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## COMMENT

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### MAPPING THE LIMITS OF REPATRIABLE CULTURAL HERITAGE: A CASE STUDY OF STOLEN FLEMISH ART IN FRENCH MUSEUMS

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## INTRODUCTION

On June 20, 1939, Adolf Hitler called upon Hans Posse, one of his chief advisors, to establish the Sonderauftrag Linz (“Special Project Linz”)—a cultural complex in the Führer’s hometown. The show-piece of the propagandistic cultural center would be the Führermuseum, a grand museum housing the most revered European artwork from every century.<sup>1</sup> By the end of the war, the Nazis had stolen more than 21,000 paintings, sculptures, and other art pieces for Hitler’s museum.<sup>2</sup> Upon discovering the large-scale pillaging when the war ended,<sup>3</sup> the Allies mounted a well-publicized campaign to return the stolen art to its rightful owners.<sup>4</sup> For essentially the first time in history, the international art community launched a coordinated campaign to repatriate stolen art and revise museum acquisition policies. Beyond returning many of the stolen works, the postwar movement

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<sup>1</sup> See FREDERIC SPOTTS, *HITLER AND THE POWER OF AESTHETICS* 187-88 (2003); William J. Diebold, *The Politics of Devestation: The Aegina Pediments and the German Confrontation with the Past*, ART J., Summer 1995, at 60, 62-63 (describing Hitler’s plan for transforming Munich into a Nazi cultural center that would utilize many classical and neoclassical themes); see also JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH*, 185-86 (1996) (describing the importance of acquiring stolen art to Hitler’s collection for the Führermuseum).

<sup>2</sup> Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 288 n.49 (1997). For a helpful overview of Hitler’s art policy and pillaging, see generally LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994). For an account of Hitler’s art collection after the war, see Gladys E. Hamlin, *European Art Collections and the War: Part II*, 4 C. ART J. 209, 210 (1945), noting that “records found at Neu-Schwanstein . . . show[ed] that twenty-one thousand works of art . . . had passed through the castle.”

<sup>3</sup> See Hamlin, *supra* note 2, at 209-10 (detailing the efforts led by the American Seventh Army to locate Hitler’s collection of stolen art at Neuschwanstein castle).

<sup>4</sup> The United States created the Commission for the Protection and Salvaging of the Artistic and Historic Monuments in Europe—a group tasked with returning art stolen by the Nazis to its original owners. See Kastenberg, *supra* note 2, at 288 n.49.

resulted in the 1954 Hague Convention, which conceived the art world's newest buzzword: "cultural property."<sup>5</sup>

Nearly two centuries before Hitler's art campaign, revolutionary and postrevolutionary French governments, particularly under Napoleon Bonaparte, oversaw many national political changes that implicated concepts of cultural property. Chief among these was the nationalization of the royal art collection at the Luxembourg Palace, later renamed the Musée Napoléon (and now known as the Louvre).<sup>6</sup> Like Hitler, Napoleon envisioned a spectacular art museum bearing his name and charged French troops with confiscating art at home and in foreign conquests.<sup>7</sup> Between 1794 and 1813, art shipments arrived in France nearly every year from Italy, Belgium, Austria, the Netherlands, and Spain.<sup>8</sup> When the Musée Napoléon became too cramped with the spoils of war, Napoleon transferred art to regional museums throughout the country.<sup>9</sup> Although the 1815 Treaty of Paris ended the war in Europe, most works stolen by the Napoleonic armies remain in the Louvre or in French regional museums today.<sup>10</sup>

Art and cultural-heritage law has matured considerably in the last century, particularly in the wake of the Nazi art-looting operation. The concept of cultural property seems all encompassing, and the art-law community is consumed by the goals of repatriation and restitution. Despite this intense focus on preserving cultural heritage, current private and public legal regimes prevent most repatriation claims for art stolen before the twentieth century, and the world's museums are not receptive to centuries-removed restitution claims. However,

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<sup>5</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 36 Stat. 2279, 249 U.N.T.S. 215; see also Naomi Mezey, Essay, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2009 (2007) (tracking the emergence of cultural-property law after World War II).

<sup>6</sup> For an overview of the transformation of the Luxembourg Palace from the royal collections to the modern Louvre, see ANDREW MCCLELLAN, *INVENTING THE LOUVRE* (1994).

<sup>7</sup> See *id.* at 115-18 (outlining Napoleon's concept for a glorious cultural center in Paris capped by the Musée Napoléon).

<sup>8</sup> CECIL GOULD, *TROPHY OF CONQUEST: THE MUSÉE NAPOLÉON AND THE CREATION OF THE LOUVRE* 77-79, 129 (1965); MCCLELLAN, *supra* note 6, at 114-19, 131, 198.

<sup>9</sup> See GOULD, *supra* note 8, at 70-77; see also Edouard Pommier, *La création des musées de province: Les ratures de l'arrêté de l'an IX*, 39 LA REVUE DU LOUVRE ET DES MUSÉES DE FRANCE 328, 332 (1989) (describing the growing political pressure for Paris to share works with the regional museums).

<sup>10</sup> See, e.g., GOULD, *supra* note 8, at 125-28 (discussing the number of works remaining in France after postrevolutionary restitution, including about half of the Italian works and most of the Flemish works).

much of the stolen cultural property in today's museums and private collections was, like the artwork taken by Napoleon's armies, stolen during the wars, revolutions, and colonial occupations of the eighteenth and nineteenth centuries.

This Comment explores the current legal paradox that allows for the repatriation of art taken during World War II while maintaining stolen Flemish art in the Louvre for eternity. Part I discusses the Napoleonic revolution and the creation of French museums relying on stolen European masterpieces for their collections. Even though the Second Treaty of Paris required some restitution of Italian and Austrian art, Flemish art taken by French troops remained in France even after peace was declared. Part II analyzes the development of the law of restitution from Roman prize law through World War II and presents examples of how nations today attempt formal and informal repatriation claims. Part III presents an argument for why France should return Flemish art to Belgium and describes what legal routes Belgium might take to retrieve its works of art.

The presence of Flemish art in French museums mimics other situations in which cultural objects were taken from their country of origin. Restitution claims invariably involve a struggle between nationalistic patriotism and our broader aspiration for international appreciation of other cultural traditions. Recognizing the perplexing boundaries of the seemingly broad world of repatriation claims, this Comment offers a replicable private-sector solution based on the accord between Italy and the Metropolitan Museum of Art (the Met)<sup>11</sup> that balances repatriation and the art community's desire for public access to the world's art.

#### I. THE NAPOLEONIC REVOLUTION AND THE CREATION OF FRANCE'S MUSEUMS

Throughout the eighteenth century, French nobility and intellectuals made great strides toward improving public access to the arts.<sup>12</sup> Semipublic display and appreciation of art took root in France before

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<sup>11</sup> See *infra* Part II.B.2.

<sup>12</sup> These improvements were mostly the result of a royal command to rid artists of guild restrictions, which in turn allowed for the salon culture in Paris under the Royal Academy. As early as the fourteenth century, artists under royal protection were able to take commissions, hold improved legal status, and enjoy free studios and incredible architectural display space at the Louvre. As artists moved under the protection of the nation, the Academy was able to organize the best work in the salons. See THOMAS E. CROW, *PAINTERS AND PUBLIC LIFE IN EIGHTEENTH CENTURY PARIS* 23-25, 33-34 (1985).

the Revolution through the royally sanctioned seventeenth-century exhibits held occasionally by the Royal Academy.<sup>13</sup> In 1737, the first regular public exhibitions began at the Salon Carré in the Louvre.<sup>14</sup> Enthusiasm for art exhibitions amplified, and by the middle of the eighteenth century, the salon model and the public agenda of educating buyers and artists consumed Paris and spread to the provinces.<sup>15</sup> Many of the French regional museums had their roots before the Revolution as local art schools<sup>16</sup> or as meeting places for art connoisseurs<sup>17</sup> in this age of enlightenment.

In 1750, the French monarchy responded to public pressure by opening its collection at the Luxembourg Palace as a spectacle of royal magnificence.<sup>18</sup> As public exhibitions became more popular, more opportunities emerged for both royal and political leaders to use art as propaganda.<sup>19</sup> At the end of the century, France was culturally and politically ripe for revolution. Napoleon would, like previous French governments, take advantage of the public's desire for art and the potential propagandistic use of cultural property to meet his political goals.

#### A. *Napoleon and the Confiscation of Art at Home and Abroad*

Following his rise to political control of France in 1799, Napoleon charged his Minister of the Interior, Jean-Antoine Chaptal, with establishing French economic and cultural superiority in Europe.<sup>20</sup> In particular, the Napoleonic regime believed that filling French regional

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<sup>13</sup> *Id.* at 33-39.

<sup>14</sup> *Id.* at 1.

<sup>15</sup> See generally DANIEL J. SHERMAN, *WORTHY MONUMENTS: ART MUSEUMS AND THE POLITICS OF CULTURE IN NINETEENTH-CENTURY FRANCE* 97-98 (1989) (noting the enthusiasm for the arts throughout France in the decades leading up to the Revolution).

<sup>16</sup> See, e.g., *id.* at 97 (describing the origins of the museum in Bordeaux as a regional teaching institution). The museum in Dijon was an art school and library until the local government converted the school into a rudimentary museum at the Estates of Burgundy. See generally PIERRE GEORGEL, *LE MUSÉE DES BEAUX-ARTS DE DIJON* (1985); PIERRE QUARRÉ, *LE MUSÉE DE DIJON* 1 (2d ed. 1966).

<sup>17</sup> See, e.g., Michel Hilaire, *Introduction* to QUENTIN BUVELOT ET AL., *TABLEAUX FLAMANDS ET HOLLANDAIS DU MUSÉE FABRE DE MONTPELLIER*, at vii-viii (1998) (explaining the founding of a museum at Montpellier by a group of "bourgeois notables," amateur connoisseurs, and collectors who hoped to educate themselves about art).

