ the general public and citizens of formerly colonized states have an increased awareness of the impact and scale of cultural dispossession caused by museum acquisition and retention of colonial cultural objects. The weakness of international instruments meant to respond to cultural heritage protection in the area of colonial cultural theft underscores the need for new and more effective approaches to be taken in the

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33. For two examples of decolonial lessons and materials taught in art history courses, see generally AMBER HICKEY & ANA TUAZON, DE COLONIAL STRATEGIES FOR THE ART HISTORY CLASSROOM, <http://arthistoryteachingresources.org/wp-content/uploads/2019/05/Decolonial-Strategies-for-the-Art-History-Classroom-Zine.pdf> (Oct. 14, 2021) [<https://perma.cc/UX5B-F53S>], and Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION, INDIGENEITY, EDUC., & SOC'Y 1 (2012).
34. See, e.g., Olga Viso, *Decolonizing the Art Museum: The Next Wave*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/opinion/decolonizing-art-museums.html> [<https://perma.cc/U2H2-TXB2>]; Elisa Shoenberger, *What Does it Mean to Decolonize a Museum?*, MUSEUM NEXT (May 11, 2021), <https://www.museumnext.com/article/what-does-it-mean-to-decolonize-a-museum/> [<https://perma.cc/FKT9-EFC6>].

legal community. Scholars³⁵ and politicians³⁶ have previously raised ideas of re-working the Washington Principles into this context. This Note aims to provide further insight into how these established principles can and must be adapted in order to make soft-law standards a suitable option for facilitating the return of colonial cultural objects currently located in museum collections across the world. Through a process of adaptation and adoption, these new Adapted Principles will legitimize the trends of return already present in institutions in the global north and underscore the inextricable human rights facets of the return of colonial cultural objects.

II: BACKGROUND

A: The Objects in Question: Disputed Colonial Cultural Objects

Whether a collector is gathering rare stamps, a complete series of prints by a renowned artist, or souvenirs from a far-off land, collecting is a political act that creates significant social effects.³⁷ Since antiquity,³⁸ the confiscation and transfer of objects stolen from occupied peoples has been a keystone activity in the project of empire building and domination.³⁹ Over hundreds of

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35. See Carsten Stahn, *Confronting Colonial Amnesia: Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects*, 18 J. INT'L. CRIM. JUST. 793, 819 (2020). See generally VAN BEURDEN, *supra* note 8, at 241.
36. Hermann Parzinger, a founding director of the Humboldt Forum, has suggested UNESCO or ICOM should establish guidelines based on the Washington Principles to facilitate the repatriation of colonial cultural objects. Catherine Hickley, *Berlin Museums Chief Calls for Rules on Restitution of Colonial Artefacts*, ART NEWSPAPER (Feb. 16, 2018), <https://www.theartnewspaper.com/2018/02/16/berlin-museums-chief-calls-for-rules-on-restitution-of-colonial-artefacts> [<https://perma.cc/KZ8K-NL7Z>].
37. See ALICE PROCTER, *THE WHOLE PICTURE: THE COLONIAL STORY OF THE ART IN OUR MUSEUMS & WHY WE NEED TO TALK ABOUT IT* 35-36 (2020) (Alex Stetter, et al., eds., 2020).
38. See Lindsey Blair, *Holocaust-Era Cultural Property Looting: The United States and the Washington Principles*, 24 ART ANTIQUITY AND L. 49, 49 (2019) (describing ancient evidence of looting and destruction through visual analysis of the Arch of Titus on the Via Sacra in Rome, built in CE 82).
39. SARR & SAVOY REPORT, *supra* note 15, at 14.

years, through the actions of numerous empires such as the Romans, French, British, and Germans, plunder of cultural treasures evolved into an accepted international norm.⁴⁰ Theft of art objects by victors in wartime symbolically empowered the victors to absorb an intangible source of the conquered peoples' strength through the depletion of their cultural wealth.⁴¹ Eventually, as these cultural objects led to the creation of splendid, public museums, the enriched state was able to assert itself as a superior, culturally dominant civilization.⁴²

The international community's acceptance of cultural theft waned around the conclusion of the Napoleonic wars.⁴³ Due to the unprecedented change in scale, organization, and state sponsorship of Napoleon's art seizures throughout Europe,⁴⁴ state parties at the 1815 Congress of Vienna⁴⁵—for one of the first times in the history of international law—advocated for the restitution of cultural objects.⁴⁶ Although the intra-European acceptance of cultural looting had begun to dwindle, the practice of occupying powers acquiring objects from the people they subjugated remained as pervasive as ever as European colonial dominance grew.⁴⁷ This colonial theft of cultural objects allowed occupying

40. WAYNE SANDHOLTZ, PROHIBITING PLUNDER: HOW NORMS CHANGE 34-35 (2007).

41. *Id.* at 33.

42. *See id.*

43. *Id.* at 47.

44. Bianca Gaudenzi and Astrid Swenson, *Looted Art and Restitution in the Twentieth Century – Towards a Global Perspective*, 52 J. OF CONTEMP. HIST. 491, 502 (2017).

45. VRDOLJAK, *supra* note 12, at 23.

46. *Id.*

47. Numerous forms of collecting practices played out across various continents over the hundreds of years of European Colonialism. Jos van Beurden lays out these different forms as: Gifts to colonial administrators and institutions, objects acquired during private expeditions, objects acquired during military expeditions, missionary collecting, and objects acquired as archival materials. *See* VAN BEURDEN, *supra* note 8, at 231-35; *see also* VRDOLJAK, *supra* note 12, at 2 (“However . . . recognition of the need to return ‘spoliations appertaining to those territories’ following independence did not extend necessarily to the dismantling of their own empires in the late twentieth century.”)

European nations to (attempt to) destroy an entire culture in order to erase its sovereignty and replace it with colonial rule.⁴⁸ Colonial cultural objects are items that have been removed from colonized peoples through the violence or force of colonial occupiers.

The intrinsic human desire to collect, and the political implications thereof, culminate in the narratives presented by the modern manifestation of museums.⁴⁹ In the Victorian age, where the rise of what we today understand as public museums and colonialism coexisted, museums served as a “three-dimensional imperial archive.”⁵⁰ The centralization of these imperial archives in capital cities, such as London, further advanced the colonialist narrative of culturally wealthy capitals as the heart of the empire.⁵¹ Today, in the post-colonial age, the project of empire building no longer requires these cultural manifestations of imperial reach to justify the work of expansion to the citizenry.⁵² Some museums, understanding the power that curatorial presentation and institutional actions hold, have attempted to re-frame colonial histories—at times using return of colonial cultural objects to achieve that goal.⁵³ Even though some museums have begun to enact human rights changes through instances of return, others have steadfastly avoided returning colonial cultural objects. Some of these institutions, such as the British Museum,⁵⁴ have simultaneously avoided large scale return of their colonial

48. See HICKS, *supra* note 7, at 149 (discussing the siege of Benin City and intentional destruction of its cultural objects by British Authorities).

49. PROCTER, *supra* note 37, at 15.

50. Tim Barringer, *The South Kensington Museum and the Colonial Project*, in COLONIALISM AND THE OBJECT: EMPIRE, MATERIAL CULTURE AND THE MUSEUM 11, 11 (Tim Barringer and Tom Flynn eds., 1998).

51. *Id.*

52. See generally VRDOLJAK, *supra* note 12, at 54.

53. See Orange, *supra* note 11, at 206.

54. See, e.g., Aditya Iyer, *At British Museum, a Promising but Flawed Start to Grappling with Colonialism*, HYPERALLERGIC (Dec. 3, 2020), <https://hyperallergic.com/605262/british-museum-empire-and-collecting-trail-colonialism/> [perma.cc/H7LX-2RKU].

cultural objects, while also publicly acknowledging the imperialist roots of their collection.⁵⁵

Some cultural objects have found their way into museum collections through consensual, voluntary donations.⁵⁶ However, a significant amount of the cultural objects in encyclopedic museums around the world nonetheless ended up there as a result of colonial theft. Additionally, objects collected through what were once considered law-abiding means are being revisited through a more decolonial-aware lens, prompting concern amongst scholars that large swaths of some nations' cultural heritage are scattered and displaced from the country of origin.⁵⁷ Even at the end of the colonial era, colonizing nations' acquisition of cultural objects from their former colonies continued, albeit under newly acceptable market transactions and relationships.⁵⁸ The combination of widespread removal practices and the unequal nature of the colonial relationship resulted in today's museological landscape wherein the once-colonizing nation has greater access to the cultural objects of the colonized.⁵⁹

In the recent past, encyclopedic museums in the global north resisted any and all calls for repatriation of colonial cultural objects.⁶⁰ In 2002, major institutions in the northern hemisphere published the Declaration on the Importance and Value of

55. *Id.*

56. Even in parts of the world where there were histories of colonial occupation, cultural objects can still end up in museum collections through ethical acquisition practices. Speaking on the topic of the collecting of the art and cultural objects of Africa, Dr. Windmuller-Luna states: "There is the good, the bad, the ugly, the very ugly, and the mundane (such as purchases made in markets or by commission)." Interview with Kristen Windmuller-Luna, *supra* note 2.

