TRACING HERITAGE: ADDRESSING CULTURAL PROPERTY CRIME THROUGH RECORDATION ON THE BLOCKCHAIN

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TABLE OF CONTENTS

I. INTRODUCTION 942
II. THEORY OF CULTURAL PROPERTY LAW 943
A. Defining cultural property 943
B. Policy underlying cultural property 945
C. Differing perspectives: Cultural nationalism & internationalism, and source & market nations 946
III. THE MARKET FOR CULTURAL ARTIFACTS AND THE EVIDENTIARY PROBLEM 948
A. The scope of illicit cultural property trafficking 948
B. The evidentiary problem in "gray market" transactions 948
IV. INTERNATIONAL CULTURAL PROPERTY LAW: THE 1970 CONVENTION 951
A. Cultural property before 1970 951
B. Policy underlying the 1970 Convention 952
C. Restitution claims 952
D. Tracing cultural artifacts 953
E. Executing the Convention 954
V. DOMESTIC CULTURAL PROPERTY LAW: CHINA, INDIA, THE UNITED STATES, AND THE U.K. 955
A. China 955
B. India 957
C. United States 959
D. United Kingdom 962
VI. COMPARATIVE ANALYSIS 964
A. Source nations: China vs. India 964

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B. Market nations: United States and U.K. 965
VII. CULTURAL HERITAGE ON THE BLOCKCHAIN 967
A. How blockchain technology solves the evidentiary problem.... 967
B. Proposal.. 968
VIII. CONCLUSION 969

I. INTRODUCTION

This Note discusses the provisions under international law for the restitution of stolen cultural artifacts, or "cultural property." The object is to explore how a claim for the return of cultural property is articulated and what sort of legal regime best serves to bring justice to such claims.

The Note begins by giving an overview of the field of cultural property law and its underlying policy. I describe the evidentiary problem in making restitution claims and how this is exacerbated by current practices in the market. Then, I lay out a history of the international law addressing the topic, culminating in the 1970 United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.[1] I discuss how the Convention articulates a claim for restitution and how it proposes a "net" of regulation to capture stolen cultural property. I then undertake a comparative analysis of the Convention's implementation across four major countries – China, India, the United States, and the U.K. – tracing in particular the different legal regimes' facilities for creating successful restitution claims. Finally, the Note proposes blockchain technology as a potential means of implementing the 1970 Convention and solving the evidentiary problem.

1 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, T.I.A.S. No. 83-1202, 823 U.N.T.S. 231 [hereinafter 1970 Convention].

II. THEORY OF CULTURAL PROPERTY LAW

A. *Defining cultural property*

The legal concept of "cultural property" originated in international law.[2] The first recorded reference to the policy underlying what would become modern cultural property law was in 1813 in the case of *The Marquis de Somerueles*.[3] In that case, the Vice-Admiralty Court of Halifax, Nova Scotia was adjudicating a petition by a U.S. citizen for the restitution of certain property onboard the ship named The Marquis de Somerueles, which had been captured by the British during the War of 1812.[4] Onboard was a collection of paintings and prints from Italy en route to a fledgling scientific establishment in Philadelphia.[5] The U.S. petitioner wrote to the Canadian court, notwithstanding international conflict, that "even war does not leave science and art unprotected, . . . we are not without hopes of seeing [the collection]."[6] The judge, Dr. Croke, was surprisingly moved by this petition and wrote as follows:

> The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.[7]

Here, there is a distillation of the fundamental elements of legal protection for cultural heritage: the "law of nations" (or international law), the inherent value of art and science, their importance in cultivating civilization, their special protection in times of conflict, and a humanistic appeal to the notion of a shared human culture.[8] This logic encapsulates a certain idealism, and perhaps a naivete, inherent in cultural property law. Cultural-national groups are delineated by the

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2 John Henry Merryman, *The Marquis de Somerueles: Vice-Admiralty Court of Halifax, Nova Scotia, Stewart's Vice-Admiralty Reports 482 (1813)*, 5 INT'L J. CULTURAL PROP. 319, 319-21 (1996) (emphasis added).

3 *Id.*

4 *Id.* at 319.

5 *Id.*

6 *Id.*

7 *Id.*

8 Merryman, *supra* note 2, at 319.

inscription of borders enforced by conflict. Despite this, special protection must be extended on behalf of these groups to cultural achievements threatened by such conflict. A common humanity cannot be recognized by a law of jurisdiction and borders, and yet the law of nations contains its "modifications and relaxations" to allow for the restitution of property moved improperly across borders.[9]

"Cultural property," in modern legal discourse, is the term applied to objects afforded special protections due to their cultural or historic significance. The term was first used in a legal context in the 1954 Hague Convention for the Protection of Cultural Property ("1954 Convention").[10] In its first Article, the 1954 Convention defines cultural property in general as "movable or immovable property of great importance to the cultural heritage of every people," as well as buildings and museums.[11] In 1970, UNESCO held another convention focusing on issues of cultural property, this time honing in on issues particular to the international trade of *movable* cultural property – the aforementioned 1970 Convention.[12] The 1970 Convention also undertook to define cultural property in its first Article, though its definition differs from that of its predecessor: cultural property is defined as that which "is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."[13] Thus, where the 1954 Convention adopts a broadly humanist view of cultural property as that which is "of great importance to the cultural heritage of every people," the 1970 Convention restricts property "of importance" to that which is designated as such by a State.[14]

Giving a fixed referent for cultural property, then, is difficult, as the term is as evaluative as it is descriptive–in the broad sense of the definitions given in the 1954 and 1970 Conventions, cultural property could be anything assigned sufficient significance. The 1970 Convention offers a sundry list of artifacts including:

> a. . . . objects of palaeontological interest; b. [p]roperty relating to history, including the history of science and technology and military and social history . . . c. [p]roducts of

9 *Id.*

10 Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1(a-c), May 14, 1954, T.I.A.S. No. 09-313.1, 249 U.N.T.S. 215 [hereinafter 1954 Convention].

11 *Id.*

12 1970 Convention, *supra* note 1, art. 10(a).

13 *Id.* art. 1.

14 1954 Convention, *supra* note 10, art. 1(a); 1970 Convention, *supra* note 1, art. 1.

> archaeological excavations (including regular and clandestine) . . . e. [a]ntiquities more than one hundred years old, such as inscriptions, coins and engraved seals; . . . [g.] i. pictures, paintings and drawings . . . ii. Original artistic assemblages and montages in any material; . . . h. [r]are manuscripts and incunabula . . . [and] i. [p]ostage, revenue and similar stamps.15

Different nations, drawing on their unique material cultures, offer their own definitions. The People's Republic of China, in its law, defines "cultural relics" as follows:

> [(1)] ancient tombs, ancient architectural structures, [and] cave temples . . . [(2)] [sites and objects] related to major historical events, revolutionary movements or famous personalities . . . [and (5)] typical material objects reflecting the social system, social production or the life of various nationalities in different historical periods.[16]

The Republic of India, for its part, exemplifies what it calls "antiquities" as: "any coin, sculpture, painting, epigraph or other work of art or craftsmanship . . . any article, object or thing detached from a building or cave" and any "thing illustrative of science, art, crafts, literature, religion, customs, morals or politics in bygone ages."[17] Because the aspect of cultural property under consideration in this Note is illicit international trade, it will discuss movable cultural property objects generally as "cultural artifacts" – "cultural" to denote their ethnological significance, and "artifact" to denote their nature as records of human creation.