<sup>18</sup> See MCCLELLAN, *supra* note 6, at 13.

<sup>19</sup> See *id.* at 13-14.

<sup>20</sup> See generally Jeff Horn & Margaret C. Jacob, *Jean-Antoine Chaptal and the Cultural Roots of French Industrialization*, 39 *TECH. & CULTURE* 671, 672 (1998) (outlining Chaptal's economic goals during the revolutionary period).

museums with exquisite art and creating the Musée Napoléon in Paris would make France the cultural center of the Western world.<sup>21</sup> In order to meet this goal, the government first looked to artwork owned by the French people. It nationalized the royal art collection at the Luxembourg Palace and all Church property in France, and later confiscated assets belonging to émigrés.<sup>22</sup> Most of this art journeyed directly to regional cities, with local museums acting as “art depots” for the works seized from churches, abbeys, and the homes of royalty.<sup>23</sup>

To complement and expand upon local collections, French armies confiscated select European masterpieces from foreign aristocrats, religious buildings, and museums.<sup>24</sup> In September 1794, the first stolen Belgian artwork arrived at the Musée Napoléon.<sup>25</sup> Over the course of France’s foreign conquests, French armies would loot many of Belgium’s largest churches and cathedrals and return with some of the most prized Flemish “old master” paintings.<sup>26</sup> Many in France

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<sup>21</sup> See MCCLELLAN, *supra* note 6, at 91-123.

<sup>22</sup> See SHERMAN, *supra* note 15, at 99 (recounting the revolutionary government’s actions nationalizing church property in 1789, and, in the following three years, censoring religious associations and confiscating foreigners’ property).

<sup>23</sup> See, e.g., Blandine Chavanne, *De la collection au musée, l'exemple nancéien*, in DE L’AN II AU SACRE DE NAPOLÉON: LE PREMIER MUSÉE DE NANCY 12-13 (Blandine Chavanne & Clara Gelly-Saldia eds., 2001) (describing the transfer of confiscated art to a local painting school to create the musée des Beaux-Arts de Nancy in 1793); Marc Fumaroli, *The Birth of the Modern Museum*, in MASTERWORKS FROM THE MUSÉE DES BEAUX-ARTS, LILLE 1, 5-8 (John P. O’Neill ed., 1992) (providing an account of the transfer of Peter Paul Rubens’s *Descent from the Cross* from a local Capuchin convent to the local museum at Lille).

<sup>24</sup> See MCCLELLAN, *supra* note 6, at 116-18 (detailing Napoleon’s confiscations during his campaigns in Italy).

<sup>25</sup> See *id.* at 114-15 (describing the start of organized confiscations in Belgium and the arrival of the first shipment of Belgian art in September 1794).

<sup>26</sup> See Abbé Grégoire, *Rapport sur les destructions opérées par le vandalisme, et sur les moyens de le réprimer*, in DÉCRET DE LA CONVENTION NATIONALE 22 (1794) (noting that France had acquired works by Crayer, Van Dyck, Rubens, and other Flemish masters to adorn the walls of French museums). Works by Rubens, David, and many other Flemish masters permeate French museum collections. See, e.g., 3 L’ASSOCIATION DES CONSERVATEURS DE LA REGION NORD—PAS-DE-CALAIS, TRESORS DES MUSEES DU NORD DE LA FRANCE: LA PEINTURE FLAMANDE AU TEMPS DE RUBENS (1977) (reciting Descamps’ 1769 description of *The Ecstasy of Mary Magdalene* taken from a Franciscan Church in Ghent and displayed at the Musée des Beaux-Arts in Lille); JOHN DENISON CHAMPLIN, JR. & CHARLES C. PERKINS, 4 CYCLOPEDIA OF PAINTERS AND PAINTINGS 378 (1887) (stating that *The Coronation of the Virgin* was taken from the Church of the Recollets in Antwerp); OLGA POPOVITCH, CATALOGUE DES PEINTURES DU MUSÉE DES BEAUX-ARTS DE ROUEN 35 (1978) (commenting that Gerard David’s *Virgin and Saints* was stolen from the Sion Carmelites Convent in Bruges and is now at the museum in Rouen); Musée des Augustins Database, *Le Christ entre les deux larrons*, <http://www.augustins.org/en/collections/bdd/fiche.asp?num=D+1805+6>.

viewed these actions not as looting, but as the restoration of the masterpieces to their rightful place in Europe's new, glorious cultural center—France.<sup>27</sup>

On August 31, 1801, Chaptal issued the Decree of 13 Fructidor year IX (the so-called “Chaptal Decree”), which institutionalized and coordinated local and national art-confiscation efforts.<sup>28</sup> The Decree provided for the distribution of batches of stolen artwork among the Louvre (then the Musée Napoléon) in Paris and fifteen regional cities.<sup>29</sup> Successive waves of artwork, carefully sorted in order to ensure that the French people would be able to view the very best art from around Europe, made their way across France in 1801, 1802, 1805, and 1811, and on to the walls of public museums.<sup>30</sup> In a report describing the Decree, Chaptal explained his initiative as an attempt to create bountiful public art collections featuring “une suite intéressante de tableaux de tous les maîtres, de tous les genres, de toutes les écoles.”<sup>31</sup>

The fulfillment of the Chaptal Decree communicated a new sense of political legitimacy to French citizens. By creating a museum system filled with confiscated masterpieces, Napoleon showed the affluence of French culture in his nouveau regime. He further demonstrated the strength of French armies, which conquered both foreign nations and their art. French subjects in the provinces had fine art at their fingertips because of the policies of their new government and leader.

### B. *The Second Treaty of Paris*

When England and its allies defeated Napoleon in 1814, Belgium had been stripped of its artistic treasures, but the walls of French museums remained covered with stolen Belgian artwork. Concerned by

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en/collections/bdd/fiche.asp?num=D+1805+6 (last visited Nov. 15, 2008) (noting that *Christ Between Two Criminals* was taken from a church in Antwerp and is now displayed at the museum in Toulouse); see also MCCLELLAN, *supra* note 6, at 111 (noting the transportation of Ruben's *Descent from the Cross* from Antwerp to the Louvre).

<sup>27</sup> See MCCLELLAN, *supra* note 6, at 115-18 (excerpting parts of speeches by Napoleon's contemporaries expressing the view that artwork stolen from around Europe belonged in France).

<sup>28</sup> See GOULD, *supra* note 8, at 75-77, 77 n.1 (presenting the September 1, 1800, Chaptal Decree and noting some confusion as to the date of the Decree); see also Edouard Pommier, *Idéologie et musée à l'époque révolutionnaire*, in LES IMAGES DE LA RÉVOLUTION FRANÇAISE 57 (Michel Vovelle ed., 1988).

<sup>29</sup> See GOULD, *supra* note 8, at 76-77.

<sup>30</sup> See Chavanne, *supra* note 23, at 12-13.

<sup>31</sup> *Id.* at 12 (quoting Chaptal's desire to amass “an interesting collection of works of all masters, from all genres and from all schools of art”).

this situation, the victorious British general, the Duke of Wellington, and Viscount Castlereagh, the Foreign Secretary, hoped to lay plans for art restoration. In correspondences written by Wellington and Castlereagh, the two men commented that the works in the Louvre and other French museums were effectively military trophies and that France should be required to return the art.<sup>32</sup> Castlereagh believed that contemporary principles of property and military law required France to return art to the museums, homes, and churches from which they were stolen.<sup>33</sup>

The preliminary 1814 Convention and Treaty of Paris did not provide any guidelines for the return of stolen art.<sup>34</sup> Therefore, when representatives of the British, Dutch, Prussian, and Russian vanquishers arrived in Paris to discuss a long-term peace treaty with France, the stolen art was a major topic. Although the French lobbied for a special convention protecting the art, the victors summarily rejected this proposal because it conflicted with the common law that existed at the time.<sup>35</sup> The Second Treaty of Paris, signed on November 20, 1815, forced France to return territories that it acquired in the war.<sup>36</sup> France was also pressured to restore to its owners any art taken by French troops as spoils of war.<sup>37</sup>

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<sup>32</sup> See Letter from Viscount Castlereagh to Plenipotentiaries of Austria, Prussia, and Russia (Sept. 1815), *reprinted in* 3 B.S.P. 203, 206 (“Can the King [of France] feel his own dignity exalted, or his title improved, in being surrounded by Monuments of Art, which record not less the sufferings of his own illustrious house, than of the several Nations of Europe?”); Letter from Duke of Wellington to Viscount Castlereagh (Sept. 23, 1815), *reprinted in* 3 B.S.P. 207, 210 (arguing that the works were “obtained by military successes, of which they are the trophies” and therefore should be returned to the now-victorious Allies).

<sup>33</sup> See Letter from Viscount Castlereagh to Plenipotentiaries, *supra* note 32, *reprinted in* 3 B.S.P. 207, 207 (“The principle of property, regulated by the claims of the Territories from whence these Works were taken, is the surest and only guide to justice . . .”).

<sup>34</sup> See Letter from Duke of Wellington to Viscount Castlereagh, *supra* note 32, *reprinted in* 3 B.S.P. 207, 209 (noting “the silence of the Treaty of Paris of May, 1914, regarding the M[u]seum”).

<sup>35</sup> *Id.*, *reprinted in* 3 B.S.P. 207, 209-10 (stating that the rejection of the French proposal weakened the claim for possession of the art by the French).