57. VAN BEURDEN, *supra* note 8, at 117 ("Although many objects were collected in a law-abiding way, their maldistribution reached such heights that an institution such as Terburen Museum has 120,000 ancient ethnographic items from DR Congo, Rwanda and Burundi, while these three countries themselves have considerably less"): *see also* SARR & SAVOY REPORT, *supra* note 15, at 3.

58. SARR & SAVOY REPORT, *supra* note 15, at 59.

59. VRDOLJAK, *supra* note 12, at 201.

60. HICKS, *supra* note 7, at 195.

Universal Museums.⁶¹ This declaration spoke to these museums' concern regarding the damages that would be imposed on an institutional level by repatriating cultural objects, classifying these returns as museological threats to the "integrity" of their collections.⁶² Since then, voluntary returns from encyclopedic institutions have increasingly occurred, but these returns often have been highly incidental instances initiated by singular museums for various reasons.⁶³

B: Cultural Heritage Frameworks Today

The most significant tools for the international community to handle claims regarding cultural objects are codified in a number of international treaties.⁶⁴ The very first international instruments that allowed states to reclaim their cultural property were the 1899 and 1907 Hague Conventions.⁶⁵ The protection of cultural objects and heritage was once again revisited by the international community through the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict⁶⁶ ("Hague Convention"). After the large-scale Nazi theft of World War II, the Hague Convention laid out the special protections

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61. The Cleveland Museum of Art was a signatory to this controversial declaration. *See, e.g., Declaration on the Importance and Value of Universal Museums*, STATE HERMITAGE MUSEUM (July 28, 2004), <https://www.hermitagemuseum.org/wps/portal/hermitage/news/news-item/news/1999> [<https://perma.cc/4XS3-J5WA?type=image>]; HICKS, *supra* note 7, at 195 (noting that not only were the signatories located in the global north, but a whopping half were American).
 62. Kathryn Whitby-Last, *Legal Impediments to the Repatriation of Cultural Objects to Indigenous Peoples*, in *THE LONG WAY HOME: THE MEANING AND VALUES OF REPATRIATION* (Paul Turnbull and Michael Pickering, eds., 2010).
 63. *See, e.g.,* VAN BEURDEN, *supra* note 8, at 24-27. Examples of the impetus behind these voluntary returns include strengthening diplomatic ties and simply needing to free up space in museum storage. *See id.*
 64. *See* ALPER TAŞDELEN, *THE RETURN OF CULTURAL ARTEFACTS: HARD AND SOFT LAW APPROACHES* 9 (2016).
 65. *Id.*
 66. Gaudenzi & Swenson, *supra* note 44, at 506.

that cultural heritage requires.⁶⁷ The Convention takes a universalist⁶⁸ approach to cultural objects, emphasizing the ubiquitous harm to all humankind that occurs when cultural property is damaged.⁶⁹ Although the Hague Convention facilitated international conversations on art theft through the lens of the Nazi's looting of Europe during World War II, silence prevailed on the fate of colonial cultural objects located in institutions outside of their source countries.⁷⁰ As decolonization nominally came to an end and newly independent peoples sought to build a national identity, the cultural losses of the colonial era came into sharp focus.⁷¹

Today, the two most dominant⁷² international instruments that attempt to deal with the return of disputed colonial cultural objects are the 1970 UNESCO Convention on the Means of

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67. Alessandro Chechi, *Plurality and Coordination of Dispute Settlement Methods*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 177, 181 (Francesco Francioni and James Gordley, eds., 2013). Even though Nazi theft displaced art and Judaica from its rightful owners on a widespread scale, the Hague Convention was silent on the issue of returning these objects. *See id.* The frameworks guiding the return of these works, such as the Washington Principles and other subsequent declarations, are discussed in further detail later in this Note.
68. The other side of the universalist argument for dealing with cultural heritage items is the nationalist approach. For more information about the universalist vs. nationalist dichotomy that once largely bifurcated cultural property discourse, see John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L. L. 831, 836 (1986).
69. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, preamble, May 14, 1954, S. Treaty Doc. 106-1, 249 U.N.T.S. 240 ("Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all man-kind, since each people makes its contribution to the culture of the world . . .").
70. VRDOLJAK, *supra* note 12, at 197.
71. *Id.* at 206.
72. There are several other international treaties that handle the protection and preservation of cultural property, such as the Convention on the Protection of Underwater Cultural Heritage, Nov. 2, 2001, S. Treaty Doc. 103-39, 2562 U.N.T.S. 3. In-depth analysis and discussion of these conventions, however, is beyond the scope of this Note.

Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property⁷³ and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.⁷⁴ The UNESCO Convention was one of the first major international treaties drafted to protect cultural objects in the postcolonial age.⁷⁵ The UNESCO Convention not only codified the universalist underpinnings of cultural property protection of the Hague Convention, but also extended the prior Convention's general protections of cultural objects from the unique context of war to peacetime.⁷⁶

Twenty-five years after the emergence of the UNESCO Convention, the International Institute for the Unification of Private Law drafted the 1995 UNIDROIT Convention in order to assist facilitation of principles laid out in the UNESCO Convention through harmonization of the private, domestic laws of member states.⁷⁷ The UNIDROIT Convention covers a larger range of items than the UNESCO Convention, as it protects any stolen cultural object, as opposed to just the objects that a state has inventoried and declared part of its cultural heritage through patrimony declarations or legislation.⁷⁸

C: The Washington Principles: Fair and Just Standards Elsewhere

Aside from the UNESCO and UNIDROIT treaties, soft-law standards such as the 1998 Washington Conference Principles on

73. See Alexandra Love Levine, *The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention*, 36 BROOK. J. INT'L L. 751, 753 (2011).

74. *Id.*

75. *Id.* at 757.

76. Januszkiewicz, *supra* note 10, at 339.

77. See Sophie Vigneron, *Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects*, in ART, CULTURAL, HERITAGE AND THE MARKET: ETHICAL AND LEGAL ISSUES 117, 127 (Valentina Vadi & Hildegard E.G.S. Schneider, eds., 2014).

78. Evelien Campfens, *Alternative Dispute Resolution in Restitution Claims and the Binding Expert Opinion Procedure of the Dutch Restitutions Committee*, in ART, CULTURAL, HERITAGE AND THE MARKET: ETHICAL AND LEGAL ISSUES, 61, 68 (Valentina Vadi & Hildegard E.G.S. Schneider, eds., 2014).

Nazi-Confiscated, and subsequent declarations,⁷⁹ also aim to protect cultural objects. During World War II, the Nazi regime looted nearly twenty percent of all the art in Europe.⁸⁰ Between the promulgation of the 1899 and 1907 Hague Conventions and the end of the Cold War, little attention or action had been done in the area of Holocaust-era art restitution.⁸¹ The notion that wrongfully taken cultural property should be returned (in the context of victims of the Holocaust and their descendants) was eventually embodied in the Washington Principles⁸² developed in the Washington Conference on Holocaust Era Assets⁸³ in 1998.⁸⁴ The Washington Principles were formulated and agreed upon by 44 countries⁸⁵ in order to facilitate the undertaking of returning the immense amount of art and cultural objects stolen during this time period. These principles were subsequently reaffirmed 10 years later through the Terezin Declaration,⁸⁶ signed by 46 countries.⁸⁷ These principles emphasize the rights of families of deprived former owners to “just and fair solutions” for the

79. See Michael J. Birnkrant, *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-Looted Art*, 18 WASH. U. GLOB. STUD. L. REV. 213, 219 (2019).

80. *Id.* at 213.

81. Gaudenzi & Swenson, *supra* note 44, at 507.

82. Lawrence M. Kate, *Recovery of Art Looted During the Holocaust*, in CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 351, 352 (James A.R. Nafziger and Ann M. Nicgorski eds., 2009).

83. *Id.*

84. *Id.*

85. Elizabeth Campbell, *The Washington Principles 20 Years Later: Some Progress but Not Enough*, CTR. FOR ART COLLECTION ETHICS (Jan. 6, 2019), <https://liberalarts.du.edu/art-collection-ethics/news-events/all-articles/washington-principles-20-years-later-some-progress-not-enough> [perma.cc/Q5XA-4JJN].

86. Till Vere-Hodge, *Architect of Washington Principles Takes Stock*, ART@LAW (Aug. 1, 2019), <https://www.artatlaw.com/architect-washington-principles-takes-stock/> [https://perma.cc/LJ6Q-7KCR].