B. *Policy underlying cultural property*

Why, though, do *cultural* artifacts matter? What is distinct about the importance a people assign to its art and artifacts, as compared to, say, its infrastructural projects or food products? The answer lies in the role such objects play in the construction of group identity.[18] Professors Prott and O'Keefe, two specialists in the cultural property

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15 1970 Convention, *supra* note 1, art. 1(a), (b), (c), (e), (g)(i), (g)(ii), (h), (i).

16 Zhonghua renmin gongheguo wenwu baohu fa (中华人民共和国文物保护法) [Law of the People's Republic of China on Protection of Cultural Relics] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Oct. 28, 2002), ch. I art. 2(1), (2), (5) (China) [hereinafter 2002 Law].

17 India Antiquities and Art Treasures Act, 1972, § 2(1)(a) [hereinafter India Antiquities Act].

18 Lyndel V. Prott & Patrick J. O'Keefe, *'Cultural Heritage' or 'Cultural Property'?*, INT'L J. CULTURAL PROP. 307, 307 (2007).

field, argue that "cultural heritage consists of manifestations of human life which represent a particular view of life and witness the history and validity of that view."[19] Material manifestations of a particular culture or way of life are important because they enable a group to bear witness to its own historical narrative.[20] Prott and O'Keefe explain that "[s]ome [artifacts] are masterpieces, some are merely representative, a 'snapshot' as it were, of a particular way of life at a particular time, especially valuable as a historical record where that way of life is under threat."[21] As John Merryman, a Stanford law professor who pioneered the field of art and the law, eloquently explains: "[t]he social functions of objects testify to our common humanity. They illustrate one's connection with others, express a shared human sensibility and purpose, communicate across time and distance, dispel the feeling that one is lost and alone."[22] In short, one's ability to find continuity with the past reifies and validates one's existence in the present.

Cultural artifacts can thus be characterized as the material history of a people. They are evidence not just of human existence, but of our will to self-creation – invention, civilization, and art. In a room of artifacts, one can see, like the bands of a canyon face revealing layers of geological history, the generations of art and craft comprising one's own culture. *Inter*n*ational* law guarantees the right to this historical record because it is foundational to the very notion of a "nation" – a distinct and sovereign group, self-determined and self-defined.

C. *Differing perspectives: Cultural nationalism & internationalism, and source & market nations*

As John Merryman explains in his 1986 article "Two Ways of Thinking About Cultural Property," there are two ideological poles in academic and policy debates of cultural property law.[23] He calls these "cultural internationalism" and "cultural nationalism."[24] Merryman aligns cultural internationalism with the values embraced by the 1954 Convention, connoting a "cosmopolitan" approach to cultural property

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19 *Id.*

20 *Id.*

21 *Id.* at 308.

22 John H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 349 (1989).

23 John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 846 (1986).

24 *Id.*

protections.[25] The internationalist view takes the 1954 Convention's position that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind," and that "preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection."[26] Cultural nationalism, on the other hand, is aligned with the 1970 Convention, rooting the special value of cultural property in its significance to a national heritage: to wit, "cultural property constitutes one of the basic elements of civilization and national culture, and [] its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting."[27]

The split between these two modes falls along yet another dichotomy in the field – that of "source" nations and "market" nations.[28] Merryman puts the distinction between these nations in terms of market forces: source nations are countries in which "the supply of desirable cultural property exceeds the internal demand," whereas market nations are those in which "the demand exceeds the supply."[29] Put another way, source nations tend to export their cultural property, and market nations tend to import from other nations. Examples of source nations include the People's Republic of China and the Republic of India, and examples of market nations include the United States and the United Kingdom, as will be discussed further below.

It is important to recognize that this dichotomy is not the product of seemingly arbitrary market forces – nations like the United States and the U.K. do not find themselves in a commanding position in the world economy by accident. The distinction, between "source" and "market" nations, and the "internationalist" and "nationalist" orientations, falls quite plainly on the deeper international division between *colonizers* and *colonized*. U.S. and British museums are filled with the loot[30] of their former conquests – stolen histories of other peoples from around the world. In light of the prior discussion of the value of cultural artifacts, it is highly unlikely that these collections are maintained

25 *Id.*

26 1954 Convention, *supra* note 10, Preamble.

27 1970 Convention, *supra* note 1, Preamble.

28 Merryman, *supra* note 23, at 832.

29 *Id.*

30 The word "loot" is itself a loanword from Hindi, taken up by the British during their colonization of India. *Loot*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/loot [https://perma.cc/X3RG-KAF9] (last visited Jan. 30, 2023).

to preserve these nations' cultural memory. Their collections point to history not of self-creation, but of *subjugation* – not of culture, but of empire.

III. THE MARKET FOR CULTURAL ARTIFACTS AND THE EVIDENTIARY PROBLEM

A. *The scope of illicit cultural property trafficking*

Illicit trade of cultural property touches a variety of stakeholders in cultural institutions globally – such as culture bearers,[31] legitimate owners, museums, private collections, religious buildings, and archaeological sites as well as market participants like auction houses and galleries. The international trade of cultural property is thus complex and multipolar, made up of private, group, and government interests, and inflected by legacies of colonialism.

In 2020, UNESCO reported that the illicit trade in cultural goods is estimated to be worth $10 billion each year.[32] INTERPOL Works of Art Unit reported in the same year that 35,749 culturally significant objects had been stolen globally.[33] The illicit trade in cultural goods thus represents a devastating loss of both cultural and monetary value. This is especially true for source nations, which are rich in cultural resources but lag behind market nations in terms of economic development.[34] More importantly, the loss of these artifacts reflects the loss of invaluable manifestations of culture, and what is currently referred to as "illicit trafficking in cultural property" may be better described as the plundering of a people's historical memory.

B. *The evidentiary problem in "gray market" transactions*

The international trade in cultural artifacts has been characterized as a "gray market" in which business cannot be said to be either

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31 "Culture bearers" are individuals who represent a cultural group.

32 *The Real Price of Art: International UNESCO Campaign Reveals the Hidden Face of Art Trafficking*, UNESCO, https://en.unesco.org/news/real-price-art-international-unesco-campaign-reveals-hidden-face-art-trafficking [https://perma.cc/Y57T-JEP4] (June 1, 2022). This figure has also faced significant criticism. *See contra* Vincent Noce, *Unesco, Stop Citing 'Bogus' $10bn Figure, Art Trade Pleads*, THE ART NEWSPAPER (Nov. 12, 2020), https://www.theartnewspaper.com/2020/11/12/unesco-stop-citing-bogus-dollar10bn-figure-art-trade-pleads [https://perma.cc/EMB7-3SMU].