<sup>36</sup> See Definitive Treaty Between Great Britain, Austria, Prussia, and Russia, and France, Nov. 20, 1815, 3 B.S.P. 280, 284 [hereinafter Second Treaty of Paris] (stating that, with some exceptions, “[t]he Frontiers of France shall be the same as they were in the Year 1790”). See generally ALISTAIR HORNE, *LA BELLE FRANCE: A SHORT HISTORY* 238-39 (2005) (chronicling the end of the Napoleonic Age).

<sup>37</sup> See John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL’Y J. 1, 20 (2004); Kastenberg, *supra* note 2, at 284; David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. & POL’Y 1, 3 (2004); see also TIM

The Second Treaty of Paris did not lay out the specific method by which restitution should take place. Legal practice at the time, however, maintained two requirements for restitution: (1) proper identification, so that the Allies could only take art actually looted by Napoleon's armies, and (2) territorial return, by which objects are returned to the nation from which they were taken despite territorial changes after the war.<sup>38</sup> This practice caused many problems for countries hoping to claim stolen art. The territoriality requirement led to particularly confusing results because of territorial changes in Europe after the war. For example, the French returned the Heidelberg manuscripts to Heidelberg (the city from which the Vatican had taken the manuscripts 200 years earlier) in 1815, even though the French had found the manuscripts in the Vatican.<sup>39</sup> For the same reason, a few Flemish paintings that had been housed in the Louvre were returned to the King of the Netherlands, rather than the new Belgian state.<sup>40</sup>

The Second Treaty of Paris was an important landmark in the development of cultural-heritage law. For the first time, a major art-restitution project was justified by the significance of national cultural property. The rise of the democratic nation-state after the French Revolution undoubtedly justified the concept of cultural heritage.<sup>41</sup> Although the legal principles surrounding modern cultural-property law would not solidify until 1954, the Second Treaty of Paris laid the groundwork for the later repatriation model. Nevertheless, the Treaty was wrought with political and practical problems. Indeed, "diplomacy, bureaucratic obstruction, and the inability of weak nations to reclaim what was theirs" permanently stalled restitution.<sup>42</sup> Almost half

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CHAPMAN, *THE CONGRESS OF VIENNA* 55 (1998); CHARLES GRANT ROBERTSON, *ENGLAND UNDER THE HANOVERIANS* 472 (1930); WILLIAM SIMPSON & MARTIN JONES, *EUROPE, 1783–1914*, at 87 (2000); H. MORSE STEPHENS, *REVOLUTIONARY EUROPE, 1789–1815*, at 354 (1907).

<sup>38</sup> These requirements are discussed in WOJCIECH A. KOWALSKI, *ART TREASURES AND WAR* 27-28 (Tim Schadla-Hall ed., 1998).

<sup>39</sup> Tim Schadla-Hall, *Foreword* to KOWALSKI, *supra* note 38, at ix, xii (highlighting the "long-lived nature of restitution cases").

<sup>40</sup> JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 390 (3d ed. 2007) (describing the bizarre consequences of the territoriality requirement for the works of art taken from new nations).

<sup>41</sup> See KOWALSKI, *supra* note 38, at 22-23 (noting the political rise of the nation-state as an important catalyst for the concept of cultural property).

<sup>42</sup> See MCCLELLAN, *supra* note 6, at 200 (describing the French retention of art despite the Duke of Wellington's desire to repatriate the works).

of what had been taken by French armies remained in the Louvre and French regional museums.<sup>43</sup>

## II. DEVELOPMENT OF THE LAW OF RESTITUTION

The repatriation policy enunciated in the Second Treaty of Paris and any possible Belgian claim for Flemish work in French museums today are best understood by considering the development of cultural-property law and the law of restitution. The law protecting cultural property in armed conflict has evolved considerably since its origins in ancient Rome.<sup>44</sup> By and large, repatriation laws closely track changes in legal and political theory. During the era of the powerful nation state, repatriation laws focused on the cultural property of individual nations; however, through the rise of globalization, more museums and art-law scholars now advocate a universal view of cultural property.

This Part explores the development of the law of restitution from ancient times through the doctrines of cultural property and heritage. Part II.A sets out the current legal and theoretical guidelines for analyzing a restitution claim based on the historical evolution of restitution law. Part II.B presents two comparative examples of repatriation demands. In particular, this Part shows why some demands fail, such as Greece's claim for the Elgin Marbles, while other similar claims succeed, as most notably shown by the agreement between Italy and the Metropolitan Museum of Art for the return of the Euphronios Krater. By considering the underlying principles for successful repatriation, we can use comparative examples to increase our understanding of how a hypothetical Belgian action against France might proceed.

### A. *Looting and War: From Prize Law to Nationalism and Cultural-Property Internationalism*

Looting and war have been natural partners for centuries. From the earliest conflicts, victors have taken the spoils of war in the form of

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<sup>43</sup> *Id.*; see also Ferdinand Boyer, *Le musée du Louvre après les restitutions d'œuvres d'art de l'étranger et les musées des départements (1816)*, in *BULLETIN DE LA SOCIÉTÉ DE L'HISTOIRE DE L'ART FRANÇAIS*, 79, 80-83 (1969) (cataloging various works retained by the French); John Henry Merryman, *Introduction* to *IMPERIALISM, ART AND RESTITUTION* 1, 1 (John Henry Merryman ed., 2006) ("The Louvre and other French museums are filled with paintings and sculptures 'acquired' by Napoleon's forces during his Northern and Italian campaigns . . .").

<sup>44</sup> See John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190/191 *MIL. L. REV.* 111, 114-32 (2007) (reviewing the history of laws and customs protecting cultural property during wartime).

money, treasures, and works of art.<sup>45</sup> The first formal law concerning war spoils was the Roman concept of “prize law.” Under Roman prize law, vanquishers were not required to return any spoils taken as a result of offensive or defensive war.<sup>46</sup> By the Middle Ages, Christian notions of ethics led to limitations on the broad allowances of prize law. The medieval concept of “just war” narrowed prize law so that armies could only keep the spoils they acquired in a defensive war.<sup>47</sup>

John Locke and other Enlightenment intellectuals questioned the morality of prize law in the late seventeenth and early eighteenth centuries. Locke believed that although a winner in war could take an enemy’s life, he should not be able take his property.<sup>48</sup> The views of natural-law writers like Locke particularly influenced eighteenth-century European politics, and warring nations began to adopt Locke’s views on the spoils of war.<sup>49</sup> Even before the Second Treaty of Paris in 1815, a number of treaties recognized the concept of national property and required small-scale return of certain art objects.<sup>50</sup>

In what many scholars recognize as the first art-law case, *The Marquis de Somerueles*, the British Vice-Admiralty Court of Halifax allowed confiscation of spoils with an exception for art objects.<sup>51</sup> Justice Croke stated that works of art are cultural property and, as such, are “an exception to the severe rights of warfare, and . . . [are] entitled to favour and protection.”<sup>52</sup> Therefore, paintings and prints owned by the Academy of the Arts of Philadelphia that were seized by a British ship during the War of 1812 were returned to the museum—their rightful

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<sup>45</sup> See Manlio Frigo, *Looted Art and Public International Law: General Principles and International Conventions*, in 15 *STUDIES IN ART LAW: CLAIMS FOR THE RESTITUTION OF LOOTED ART* 47 (Marc-Andre Renold & Pierre Gabus eds., 2004) [hereinafter *RESTITUTION OF LOOTED ART*] (explaining the emergence of international customs and conventions for returning property during and following war).

<sup>46</sup> See KOWALSKI, *supra* note 38, at 6 (noting that property became ownerless during declared war).

<sup>47</sup> *Id.* at 6-7 (noting that wagers of unjust wars were “always burdened with the obligation of restitution”).

<sup>48</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 389-90 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (arguing that the enemy’s property should go to his children).

<sup>49</sup> See KOWALSKI, *supra* note 38, at 7-8; see also Frigo, *supra* note 45, at 50 (stating that the views of natural-law writers changed ideals in the eighteenth century and began influencing peace treaties).

<sup>50</sup> These treaties include the Treaties of Münster (1648), Nijmegen (1678), Lunden (1679), Ryswick (1697), Utrecht (1713), and Whitehall (1662). GREENFIELD, *supra* note 40, at 391.

<sup>51</sup> The Marquis de Somerueles, [1813] Stewart’s Vice Admiralty Reports 482 (U.K.).

<sup>52</sup> *Id.* at 483.

owner.<sup>53</sup> After the Second Treaty of Paris, European nations uniformly adopted a nationalistic view affording special protection to art objects. The groundwork for the massive art-restitution campaign following World War II had been set, and the basic concepts governing art and cultural-property law shifted little between the early-nineteenth century and the 1954 Hague Convention.

For the last two centuries, four basic principles have governed when restitution is proper: (1) nationalism, (2) legality, (3) morality, and (4) universalism.<sup>54</sup> In essence, cultural-property law requires a court to ask four questions of a claimant. First, how important is the art to the national pride of a claiming entity?<sup>55</sup> This question reflects the nationalistic theories underpinning cultural-property law as expressed by Locke and embodied in the Second Treaty of Paris. Second, was the looting illegal when it occurred? A court or other body analyzing the claim must look to past law to determine the current status of the stolen art even if modern law would require restitution.<sup>56</sup> Third, what is the current prevailing public opinion about the morality of the theft? This question can be very difficult to answer, particularly when an adjudicating body must choose which ethical standard to apply in a heated repatriation case.<sup>57</sup> Finally, how will returning the works of art affect the international art community and art scholars? This final question reflects the most recent theoretical addition to cultural-property law—"cultural-property internationalism." The principle of cultural-property internationalism, or the "universal museum" theory, embodies the idea that art is universal, not strictly national, and should be preserved for educational purposes.<sup>58</sup>

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<sup>53</sup> For a helpful discussion of *The Marquis de Somerueles* and its ramifications for cultural property law, see Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT'L L. 1067, 1068-69 (2005).