87. *Id.*

ownership and/or return of Nazi-looted art.⁸⁸ This notion of just and fair standards is a call to action for the domestic governments of signatories, imploring them to implement this principal however it suits their individual legal scheme to facilitate the return of these objects.⁸⁹ The principles also call for museums, cultural organizations, and collectors to perform extensive provenance and consolidate that research into a central registry.⁹⁰

The Washington Principles, though not perfect, have facilitated an immense amount of cultural object return. In Germany alone, over 16,000 objects have been returned to Holocaust survivors or their families.⁹¹ The Principles have also been instrumental in drawing attention to various issues surrounding spoilation and various forms of unethical acquisition of art.⁹²

III: ANALYSIS

A: Fractured Contemporary Frameworks

Although the international frameworks in place for protecting cultural objects have been successful in culling the negative effects of the post-1970 antiquities market,⁹³ both the UNESCO

88. Evelien Campfens, *Whose Cultural Objects? Introducing Heritage Title for Cross-Border Cultural Property Claims*, 67 NETH. INT'L L. REV. 257, 276 (2020).

89. Blair, *supra* note 38, at 52.

90. *Id.* at 55.

91. Joint Declaration Concerning the Implementation of the Washington Principles from 1998 by the Federal Government Commissioner for Culture and the Media of the Federal Republic of Germany and the Director-General for Culture and Communication at the Federal Foreign Office and Expert Adviser for Holocaust Era Issues to the U.S. Department of State, Ger.-U.S., Nov. 26, 2018, <https://www.state.gov/wp-content/uploads/2020/09/Jt-Decl-US-Germany-re-Nazi-looted-art.pdf> [<https://perma.cc/UKR5-3GF9>].

92. Martin P. Levy, *Are the Principles Set Out for Identifying Nazi-looted Art Fit for Purpose?*, APOLLO MAG. (Oct. 29, 2018), <https://www.apollo-magazine.com/are-the-principles-set-out-for-identifying-nazi-looted-art-fit-for-purpose/> [<https://perma.cc/RVG6-DZRK>].

93. This statement is not meant to imply that the illicit trafficking of antiquities and other cultural objects ceased altogether with the

Convention and UNIDROIT Convention are structurally unsuited to act as the primary international agreements for reaching just results for claimants seeking return of their cultural objects. The UNESCO and UNIDROIT conventions are less than ideal instruments for handling the return of colonial cultural objects due to their non-retroactive provisions, sole focus on state action, and spotty implementation.

A relevant feature of both the UNESCO and UNIDROIT Conventions that prevents the return of colonial cultural objects is their non-retroactivity. Due to the vastly different priorities between market and source states,⁹⁴ the drafters of the UNESCO Convention faced no choice other than to reach a compromise⁹⁵ regarding the non-retroactivity of the document.⁹⁶ Although some states, such as China, pushed for the inclusion of a retroactivity clause in the document,⁹⁷ former colonizing powers and other market states insisted on the converse, requiring a non-retroactivity provision in the UNESCO Convention as a

passage of the UNESCO Convention. Rather, countries have been able to use the tools of the Convention to ascertain whether objects have entered markets legally and determine a course of action. However, this focus on illegality has allowed actors to overlook the fact that cultural object theft occurs well into the modern age. See Laetitia Kaci, *We Must Punish the Looters, but also the Buyers*, UNESCO, <https://en.unesco.org/courier/2020-4/we-must-punish-looters-also-buyers> (Nov. 16, 2021) [<https://perma.cc/5K6F-4C3L>].

94. “Market states” are those which have established antiquities markets and wherein museums have acquired colonial cultural objects through such markets, such as the United States. “Source states” are those from which antiquities and cultural objects are removed. Januskiewicz, *supra* note 10, at 341-342.
95. Article 15 of the UNESCO Convention notifies states that nothing in the Convention itself prevents state parties from returning cultural objects removed before adoption of the Convention. However, this provision does not necessarily encourage states to look beyond adoption of the Convention in deciding whether to return a cultural object. UNESCO Convention, *supra* note 19, art. 15.
96. See generally Januskiewicz, *supra* note 10, at 342 (discussing compromises that drafters of the UNESCO Convention reached in formulating the treaty).
97. VAN BEURDEN, *supra* note 8, at 99.

precondition to acceptance of the instrument.⁹⁸ Even after the UNESCO Convention came into effect, former colonizing nations such as Belgium and the United Kingdom refused to ratify the instrument due to wrongly assumed fears of the retroactivity of the Convention.⁹⁹

The non-retroactivity of the UNESCO Convention is one of the most notable obstacles preventing the return of colonial cultural objects. The treaty only provides for the return of cultural objects that individuals illegally remove *after* the convention came into force.¹⁰⁰ Due to the inapplicability of its provisions to cultural crimes prior to implementation, the UNESCO Convention is most effective as a tool to prevent ongoing illicit trafficking,¹⁰¹ rather than facilitate the return of long-removed cultural objects. The Convention's non-retroactivity, coupled with the fact that almost all instances of removal of colonial cultural objects from their source countries and communities happened prior to 1970,¹⁰² mean that the Convention provides little recourse for people seeking repatriation of cultural objects lost before the instrument came into effect.¹⁰³

Furthermore, the UNESCO Convention is non-self-executing,¹⁰⁴ meaning member states are only bound by its standards after they become party to the treaty and implement Convention provisions into national law.¹⁰⁵ For many market nations, membership and implementation to the UNESCO treaty

98. VRDOLJAK, *supra* note 12, at 207.

99. VAN BEURDEN, *supra* note 8, at 133.

100. VRDOLJAK, *supra* note 12, at 207.

101. *About 1970 Convention*, UNESCO, <https://en.unesco.org/fighttrafficking/1970> (Nov. 13, 2021) [<https://perma.cc/SN5R-85WE>].

102. The British Museum, whose collection holds over 900 pieces of art from the Kingdom of Benin, including an immense number of Bronzes, publicly presents the fact that a large amount of their collection acquired during the United Kingdom's colonial era. *Collecting Histories*, BRIT. MUSEUM, <https://blog.britishmuseum.org/collecting-histories/> (Feb. 4, 2022) [<https://perma.cc/5EUC-JLHL>].

103. VRDOLJAK, *supra* note 12, at 202.

104. *See* Campfens, *supra* note 78, at 69.

105. *Id.*

did not happen until years after the convention came into effect.¹⁰⁶ The United States, for instance, did not implement the provisions of the UNESCO Convention into its domestic law until the passage of the Convention on Cultural Property Implementation Act¹⁰⁷ in 1983.¹⁰⁸ With the 1970 cut-off already too far removed from acts of colonial violence and cultural theft, the lagging implementation of the Convention compounds the temporally distancing effects of the instrument.

Since the UNESCO Convention did not speak to any uniform application of domestic statute of limitation periods, drafters of the UNIDROIT Convention sought to find a way to harmonize the patchwork of varying temporal policies across diverse legal systems.¹⁰⁹ Article III of the UNIDROIT Convention provides that claims for restitution will not be subject to statutes of limitations other than three years from when a claimant knew the location of a cultural object and the identity of its possessor.¹¹⁰ Similar to the UNESCO Convention, however, the UNIDROIT Convention only applies to repatriation requests that occurred after ratification and implementation by states on a domestic level.¹¹¹ Not a single major market state—including France, Switzerland, the United States and the United Kingdom—has acceded to the UNIDROIT Convention, despite having numerous

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106. Ratification of the UNESCO Convention did not happen until decades later for many market nations. For instance, the United Kingdom, Switzerland, and Germany all became parties to the Convention a fter
2000. See Lyndel V. Prott, *UNESCO International Framework fo
r Protection of the Cultural Heritage*, in *CULTURAL HERITAGE
ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE*
257, 265 (James A.R. Nafziger & Ann M. Nicgorski, eds., 2009).
107. James A.R. Nafziger, *Protection and Repatriation of Indigenous
Cultural Heritage in the United States*, in *CULTURAL HERITAGE
ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE*
37, 39 (James A.R. Nafziger and Ann M. Nicgorski, eds., 2009).
108. Januszkiewicz, *supra* note 10, at 345.
109. Patrick O’Keefe, *Using UNIDROIT to Avoid Cultural Heritage
Disputes: Limitation Periods*, 14 *WILLAMETTE J. INT’L L & DISPUTE
RESOLUTION* 227, 228 (2006).
110. UNIDROIT Convention, *supra* note 19, at art. 3.
111. Evelien Campfens, *Restitution of Looted Art: What About Access
to Justice?*, 2 *SANTANDER ART & CULTURE L. REV.* 185, 189 (2018).

encyclopedic museums filled with colonial cultural objects.¹¹² The fact that the UNIDROIT Convention has not been widely ratified by many major market states means that individuals or states wanting to bring claims under this instrument must continue to wait, potentially forever, until the states they seek redress from eventually accede to the Convention.