33 INTERPOL, ASSESSING CRIMES AGAINST CULTURAL PROPERTY 2020 13 (2020).

34 Merryman, *supra* note 23, at 832.

entirely legal or illegal.[35] "Laundering" occurs when illegally-acquired objects are sold on the legal market; conversely, "blackening" occurs when legally-acquired objects are sold on the black market.[36] Artifacts traveling through this market can become illegal at any point along the chain from supplier to purchaser – if they are improperly acquired at the source, such as through looting, or improperly transmitted across borders, such as through smuggling.[37] The ambiguity of the market is only exacerbated by market participants' tendency toward strict confidentiality.[38] Participants cite a desire to protect sellers by not inquiring too deeply into their business practices.[39] The gray market for cultural property, then, wears two shrouds; the first being the ambiguity of its legality across overlapping systems, and the second being the culture of secrecy among its participants.

Complicating matters further, even if a suspicion exists that a particular object was improperly acquired, legal action to recover it is inhibited by the current legal regime.[40] This is because of the immense evidentiary burden required to make these claims. The burden of proof lies with the claimant to establish that the current possessor knew or should have known that the object was improperly acquired.[41] However, loot, by definition, is undocumented before it appears on the international market, so recovery is only possible if a claimant or the government can prove the object's time and place of discovery.[42] Due to this immense evidentiary burden, actions for the recovery of looted antiquities are more likely civil actions, such as civil forfeitures and private replevin claims.[43] Though civil actions have a higher

35 SIOBHÁN NÍ CHONAILL, ANAÏS REDING & LORENZO VALERI, ASSESSING THE ILLEGAL TRADE IN CULTURAL PROPERTY FROM A PUBLIC POLICY PERSPECTIVE 11 (2011).

36 CHONAILL, REDING & VALERI, *supra* note 35, at 11, n.9. For example, good title in an improperly acquired object can be "laundered" by transferring it from common law to civil law jurisdictions, as bona fide buyers are privileged over original owners in that system. *Id.*

37 *Id.* at 13-15.

38 Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 179 (2007) (internal citations omitted).

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 179-80.

43 *Id.* at 180.

likelihood of success, they are insufficient as a means of preventing cultural property crime.[44]

In a civil action, possessors of looted antiquities face only the risk of losing the antiquities' monetary value – but sellers of antiquities have little financial investment in their merchandise relative to the actual value these artifacts realize upon final sale.[45] For example, as Professor Gerstenblith describes in her article "Controlling the International Market in Antiquities," cuneiform tablets could be purchased for as little as $4 at archaeological sites in Iraq, and sell for over $10,000 at auction.[46] The extreme mark-ups that cultural property objects see as they travel through the supply chain mean that purely monetary compensation, such as is available in civil actions, is insufficient to ameliorate the damage wrought by the illicit cultural property trade.

The problem here is not that there is no claim for restitution under the law. Rather, the problem is that the law does not provide an adequate solution for the evidentiary problem posed by these disputes. In the context of the market's legal ambiguity, both international and domestic law have a duty to weave a tighter net to address this evidentiary problem. As will be discussed below, international and domestic regimes have made some progress on the issue. However, the lack of a truly consistent global standard continues to allow market participants to elude regulation as artifacts are transported through borders across the globe.[47] Emergent blockchain technology – offering proof-of-ownership, which follows property throughout its history of transactions and cannot be defrauded – offers a solution that could streamline the current global system and create a new standard for the market in cultural artifacts.

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44 Gerstenblith *supra* note 38, at 180.

45 *Id.*

46 *Id.* at 180-81. *See also* Franklin C. Sayre, *Cultural Property Laws in India and Japan*, 33 UCLA L. REV. 851, 875 (1986) (discussing how plunderers in India were compensated with as little as a single rupee for artifacts which could realize profits of more than a million dollars on the international market).

47 Gerstenblith, *supra* note 38, at 181.

IV. INTERNATIONAL CULTURAL PROPERTY LAW: THE 1970 CONVENTION

A. *Cultural property before 1970*

As *The Marquis de Somerueles* makes clear, the issues raised by cultural property law are not new to considerations of international policy.[48] Fifty years after that case, in 1863, the precepts of the law of nations described by Dr. Croke would be enshrined in the Lieber Code.[49] This was a code of instructions, promulgated by President Abraham Lincoln, as General Order No. 100 to regulate Union soldiers in their occupation of the Confederate territories.[50] The Lieber Code extended special protections to works of cultural significance against appropriation in war.[51]

As one of the first documents laying out principles of just warfare in the modern era, the Lieber Code was highly influential.[52] It influenced legal discourse across the Atlantic, leading in part to the Hague Conventions on the international law of war in 1899 and 1907.[53] These conventions incorporated the Lieber Code's proto-cultural property provisions.[54] After the Second World War, cultural property law was updated again in the 1954 Convention which would give the field its name: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[55] This was the first international convention specifically dedicated to this issue and the first to define the term "cultural property."[56] The 1954 Convention was then followed in 1970 by the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[57]

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48 Merryman*, supra* note 2.

49 *See generally* General Orders No. 100: Instructions for the Government of Armies of the States in the Field (Apr. 24, 1863), reprinted in 2 Frances Lieber, Contributions to Political Science (1881) [hereinafter LIEBER CODE].

50 *Id.*

51 *Id.* art. 31, 34.

52 PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 721 (4th ed. 2019).

53 *Id.*

54 LIEBER CODE, *supra* note 49, arts. 31, 34.

55 1954 Convention, *supra* note 10.

56 *Id.* art. 1.

57 1970 Convention, *supra* note 1.

B. *Policy underlying the 1970 Convention*

Whereas the 1954 Convention and its predecessors were focused on the preservation of cultural property in the event of warfare,[58] the 1970 Convention's innovation was that it drew upon concepts invented to protect cultural property in war to regulate the same in trade.[59] Wartime protections for cultural property, first articulated in a world where borders had collapsed, would now be reformulated for a world of relative peace in which borders had stabilized. Fundamentally, the 1970 Convention is not self-executing and does not rely on an international body for enforcement – the Convention looks to the governments of its signatory nations, or States Parties, to adopt and implement its terms.[60]

As a preliminary matter, the 1970 Convention defines as illicit any "import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto."[61] In line with its earlier-referenced provision that cultural property is what States define it as,[62] the Convention here gives States Parties the power to define what trade in cultural property is illicit.[63] Many countries adopt "vesting laws," statutes vesting ownership of all undiscovered cultural property in the State, to implement this provision – though there are other means by which States control the trade in cultural property.[64]

C. *Restitution claims*

The core purpose of the Convention is to enable the restitution of illicitly removed cultural artifacts to their country of origin. To that end, the Convention lays out in Article 7 the process of making and fulfilling restitution claims.[65] States Parties are instructed "to admit actions for recovery of lost or stolen items of cultural property brought

58 *Id.*; LIEBER CODE, *supra* note 49.