<sup>54</sup> The four-principle concept was first mentioned by art-law scholar John Henry Merryman. See Merryman, *supra* note 43, at 10-11 (reviewing common principles from the literature of restitution).

<sup>55</sup> See Magnus Magnusson, *Introduction to GREENFIELD*, *supra* note 40, at 1, 7 (noting the importance of "national pride or the soothing of national injury").

<sup>56</sup> See Merryman, *supra* note 43, at 11 ("If art looting in earlier centuries by the French and the Romans, among others, was legal under the then-applicable international law, it cannot now be legally claimed that the loot they acquired and still hold should be legally treated as stolen property, subject to recovery by the offended state.")

<sup>57</sup> *Id.* at 12 (citing problems, for example, in understanding the moral climate of eighteenth-century Athens during its occupation by the Ottoman Empire).

<sup>58</sup> *Id.*

The question of universalism both grounds the ethical debate over restitution today and elicits impassioned arguments for and against repatriation. Proponents of the universal-museum theory argue that restitution may not be appropriate if a home country or rightful owner would be unable to properly protect the art.<sup>59</sup> The most vocal advocates of cultural-property internationalism happen to be the world's "art rich" museums,<sup>60</sup> raising the question whether the universal view is adopted out of concern for art or simple opportunism. For example, a 2006 document laying out the argument for universalism was signed by the Getty Museum, the Guggenheim, the Louvre, the Metropolitan Museum of Art, and fourteen of the world's other largest museums.<sup>61</sup> As a generalization, art-rich museum proponents of cultural-property internationalism "are against the return of anything if it can possibly be avoided."<sup>62</sup>

In essence, the four questions that ground restitution claims today reflect the long history of looting and war. Our concern for morality is rooted in Christian medieval ethics, while centuries of treaties and changing law have supported or forbidden looting. Most importantly, adjudicators of today's claims must balance the traditional nationalistic concept of cultural property from *The Marquis de Somerueles* with the postmodern notion of universalism. Because all of today's restitution laws and customs incorporate these core principles, a successful repatriation claim must be strongly based in pleas to nationalism, ethics, law, and cultural-property internationalism.

#### B. *Methods of Restitution Today: Comparative Examples*

Because of the lack of uniform private and public laws governing disputes over cultural property, there are no clear rules that may be

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<sup>59</sup> See Magnusson, *supra* note 55, at 7 (listing as relevant considerations "the capacity of the home country to house, protect, study, and display any material that is returned").

<sup>60</sup> See, e.g., James Cuno, *The Object of Art Museums*, in WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 49, 52 (James Cuno ed., 2004) (describing the contract between the museum and the public to "acquir[e], preserv[e], and provid[e] access" to art); James Cuno, *View from the Universal Museum* [hereinafter Cuno, *Universal Museum*], in IMPERIALISM, ART AND RESTITUTION, *supra* note 43, at 15 (arguing that museums hold art in trust for all mankind).

<sup>61</sup> Art Inst. of Chicago et al., *Declaration on the Importance and Value of Universal Museums*, reprinted in Cuno, *Universal Museum*, *supra* note 60, at 34 app.

<sup>62</sup> Magnusson, *supra* note 55, at 7.

applied to these disputes.<sup>63</sup> Post-Enlightenment restitution law and the notions of nationalism in the *Marquis de Somerueles* case seem to favor nationalistic repatriation claims as long as legality and morality are considered. The universal museum model, however, has thrown a wrench in cultural-property law and has made claims for restitution extraordinarily arduous today. A sampling of current restitution claims shows the delicate balance between nation-based concepts of cultural heritage and opposition to restitution based on cultural-property internationalism.

In the absence of clear legal guidelines for restitution claims, claimant nations have pursued a number of means and fora for the return of their art. Many nations rely on traditional litigation in the courts of the country where the art is currently located.<sup>64</sup> Because private law generally favors current possessors, however, most nations prefer formal negotiation in heated cultural disputes. Two examples of long-term negotiations—like those that might take place between Belgium and France<sup>65</sup>—are Greece's failed attempts to retrieve the Elgin Marbles from the British Museum<sup>66</sup> and Italy's recent success in reaching an agreement with the Metropolitan Museum of Art for return of the Euphronios Krater.<sup>67</sup> Negotiation can be a better choice where a country does not have a strong legal claim for restitution, but can make a persuasive political and moral argument.<sup>68</sup> Even the most persuasive ethical argument for restitution, however, must be accompanied by an appeal to nationalism and universalism. The success of Italy's claim stems from its careful balancing of nationalistic and universal arguments and its willingness to strike a deal with cultural-property internationalism in mind. The case of the Elgin Marbles, on

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<sup>63</sup> For a discussion of the current problem, and a proposal for an international dispute-resolution mechanism, see Maria Granovsky, *A Permanent Resolution Mechanism of Cultural Property Disputes*, 8 PEPP. DISP. RESOL. L.J. 25 (2007).

<sup>64</sup> For example, Cyprus brought a recent claim in a U.S. court for the restitution of a mosaic from an American museum. See Nicholas Augustinos, *The Protection of Cultural Heritage in the Event of Armed Conflict: The Cyprus Experience*, in *THE RECOVERY OF STOLEN ART* 217, 237-39, 244-52 (Norman Palmer ed., 1998).

<sup>65</sup> See *infra* Part III.

<sup>66</sup> See *infra* Part II.B.1.

<sup>67</sup> See *infra* Part II.B.2. Another interesting example is the dialogue between Peru and Yale University regarding the return of objects from Machu Picchu. See Molly L. McIntosh, Note, *Exploring Machu Picchu: An Analysis of the Legal and Ethical Issues Surrounding the Repatriation of Cultural Property*, 17 DUKE J. COMP. & INT'L L. 199, 201-04 (2006).

<sup>68</sup> McIntosh argues that one possible reason that Peru has not brought a legal action in Connecticut courts is the relative weakness of its legal argument. See *id.* at 203.

the other hand, illustrates the questionable reliance on universalism by art-rich museums to ward off restitution claims.

### 1. The Elgin Marbles and the Problem of Cultural-Property Internationalism

The case of the Elgin Marbles, a particularly important contemporary example, sheds light on a possible Belgian claim against France. In 1801, during a time of unrest in Greece, Lord Elgin removed marble statues and the frieze from the Parthenon.<sup>69</sup> The Marbles were not taken by the British during war,<sup>70</sup> but Lord Elgin used his position as a member of the British House of Lords to complete the operation.<sup>71</sup> Elgin procured written authority “to remove some stones with inscriptions and figures”<sup>72</sup> in the form of a letter from the Turkish government in Constantinople to the governor of Athens.<sup>73</sup> Elgin later sold the Marbles to the British government. The Marbles are now displayed in the Duveen Gallery of the British Museum.<sup>74</sup>

In 1832, Greece gained independence from Turkish rule and began to restore the Acropolis.<sup>75</sup> At this time, Greece made its first bid for the return of the Elgin Marbles.<sup>76</sup> Nevertheless, the Marbles remained in the museum with little dispute over ownership until after World War II.<sup>77</sup> Given the art community’s dedication to returning art stolen by the Nazis after the War, some British scholars and members of government believed that the Marbles should be given back as a “gesture of friendship” between Britain and Greece.<sup>78</sup> At a 1982 United Nations Educational, Scientific, and Cultural Organization

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<sup>69</sup> GREENFIELD, *supra* note 40, at 46.

<sup>70</sup> Schadla-Hall, *supra* note 39, at xii-xiii.

<sup>71</sup> See GREENFIELD, *supra* note 40, at 55-56 (noting that Lord Elgin “used his special office to accomplish something which would otherwise have been impossible”).

<sup>72</sup> *Id.* at 46.

<sup>73</sup> See William St. Clair, *Imperial Appropriations of the Parthenon*, in IMPERIALISM, ART AND RESTITUTION, *supra* note 43, at 65, 77-78 (noting that Lord Elgin’s firman was different from permissions previously granted to other applicants, and discussing the ambiguities of its language); see also GREENFIELD, *supra* note 40, at 53 (discussing Lord Elgin’s application for permission to remove the Marbles).

<sup>74</sup> St. Clair, *supra* note 73, at 86-87.

<sup>75</sup> GREENFIELD, *supra* note 40, at 62.

<sup>76</sup> See *id.* (noting that the recovery of the Marbles was important to Greece because the Parthenon is a national symbol).

<sup>77</sup> In 1924, Greece made its only attempt at restitution between 1832 and 1941. *Id.*

<sup>78</sup> See *id.* at 63 (detailing the views of British Museum administrators and Foreign Office employees in favor of returning the Marbles to promote positive relations between the nations).

(UNESCO) conference, a recommendation was made to return the Marbles to Greece.<sup>79</sup> On October 12, 1983, the Greek ambassador made a formal request to the British Foreign Office for return of the Marbles.<sup>80</sup> His restitution claim was premised on three tenants of cultural-property law: (1) the importance of the Parthenon Marbles to Greek cultural heritage, (2) the general rule that a work of art belongs in the "cultural context in which (and for which) it was created," and (3) the circumstances of unrest and foreign occupation at the time the marbles were taken that gave the Greek people no voice in the original removal.<sup>81</sup>

Despite fairly strong public support for returning the Elgin Marbles, the British Museum continues to firmly oppose restitution for a number of legal and practical reasons. First, relying on the doctrine of cultural-property internationalism, the Museum has argued that returning the Marbles to Greece would compromise future study and appreciation of the pieces. The British also argue that as a result of humid weather and a poor Greek economy, the Greek government would be unable to preserve properly the Marbles and that the Marbles are best maintained in the international British Museum.<sup>82</sup> Furthermore, because Lord Elgin received authority from the Turkish government to take the Marbles, the Museum also proposes that the only legal way to repatriate the Marbles is through an Act of Parliament.<sup>83</sup>

In all, because Greece's arguments rest primarily on an ethical obligation to return the Marbles, negotiations between Greece and Britain have failed. This problem is exacerbated by the new concepts of the universal museum and cultural-property internationalism. In the absence of concrete examples describing how restitution would benefit the international art community, there may be no end in sight for Greece.