An additional way the UNESCO and UNIDROIT conventions hinder the return of colonial cultural objects is through their sole focus on state actors.¹¹³ In the UNESCO Convention, states define the cultural objects that are protected under the document, and identify removal from state territory as the trigger for enforcement of the treaty.¹¹⁴ Furthermore, because states are the only parties impacted by the instrument, they are the sole right holders¹¹⁵ of the cultural objects they seek to protect through the document.¹¹⁶ Likewise, the UNIDROIT convention only applies to state actors and is regarded as complimentary to the state-level applicable UNESCO Convention.¹¹⁷ This state-centered conception of object-identity fails to account for the fact that the value of cultural objects, colonial-era provenance or not, may be linked to the interests of sub-state ethnic groups.

Although the UNESCO and UNIDROIT Conventions have generally raised global awareness of the need for cultural heritage protection,¹¹⁸ they are simply unsuited for the specific task of facilitating the return of cultural objects with colonial-era provenance. All of this is not to say that these organizations do not contribute to important and just outcomes in this field. Rather, there is a more appropriate and effective standard out

112. Sophie Vigneron, *Protecting Cultural Objects: Enforcing the Illicit Export of Foreign Cultural Objects*, in ART, CULTURAL HERITAGE AND THE MARKET: ETHICAL AND LEGAL ISSUES 117, 128 (Valentina Vadi & Hildegard E.G.S. Schneider, eds., 2014).

113. Whitby-Last, *supra* note 62, at 40.

114. VRDOLJAK, *supra* note 12, at 209.

115. Campfens, *supra* note 111, at 188.

116. *See id.*

117. Prott, *supra* note 106, at 266.

118. *See generally* Somipam R. Shimray, *Ways to Create Awareness on Cultural Heritage: An Overview*, LIBR. PHIL. & PRAC., Apr. 26, 2019, at 1, 1.

there. The international community just needs to adapt and adopt it.

B: Adapted Soft-law Standards: A Fair and Just Solution

The implementation of soft law Adapted Principles is a more appropriate solution to promoting the facilitation of repatriation, return, and restitution of colonial cultural objects than the current framework established by the UNESCO and UNIDROIT Conventions. Scholars¹¹⁹ and politicians¹²⁰ have proposed an adaptation of the Washington Principles as a means to facilitate justice through repatriation in lieu of the continuing failures of the UNESCO and UNIDROIT conventions. The Washington Principles' unique approach to dealing with stolen cultural objects is underscored by a recognition of the unprecedented scope of Nazi art theft.¹²¹ Nazi theft of art and violent colonial acquisitions of cultural objects share certain contextual similarities that make the Washington Principles an appropriate model from which to build a new Adapted Principles.¹²² Similar to how Napoleonic and subsequent European colonial theft of cultural objects were a means to colonize nations by destroying the sovereignty of colonized peoples and underscore the political and cultural dominance of the colonizers, the Nazis likewise acquired as much art as they could in order to establish the cultural dominance of their regime.¹²³

Due to the circumstantial and material differences between art stolen by the Nazis and cultural property stolen in a colonial context, the implementation of an adapted version of the

119. For an example of a list of adapted principles, see VAN BEURDEN, *supra* note 8, at 252. This Note takes van Beurden's Adapted Principles as a starting point in its discussion of further adaptation and adoption of soft-law principles. See also Stahn, *supra* note 35 (proposing an adaption of the Washington Principles to fit the context of repatriating colonial cultural objects in order to rectify the continuing violences of colonialism propagated by international law).

120. Hickley, *supra* note 36.

121. Evelien Campfens, *Nazi Looted Art: A Note in Favour of Clear Standards and Neutral Procedures*, 22 ART ANTIQUITY & L. 315, 320 (2017).

122. VAN BEURDEN, *supra* note 8, at 111.

123. Campfens, *supra* note 121, at 320.

Washington Principles will only succeed with specific additions and changes. Aside from the overarching shift in contextual circumstance, additional changes that may increase the effectiveness of a regime under the Adapted Principles include: employing the notion of heritage title to settle ownership disputes between contemporaneous and past owners, addressing the ways statutes of limitations prevent the return of looted cultural property, ensuring once-colonized nations are centered in these discussions and the reworked principles themselves, thoughtful and thorough definitions regarding colonial cultural property, and establishing robust public databases of items with disputed ownership and colonial-era provenance. By shifting and changing aspects of the Washington Principles, this already-established soft-law framework will more effectively facilitate the return of colonial cultural objects than the international treaties and frameworks currently in place. Furthermore, this new approach will pave the way for subsequent international endorsement and recognition of the importance of fair and just solutions through cultural return.

I. Emphasis on Fair and Just Solutions

The first and one of the most important aspects that a new Adapted Principles must incorporate from the Washington Principles is the achievement of fair and just solutions. The Washington Principles are built off the need for justice to be achieved through the return of art previously stolen from their rightful owner.¹²⁴ Extending this spirit to a new Adapted Principles to handle the return of colonial cultural objects recognizes the ways that human rights are advanced through cultural recognition and return. Currently, the legal frameworks in place for dealing with the return of colonial cultural objects reproduce the violent biases that led to the items' removal in the first place.¹²⁵ Re-thinking what is currently considered fair and just in the field of colonial cultural objects through Adapted Principles will allow for international law to guide signatories' legal systems and cultural institutions to move towards a new framing of justice and decolonization, one in which colonial cultural objects are no longer pawns in a system of enduring neo-colonialism.

124. *Id.*

125. Stahn, *supra* note 35, at 794.

II. Incorporation of Heritage Title as a New Mode of Property Ownership

A new Adapted Principles must be able to help answer the complex question of to whom colonial cultural objects should be returned.¹²⁶ European authorities and institutions, specifically, have sometimes used this uncertainty to refuse claims for return.¹²⁷ The notion of heritage title¹²⁸ could serve as a means of resolving these disputes between current owners of these objects and the cultural descendants of the original owners. This new conception of property rights employs verifiable cultural links between people and objects in order to support claims to national heritage and ownership.¹²⁹ Although this is a relatively new conception of property ownership, heritage title is supported by existing human rights legislation, such as the Native American Grave Protection and Repatriation Act¹³⁰ in the United States,¹³¹ bolstering its usefulness as a tool through which to settle ownership disputes in the context of colonial cultural object return.

Incorporating the notion of heritage title into a new set of Adapted Principles will provide one way to untangle the state-centered cultural protection of the UNESCO and UNIDROIT Conventions. Although the signatories of the Washington Principles are states, the claimants who argue for ownership of

126. In nearly every interview conducted for this Note, interviewees remarked that the question of whom to return colonial cultural objects back to is one of the largest puzzles preventing easy instances of return. *See, e.g.*, Interview with Kristen Windmuller-Luna, *supra* note 2; Telephone Interview with Carsten Stahn, *supra* note 20.

127. Nosmot Gbadamosi, *Stealing Africa: How Britain Looted the Continent's Art*, AL JAZEERA (Oct. 12, 2021), <https://www.aljazeera.com/features/2021/10/12/stealing-africa-how-britain-looted-the-continent-art> [<https://perma.cc/EN3G-Z53W>].

128. For an elaboration of what application of heritage title entails and the arguments supporting its existence as a way to mediate colonial cultural object ownership disputes, see Campfens, *supra* note 88.

129. *Id.* at 275.

130. *Facilitating Respectful Return*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/index.htm> (Sept. 13, 2022) [<https://perma.cc/RM7E-9EAL>]; S. REP. NO. 101-473, at 3 (1990).

131. Campfens, *supra* note 88, at 281-82.

stolen works are often sub-state actors, specifically families whose ancestors were victims of Nazi theft and the Holocaust.¹³² In the context of colonial cultural objects, the incorporation of heritage title into the Adapted Principle's fair and just aims could provide flexibility and new possibilities regarding sub-state ownership of colonial cultural objects. Some claimants to colonial cultural objects may be sub-state actors, as is the case with the current repatriation requests of the Benin bronzes. The current Oba, Oba Ewuare II, has stated the appropriate end destination for the Bronzes is a Benin Royal Museum.¹³³ On the other hand, the federal government of Nigeria, a distinct political and historical entity, has also received a number of returned Bronzes.¹³⁴ In 2020, discussions between the Oba of Benin, the Benin Dialogue Group, the Edo State Government, and the Nigerian National Commission for Museums and Monuments led to the establishment of the Legacy Restoration Trust.¹³⁵ The LRT is an independent organization, rather than a governmental one. However, under the current state-focused international frameworks, the only claimant who could potentially utilize either of the Conventions to request the return of Bronzes from an institution would be the Nigerian government, rather than the

132. *Id.* at 276-77.

133. Barnaby Phillips, *Benin Bronzes: Nigeria Dispute Jeopardizes Return of Artefacts*, BBC (July 22, 2021), <https://www.bbc.com/news/world-africa-57914111> [<https://perma.cc/NG38-M3RX>]. It should be noted that some recent instances of return have resulted in the Oba receiving objects stolen during the punitive British siege on Benin. See *Benin bronze: 'Looted' Nigerian Sculpture Returned by University*, BBC (Oct. 28, 2021), <https://www.bbc.com/news/uk-scotland-north-east-orkney-shetland-59063449> [<https://perma.cc/C7UU-XAEY>].