59 1970 Convention, *supra* note 1.

60 Vienna Convention on the Law of Treaties art. 2.1(g), May 23, 1969, U.N.T.S. 18232 [hereinafter Vienna Convention on the Law of Treaties] (a State Party is a "State which has consented to be bound by the treaty and for which the treaty is in force").

61 1970 Convention, *supra* note 1, art. 3.

62 *Id.*

63 *Id.*

64 *See* 2002 Law, *supra* note 16; *see also* India Antiquities Act, *supra* note 17.

65 1970 Convention, *supra* note 1, arts. 7, 13.

by or on behalf of rightful owners,"[66] and to "co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner."[67] Each State Party is instructed "to take appropriate steps to recover and return" illicitly imported cultural property "at the request of the State Party of origin."[68] However, the onus is on the requesting party to "furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery"; in addition, "the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property."[69]

The claim is simple enough, the challenging part is how States Parties should solve the evidentiary problem of undocumented loot in order to substantiate restitution claims.

D. *Tracing cultural artifacts*

The Convention lays out a series of provisions for protecting cultural property against illicit export while it is still within the boundaries of its nation of origin. States Parties are instructed to regulate cultural artifacts at the source by supervising archaeological excavation preserving already-discovered cultural property and protecting areas reserved for future research.[70] Further, each country should "oblige antique dealers . . . to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, [and] description and price of each item sold."[71] Similarly, the Convention proposes the establishment of "a national inventory of protected property" and the determination of specific artifacts whose export would appreciably lessen the national cultural heritage.[72] These provisions, taken together, instruct States Parties to keep meticulous documentation of cultural artifacts as they are discovered and as they move through the marketplace. Such documentation would be extremely helpful for substantiating restitution claims.

The Convention also provides for the regulation of imports and exports of cultural artifacts. Article 7, governing imports, instructs States Parties to guard against the entry of stolen goods: States Parties must undertake to "prohibit the import of cultural property stolen from

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66 *Id.* art. 13(c).
67 *Id.* art. 13(b).
68 *Id.* art. 7.
69 *Id.*
70 1970 Convention, *supra* note 1, art. 5(d).
71 *Id.* art. 10(a).
72 *Id.* art. 5(b).

a museum or . . . similar institution . . . provided that such property is documented as appertaining to the inventory of that institution."[73] Article 6, governing exports, gives a more fundamental provision – export permits should be required for the removal of any cultural artifact from the country.[74] This provision sets a bright line of legality around a country's borders, which would be immensely helpful for constructing a restitution claim.

Taken in its totality, the scheme laid out by Convention weaves a tight evidentiary net that could capture any illicitly-exported artifact. If all of these provisions were adopted, then the illicit export of an artifact would either generate direct evidence of illicit activity through memorializing improper excavation or transfer, or circumstantial evidence through a gap in recordation where it was required. Whether in the positive space of the net (a recorded illegal transaction) or the negative space (a gap in required recordation), evidence would be supplied to make a successful claim for restitution.

E. *Executing the Convention*

The 1970 Convention has been adopted by countries around the world, by source and market nations alike.[75] However, as noted by the United States in its reservations to the Convention,[76] the treaty is not self-executing – it is reliant on each country's implementation. Ultimately, uneven implementation is problematic for the enforcement of restitution claims. The remainder of this Note will undertake an analysis of four major countries' implementations of the 1970 Convention – two source nations, China and India, and two market nations, the United States and the U.K. – followed by a comparative analysis of their implementation and recommendations drawn from such comparison. Chief among these recommendations is source nations' registration of cultural artifacts on a heritage blockchain, which would allow for consistent and well-documented tracing of cultural artifacts wherever they go.

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73 *Id.* art. 7.

74 *Id.* art. 6(a)-(b).

75 *See* UNESCO 1970 Convention list of signatories, UNTC, https://treaties.un.org/pages/showdetails.aspx?objid=08000002801170ec [https://perma.cc/RT97-KNEU] (last visited Jan. 30, 2023).

76 Vienna Convention on the Law of Treaties, *supra* note 60, art. 2(d) ("Reservation" means "a unilateral statement, however phrased or named, made by a State . . . whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.").

V. DOMESTIC CULTURAL PROPERTY LAW: CHINA, INDIA, THE UNITED STATES, AND THE U.K.

A. *China*

As a major source nation, the People's Republic of China has a strong incentive to preserve its rich cultural heritage. The Chinese Constitution itself opens with a paean to China's culture and history: "China is one of the countries with the longest histories in the world. The Chinese people of all ethnic groups jointly created its magnificent culture and have a proud revolutionary tradition."[77] In its twenty-second Article, the Constitution pledges the State to "protect[] . . . valuable cultural monuments and relics and other significant items of China's historical and cultural heritage."[78]

In accordance with these stated policy goals, China accepted the 1970 Convention in 1989 without reservations.[79] The Convention's provisions are implemented by the 2002 Law on Protection of Cultural Relics (the "2002 Law").[80] The 2002 Law lays out a comprehensive regulatory scheme, providing for the recordation of recently discovered cultural artifacts as well as the regulation of transfers of cultural property.[81]

The 2002 Law operates as a "vesting law" by declaring in Article 5 that "[a]ll cultural relics remaining underground or [underwater] within the boundaries of the People's Republic of China are owned by the State."[82] To that end, the 2002 Law states that no one may, "without permission [from the appropriate administrative department], conduct excavation of the cultural relics buried underground."[83] If an archaeological investigation is permitted, any discoveries "shall be registered, preserved properly and . . . turned over for collection to the administrative department"; and, further, "[n]o units or individuals may take excavated archeological relics into their own possession."[84]

77 XIANFA Preamble para. 1 (1982) (China).

78 *Id.* art. 22.

79 UNTC, *supra* note 75.

80 2002 law, *supra* note 16; Zhonghua renmin gongheguo xingfa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), pt. 1, § 1, art. 10 [hereinafter 1997 Criminal Law].

81 2002 Law, *supra* note 16.

82 *Id.* art. 5.

83 *Id.* art. 27.

84 *Id.* art. 34. Similarly, Article 59 states that "[b]anks, smelteries, paper mills and units for the recovery of old and waste materials shall be responsible," together with

Any cultural artifacts thus discovered "shall be turned over to the local administrative department," with reasonable compensation paid to the discoverer.[85] By claiming all undiscovered cultural property for the State and regulating newly discovered cultural property at the point of discovery, the 2002 Law fulfills the 1970 Convention's instruction to supervise archaeological excavation, as well as its instruction to record newly excavated cultural property in a national inventory.[86]

Private businesses are allowed to deal in cultural property, but the 2002 Law requires extensive State supervision.[87] Cultural relics stores and auction enterprises may be established subject to approval by the appropriate administrative department.[88] Cultural property held out by such businesses must be examined and verified before a sale,[89] and such businesses must keep records of the cultural property they purchase and sell for submission to the appropriate administrative department.[90] The 2002 Law's stringent record-keeping requirements ensure that a paper trail attends all cultural property moving through the private market in China – thus, illicit practices should be discoverable, either through a record memorializing the unlawful transaction or the lack of a record where one is required. This is in keeping with the 1970 Convention's admonition to oblige artifact merchants to maintain a detailed register of their inventory.[91]

The 2002 Law does not require the recordation of cultural artifacts already held in the hands of private citizens.[92] It allows for the unrecorded transfer of cultural artifacts between private citizens via inheritance, gifting, mutual exchange, and recorded purchase from State-sanctioned vendors.[93] However, the Law does guard against illicit international trade by regulation at the border.[94] The Law states that "[c]ultural relics to be taken out of the country shall be subject to

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the relevant administrative department, "for sorting out cultural relics from among gold and silver articles and waste materials." *Id.* art. 59.