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<sup>79</sup> For a description of the proceedings surrounding Recommendation No. 55 in Mexico City, where fifty-six representatives supported return of the Marbles with no opposition, see Stephanie Ginger, *Mercurial Melina's Marbles*, 243 CONTEMP. REV. 311, 312 (1983).

<sup>80</sup> GREENFIELD, *supra* note 40, at 67-68.

<sup>81</sup> See *id.* at 68 (analyzing Ambassador Kyriazides's legal and political claim in the formal request).

<sup>82</sup> Cf. St. Clair, *supra* note 73, at 94 (describing the British ideal of a universal museum in which scholars could "compare differing styles of art").

<sup>83</sup> See GREENFIELD, *supra* note 40, at 68-71 (discussing Greece's very limited legal options).

## 2. The Italy-Met Accord as a Restitution Blueprint

Another recent example of a long-term negotiation is Italy's restitution claim against the Metropolitan Museum of Modern Art for the Euphronios Krater and other antiquities. This action culminated in the Italy-Met Accord of 2006.<sup>84</sup> In 1972, the Metropolitan Museum of Art purchased the Krater, a 2500-year-old Greek bowl signed by famed potter and painter Euphronios.<sup>85</sup> Almost immediately, art critics and historians questioned the acquisition.<sup>86</sup> Italy contacted the United States Federal Bureau of Investigation and hired American lawyers to examine the Met's acquisition procedures.<sup>87</sup> Despite evidence that the Krater had been stolen from an Etruscan tomb outside of Rome, the Met maintained for thirty years that it had purchased the Krater in good faith.<sup>88</sup> Although investigations led to the discovery that American dealer Robert Hecht sold the Krater,<sup>89</sup> Italy was unable to connect Hecht to the Etruscan tomb.<sup>90</sup> In 1995, however, Italian and Swiss investigators found a horde of stolen antiquities belonging to Giacomo Medici, an Italian antiquities dealer and famed museum supplier from whom Hecht had acquired the Krater.<sup>91</sup> This discovery led to Medici's

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<sup>84</sup> See generally Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 646-48 (2007) (discussing the potential of the Italy-Met Accord to change the way cultural property disputes are resolved).

<sup>85</sup> See James R. Mellow, *A New (6th Century B.C.) Greek Vase for New York*, N.Y. TIMES MAG., Nov. 12, 1972, at 42, 42-43 (discussing the desirability of the piece and its impact on the Met's collection); see also Elisabetta Povoledo, *Ancient Vase Comes Home to a Hero's Welcome*, N.Y. TIMES, Jan. 19, 2008, at B9 (describing the significance of the Krater as a historical artifact).

<sup>86</sup> See, e.g., John Canaday, *Met Proud of a Rare Greek Pitcher*, N.Y. TIMES, Feb. 26, 1973, at 24 (pointing to the low purchase price and lack of documentation as evidence of the dubious origins of the Krater).

<sup>87</sup> See Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, at A1 (detailing Italy's legal response to the Met's acquisition of the Krater).

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

<sup>89</sup> PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS*, at x-xii (2006) (describing the transaction between Hecht and the Met).

<sup>90</sup> See *id.* at xiv-xv (noting the *New York Times's* discovery that Hecht likely purchased the Krater from a tomb raider, but that he was acquitted in an early Italian trial because the sole witness recanted his story).

<sup>91</sup> See *id.* at 48-54 (presenting the discovery of Corridor 17—Medici's collection of looted antiquities).

criminal conviction and Hecht's current trial and eventually renewed discussions between Italy and the Met.<sup>92</sup>

While many scholars did not consider Italy's claim for the return of the Euphronios Krater to be legally strong,<sup>93</sup> renewed negotiations in 2005 led the Met to return the vessel to Italy. The resulting agreement, reached on February 21, 2006, reflects a careful balance of the four principles of restitution.<sup>94</sup> The operative language of the Accord has three major parts: (1) an acknowledgement of Italian ownership of the Krater, (2) an express prohibition of future litigation, and (3) a loan program between Italy and the Met. The ownership provision meets the morality and nationalism principles for restitution. Italy made a strong argument that art stolen from Italian archaeological sites and then illegally exported belongs to Italy and is important Italian cultural property. As a result, the Met agreed to return the Krater and a number of other Italian archaeological objects in 2008. By barring future litigation, the parties acknowledged some past illegality while making the agreement palatable to the Met.

While morality, legality, and nationalism arguments are important, the Elgin Marbles case shows that these alone will not ensure a successful restitution claim. The loan program created by the Italy-Met Accord highlights the importance of cultural-property internationalism—a crucial requirement that Greece has not addressed. The Accord sets up a rotating short-term and long-term loan program through which Italy allows the Met to borrow archeological objects for study and display. By accepting this provision, Italy acknowledged the importance of public education and cooperation in the universal-museum model. The Accord's inclusion of universal-museum values was fundamentally important to Philippe de Montebello, the director of the Met, who asserted that the agreement would “pave the road to new legal and ethical norms in the future” while “not depriv[ing] the

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<sup>92</sup> See Hugh Eakin & Elisabetta Povoledo, *Met's Fears on Looted Antiquities Are Not New*, N.Y. TIMES, Feb. 20, 2006, at E1 (revealing that the Met had seriously considered returning the Krater as early as 2003 after renewed talks in the wake of evidence amassed for Medici and Hecht's trials).

<sup>93</sup> Under American law, Italy would have to argue that the Met knowingly purchased stolen antiquities—a difficult burden to meet given these circumstances. See, e.g., *United States v. Schultz*, 333 F.3d 393, 411 (2d Cir. 2003) (interpreting the National Stolen Property Act, 18 U.S.C. § 2315 (2006)); *United States v. McClain*, 545 F.2d 988, 993-94 (5th Cir. 1977) (same).

<sup>94</sup> Agreement Between The Ministry of Cultural Assets and Activities of the Italian Republic and The Metropolitan Museum of Art (Feb. 21, 2006), reprinted in 13 INT'L J. CULTURAL PROP. 427 (2006).

millions of visitors to our museum of the opportunity to see archaeological material.”<sup>95</sup> Recognizing that it was dealing with the Met, an art-rich museum and one of the proponents of the universal museum ideal, Italy wisely accepted the loan concession as crucial to the success of its restitution claim.

In his article examining the Italy-Met Accord, Aaron Kyle Briggs notes that the Accord has set new standards in nations’ abilities to make ethical and political claims against foreign museums without pursuing litigation.<sup>96</sup> Briggs points to the bargaining-power/liability-waiver model that is Italy’s main asset in its restitution claim:

Italy achieves considerable bargaining power by making clear it will refuse to lend art and antiquities to uncooperative museums for temporary exhibitions. Amidst this dual pressure, Italy then offers museums a way out by waiving all liability . . . , which is good for museum public relations . . . in exchange for what Italy desired: restitution and ownership transfer of the cultural property.<sup>97</sup>

Briggs, however, is not optimistic that this model can easily be replicated in other restitution cases because of the unique circumstances surrounding the Italy-Met Accord.<sup>98</sup>

Repatriation claims, like those brought by Italy and Greece, are largely handled on an ad hoc basis that relies on local law, diplomacy, and legal theory. If a nation has a strong legal argument for restitution, then it will likely succeed on the merits in court or through informal negotiation. However, as demonstrated by the disparate experiences of Greece with the Elgin Marbles and Italy with the Euphronios Krater, claims resting on nationalistic or ethical duties alone rarely succeed. In an art world increasingly concerned with public education and international cooperation, an appeal to cultural-property internationalism is the key factor distinguishing successful from unsuccessful restitution.

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<sup>95</sup> Elisabetta Povoledo, *Italy and U.S. Sign Antiquities Accord*, N.Y. TIMES, Feb. 22, 2006, at E7.

<sup>96</sup> See Briggs, *supra* note 84, at 652-53 (suggesting that the Accord may open new avenues for dialogue about art and ownership).

<sup>97</sup> *Id.* at 642-43.

<sup>98</sup> See *id.* at 652-53. I will argue in Part III.D that Briggs makes this conclusion too hastily and that Belgium and other claimant countries have much to learn from the Italy-Met Accord.

### III. RESTITUTION OF FLEMISH ART AND POSSIBLE SOLUTIONS IN PUBLIC AND PRIVATE LAW

Whether Belgium has a legal claim for possession of paintings stolen by French armies and placed in French museums almost two centuries ago depends on Belgium's ability to make a convincing restitution argument based on the four principles of legality, morality, nationalism, and universalism. Key to a successful claim is whether Belgium can show that repatriation is best for public education and cultural-property internationalism. A convincing argument for restitution, however, does not alone create ownership rights for Belgium. It must also overcome a host of jurisdictional and other legal hurdles implicit in multinational legal conflicts. Seemingly simple issues, such as where to bring a lawsuit or which nation's law to apply, become significant problems in restitution claims. The hypothetical case between Belgium and France shows that jurisdictional dilemmas can thwart strong repatriation claims.

This final Part analyzes the strength of Belgium's possible restitution claim by first examining the arguments for and against returning Flemish Art. Parts III.B and III.C then consider the legal routes for restitution—both in French courts under French law and in international adjudicatory bodies. Finally, Part III.D examines formal and informal negotiation as a possible route for restitution and argues that the methods of negotiation in the Italy-Met Accord should be standardized in order to close the illogical gaps in cultural-property law.

