

NOTE

REPATRIATION AS RESTITUTION: TOWARD PROCEDURAL RIGHTS FOR INDIGENOUS CLAIMS TO MOVEABLE CULTURAL PROPERTY

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ABSTRACT

The market for indigenous works tends to favor older items that were taken from indigenous owners in the distant past and then preserved by collectors. Indigenous peoples attempting to reclaim culturally significant works in overseas art collections may therefore face a variety of challenges when navigating foreign legal systems, including various levels of compliance with international repatriation mechanisms, differing ownership laws and statutes of limitations, and even the recognition of indigenous legal personality. This Note proposes that the United Nations General Assembly promulgate a resolution that allows indigenous peoples to bring a claim in foreign courts independently of their home State by explicitly affirming that indigenous peoples (1) collectively own their moveable cultural property; (2) have universal jus standi for the purpose of reclaiming their cultural property; and (3) may bring a claim when the current owner transfers the property, regardless of national statutes of limitations.

I. INTRODUCTION

In April 2013, the Hopi, a federally recognized¹ indigenous² Tribe in the United States, wrote to Néret-Minet Tessier & Sarrou,

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1. See *Federal and State Recognized Tribes*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> (last updated Mar. 2020) [<https://perma.cc/K9EE-F8RA>].

2. There is no official definition of indigenous peoples in international documents, although “self-identification” and the definition proposed by Martínez Cobo are widely viewed as authoritative. See OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM: FACT SHEET NO. 9/REV.2 (2013) [hereinafter U.N. FACT SHEET]. Martínez Cobo defined indigenous peoples as:

[T]hose which, having a historical continuity with preinvasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present nondominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

a Parisian auction house, to ask that the auction house delay the auction of several Katsinam.³ Katsinam are Hopi masks⁴ that “represent the spirit[s] of deceased ancestors, animals, natural features and events, and various deities.”⁵ The Hopi consider Katsinam “friends,” and use Katsinam for ceremonial purposes “in which Hopi religious leaders perform their trust obligation to protect the world.”⁶ In his letter to Gilles Néret-Minet, the Chairman of the Hopi Tribe called the auction “sacrilege” and “a desecration of [Hopi] religion.”⁷ The Hopi further claimed that the Katsinam were illicitly removed from Hopi territory, but Néret-Minet Tessier & Sarrou disputed this, stating that the collector was the rightful owner.⁸

Survival International, an organization that advocates for indigenous rights,⁹ filed a lawsuit in French court in April 2013 to prevent the auction from moving forward, with the Hopi

José R. Martínez Cobo, Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, Study of the Problem of Discrimination Against Indigenous Populations, V, ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987). The United Nations Permanent Forum on Indigenous Peoples emphasizes (1) affinity with specific land “and surrounding natural resources”; (2) unique forms of governance; and (3) “distinct language, culture and beliefs.” U.N. FACT SHEET at 3.

3. Letter from LeRoy N. Shingoitewa, Chairman, Hopi Tribe, to Gilles Néret-Minet, Néret-Minet Tessier & Sarrou Auction House (Apr. 4, 2013), at 1, http://www.nativehistoryassociation.org/hopi_auction_letter.pdf [<https://perma.cc/AFG3-8E6R>].

4. See generally NÉRET-MINET TESSIER & SARROU, L.S. COLLECTION: 70 KATSINAM MASKS OF THE HOPÍ INDIANS OF ARIZONA (Apr. 12, 2013), <http://1uyxqn3lzdsa2ytyzjlaxxmmmpt-wpengine.netdna-ssl.com/wp-content/uploads/2013/03/Press-release-70-Katsinam-masks-of-the-Hopi-Indians-of-Arizona-DROUOT-PARIS-12-april-2013.pdf> [<https://perma.cc/TQ8Y-HHB6>] (catalogue for the April 12, 2013 Katsinam auction). Katsinam may also be represented by dolls and referred to as kachina (plural: kachinas), but the Hopi refer to these figures as katsina (plural: katsinam). See *Guide to Hopi Kachina (Katsina) Dolls*, KACHINA, <https://kachina.us/> (last viewed May 10, 2020) [<https://perma.cc/HB4T-M8JG>]. Other dolls that may appear similar to katsinam are called tithu, which are dolls used to familiarize Hopi children with katsinam powers. See *Katsina Dolls*, HOPI CULTURAL PRESERVATION OFF., <http://www8.nau.edu/hcpo-p/katsina.html> (last visited Mar. 30, 2019) [<https://perma.cc/DL4E-35SF>]. This Note will assume that auction items listed as katsinam are katsinam, not tithu.