85 *Id.* art. 59 (There is an exception for coins and other currency discovered which, due to their vintage, "are needed for research by banks.").

86 *Id.* art. 27, 34; 1970 Convention, *supra* note 1, art. 5(b), 5(d).

87 2002 Law, *supra* note 16, art. 56, 57.

88 *Id.* art. 53, 54 (writing that stores selling cultural relics may not conduct auctions, and auction enterprises may not set up cultural relics stores).

89 *Id.* art. 56.

90 *Id.* art. 57.

91 1970 Convention, *supra* note 1, art. 10(a).

92 2002 law, *supra* note 16.

93 *Id.* art. 50.

94 *Id.* art. 61.

examination and verification" and "declared to the Customs."[95] Further, cultural artifacts must be issued an exit permit in order to leave the country.[96] This is in keeping with the 1970 Convention's instruction "[t]o introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized."[97]

The 2002 Law thus fully implements the 1970 Convention's scheme by creating a comprehensive scheme for tracking cultural artifacts. As the 1970 Convention recommends, cultural artifacts are regulated at the point of discovery, in the marketplace, and upon transfer out of the country. China's laws exemplify the Convention's proposed evidentiary net.

B. *India*

The Constitution of the Republic of India states that culturally significant objects should be preserved as a matter of policy.[98] Per Article 49, the State is obligated "to protect every monument or place or object of artistic or historic interest, [declared by or under law made by Parliament] to be of national importance, from spoliation . . . removal . . . or export, as the case may be."[99] This language echoes that of the 1970 Convention's preamble, which states that "it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export."[100]

The primary legislation regulating cultural artifacts in India is the Antiquities and Art Treasures Act of 1972[101] and the attendant Antiquities and Art Treasures Rules of 1973,[102] as well as the Ancient Monuments and Archaeological Sites and Remains Act of 1958.[103] The Antiquities Act establishes a national boundary around the trade in cultural property through licensure – only those authorized by the

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95 *Id.*

96 *Id.*

97 1970 Convention, *supra* note 1, art. 6(a).

98 India Const. pt. IV, art. 49.

99 *Id.*

100 1970 Convention, *supra* note 1, Preamble.

101 India Antiquities Act, *supra* note 17.

102 Antiquities and Art Treasures Rules, 1973 (India) [hereinafter Antiquities Rules]; India Antiquities Act, *supra* note 17, § 31.

103 The Ancient Monuments and Archaeological Sites and Remains Act, 1958 (India) [hereinafter Ancient Monuments Act].

Indian Central Government are allowed to export cultural property.[104] The same is true of the domestic market; the Act states that "no person shall, . . . carry on the business of selling or offering to sell any antiquity except" one authorized to do so.[105]

Licensed merchants are required to maintain "such records, photographs and registers, . . . as may be prescribed."[106] Such records "shall, at all reasonable times, be open to inspection by the licensing officer."[107] The Antiquities Rules fill in the manner and particulars of these records; Rule 8 points to Form IV, which asks license-holders to detail, for each antiquity in their possession, its approximate age, source of acquisition, and, if sold, the name and address of its purchaser.[108] Rule 8 also requires the maintenance of detailed photographic documentation of antiquities in license-holders' possession.[109] India's Antiquities Act, like China's 2002 Law, implements the 1970 Convention by obliging market participants to keep comprehensive records of their artifacts.[110] For any allegedly illicit cultural property object that has moved through a licensed trader in India, these records' existence would either memorialize an illicit transaction, or their nonexistence would render the transaction illicit.

India's other regulations, however, are less successful. India does not utilize a "vesting law" – instead, the Antiquities Act empowers the Central Government to put out a call for the conservation of specific types of cultural property.[111] The Central Government may, "by notification in the Official Gazette, specify those antiquities which shall be registered under this Act."[112] Following such notification, every person in possession of such an antiquity "shall register such antiquity before the registering officer."[113] Those required to register antiquities must submit detailed photographic documentation and the source of

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104 India Antiquities Act, *supra* note 17, § 3.

105 *Id.* § 5.

106 *Id.* § 10(1).

107 *Id.* § 10(2) (noting that the records must also be open to inspection by "any other gazetted officer of Government authorised in writing by the licensing officer in this behalf").

108 Antiquities Rules, *supra* note 102, Rule 8, Form IV "Register of Antiquities."

109 *Id.* Rule 8.

110 India Antiquities Act, *supra* note 17, § 10; 2002 Law, *supra* note 16, art. 57; 1970 Convention, *supra* note 1, art. 10(a).

111 India Antiquities Act, *supra* note 17, § 14.

112 *Id.* § 14(1).

113 *Id.* § 14(3).

acquisition.[114] Holders of registered antiquities must also inform the registering officer of any transfer of the antiquity.[115]

The registration program, in combination with the Act's requirement for market participants to maintain detailed and accessible records, echoes some parts of the 1970 Convention's proposed national inventory of cultural artifacts.[116] However, any cultural artifact of a sort not called for registration, or not held by licensed traders, would not be captured by this scheme. This means that the lack of recordation of a particular artifact could not serve as circumstantial evidence of its illicit removal, simply because it was of a category not called for registration or because it never passed through the hands of a licensed trader. Overall, there are significant gaps in the registration program's reach which frustrate the Indian Central Government's ability to create a comprehensive national inventory.

The Indian government does undertake to record cultural artifacts at archaeological sites, but this program suffers from similar issues.[117] Per Section 4 of the Ancient Monuments and Archaeological Sites and Remains Act, the Central Government is empowered to declare an ancient monument or archaeological site to be of national importance and thus protected.[118] Under the Archaeological Sites Act, "[w]here, as a result of any excavations made in" a protected area "any antiquities are discovered," the discoverer shall submit a report to the Central Government recording what they discovered.[119] Though the Archaeological Sites Act, like the Antiquities Act, is a good start, the scope of its recordation is limited to the sites specified by the State.[120]

Having discussed China and India, two prime examples of source nations, this Note now shifts its focus to two major market nations, the United States and the U.K.