134. See, e.g., Caroline Goldstein, *Washington's National Gallery of Art Will Return a Looted Benin Bronze Cockerel to Nigeria*, ARTNET NEWS (Dec. 6, 2021), <https://news.artnet.com/art-world/benin-bronze-national-gallery-of-art-2044310> [<https://perma.cc/5URD-CRNT?type=image>].

135. Press Release, Legacy Restoration Trust, Adjaye Associates & Brit. Museum, *The Legacy Restoration Trust, Nigeria, the British Museum and Adjaye Associates announce details of major archaeology project on the site of a new museum in Benin City* (Nov. 13, 2020), https://www.britishmuseum.org/sites/default/files/2020-11/EMOWAA-Project_release_November_2020.docx [<https://perma.cc/WS75-5N8T>].

collaborative, sub-state LRT. By employing heritage title to expand the realm of possible claimants, the Adapted Principles could potentially serve as a useful tool for organizations such as the LRT to further discussions regarding the return of their colonial cultural objects, with the potential that such objects could be returned to them despite not being a state entity.

Heritage title may also be a way of legitimizing sub-state claimants' arguments for ownership in light of contemporary museum stewardship of colonial cultural objects. Museums in western nations often argue that they should not be required to repatriate or return colonial cultural objects, as those items have been acquired through legal means, or have evolved into the cultural fabric of their new location.¹³⁶ Some institutions, such as the museum of the University of Leipzig, have argued that restituting items seized in the siege of Benin City "would be almost as tragic as the original removal of the objects from the Oba's palace nearly a century ago."¹³⁷ Problematic equivocations aside, the Leipzig museum's claim illuminates the tension between the relationships that western states and the people of a source state or ethnic group claim to have with an object. Heritage title, by tying the deep social significance and identity-forming values of cultural objects together with legal, human rights-based notions, allows for the achievement of just and fair solutions with regards to the return of these colonial objects by requiring institutions in signatory states to recognize the kinds of cultural connections claimants may have to objects in their collections.¹³⁸

This fair and just aspect of heritage title would also be in the vein of the spirit of the Washington Principles with regards to approaching the balance of ownership claims between museums and families of Holocaust victims. In the context of Nazi looted art, the Dutch Restitutions Commission previously adopted a policy of balancing interests of claimants and museums in 2012.¹³⁹ According to American diplomat Stuart Eizenstat, one of the architects of the Washington Principles, the Dutch policy

136. See Campfens, *supra* note 88, at 275-77.

137. VAN BEURDEN, *supra* note 8, at 23.

138. Campfens, *supra* note 88, at 267.

139. Nina Segal, *Dutch Panel for Looted Art Claims Must Change Course, Report Finds*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/arts/netherlands-looted-art-report.html> [<https://perma.cc/QN7G-DEL8>].

adoption was a “major setback” which was “totally contrary to the Washington Principles.”¹⁴⁰ Translating this lesson on the spirit and aim of the Washington Principles back into the colonial context, an Adapted Principle—which advocates signatories and the museums within their borders to recognize enduring cultural, social, and identity-forming connections between familial and cultural descendants of original owners and colonial cultural objects—could be a means through which fair and just results, currently lacking in the field of cultural object repatriation, could be attained.¹⁴¹

III. Encouraging New Approaches to Statutes of Limitations

Any set of Adapted Principles must reckon with one of the behemoth legal norms preventing the return of colonial cultural objects: statutes of limitations.¹⁴² As discussed above, numerous market states’ adoption of the UNESCO Convention was predicated on its status as a non-retroactive document.¹⁴³ Although statutes of limitations are standard practice in property

140. Vere-Hodge, *supra* note 86. Recently, the Dutch Restitutions Commission has ended their policy of balancing interests of claimants against the interests of museums, instead using “meaningful redress” as a guiding principle. *Striving for Justice*, RAAD VOOR CULTUUR (July 12, 2020), <https://www.raadvoorcultuur.nl/documenten/adviezen/2020/12/07/striving-for-justice> [<https://perma.cc/T5W9-LPHQ>].

141. Although the concept of heritage title is a novel conception of property ownership, its general aims and ethos have been successfully applied in other areas of cultural heritage repatriation. The Native American Graves Protection and Repatriation Act (more commonly known as “NAGPRA”) is human rights legislation that makes clear that the rights it protects are those of lineal descendants of dispossessed peoples. Nafziger, *supra* note 107, at 47. In situations where a direct lineal descendant of a dispossessed individual or tribe cannot be located, this NAGPRA allows for repatriation when another claimant (possibly another tribe or organization) can show a link of cultural affiliation. *Id.* at 48-49. Heritage title would operate in a similar manner in the context of colonial cultural objects by resolving ownership disputes when a lineal descendant or exact people group cannot be located.

142. J.B. Prowda, *The Perils of Buying and Selling Art at the Fair: Legal Issues in Title*, in ART, CULTURAL HERITAGE AND THE MARKET: ETHICAL AND LEGAL ISSUES 141, 148 (Valentina Vadi & Hildegard E.G.S. Schneider, eds., 2014).

143. VAN BEURDEN, *supra* note 8, at 99.

law, as they protect good faith buyers and encourage timely claims,¹⁴⁴ in international law they may serve to temporally sever the atrocities of colonialism from the current injustices propagated by the continued removal of cultural objects abroad.¹⁴⁵ International law already rejects the application of statutes of limitation to crimes against humanity and war crimes.¹⁴⁶ Considering the human rights underpinnings that the Adapted Principles will promote through their inclusion and promotion of heritage title, the new Principles' handling of statutes of limitations may similarly follow in its human-rights oriented footsteps. The Adapted Principles' emphasis on overlooking statutes of limitations is one which some domestic legal systems are in the processes of implementing.¹⁴⁷ For instance, the Netherlands has taken a new approach to temporal relations in regard to its colonial cultural objects by pledging to unconditionally return any object with colonial era provenance, with the exception that this only applies to states with pasts of Dutch colonization.¹⁴⁸

IV. Centralizing the Voices and Desired Solutions of Formerly Colonized Peoples, Indigenous People, and Minority Ethnic Groups

As the international community drafts any Adapted Principles with the goal of museum and cultural decolonization in mind, it is imperative that these new Principles include a commitment to center the desires and voices of decolonized states and the minority ethnic groups. Trust is an essential element of any discussion surrounding the future of these objects.¹⁴⁹ The violence of the colonial era, as well as decades of institutions in

144. See generally Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L. J. 2437, 2440-41 (1994).

145. Stahn, *supra* note 35, at 807.

146. Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73. See, e.g., Stahn *supra* note 35, at 807.

147. Stahn, *supra* note 35, at 807.

148. See Sarah Cascone, *The Dutch Government Just Promised to Return Any Stolen Colonial-Era Objects in Its Collections Back to Their Countries of Origin*, ARTNET NEWS (Feb. 4, 2021), <https://news.artnet.com/art-world/netherlands-restitution-guidelines-1941734> [<https://perma.cc/P625-9RXE?type=image>].

149. VAN BEURDEN, *supra* note 8, at 117-18.

the global north refusing to cooperate, have led to gaps in trust between some citizens of once-colonized nations and former colonizers.¹⁵⁰ The Adapted Principles will embody a new relational approach by recognizing the centrality of indigenous and decolonial voices in the process of returning colonial cultural objects. According to art historian and curator El Hadji Malik Ndiaye, involvement of African stakeholders in discussions of colonial cultural objects taken from the continent will lead to “a new type of relationship between the west and Africa.”¹⁵¹ Restitution is only a parenthesis – there can be a dialogue and at the same time objects can be returned.”¹⁵² Ndiaye has also recognized the positive impact on some sort of soft-law solution to the return of colonial cultural objects, but stressed the importance of discussions taking place on an international level in order to achieve mutual agreement and ensure provisions are drafted in a balanced way,¹⁵³ rather than one which replicates the neo-colonial injustices of other international agreements.¹⁵⁴

According to Ndiaye, African stakeholders need the agency to choose which artefacts have national and societal importance, and thus, should be returned, rather than the current holders having such a decision.¹⁵⁵ Furthermore, one-sided instances of institutional return are more akin to acts of neo-colonialism if dialogue and understanding between market nation and source peoples is substituted for unthoughtful, blanket returns of colonial

150. See, e.g., Kwame Opoku, *Berlin Decision on Benin Restitution: Germany on the Way to Restitution of Looted African Artifacts*, MOD. GHANA (May 5, 2021), <https://www.modernghana.com/news/1079313/berlin-decision-on-benin-restitution-germany-on.html> [https://perma.cc/BD9K-UFEZ] (“ . . . [S]o little trust can one have in European governments and institutions regarding the restitution of looted African artefacts. The safest position has been to wait and see what comes out of their encouraging pronouncements that are often contradictory or subject to multiple interpretations.”).