#### A. *Why Should France Return Flemish Art Now?*

As seen in the failed Elgin Marbles claim and the successful Italy-Met Accord, the four basic principles of cultural-property law must be present in a convincing restitution claim. Although nationalism, morality, and legality are important considerations, an explanation of how restitution works within the universal-museum model is central to success.<sup>99</sup>

#### 1. Nationalism

In order to warrant protection under the special rules for cultural property, the Flemish paintings in the Louvre and regional museums must have been and continue to be important to Belgium's cultural

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<sup>99</sup> See discussion *supra* Part II.B.

identity. There is no controlling definition of cultural heritage and property; however, international and local law provides some instructive guidance. Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art, or science.”<sup>100</sup> Furthermore, French export law labels “[o]bjects of national importance for historical or artistic reasons” protected cultural property.<sup>101</sup>

Importantly, the Second Treaty of Paris and accompanying correspondences identified Flemish art as Belgium’s cultural property at the time it was taken by Napoleon’s forces. The Treaty justified restitution because of the importance of art to each nation.<sup>102</sup> Because the Treaty and its signatories identified the stolen works of art as important to Belgian cultural identity, the art likely falls under the extraordinarily broad definitions of artistic cultural property in the UNESCO Convention and in French law.

## 2. Morality and Legality

While Belgium can strongly argue that France has a moral obligation to return the art, the existence of a legal obligation is unclear. Claimants can almost always make a moral or ethical argument for restitution when art was stolen during war or unrest. Belgium here need only note how Napoleon preyed on its relative weakness at the beginning of the nineteenth century and how France’s armies forcibly removed art from Belgian churches, museums, and homes.

Particularly when art was stolen centuries ago, however, claims are not always based in law.<sup>103</sup> It is not settled whether France actually violated international law when its troops took art from Belgian churches and galleries. During the eighteenth century, art law evolved a great deal, from prize law to the current concept of cultural property. Art-law scholar John Henry Merryman argues that the common law before

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<sup>100</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231, 233 [hereinafter 1970 UNESCO Convention].

<sup>101</sup> GREENFIELD, *supra* note 40, at 113 (quoting the Law of June 23, 1941 (Fr.)).

<sup>102</sup> See KOWALSKI, *supra* note 38, at 22-23 (linking the rise of national consciousness to the arguments advanced in favor of restitution).

<sup>103</sup> See *supra* Part II.B (discussing Italian, Peruvian, and Greek claims for restitution).

1815 did not completely prevent armies from keeping spoils of war because prize law still applied.<sup>104</sup> The first Belgian paintings, however, were taken in 1794—decades after many other European treaties required restitution of stolen art.<sup>105</sup> Nevertheless, even if the thefts were not illegal at the time they occurred, the Second Treaty of Paris pressured France to return stolen art. Because Belgium can point to a specific treaty requiring restitution of its art, its restitution claim is much stronger than one resting on ethics alone.

### 3. Universalism

As with other contemporary restitution claims, the fourth cultural-property principle—universalism—creates a significant roadblock for Belgium. Some French writers believed that the 1815 restitution of art to other European countries unfairly and unethically hindered public appreciation of art.<sup>106</sup> As an art-rich participant in the 2006 Declaration describing the importance of the universal museum,<sup>107</sup> the Louvre would undoubtedly base its opposition to restitution on the concept of cultural-property internationalism. The Louvre has innumerable resources to preserve and protect Flemish art for the public at large. Particularly in the wake of the 2006 Italy-Met Accord,<sup>108</sup> however, it is undecided whether universalism makes museums owners of world heritage or simply stewards of it, subject to restitution in certain circumstances.<sup>109</sup> Because Belgium has a stable economy and numerous world-class museums that could properly preserve returned artwork, it has a better restitution claim than Greece did for restitution of the EL-

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<sup>104</sup> See Merryman, *supra* note 43, at 6 (stating that appropriating art as a spoil of war did not violate international law at the time).

<sup>105</sup> See generally Frigo, *supra* note 45, at 50-51 (describing legal arrangements in the sixteenth and seventeenth centuries).

<sup>106</sup> See, e.g., Eugène Müntz, *Les invasions de 1814-1815 et la spoliation de nos musées* (pt. 2), LA NOUVELLE REVUE, July, 1897, at 201-02 (decrying the limited return of some art to the Netherlands as unnecessary); see also *id.* (pt. 1), LA NOUVELLE REVUE, April, 1897 (criticizing the Allies for requesting return of art from the Louvre where it could have been appreciated by more members of the public); *id.* (pt. 3), LA NOUVELLE REVUE, August, 1897 (same).

<sup>107</sup> See *supra* note 61 and accompanying text.

<sup>108</sup> The Met also signed the 2006 declaration exalting the universal museum. See Art Inst. of Chicago et al., *supra* note 61.

<sup>109</sup> See Briggs, *supra* note 84, at 652-53 (suggesting that recent “dialogue between source nations and museums” may lead to museums acting primarily as “stewards of cultural property”).

gin Marbles.<sup>110</sup> As long as Belgium is willing to make concessions—like the loan agreement in the Italy-Met Accord—or otherwise show its devotion to public education and study of the arts, it would likely overcome the problem of cultural-property internationalism.

As a competent steward of important cultural objects and the rightful owner of many Flemish works remaining in French museums after the Second Treaty of Paris, Belgium would fulfill the four principles of cultural-property restitution. Unlike Greece, Belgium is a country well situated to show how restitution could benefit the art world. If Belgium can find an appropriate forum for its claim, it can make a strong case for restitution.

#### B. Possible Solutions in Private International Law

Even though the principles underlying cultural-property law arguably favor restitution, Belgium must find an appropriate forum to adjudicate its claim. Informal negotiation with individual museums is an option, but the result of negotiation is highly uncertain.<sup>111</sup> An alternative is to bring a case in French courts under French private law.

Kurt Siehr presents three problems associated with the use of recovery proceedings under private international law: (1) jurisdiction,<sup>112</sup> (2) statutes of limitations,<sup>113</sup> and (3) title acquired by limitation or looting.<sup>114</sup> Belgium is not barred from bringing a case for lack of jurisdiction. French troops stole Flemish art, and because the art remains in French museums today, French courts have jurisdiction over a repatriation claim. However, French property law creates a number of challenges with regard to the applicable statute of limitations and title.

First, the general statute of limitations in France requires a plaintiff to bring a case to reclaim an object from a possessor who acquired

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<sup>110</sup> See *id.* at 646 (claiming that an important factor supporting Britain's universalist argument in the Elgin Marbles controversy is that Greece does not have the resources to protect the Marbles if returned).

<sup>111</sup> See *supra* Part II.B.

<sup>112</sup> Kurt Siehr, *Restitution of Looted Art in Private International Law*, in RESTITUTION OF LOOTED ART, *supra* note 45, at 71, 80 (discussing how a host state's legal system can make recovery difficult by creating immunity for museums).

<sup>113</sup> *Id.* at 86-88 (citing art-recovery cases under New York and German law where the statutes of limitations did not bar the recovery claims, and a Dutch recovery case where the statute of limitations did bar the claim).

<sup>114</sup> *Id.* at 81-83 (explaining that, while looting no longer creates title in an object, other legal limitations—such as statutes of limitations or the particular classification given to recovery actions for stolen art—can bar recovery claims).

it in good faith within three years from the date of the loss or theft.<sup>115</sup> When there is an absence of good faith, the limitations period is lengthened to thirty years.<sup>116</sup> Even though the Flemish art was taken by force and in bad faith, the longer thirty-year statute would still bar a claim for art taken almost two centuries ago.

A potential loophole exists in French property law, however, which might allow a longer statutory period. When the Louvre and certain other museums and libraries were declared national property in 1848, French case law began to recognize a special category of "classified chattels," including artwork in state and local public museums.<sup>117</sup> French courts established a rule of lenience with regard to state claims for artwork stolen from these museums. For example, in *Bibliothèque Royale c. Charron*,<sup>118</sup> a court allowed a public library to recover an important manuscript after the statute of limitations had run. More dramatically, in *Bonnin c. Villes de Mâcon et de Lyon*,<sup>119</sup> a city museum succeeded in its restitution claim to recover a medieval manuscript forty-three years after the manuscript was stolen. The Law on Historic Monuments of December 31, 1913, codified the precedent in *Bibliothèque Royale* and *Bonnin* by granting the Fine Arts Minister an unlimited amount of time to bring an action for stolen goods.<sup>120</sup> Although this rule seems to be promising for Belgium's claim, no case has allowed parties other than the French Minister of Culture and Communication to make use of the unlimited statute of limitations. Nonetheless, Belgium might be able to rely on the special categorization of artwork as "classified chattels" under French law to get around the otherwise strict thirty-year deadline.

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<sup>115</sup> CODE CIVIL [C. CIV.] art. 2279 (Fr.), translated in THE FRENCH CIVIL CODE 418 (John H. Crabb trans., rev. ed. 1995).

<sup>116</sup> *Id.* art. 2262 (Fr.), translated in THE FRENCH CIVIL CODE, *supra* note 115, at 416 ("All actions, [in rem] as well as [in personam], are pr[o]scribed by thirty years, without the one who alleges such pr[o]scription being obliged to show a right thereto, or an inferred objection of bad faith being able to be raised against him.").

<sup>117</sup> See Ruth Redmond-Cooper, *Limitation of Actions*, in ART LOANS 343, 360-62 (Norman Palmer ed., 1997).

<sup>118</sup> Cours Royales [Royal Court] Paris, Jan. 3, 1846, D.P. II 1846, 2e civ. 212, 213 (allowing recovery after eight years despite the general three-year statute of limitations at the time).

<sup>119</sup> Cass. req. [highest court of ordinary jurisdiction] Paris, June 17, 1896, D.P. I 1897, 1e civ. 257.