C. *United States*

The United States, in ratifying the 1970 UNESCO Convention, did not commit to realizing the treaty in its entirety. In particular, Article 3, recognizing each State Party's power to vest ownership of cultural property in itself and thus set the terms of what trade is illicit –

114 *Id.* § 16; Antiquities Rules, *supra* note 102, Rule 11, form VIII.
115 India Antiquities Act, *supra* note 17, § 17.
116 1970 Convention, *supra* note 1, art. 5(b).
117 Ancient Monuments Act, *supra* note 103.
118 *Id.* §§ 2(j), 4.
119 *Id.* § 23(a).
120 *Id.*

considered by many to be the Convention's key provision – was not accepted.[121] Thus, the U.S.'s implementation statute, the Convention on Cultural Property Implementation Act ("CPIA") is not consistent with China's or India's national retention laws.[122] The CPIA does, however, afford two routes to protection: first, it implements the 1970 Convention's Article 9 by allowing for the promulgation of specific import restrictions in certain circumstances;[123] second, it implements the 1970 Convention's Article 7 by allowing for the restitution of property that has been stolen from a museum abroad.[124]

The CPIA empowers the President to set import restrictions protecting certain cultural property if it is found to be in serious danger.[125] Such a restriction must be pursuant either to an international agreement, or an emergency condition.[126] In the event of a restriction, the Secretary of the Treasury shall promulgate a list of the material to be barred from entry.[127] Such property will only be released from customs in two instances. If the property is accompanied by a certification issued by the State Party of origin allowing its export, it will be allowed in.[128] Alternatively, if the importer shows "satisfactory evidence" that the property was exported from the State Party at least ten years before the date of entry, and that the importer had no interest in the property more than one year before the date of entry, it will be allowed in.[129] Essentially, the alternative provides a "safe harbor," which assumes that an arrested cultural artifact's provenance is good if it has been on the market for an appreciable amount of time.[130]

The CPIA creates another safe harbor for cultural property tailored specifically to museum imports – if cultural property was purchased in good faith by a United States museum and has been held and exhibited for an amount of time sufficient to put a rightful owner on

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121 Patty Gerstenblith, *Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations*, *in* THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 70, 74 (Jane Anderson & Haidy Geismar eds., 2017); 1970 Convention, *supra* note 1, United States Reservations.

122 Convention on Cultural Property Implementation Act, 19 U.S.C. 2601 §§ 2601-13 (1983) [hereinafter CPIA].

123 1970 Convention, *supra* note 1, art. 9; CPIA § 2604.

124 1970 Convention, *supra* note 1, art. 7; CPIA § 2607.

125 CPIA § 2602.

126 *Id.* §§ 2602, 2603.

127 *Id.* § 2604.

128 *Id.* § 2606(b)(1).

129 *Id.* § 2606(b)(2).

130 *Id.* § 2606(b)(2).

notice that it has entered the collection, then it shall not be subject to forfeiture under the CPIA.[131]

On one hand, these safe harbors are good for the cultural property market. They enable buyers of cultural property to feel secure that their good faith purchases will be honored. Importers of cultural property may be deterred from participating in the market without such a guarantee. Applying a cultural internationalist perspective, a safe harbor for market participants serves the overall policy goal of cultural property law by enabling overseas artifacts to more easily find a permanent home in market nations, even if they were exported contrary to a source nation's retention laws. Professor Merryman argues that many source nations hold onto artifacts that they are unable to maintain, a phenomenon he describes as "covetous neglect." [132] Such artifacts may find a safer home in a market nation, even if their removal violates the law of their country of origin.

On the other hand, a cultural nationalist analysis finds that a safe harbor merely enables importers of illicitly acquired cultural property to launder good title to their ill-gotten gains, so long as they have been outside their country of origin for enough time. It should be recognized that in this way, the CPIA reinforces the historically imperialistic relationship that the United States as a "market nation" maintains with "source nations" abroad.[133] By creating a safe harbor when enough time has passed, the United States adopts the hypocritical historical amnesia professed by many empires maintaining their hegemony long past its tolerability – that happened so long ago, they cannot possibly be held responsible for it today. Yet despite the U.S.'s choice to ignore its own history, *it is the historical memory of source nations that is erased* by the plundering of their patrimony.

Despite the CPIA's reservations regarding other countries' vesting laws, the Court of Appeals for the Second Circuit found in United

131 CPIA § 2611(2). There are four sets of circumstances under which this safe harbor is provided: (A) the property has been held by the institution for at least three years, which acquisition was reported in a widely circulated publication, and the property has been exhibited for at least one year, and the property has appeared in the institution's catalog for at least two years; (B) the property has been in the United States for at least ten years, and has been exhibited for at least five years; (C) the property has been in the United States for at least ten years, and the State Party concerned "has received or should have received during such period fair notice" through adequate and accessible publication; and (D) the property has been in the United States for at least twenty years. *Id.*

132 Merryman, *supra* note 23, at 846.

133 John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1221 (1988-1989).

States v. Schultz that vesting laws could be given effect through other means.[134] In that case, one Frederick Schultz had been convicted of violating the National Stolen Property Act ("NSPA") due to his importation of ancient Egyptian artifacts in willful contravention of Egypt's patrimony law vesting their ownership in the Egyptian state.[135] The NSPA states that:

> Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, . . . of the value of $5,000 or more, . . . which have crossed a State or United States boundary after being stolen, . . . knowing the same to have been stolen, . . . Shall be fined under this title or imprisoned not more than ten years, or both.[136]

Schultz argued that because the CPIA did not embrace cultural property claimed by national vesting laws, the NPSA should not apply to cultural property stolen from a foreign state.[137] The Court disagreed, finding that "the passage of the CPIA does not limit the NSPA's application to antiquities stolen in foreign nations"[138] and concluding that "the NSPA applies to property that is stolen in violation of a foreign patrimony law."[139] Thus, despite the CPIA's blatant refusal to validate foreign nations' vesting laws, U.S. courts have validated claims based on vesting laws through the NSPA.

D. *United Kingdom*

The United Kingdom accepted the 1970 Convention in 2003 relatively late compared to the other signatories.[140] Prior to that, the U.K. prosecuted illicit trade in cultural property in the same way as any other illicitly-acquired property in international trade. In *R. v. Tokeley-Parry*, a trafficker of stolen Egyptian antiquities – and colleague of the United States' own Frederick Schultz[141] – was found guilty of violating the U.K.'s Theft Act of 1968.[142] In finding Tokeley-Parry guilty of handling stolen goods, the U.K. court, like the Second Circuit in the

134 United States v. Schultz, 333 F.3d 393, 410 (2d Cir. 2003).
135 *Id.*
136 18 U.S.C. § 2315 (2013).
137 *Schultz*, 333 F.3d at 408.
138 *Id.* at 409.
139 *Id.* at 410.
140 UNTC, *supra* note 75.
141 *Schultz*, 333 F.3d at 410.
142 R. v. Tokeley-Parry (Jonathon Aidan) [1999] Crim. L.R. 578; Theft Act, 1986, § 22(1) CURRENT LAW (Eng.).