151. Isabel von Klitzing, *Why African Voices Are Crucial to the Debate over the Return of Colonial Loot*, ART NEWSPAPER (Mar. 26, 2021), <https://www.theartnewspaper.com/2021/03/26/why-african-voices-are-crucial-to-the-debate-over-the-return-of-colonial-loot> [https://perma.cc/MUW3-NJWW].

152. *Id.*

153. *Id.*

154. See generally Stahn, *supra* note 35, at 795.

155. Von Klitzing, *supra* note 151.

cultural objects.¹⁵⁶ This unthoughtful return of objects may even lead to expensive and devastating results. One such instance was the Denver Museum of Nature & Science's repatriation of a wooden *vigango* to the Nairobi National Museum in Kenya, from where the *vigango* had been forcibly removed years prior.¹⁵⁷ Due to insufficient communication as to how the *vigango* would be declared at customs and who would pay the customs tax, the wooden poles, which carry immense spiritual value since they are the physical embodiment of an ancestor's soul, sat in shipping crates for nearly four years, stuck in a painful bureaucratic limbo.¹⁵⁸

As discussed in the beginning of this Note, fair and just solutions for "return" may not necessarily require the physical relocation of objects to another country. In fact, the Adapted Principles may encourage signatories to consider other property-law solutions in order to empower decolonized claimants to have the final say in where their colonial cultural objects end up. Consider, for instance, Belgium's new policy regarding colonial cultural objects in their national museums.¹⁵⁹ During the Belgian colonial occupation of Congo Free State, King Leopold II ordered colonial officials to collect cultural objects to display in museums back in Belgium.¹⁶⁰ In doing so, the Royal Museum for Central Africa in Tervuren served as a museological celebration of the nation's imperial power.¹⁶¹ Today, Belgian officials are finally

156. Jennifer Venis, *New Laws and Guidelines Tackle Repatriation of Colonial-era Artefacts*, INT'L BAR ASS'N (Mar. 12, 2021), <https://www.ibanet.org/article/05DD150F-BF18-4B1E-A431-911EA2A1561A> [<https://perma.cc/R4LD-NKKQ>].

157. Stephen E. Nash, *A Curator's Search for Justice*, SAPIENS (May 14, 2020), <https://www.sapiens.org/column/curiosities/vigango-repatriation/> [<https://perma.cc/T3YA-RKAD>].

158. *Id.*; see also Interview with Kristen Windmuller-Luna, *supra* note 2.

159. Kwame Opoku, *Proposed Belgian Guidelines Re-Introduce Ethics Into Restitution Debate*, MOD. GHANA (Nov. 6, 2021), <https://www.modernghana.com/news/1087399/proposed-belgian-guidelines-re-introduce-ethics.html> [<https://perma.cc/4UFK-TXVW>].

160. VAN BEURDEN, *supra* note 8, at 78.

161. Johnny Cotton, *Belgium Begins Long Road to Returning Looted Congolese Art Works*, REUTERS (July 6, 2021, 2:35 PM), <https://www.reuters.com/lifestyle/belgium-begins-long-road->

positively responding to the Democratic Republic of Congo's restitution requests.¹⁶² However, rather than overloading Congolese museums and officials with the shipment of thousands of colonial cultural objects all at once, the parties have agreed that Belgium will transfer legal ownership of all items acquired through illegitimate theft, violence, and pillaging to the Democratic Republic of Congo.¹⁶³ After the legal transfer of ownership, it will be up to the Democratic Republic of Congo to decide whether they want certain items returned to the country.¹⁶⁴ That way, Congolese authorities will have the agency to choose which items they want returned, when and how the return will occur, and whether the Royal Museum for Central Africa will pay a loan fee in order to retain the objects in Belgium.¹⁶⁵ Although this is just one example between two nations with their own unique history and relationship, this agreement between Belgium and the Democratic Republic of Congo may serve as an example for other signatories to cooperate without drowning out the voices and desires of claimants.

V. Adoption of Specific, Accurate, and Effective Definitions and Understandings.

The scope and impact of international agreements regarding cultural objects will be governed by the definitions adopted therein. Thus, the language of the Adapted Principles must provide a specific, accurate, and effective foundation for signatories, institutions, and individuals to approach discussions and negotiations regarding the return of colonial cultural objects. As seen in numerous footnotes throughout this Note, semantics and word choice carry immense implications. The connection between art-related and political vocabularies emerged during the nineteenth and twentieth centuries.¹⁶⁶ This ménage à trois between art historical methodology, linguistics, and international law is critical in order to determine what works must be returned

returning-looted-congolese-art-works-2021-07-06/ [https://perma.cc/YW85-EWTB?type=image].

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Gaudenzi & Swenson, *supra* note 44, at 500.

and what level of ownership will be realistically and symbolically reinstated. For instance, a blanket definition of “colonial” era may fail to capture temporal differences in colonial occupation in varying parts of the world. Furthermore, contemporary indigenous claimants may be barred from achieving the return of their cultural heritage if the definition of “colonial” is one focused solely on the more far-off occupation pre-1960’s rather than one which acknowledges the continuing cultural losses that ongoing settler colonialism magnifies.

With regards to the choice of language used to express giving a colonial cultural object back to its original owner, the linguistic choice of verb carries strong political undertones. For instance, the choice between “return,” “redress,” “restitution,” and “repatriation” has significant impacts on connotations of the nature of original acquisition and effects on parties after the transfer from current owner to rightful claimant.¹⁶⁷ What constitutes appropriate definition and the conditions attached may vary between different groups of claimants. For indigenous claimants, “repatriation” may be an unattractive solution for lost cultural heritage since certain definitions of that word include conditions of continued stewardship attached by holding museums.¹⁶⁸ Global linguistic diversity further complicates these choices, as the semantic richness of a word in one language may be lost in translation. The initial soft-law nature of the Principles, therefore, may help facilitate the appropriate choice for each adopting nation, as it will ideally allow communities therein to shift the definition sensitive Adapted Principles to fit their cultural and linguistic landscape. Furthermore, by embodying a concern for linguistic consequences in this Principles themselves, parties will come together in negotiations with the initial understanding of the different interpretations and level of importance the other party places on their choice of verbiage.

VI. Establishment of Accessible Public Databases and Adoption of New Modes of Provenance Research

The adoption of accessible and comprehensive public databases of contested colonial cultural objects is one of the more technologically demanding, but still integral, aspects of a new

167. See VAN BEURDEN, *supra* note 8, at 33-34.

168. Whitby-Last, *supra* note 63, at 41; see also VAN BEURDEN, *supra* note 8, at 24-27.

Adapted Principles. This Principle mirrors that of the model Washington Principles, which implores participating nations to identify and publicize art that was confiscated by the Nazis and create a central registry of such information.¹⁶⁹ Providing provenance records in public, accessible databases provides a basis for individuals to learn about their stolen cultural history and subsequently bring claims for return.¹⁷⁰ Currently, centralized databases exist for art that has either recently become stolen or is being illicitly trafficked. However, these databases are often inaccessible for the general public¹⁷¹ or are prohibitively expensive for museums or individuals to list objects that they believe have been stolen or have questionable provenance.¹⁷²

The establishment of uniform, accurate definitions, alongside radically new and in-depth provenance research practices will ideally culminate in one central, accessible database of cultural objects with colonial origins and/or contested ownership. This idea of a central database of contested and documented objects

169. See Washington Conference Principles on Nazi-Confiscated Art, *supra* note 22.

170. Stahn, *supra* note 35, at 821.

171. Databases include INTERPOL's stolen art database and the Art Loss Register. Access to the INTERPOL database requires an application that is vetted by INTERPOL National Central Bureaus. Access to the database is not unlimited once access has been granted and can be terminated at any time. See *Application Form to Access INTERPOL's Works of Art Database*, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database/Application-form-to-access-INTERPOL-s-Works-of-Art-Database> (Nov. 18, 2021) [<https://perma.cc/5PVP-QGYS>].

172. The Art Loss Register charges a fee for both searching and registering objects. The charging of fees to conduct a search is due to the fact that the Register is a commercial tool. The Art Loss Register offers auction houses and art fairs specially priced subscriptions, revealing that those institutions are their indented audiences. This is not to say that the Art Loss Registry is automatically an unhelpful tool because it has monetary barriers preventing widespread access, but rather that in the case of colonial cultural objects, it may not be the most effective tool for claimants and museums to provide information to each other on potentially claimable items without first changing the access structure of the database. See *Frequently Asked Questions*, ART LOSS REG., <https://www.artloss.com/faqs/> (Nov. 18, 2021) [<https://perma.cc/D6XT-UYR7>].

originates from the Washington Principles.¹⁷³ State methodologies of bringing attention to stolen works, such as the use of databases, is also part of the UNESCO Convention's provisions.¹⁷⁴ Today, major museums often explicitly present works with Holocaust-era provenance to the public through their websites, and other databases exist for the purpose of compiling these objects.¹⁷⁵ However, in the case of both items with Nazi-era provenance as well as colonial cultural objects, there is no truly central database hosting a comprehensive account of these items.