<sup>120</sup> See Law on Historic Monuments of Dec. 31, 1913, art. 20, D.P. IV 1915, 153, 157; see also Ruth Redmond-Cooper, *Time Limits in Actions to Recover Stolen Art*, in THE RECOVERY OF STOLEN ART *supra* note 64, at 153 (noting that works of art frequently remain recoverable for longer periods of time than other stolen items).

Even if Belgium were able to skirt the French statute of limitations, the Law on Historic Monuments, and the French Export Law of June 23, 1941, prevent public museums from disposing of art, particularly works made before 1900.<sup>121</sup> This means that French courts would likely bar restitution because French law prohibits transferring ownership of art belonging to the state. For example, when Greece made a restitution claim for the Venus de Milo (located in the Louvre), France asserted that French law prevented the return even if there was “a wish to do so; these treasures belonged to the French nation.”<sup>122</sup>

This precedent, however, does not engender title by looting. The Venus de Milo was legally purchased by a French ambassador in Constantinople in 1821. The Flemish art, on the other hand, was forcibly taken, and France essentially violated the spirit of the Second Treaty of Paris by not returning it. With regard to stolen or illicitly traded items located in the Louvre and other museums, French courts have been more lenient. In 1950, France returned Laotian artwork taken during the colonial invasion of Laos.<sup>123</sup> In 1981, a French court ordered restitution of an illicitly traded Amon Min statue to Egypt.<sup>124</sup> Additionally, in 1980, France agreed to a long-term loan agreement with the Iraq Museum for fragments of the Babylonian law codes.<sup>125</sup> Still, each of these restitutions involved return of art to non-Western countries. European countries generally are more willing to repatriate art to former colonies in Africa and Asia than to exchange art with other European nations. This is particularly true for exchanges between members of the European Union. In many cases, the universal-museum concept disfavors transfers among European countries, as these nations increasingly view themselves more as members of the greater Union than as individual nation states.<sup>126</sup>

Overall, even though French courts would have jurisdiction, Belgium must cross too many hurdles for successful restitution under private law. Not only does the generally applicable statute of limitations

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<sup>121</sup> GREENFIELD, *supra* note 40, at 113 (quoting the export-law provision requiring authorization from the Secretary of State for Education and Youth for export of included works).

<sup>122</sup> *Id.* at 111.

<sup>123</sup> Magnusson, *supra* note 55, at 4.

<sup>124</sup> See GREENFIELD, *supra* note 40, at 374; Magnusson, *supra* note 55, at 5.

<sup>125</sup> Magnusson, *supra* note 55, at 5.

<sup>126</sup> See GREENFIELD, *supra* note 40, at 114-15 (“[T]he collective European position can be seen to run counter to the idea of national cultural protection, and to positively impede the concept of cultural return within Europe.”); *cf.*, e.g., Schadla-Hall, *supra* note 39, at ix n.2 (noting Italy’s return of a fourth-century obelisk to Ethiopia).

bar Belgium's claim at this point, but also France's unique legal structure may prevent the Louvre and other museums from handing over artwork even when statutes of limitations do not. While France more readily accepts restitution to "non-Western" or "non-European" countries, it is less likely to decide a restitution claim in favor of another European Union member.

### C. Possible Solutions in Public International Law

The clear benefit of public international law over private law is consistency. A problem with private international cultural-property law in general is the degree of legal variance between countries. Possible solutions in private law, therefore, depend not only on the merits of a claimant's case, but also on the jurisdictional laws and statutes of limitations of particular countries. In order to circumvent the inconsistencies of private law, many claimant countries turn to public international law as an alternative.

Following the growing popularity of cultural-property internationalism and the campaign to return stolen Nazi art, a number of international conventions laid out rules for restitution in public international law.<sup>127</sup> Because public international law is based on the common law of cultural property, Belgium would have a high likelihood of success on the merits should it rely on public law. Nonetheless, because France has not ratified several major international conventions, Belgium may face a jurisdictional problem in finding an appropriate forum to hear a restitution claim.

International cultural-property law emerged at the end of the French Revolution. Since the Congress of Vienna and the Second Treaty of Paris in 1815, two bodies of international cultural-property rules have emerged. The first set of principles requires nations to avoid destroying cultural property in occupied countries, while the second concerns the obligation to return looted cultural property.<sup>128</sup>

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<sup>127</sup> For a good general overview of public international cultural-property law, see Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW. 613 (2007).

<sup>128</sup> Frigo, *supra* note 45, at 48-49 (describing the evolution of these bodies of law and finding that the obligation to return has been much more controversial than the rule to avoid destruction); *see also supra* Part II.A.

Common international law also has no statute of limitations for any claim.<sup>129</sup>

Two conventions grew out of common cultural-property law following World War II: the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. The UNESCO Convention is the primary source of international law governing cultural property today and has been ratified by most, but not all, nations.<sup>130</sup> The Convention broadly requires restitution of stolen and illicitly traded art, and, because it has no rules about time limitations,<sup>131</sup> would be an excellent basis for a Belgian claim. A key problem with the UNESCO Convention, however, is the absence of art-rich nations, including France, as member states.<sup>132</sup> Because France is not a member state, Belgium cannot claim that France has any obligation under the UNESCO Convention.

France was, however, a signatory of the 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects.<sup>133</sup> UNIDROIT and UNESCO provide similar protections for illicitly traded cultural property, but UNIDROIT is silent with regard to wartime seizures. As a result of this silence, many scholars feel that UNIDROIT is a watered-down law favoring art-rich coun-

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<sup>129</sup> GREENFIELD, *supra* note 40, at 82 (concluding that “national legislation cannot prescribe any rights in international law and could not have any effect on any international historic delict”).

<sup>130</sup> See 1970 UNESCO Convention, *supra* note 100.

<sup>131</sup> Cf. JIRÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 345 (1996) (arguing that there is no statute of limitations for claims related to the return of cultural property under the UNESCO Convention).

<sup>132</sup> The lack of key parties is a problem plaguing international cultural-property conventions. See Norman Palmer, *Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities*, in THE RECOVERY OF STOLEN ART, *supra* note 64, at 1, 20 (noting that the United Kingdom, along with several other important nations, has not ratified the 1970 UNESCO Convention); Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213, 219 (2007) (noting that many treaties suffer from both insufficient adoption and insufficient enforcement).

<sup>133</sup> June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention]. For a good comparison of the UNESCO and UNIDROIT Conventions, see Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, in THE RECOVERY OF STOLEN ART, *supra* note 64, at 205. Even though France was a signatory of the UNIDROIT Convention, most “market countries” have not signed the Convention, severely limiting a claimant country’s use of the Convention. See Stacey Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, 16 J.L. & POL’Y 265, 299-304 (2007) (describing the many problems claimant countries face under UNIDROIT, including vague language and the absence of many market countries as signatories); Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT’L L. 1177, 1186-87 (2005).

tries.<sup>134</sup> Additionally, the UNIDROIT Convention includes a statute of limitations barring claims brought more than three years after the time of discovery with a “longstop” provision of fifty years.<sup>135</sup> If a cultural object is particularly important to the cultural identity of the possessing country, even this “longstop” rule is subject to a three-year limitation period running from the date of discovery of the location and identity of the possessor.<sup>136</sup> Even though the UNIDROIT statute of limitations alone presents an obvious problem for Belgium, the insurmountable hurdle involved in using public international law is that both the UNESCO and UNIDROIT Conventions are not retroactive. No express provision of either Convention denies retroactivity, but the standard rule of international law is that treaties are not retroactive and that an explicit provision saying so is not required.<sup>137</sup>

Ultimately, if Belgium were to bring a claim relying on public international law, it would have to base its case on common law rather than any particular convention. This creates additional jurisdictional problems because, while conventions might designate an appropriate forum, there is no universally suitable public international legal forum to adjudicate Belgium’s case. This leaves Belgium with little forum choice. One option is the Council of Europe, which can adjudicate claims brought by member states such as Belgium and France. The Parliamentary Assembly of the Council of Europe, however, issued a 1983 resolution and report on the return of works of art that declared that “claims for the return of cultural property within the European area must be considered differently from claims for return of property outside this area.”<sup>138</sup> This rule would bar a claim for cultural property brought by one member state against another. The other potential forum is the International Court of Justice (ICJ), which has jurisdiction over contentious cases between U.N. member nations as long as

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<sup>134</sup> See, e.g., Kirstin E. Petersen, Note, *Cultural Apocalypse Now: The Loss of the Iraq Museum and a New Proposal for the Wartime Protection of Museums*, 16 MINN. J. INT’L L. 163, 178 (2007) (noting that UNIDROIT does not provide for the return of wartime seizures and thus provides no solution to art stolen from the Iraq Museum in 2003).

<sup>135</sup> UNIDROIT Convention, *supra* note 133, art. 3. The application of the “long-stop” provision does not take into account when the art object was discovered, but places a maximum fifty year limit on action from the time of the theft itself.

<sup>136</sup> See Redmond-Cooper, *supra* note 117, at 153-54 (discussing the different time limitations in the UNIDROIT Convention); see also Prott, *supra* note 133, at 211 (noting that a number of states with an important trade in cultural objects supported time limitations on claims in the UNIDROIT Convention).

<sup>137</sup> See Prott, *supra* note 133, at 213.

<sup>138</sup> Eur. Parl. Ass., *Resolution on the Return of Works of Art*, 35th Sess., Res. No. 808 (1983); see also *supra* note 126 and accompanying text.

both nations “refer” the case to the ICJ.<sup>139</sup> France would therefore have to consent to the hearing based on international common law. Additionally, because judgments of the ICJ are not binding, any decision in Belgium’s favor would not mandate restitution.<sup>140</sup>

In all, because France has not signed the 1970 UNESCO Convention and because the UNIDROIT Convention provides no relief for nations attempting to recover art stolen during wartime, Belgium’s claim would fail under both private and public international law. Although today’s legal regimes provide solace for countries whose cultural property was stolen after World War II, nations with longstanding claims are left helpless under the current state of the law. The situation suggests an immense gap in cultural-property law: the legal status of art stolen in wars before the twentieth century.