United States, found that Egypt's national vesting law created an enforceable property right in undiscovered cultural artifacts.[143] Thus, by enforcing vesting laws through the application of laws governing the transfer of stolen property, the U.K. fulfilled the 1970 Convention's Article 3 through the Theft Act in the same way as the United States did through the NSPA.[144]

The relatively late decision to accept the 1970 Convention in 2003 was informed by the 2000 Ministerial Advisory Panel on Illicit Trade Report.[145] The Report analyzed the U.K.'s place in the international illicit trade of cultural property, ultimately finding that the U.K.'s legal framework at the time already largely fulfilled the terms of the 1970 Convention.[146] The Report made three recommendations relevant to our discussion here. First, the Report recommended that the U.K. accede to the 1970 Convention since it would require no additional legislation.[147] Second, the Report recommended the establishment of a new criminal offense "to import, deal in or be in possession of any cultural object, knowing or believing that the object was stolen, or illegally excavated, or removed from any monument or wreck contrary to local law."[148] Third, the Report proposed "the institution of a specialist national database of unlawfully removed cultural objects" recording unlawfully removed cultural property.[149]

The Report's recommendation for the creation of a criminal offence specifically addressing illicit trade in cultural property was implemented in the Dealing in Cultural Objects (Offences) Act of 2003.[150] The Act describes the crime as follows: "[a] person is guilty of an offence if he dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted."[151] The Act defines "cultural object" as "an object of historical, architectural or archaeological interest."[152] A cultural object is considered "tainted" if it has been unlawfully (under the law of the U.K. or any other country)

143 *Id.*

144 *Id.*; *Schultz*, 333 F.3d at 410.

145 MINISTERIAL ADVISORY PANEL ON ILLICIT TRADE, REPORT OF THE MINISTERIAL ADVISORY PANEL ON ILLICIT TRADE 5 (2000).

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.* at 6.

150 Dealing in Cultural Objects (Offences) Act 2003, c. 27.

151 *Id.* § 1(1).

152 *Id.* § 2(1).

removed from a building or excavation site.[153] The practice of "deal[ing] in" cultural property is described as the acquisition, disposal, importation, or exportation of cultural property, whether on one's own behalf or on behalf of another.[154]

VI. COMPARATIVE ANALYSIS

A. *Source nations: China vs. India*

As source nations, China and India face this issue at its origin. Both countries contain records of continuous human settlement stretching far back into prehistory, resulting in the accumulation of vast troves of artifacts over which they now preside. While both countries adopted the 1970 Convention in full, their implementations vary. Broadly, China has implemented a relatively rigid and comprehensive regime compared to India's State-directed regulations.[155] Ultimately, China's laws lend to more robust recordation of cultural property, and thus to better results in enabling restitution.

China's 2002 Law vests the right to all undiscovered cultural artifacts in the State, and it requires permission for archaeological excavation.[156] Any excavated artifacts must be recorded with the State.[157] India, on the other hand, did not pass a totalized vesting law, nor does it require permission for every archaeological excavation. Instead, India empowers its Central Government to specify what sites of ancient culture to bring under its protection and what artifacts to record.[158]

In terms of regulation of market participants, these countries are mostly the same. In China, artifacts held by merchants must be recorded, and any artifact to be transferred out of the country must be issued an export permit.[159] In India, artifact merchants are required to keep detailed records of their inventory at all times, and such records must be open to inspection by the State.[160] Also, any cultural artifact to be exported from India must be issued an export permit.[161] These

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153 *Id.* §§ 1(1), 2(2), 4, 5.

154 *Id.* § 3(1).

155 2002 Law, *supra* note 16; 1997 Criminal Law, *supra* note 80; India Antiquities Act, *supra* note 17; Antiquities Rules, *supra* note 102; Ancient Monuments Act, *supra* note 103.

156 2002 Law, *supra* note 16, art. 5, 27.

157 *Id.* art. 34.

158 Ancient Monuments Act, *supra* note 103, §§ 4, 2(j).

159 2002 Law, *supra* note 16, art. 57, 61.

160 India Antiquities Act, *supra* note 17, § 10.

161 *Id.* § 3(1).

countries' regulation of market participants, then, is mostly the same and tends toward the same standard of documentation.

In terms of comprehensive recordation, however, China's regime weaves a tighter net. China's totalized vesting statute and restriction on excavation means that any looted artifact could be proven to be so by the lack of its recordation with the State.[162] India's system, however, provides no such guarantee, as an artifact could simply have been removed from a site that the State has not chosen to protect.[163] Similarly, though the Central Government can put out a call for the registration of certain types of artifacts, artifacts outside these calls are not protected.[164] China is thus more successful than India in its implementation of the 1970 Convention's evidentiary net.

B. *Market nations: United States and U.K.*

As market nations, the United States and the U.K. face this issue at their terminus – artifacts illicitly removed from source nations tend to reach their final sale in nations like these. It is thus unsurprising that the United States and the U.K. adopted much less of the 1970 Convention than their source nation counterparts, despite the fact that their participation in the market is just as essential.

The United States accepted the 1970 Convention in 1983, passing the CPIA in that year as its means of implementing the Convention.[165] The Act did not include recognition of foreign nations' vesting laws, but the Second Circuit recognized that such laws could be given effect through the application of the National Stolen Property Act.[166] The U.K. accepted the 1970 Convention in 2003, and though its statutory regime already gave effect to foreign nations' vesting laws, it passed the Dealing in Cultural Property (Offences) Act in 2003 as a means of further implementing the Convention.[167] The U.K.'s implementation Act made it a crime not just to deal in artifacts that are rightfully owned by foreign States, but also to deal in artifacts that were removed contrary to foreign laws regardless of vesting laws.[168]

Consider, then, a hypothetical abstracted from the facts of the aforementioned case of Frederick Schultz and Jonathon Tokley-Parry

162 2002 Law, *supra* note 16, art. 5, 27.
163 India Antiquities Act, *supra* note 17, § 14.
164 *Id.*
165 CPIA §§ 2601-2613.
166 *Schultz*, 333 F.3d at 410.
167 Dealing in Cultural Objects (Offences) Act 2003 CURRENT LAW (Eng.).
168 *Id.* at c. 27, §§ 2(2), 4, 5.

– a U.S. citizen and a British national partnered in a scheme to loot and sell previously undiscovered artifacts.[169] Had such a scheme been conducted in China or India, how would current U.S. and U.K. law deal with it? U.K. law would criminalize the sale of artifacts looted from China – which belong to the Chinese State under its vesting law– as well as artifacts removed from protected archaeological sites in India.[170] U.S. law, however, would criminalize dealing in artifacts looted from China, *but not* artifacts looted from protected sites in India, because while China has a vesting law establishing title in its undiscovered cultural property, India does not.[171] For the U.S.'s CPIA to be of any help, the President would have to have established an import restriction embracing the looted artifacts pursuant to an international agreement or emergency condition.[172] The United States and China have such an international agreement in the form of a Memorandum of Understanding restricting unauthorized imports of certain archaeological materials and other artifacts.[173] The United States and India, however, have no such agreement.