The construction of this central database will be a massive undertaking. According to some experts, the volume of colonial cultural items¹⁷⁶ plus the hundreds of years it took for them to disseminate throughout the globe means it is "unpractical" to attempt to centralize contested colonial cultural objects.¹⁷⁷ However, continuing technological developments will only allow for greater results to be achieved through centralization of databases.¹⁷⁸ Already, Germany has unveiled a centralized database documenting provenance and documentation of Benin

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173. See Washington Conference Principles on Nazi-Confiscated Art, *supra* note 22.
174. Off. Internal Oversight Servs., Evaluation of UNESCO's Standard-setting Work of the Culture Sector, U.N. Doc. IOS/EVS/PI/133 REV, at 48 (2014); see also UNESCO Convention, *supra* note 19, at art. 5(g) ("seeing that appropriate publicity is given to the disappearance of any items of cultural property") and *id.* at art. 5(b) ("establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage").
175. See *Selected Museum Provenance Research Projects in the US and Abroad*, METRO. MUSEUM ART, <https://www.metmuseum.org/about-the-met/provenance-research-resources/museum-provenance-research-projects> (Sep. 16, 2022) [<https://perma.cc/XU3G-GWEK>].
176. Regarding Benin Bronzes and other Benin Kingdom cultural objects that were removed during the siege of Benin, estimates on their numbers are around 10,000. And that alone is just one group of colonial cultural objects from one Kingdom. The numbers of colonial cultural objects as a whole that are out there is likely dizzying. See HICKS, *supra* note 7, at 137.
177. VAN BEURDEN, *supra* note 8, at 243.
178. Haley R. Cohen, *Modern(izing) Art: The Need for a Centralized Registry*, 26 SW. J. INT'L L. 354, 370 (2020).

Bronzes.¹⁷⁹ So far, 1,100 works have already been accounted for.¹⁸⁰ The trends of museum digitization of their collections will only allow for greater collaboration between institutions in the establishment of this centralized database, as some museums already possess the technology to transfer their online collections information for inclusion in other databases.¹⁸¹ Therefore, any adoption of the Adapted Principles by a new signatory will grow the amount of data shared by their domestic institutions, providing greater access to claimants searching for which museum(s) are in possession of their colonial cultural objects.

Although provenance research for colonial cultural objects will be bolstered by the existence of current expansive databases,¹⁸² the temporal distance and length of colonial rule,¹⁸³ coupled by the varied ways by which objects were acquired and transferred creates unique hurdles in providing comprehensive provenance information for colonial cultural objects. However,

179. Alex Greenberger, *Germany Unveils Comprehensive Database of Its Benin Bronzes*, ARTNEWS (June 17, 2021), <https://www.artnews.com/art-news/news/germanybenin-bronzes-database-1234596078/> [<https://perma.cc/J9SK-JHKB>].

180. *Id.*

181. See Brian Boucher, *All-Star Museums Team Up to Digitize 25 Million Images, Putting Art History Online*, ARTNET NEWS (May 16, 2017), <https://news.artnet.com/art-world/pharos-25-million-artworks-digitized-962210> [<https://perma.cc/VYE6-36EW?type=image>]; see also Sarah Cascone, *The British Museum Has Put 300,000 Images of Its Most Famous Artworks Online So You Can Play Around With Them*, ARTNET NEWS (May 1, 2020), <https://news.artnet.com/art-world/british-museum-makes-collection-available-online-1850229> [<https://perma.cc/4LDT-8KXV?type=image>]. See generally *Collections Management Software that Helps You Expertly Manage Your Collection*, GALLERY SYS., <https://www.gallerysystems.com/tms-collections/tms-suite/tms/tms/#:-:text=A%20Worldwide%20Community%20of%20Support,share%20their%20knowledge%20and%20expertise> [<https://perma.cc/A23V-VZ8V>]. The Museum System (TMS), owned by Gallery Systems, is a museum database platform that is used by over 800 institutions worldwide. TMS's collections management software allows for institutions to transfer information between entities.

182. See, e.g., *Search*, ART LOSS REG., <https://www.artloss.com/search/> [<https://perma.cc/6R8A-GA8U>].

183. Stahn, *supra* note 35, at 821.

challenges posed by compiling colonial era provenance may not necessarily be a net negative, as the unique nature and scale of the theft and loss of colonial cultural objects may open doors for new understandings of provenance research and documentation. In the case of the aforementioned Benin Bronzes,¹⁸⁴ the violent nature of their removal has led to a gap in understanding regarding the number of them floating around museums, private collections, and markets is unknown.¹⁸⁵ However, numerical estimates of the scale of lost cultural wealth of the Benin Kingdom approach upwards of 10,000 missing objects.¹⁸⁶ To understand and begin to document the immense loss of colonial cultural objects through provenance research, the understanding of “provenance” itself must be expanded beyond typical art historical notions.¹⁸⁷ Typical art historical provenance research requires following the chain of ownership of an object, attempting to bridge gaps between named and known owners through in-depth research consulting a multitude of sources. However, this narrow approach to ownership and documentation provides a “bland” sequential list of owners that doesn’t necessarily capture the multiple layers of legal intricacies attached to an object’s life.¹⁸⁸

Looking into the provenance of colonial cultural objects may require going beyond this chain of ownership towards documentation of what Dan Hicks conceptualizes as the necography of the object.¹⁸⁹ Necography aims to understand the truth of the “scene of the crime,” and incorporates evidence of ethics, responsibility, and effects of killing and destruction into understandings of an object’s life.¹⁹⁰ The inclusion of necography and other non-traditional art historical provenance research

184. *See supra* text accompanying note 4.

185. HICKS, *supra* note 7, at 137.

186. *Id.*

187. *Id.* at 154.

188. Arthur Tompkins, *The History and Purposes of Provenance Research* in *PROVENANCE RESEARCH TODAY: PRINCIPLES, PRACTICE, PROBLEMS* 16, 18 (Arthur Tompkins ed., 2020).

189. Necography is a philosophically complex and rich means of going beyond typical object biographies. For a full account of its underpinnings, *see* HICKS, *supra* note 7, at 24-36.

190. *Id.* at 155.

methods could support the fair and just aim of an Adapted Principles, as they may simultaneously provide greater, more relevant information than just a chain of title while also accounting for the colonial pasts of these items as well as their colonized presents.

*C: The Continuing Challenges and Potential Justice of Soft-law
Solutions*

Although the adoption of new soft law principles will provide a more radical, effective solution to the failures of the UNESCO and UNIDROIT Conventions, successful implementation of the Adapted Principles may rely heavily on widespread adoption and implementation of the principles into domestic law. However, even though soft-law solutions present their own set of problems, today's trend of meaningful instances of bottom-up return processes demonstrate that international endorsement and adoption of Adapted Principles are a logical next-step in achieving fair and just solutions for colonial cultural objects.

The Washington Principles have been criticized as a failure by some scholars and legal practitioners, largely in part because of their non-binding nature.¹⁹¹ As a result, even though 44 countries have agreed to the Washington Principles, only five states have adopted them into their own domestic law.¹⁹² This results in cases being brought in domestic courts in various legal systems and unsynchronized decisions being made by judiciaries regarding who the rightful owner of a work is and what constitutes just and fair solutions.¹⁹³

191. See, e.g., Noah Charney, *20 Years on, It's Time to Admit our Rules for Handling Nazi-Looted Art Have Failed*, OBSERVER (Nov. 18, 2020, 7:30 AM), <https://observer.com/2018/11/washington-principles-nazi-looted-art-failed-what-went-wrong/> [<https://perma.cc/PK8Y-ZRCB>].

192. Talya Zax, *The World Set Rules for Returning Nazi-Looted Art. Are they Working?*, FORWARD (Dec. 3, 2018), <https://forward.com/culture/415255/washington-principles-nazi-looted-artreturn-are-they-working/> [<https://perma.cc/87QZ-YHFV>] (“only 5 countries out of 42 have set up some form of mechanism to address the restitution of objects looted and displaced during the Nazi years — [the] UK, France, Germany, Austria, and the Netherlands”).

193. See generally Charney, *supra* note 191.

Although the Adapted Principles will likewise be non-binding, the Washington Principles have been successful in facilitating some instances of return since moral underpinnings and guidelines have been more successful in the field of cultural object return than other forms of legal action.¹⁹⁴ Furthermore, the non-binding nature of the Adapted Principles will not be as much of an impediment to implementation as the Washington Principles, since with colonial cultural objects, the relational and moral imperatives to return these objects in order to address the damage of the colonial past has already largely driven a number of return policies in countries such as Belgium, the Netherlands, and France.