#### D. *The Italy-Met Accord as a Model for Formal Negotiation*

Despite a strong argument for restitution, no legal forum in public or private international law exists in which Belgium can bring a claim against France. The current legal framework essentially protects nations that hold art stolen before the twentieth century. Barring legal claims brought by nations whose artwork and cultural heritage lie in the museum of another country merely because of a flaw in cultural-property law is not a satisfactory result.

While informal negotiation can lead to successful restitution in the absence of litigation, negotiation also produces widely divergent results, as discussed in Part II.B. Many art museums simply invoke the notion of cultural-property internationalism in order to keep impor-

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<sup>139</sup> See Statute of the International Court of Justice art. 36(1), June 26, 1945, 59 Stat. 1055, 156 U.N.T.S. 77. (“The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”).

<sup>140</sup> A peculiar option that other nations have followed is to rely on the United States Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (2006), which gives United States courts jurisdiction over international disputes involving any works of art that had ever been loaned to or present in an American museum. See, e.g., Sylvia Hochfield, *Who Owns the Stedelijk’s Maleviches?*, ARTNEWS, Apr. 2004, at 64, 64-65 (discussing a suit against an Amsterdam museum under the Foreign Sovereign Immunities Act that was brought when the museum lent the paintings in dispute to an American museum). While such a suit is not currently an option for Belgium, if the Louvre or another French museum ever loans one of the Flemish paintings to an American museum, Belgium would have a claim. This might not be a distant hypothetical given the current loan agreement between the Louvre and the High Museum of Art in Atlanta, Georgia. See Alan Riding, *France Frets as Louvre Looks Overseas*, N.Y. TIMES, Jan. 1, 2007, at E1.

tant pieces on their walls, despite the claimant country's best moral, legal, and nationalistic arguments for restitution. Informal negotiation is far too malleable a process to provide consistent protection for countries with legitimate restitution claims. One apparent solution is formalized negotiation procedures. Fortunately, the Italy-Met Accord provides duplicable guidelines for standardized negotiation that would fill the gap in cultural-property law and provide Belgium with a desirable outcome.

Aaron Kyle Briggs has noted that the Italy-Met Accord is particularly instructive because it provides the themes for successful restitution dialogue. He has described how Italy was able to construct a bargaining-power/liability-waiver model to practically bribe the Met into returning the Euphronios Krater.<sup>141</sup> In order for this bargaining-power/liability-waiver model to be successful, Briggs points to six circumstantial requirements: (1) the art in question is important to the possessing museum's collection; (2) the museum cannot afford lengthy litigation; (3) the claimant is an art-rich nation and there is high demand for the claimant's cultural property; (4) the claimant is able to properly preserve cultural property if restituted; (5) the country in which the possessing museum is located must be a party to an international agreement encouraging return of looted art; and (6) the claimant has evidence of illegality in the acquisition process.<sup>142</sup> Although Briggs concedes that the cooperative themes of the Accord are important to future restitution claims, he argues that because of the numerous incidental requirements for success in the bargaining-power/liability-waiver model, the Accord cannot be easily replicated in all other situations.

Although Briggs came to the important conclusion that the Italy-Met Accord provides themes for restitution dialogue, he too quickly dismissed the Accord as a potentially unreplicable model for formal negotiation. What is important about the Italy-Met Accord is not simply the bargaining-power/liability-waiver model, as Briggs notes, but the inclusion of universal museum concepts in the form of the loan agreement. Italy's agreement to provide a series of short-term loans in return for acknowledgement of Italian ownership of the Euphronios Krater sensibly solves the universalism problem encountered

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<sup>141</sup> See Briggs, *supra* note 84, at 642-43 (discussing how Italy established bargaining power with the Met by threatening to withhold future loans of Italian antiquities and offering to waive its right to future litigation if the Met returned the Krater); see also *supra* Part II.B.

<sup>142</sup> See Briggs, *supra* note 84, at 643-48.

by many claimant countries. As long as the claiming country is able to properly preserve returned artwork, loan agreements fill any void in the public's ability to study the art of other cultures. Where cooperative exchanges of art maintain the universal-museum model, strategic reliance on cultural-property internationalism to rebut restitution claims is minimized.

When the Italy-Met Accord is viewed as the successful culmination of the four principles of cultural property, the Accord's processes and conclusions are replicable on a much larger scale. A standardized negotiation model based on the Italy-Met Accord could have four steps:

(1) an initial opportunity for the claiming country to present evidence that artwork was illegally and immorally taken from its borders and that, if restituted, the claimant could properly preserve the artwork;

(2) a chance for the possessing museum or country to offer proof of its good faith acquisition in order to prevent outright restitution;

(3) a mandated short-term loan series in situations where the possessing party acquired the artwork in good faith or where cultural-property law does not provide a clear remedy (the series would require the claimant to provide short-term loans of comparable artwork in exchange for returning the artwork in question and acknowledging the claimant's ownership); and finally,

(4) a waiver of liability and an agreement not to pursue future legal recourse against the possessing museum or country.

This suggested plan requires the claimant to meet the four requirements for restitution and specifically benefits the public by calling for cooperation and exchange between museums. Furthermore, by requiring loans, the plan diminishes the possibility of frivolous restitution claims. Countries hoping for the return of their artwork must be willing to cooperate and even lend comparable art to possessing museums. Because of this requirement, a claimant has an incentive to bring a claim only for truly important cultural property. The model can be copied in a variety of circumstances and would allow the parties to come to a specific agreement on how best to reconstitute art.

Belgium would clearly benefit from standardized negotiations following the model of the Italy-Met Accord. Because Belgium can present a strong legal argument for restitution based on the Second Treaty of Paris, it would be able to meet the first step. Additionally, Belgium, like Italy, is a cultural patron of some of the world's finest artwork and is situated to preserve any artwork that is restituted. Even if France is not willing to concede that it holds the artwork in bad

faith, Belgium and France could agree to a loan program in exchange for recognizing Belgian ownership of the art. Because Belgian museums hold many great works of art, a series of short-term loans in exchange for restitution would benefit both Belgium and the museums returning the stolen art. One potential difficulty in this proposal is that Belgium would negotiate with individual French museums, rather than engage in nation-to-nation dialogue. While this minor complexity might create some practical difficulties, the potential end result would likely be the same.

The greatest setback for standardizing negotiation procedures is the need for an adjudicatory body to convince museums to follow a new standard. Fortunately, most of the world's museums are members of the International Council of Museums (ICOM) and therefore must adhere to the baseline ethical standards set forth in ICOM's Code of Ethics. Currently, ICOM requirements for repatriation claims are very relaxed. ICOM members must simply submit to dialogue with nations attempting to repatriate cultural property.<sup>143</sup> ICOM provides an acceptable infrastructure for standardized negotiation procedures. Nevertheless, the museum members of ICOM would have to agree to the negotiation plan.

The 2006 Italy-Met Accord auspiciously provides the groundwork for a broadly reproducible standard negotiation procedure that encompasses the four principles at the core of cultural-property law. Formalized negotiation as an industry standard would represent an admirable step by museums themselves to fill the gaps left open by lawmakers.

#### CONCLUSION

Because of war, revolution, and colonialism, much of the stolen art currently held in European museums was taken from its respective country of origin before the twentieth century, yet contemporary legal regimes provide little consolation for countries attempting to repossess art looted before World War II. In many instances, private and

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<sup>143</sup> INT'L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS, 2006 art. 6.2 (2006), available at <http://icom.museum/ethics.html> ("Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation . . ."); see also *id.* art. 6.1 ("The possibility of developing partnerships with museums in countries or areas that have lost a significant part of their heritage should be explored.").

public laws based on cultural-property internationalism simply sanction past wrongs. Belgium's case is important for considering the status of art stolen as a spoil of war and for the significance of including repatriation clauses in peace treaties. Even though France clearly disregarded the restitution provisions of the Second Treaty of Paris, Belgium has no legal recourse in private or public international law. The only currently available vehicle for a potential Belgian restitution claim is informal negotiation, relying on France's moral obligation to return artwork stolen by Napoleon. The limits of the UNESCO and UNIDROIT Conventions, as well as the fact that private law makes restitution claims difficult among European countries, create a potentially devastating situation for nations hoping for the return of their cultural property.

Although the universal-museum model unquestionably benefits academics, art should also be valued for its role in defining individual cultures and nations. Before cultural-property internationalism advocates further weaken nation-based restitution laws, art and cultural-heritage lawyers must consider the ramifications of the universal-museum concept. If we proceed under the current model, art-rich museums in powerful countries will be able to keep cultural-property objects as a matter of course.

The Italy-Met Accord reflects an encouraging shift in at least one museum's approach to a restitution claim. Although initially construed as a unique agreement based on particularized circumstances, the Accord provides an ideal and replicable framework for future restitution claims. Because the Accord is based on the four longstanding principles of cultural property—morality, legality, nationalism, and universalism—it has the potential to function as a standardized negotiation procedure for future restitution claims. The restitution of the Euphronios Krater to Italy heralded a new era in art law and finally struck an appropriate balance between nationalism and cultural-property internationalism.

If museums are willing to standardize restitution procedures, they may be able to correct the defects in private and public cultural-property law that bar many valid restitution claims. In the absence of a clear legal solution to pre-twentieth century restitution claims such as Belgium's, museums are best situated to solve the problem in furtherance of their role as stewards of the world's cultural property.