Finally, both the United States and the U.K. have failed to implement the 1970 Convention's instructions to set higher standards for cultural property market participants.[174] In Article 10, the Convention instructs that each State Party should "oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin" of their inventory.[175] While both China and India, despite their position as source nations, implemented Article 10,[176] neither the United States nor the U.K. as market nations placed such a requirement on their own merchants.

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169 R. v. Tokeley-Parry (Jonathon Aidan) [1999] Crim. L.R. 578; *Schultz*, 333 F.3d at 410.

170 Dealing in Cultural Objects (Offences) Act 2003; 2002 Law, *supra* note 16, art. 5; Ancient Monuments Act, *supra* note 103, §§ 4, 2(j).

171 18 U.S.C. § 2315; 2002 Law, *supra* note 16, art. 5.

172 CPIA § 2602.

173 Extension of Import Restrictions Imposed on Certain Archaeological Material From China, 84 Fed. Reg. 107 (Jan. 14, 2019) (codified at 19 C.F.R. pt. 12).

174 1970 Convention, *supra* note 1, art. 10.

175 *Id.*

176 *Id.* art. 10; 2002 Law, *supra* note 16, art. 57; India Antiquities Act, *supra* note 17, § 10(1).

VII. CULTURAL HERITAGE ON THE BLOCKCHAIN

A. *How blockchain technology solves the evidentiary problem*

The above comparative analysis reveals that despite the cultural nationalist values of the 1970 Convention, an uneven implementation by States Parties still allows cultural property crime to fall through the cracks. With billions of dollars of cultural property crime occurring every year,[177] a new solution is required. This Note proposes blockchain technology as a potential solution to streamline the process of substantiating restitution claims and to set a new standard in the international artifact market.

Blockchain has been advancing in relevance in recent years, due in large part to the new standard of authentication provided by its immutable public ledger system. It was invented in 2008 as a means of creating a digital currency – the well-known Bitcoin – which would be immune to fraud.[178] In practical terms, a blockchain is a network of computers that share a constantly-updated record of transactions.[179] Each time a transaction is completed, the updated record is saved in its entirety on every computer in the network.[180] Once a new record is created, it is "immutable;" that is, it cannot be altered. This immutable record represents a "block." Blockchain technology will not validate transactions that are inconsistent with the overall record. So, if a person attempted to spend the same token in two transactions, the first would be validated, but the second would be inconsistent with the established blockchain and would not be accepted.[181] This single line of validated transactions represents the "chain." Each immutable "block" is linked together in a single internally consistent "chain" which contains the totality of valid transactions along the network.[182]

This technology is now seeing extensive use in high-value asset markets. The aforementioned Bitcoin has seen immense growth in

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177 UNESCO, *supra* note 32.

178 SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM (2008), https://bitcoin.org/bitcoin.pdf [https://perma.cc/G6UT-DMJJ].

179 Naomi Chetrit, Mayrav Danor, Angelic Shavit, Boaz Yona & Dov Greenbaum, *Not Just for Illicit Trade in Contraband Anymore: Using Blockchain to solve a millennial-long problem with Bills of Lading*, 22 VA. J.L. & TECH. 56, 80-81 (2018).

180 *Id.*

181 *Id.*

182 *Id.*

value since it was first launched.[183] Non-fungible tokens ("NFT"), which also operate on blockchain technology, have made a splash in the contemporary art market.[184] But the utility of blockchain technology is not limited to digital assets – a physical object can be paired with an NFT and registered on a blockchain. The company Flipkick, for example, markets "NFTs linked to physical works of art" – a Flipkick NFT can be redeemed for delivery of the physical work.[185] In this way, the NFT functions as a sort of deed to the property by providing proof of legitimate title. The difference is that this deed follows the property, creating a traceable and immutable provenance wherever it goes.[186]

B. *Proposal*

The benefits of this technology dovetail elegantly with the terms of the 1970 UNESCO Convention. This Note proposes that every nation with an interest in preserving its cultural property should establish its own cultural heritage blockchain. A unique "heritage token" would be minted for each artifact that the nation seeks to protect and paired with that artifact as a sign of legitimate provenance. These nations should then pass a law to the effect that any transaction of an artifact in the absence of its assigned token is considered illicit. Current owners of artifacts could request a new token to be minted for their asset – for example by producing the records of the merchant they bought it from or the export permit which allowed it out of its country of origin.

The establishment of national heritage blockchains would advance a number of goals of the 1970 Convention. First, because the Convention leaves it up to each nation to determine what their cultural property is, the intangible and arbitrary nature of an NFT is flexible enough to stand for ownership of essentially anything a country designates.[187] Second, registry of cultural artifacts on the blockchain would make significant progress toward each nation's establishment

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183 Paulina Likos & Coryanne Hicks, *The History of Bitcoin, the First Cryptocurrency,* U.S. NEWS (Aug. 31, 2022, 3:21 PM), https://money.usnews.com/investing/articles/the-history-of-bitcoin [https://perma.cc/5ASZ-G3G4].

184 Jacob Kastrenakes, *Beeple Sold an NFT for $69 million*, THE VERGE (Mar. 11, 2021, 10:09 AM), https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million [https://perma.cc/BN3X-L54R].

185 *Physical NFT*, FLIPCKICK, https://www.flipkick.io/physical-nft [perma.cc/9CGZ-ULUX] (last visited Feb. 10, 2023).

186 NAKAMOTO, *supra* note 178.

187 1970 Convention, *supra* note 1, art. 1a.

of a "comprehensive inventory of cultural property."[188] Third, the constantly-updated record of transactions would also make significant progress toward the records merchants are obliged to keep.[189] Much of the aforementioned "evidentiary net" would be contained within the blockchain itself.

Finally, broad registration of cultural heritage on the blockchain would establish a new standard for participants in the artifact market as to what objects are safe from potential restitution claims. The tokens' traceability and immunity to fraud would grant market participants greater security – at least with regard to those artifacts for which a token has been minted – and improve overall confidence in the artifact trade. The very existence of this standard would profoundly impact market participants, and artifacts whose origins are shrouded in secrecy would lose value in comparison.

VIII. CONCLUSION

This Note has aimed to put forth the argument for comprehensive recordation of cultural property paired with strict regulations on international trade. Such a scheme would create a tightly-woven net that could capture evidence of any illicit trade. In any given case, the record would either be able to show direct or consequential evidence of an illicit transaction – either by directly recording the transaction or by having no record where recordation was required. The currently-existing legal framework – especially in source nations – is a start to establishing this comprehensive record. However, the prevailing culture of secrecy in the artifact market, as well as the uneven implementation of international law, allows problematic provenances to be easily forgotten and enables the effective laundering of stolen goods and the plundering of many nations' patrimony. It is clear that this market requires a modernized standard of authentication – one that will represent the origin nation from the point of discovery to the artifact's movement through the international market. Blockchain technology provides an elegant solution. By creating an immutable but constantly evolving ledger, the blockchain is an excellent tool for tracing these invaluable assets and preventing future spoliation of cultural heritage all over the world.

188 *Id.* art. 5(b).
189 *Id.* art. 10(a).