Another criticism of the Washington Principles is that they did not meet their temporal goal of completing the “unfinished business” of returning Nazi looted art by the end of the 20th century.¹⁹⁵ Although the Adapted Principles will not be crafted to attempt to fulfill any kind of time-based goal, the sheer amount of colonial cultural objects in foreign institutions, coupled by the sheer lack of knowledge as to what is out there, will likely result in an even longer, more costly process of repatriation. However, the Washington Principles’ failure to abide by narrow temporal goals can serve as guidance to signatories of the Adapted Principles. Looking to the lengthy return processes of Nazi-looted art can inspire realistic temporal outcomes for the Adapted Principles. By approaching the return of colonial cultural objects with this realistic acknowledgement of the time, work, and money involved in facilitating these returns, lessons learned from the Washington Principles may allow for more economical planning of the implementation of the Adapted Principles.

The endorsement of the Adapted Principles by the U.N. General Assembly or UNESCO Intergovernmental Committee for

194. Blair, *supra* note 38, at 65 (quoting J. Christian Kennedy, Special Envoy for Holocaust Issues who stated: “moral authority . . . is probably more effective than the threat of civil or criminal proceedings . . .”).

195. Well into the 21st century, Nazi looted art is still being returned. Catherine Hickley, *Washington Principles: The Restitution of Nazi Looted Art is Still a Work in Progress, 20 Years on*, ART NEWSPAPER (Nov. 26, 2018), <https://www.theartnewspaper.com/2018/11/26/washington-principles-the-restitution-of-nazi-looted-art-is-still-a-work-in-progress-20-years-on> [<https://perma.cc/AU9U-XHT8>].

Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (“ICPRCP”)¹⁹⁶ could eventually serve as a way to solidify these soft law solutions on a larger scale. International law, through UN declarations and treaties, has evolved towards the acknowledgement that cultural heritage is connected to human rights.¹⁹⁷ Furthermore, nearly all of the former colonial states which are taking strides towards greater return of colonial cultural objects are U.N. member states.¹⁹⁸ The ICPRCP, which was established to handle cultural dispossession prior to 1970, today mainly handles cases that concern contemporary trafficking of cultural objects.¹⁹⁹ However, ICPRCP has previously endorsed and developed guidelines, such as codes of ethics.²⁰⁰ If a future conference establishes a concrete set of Adapted Principles, perhaps these international bodies may assist with broadening their scope of implementation through endorsement.

IV: CONCLUSION

The tides are turning around the world with regards to disputed colonial cultural objects. Cultural institutions are realizing the negative effects of their acquisition of colonial cultural objects, and the impact that dispossession has on the nations and communities from where they came. Although the international community has attempted to enact protections for cultural property in the past, these instruments cannot be the only ones available to claimants seeking the return of their cultural heritage. Statutes of limitations, state-centric approaches, and weak implementation due to enduring colonialist fears have prevented these Conventions from facilitating fair and just solutions on their own. The current UNESCO and UNIDROIT frameworks, while appropriately suited and

196. “Return & Restitution” Intergovernmental Committee, UNESCO, <https://en.unesco.org/fightrafficking/icprep> [<https://perma.cc/6HDK-QFEC>]; see also VAN BEURDEN, *supra* note 8, at 102-103.

197. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1212 (2004).

198. See TAŞDELEN, *supra* note 64, at 138.

199. *Id.* at 137.

200. *Id.* at 150.

successful in other contexts, have proved that they are an inappropriate solution to rely on for the return of colonial cultural objects.

Soft-law standards are not a perfect solution to amending the lack of justice in international cultural heritage law. However, the flexibility of soft-law solutions and potential for coordination between states, cultural institutions, and claimants demonstrate that an Adapted Principles are a more appropriate means of facilitating repatriation of colonial cultural objects than the current international frameworks. If soft law Adapted Principles are dismissed in favor of solutions stuck within the current international framework, there are scant ways to remedy current injustices without relying on Conventions which inadvertently perpetuate continuing colonial injustices. Colonial injustice and violence is treated by the law as a thing of the past, and thus, it is often left out of the discussion of other international wrongs.²⁰¹ However, within the walls of the encyclopedic museum, tucked away in whichever corner of the institution, colonialist violence is “renewed every day the museum doors are unlocked and these trophies are displayed to the public.”²⁰²

By embodying today’s encouraging trends of return, the Adapted Principles will facilitate fairer and more just solutions for colonial cultural objects and their original owners. The adaptation and adoption of these Principles are the start of new ways of conceptualizing relationships between colonizing powers and their former colonies. Although the return of colonial cultural objects is not the end of colonialist thought and the lingering effects of the era, the adoption of the Adapted Principles may signal a new, decolonial approach to cultural exchange, dialogues, and international relations.

201. Stahn, *supra* note 35, at 797.

202. HICKS, *supra* note 7, at xiv.

ANNEX: ADAPTED PRINCIPLES

WASHINGTON PRINCIPLES ²⁰³	PRINCIPLES ON OBJECTS OF CULTURAL OR HISTORICAL IMPORTANCE, TAKEN WITHOUT JUST COMPENSATION OR INVOLUNTARILY LOST IN THE EUROPEAN COLONIAL ERA ²⁰⁴	ADAPTED PRINCIPLES ²⁰⁵
1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.	1. Objects of cultural or historical importance taken without just compensation or involuntarily lost in a territory controlled by European, American, or Asian colonial powers and not subsequently returned should be identified.	1. Cultural objects taken without just compensation or involuntarily taken during a colonial era and not subsequently returned should be identified. Signatory nations should carefully craft definitions for words such as “return” and “colonial era”. Signatories should engage in bilateral discussions to ensure mutual

203. Washington Conference Principles on Nazi-Confiscated Art, *supra* note 22.

204. VAN BEURDEN, *supra* note 8, at 252-253.

205. Adapted from *id.*

		understanding of these defined terms regardless of linguistic differences between claimants and state actors.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.	2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.	2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council of Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.	3. Resources and personnel should be made available to facilitate the identification of all objects of cultural or historical importance taken without just compensation or involuntarily lost in the European colonial era and not subsequently returned.	3. Cultural institutions should make resources and personnel available to facilitate the identification of all cultural objects that had been lost involuntarily during a colonial era and not subsequently returned.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration	4. In establishing that an object of cultural or historical importance was taken without just compensation or had been lost	4. In establishing that a cultural object was taken without just compensation or had been involuntarily lost during the colonial

<p>should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.</p>	<p>involuntarily in the European colonial era and not subsequently returned, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the European colonial era.</p>	<p>era, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time, circumstances of colonial eras, and international acquiescence of colonialist standards in contemporary law.</p>
<p>5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-war owners or their heirs.</p>	<p>5. Every effort should be made to publicise objects of cultural or historical importance that are found to have been taken without just compensation or were lost involuntarily during the European colonial era and not subsequently returned in order to locate its rightful claimants.</p>	<p>5. Every effort should be made to publicize cultural objects that are found to have been taken without just compensation or lost involuntarily during colonial eras and not subsequently returned through accessible, affordable, and widely available databases or other means in order to locate its rightful claimants.</p>
<p>6. Efforts should be made to establish a central registry of such information</p>	<p>6. Efforts should be made to establish a registry of such information on a bilateral basis</p>	<p>6. Efforts should be made to establish a central database of such information that is widely</p>

		accessible and does not have institutional or financial barriers to searching, viewing, or inquiring.
7. Pre-war owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.	7. Rightful parties should be encouraged to come forward and make known their claims to objects that were taken without just compensation or lost involuntarily in the European colonial era and not subsequently returned.	7. Signatories should encourage rightful claimants and connected indigenous or minority groups to come forward and make known their claims to cultural objects that were taken without just compensation or lost involuntarily during colonial eras.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.	8. If the rightful claimants can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.	8. If the rightful claimants or connected indigenous or minority groups cannot be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case

<p>9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.</p>	<p>9. If no rightful claimants can be identified, steps should be taken expeditiously to achieve a just and fair solution.</p>	<p>9. If the rightful claimants or connected indigenous or minority groups cannot be identified, steps should be taken expeditiously to achieve a just and fair solution, keeping in mind that this solution may change if claimants come forward in the future.</p>
<p>10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.</p>	<p>10. Commissions or other bodies established to identify objects of cultural or historical importance that are found to have been taken without just compensation or to have been lost involuntarily in the European colonial era and to assist in addressing ownership issues should have a balanced membership.</p>	<p>10. Commissions or other bodies established to identify cultural objects taken without just compensation or lost involuntarily during colonial eras should have a balanced membership between citizens of former colonizing states and formerly colonized people groups, with a special emphasis on the centering of the voices and desired solutions of formerly colonized people, indigenous people,</p>

		and minority ethnic groups.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues	11. Nations, including the minorities and indigenous peoples in these nations, are encouraged to develop national and international processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.	11. Nations are encouraged to develop national processes to implement these principles, particularly ones which are developed in conjunction with indigenous communities and minority ethnic groups.