5. Letter from LeRoy N. Shingoitewa to Gilles Néret-Minet, *supra* note 3.

6. *Id.*

7. *Id.*

8. See Tom Mashberg, *Auction of Hopi Masks Proceeds After Judge’s Ruling*, N.Y. TIMES: ARTSBEAT (Apr. 12, 2013, 8:20 AM), <https://artsbeat.blogs.nytimes.com/2013/04/12/french-judge-rules-that-auction-of-hopi-masks-can-proceed/> [<https://perma.cc/U548-ZSTM>].

9. See *About Us*, SURVIVAL INT’L, <https://www.survivalinternational.org/info> [<https://perma.cc/AFY4-AXM8>] (last visited Mar. 30, 2019).

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intervening.¹⁰ The court refused to grant injunctive relief, and the auction proceeded.¹¹ Néret-Minet Tessier & Sarrou auctioned seventy Katsinam for approximately \$1.2 million.¹² The Hopi and Survival International brought two additional suits before the French court to stop Estimations & Ventes ux Enchères (EVE) from auctioning off additional Hopi cultural property in December 2013 and June 2014 auctions.¹³ The United States embassy asked that EVE delay the December 2013 sale to “give [the Hopi] time to inspect the objects and see if they had a claim to them.”¹⁴ In its December and June interim orders, the French court rejected the Hopi’s lawsuits because the Hopi did not have legal personality under French law such that they could bring a repatriation claim.¹⁵ The subsequent auctions also proceeded.¹⁶

In July 2016, France implemented a customs law under the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property¹⁷ (UNESCO Convention) that aimed to address the importation of

10. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Apr. 12, 2013, 13/52880; *Paris Judge Rejects Attempt to Halt Auction of Hopi Sacred Objects*, SURVIVAL INT’L (Apr. 12, 2013), <https://www.survivalinternational.org/news/9135> [https://perma.cc/2QQW-JP8S].

11. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Apr. 12, 2013, 13/52880; Mike Boehm, *Sacred Hopi Tribal Masks Are Again Sold at Auction in Paris*, L.A. TIMES (June 28, 2014), <https://www.latimes.com/entertainment/arts/culture/la-et-cm-native-american-hopi-sacred-mask-auction-paris-20140627-story.html> [https://perma.cc/RL2G-YQPQ].

12. See Mashberg, *supra* note 8.

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13. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, June 27, 2014, 14/55733; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 6, 2013, 13/59110; Laetitia Nicolazzi et al., *Case Hopi Masks – Hopi Tribe v. Néret-Minet and Estimations & Ventes aux Enchères*, ARTHEMIS 2–3 (2015), <https://plone.unige.ch/art-adr/cases-affaires/hopi-masks-2013-hopi-tribe-v-neret-minet-and-estimations-ventes-aux-encheres> [https://perma.cc/XT3D-VD7V].

14. *Native American Hopi Artefacts Sold at Paris Auction*, BBC NEWS (Dec. 9, 2013), <https://www.bbc.com/news/world-europe-25306834> [https://perma.cc/B74K-HVFX].

15. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, June 27, 2014, 14/55733; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 6, 2013, 13/59110; HOPI TRIBE, MEDIA FACT SHEET: HOPI TRIBE DEMANDS RETURN OF SACRED OBJECTS BEING SOLD ILLEGALLY IN PARIS AUCTION 1 (May 20, 2015), <http://assets.survivalinternational.org/documents/1406/hopitribe-factsheet-parisauction-w-links.pdf> [https://perma.cc/ZP8K-CA3V].

16. See Tom Mashberg, *Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France*, N.Y. TIMES (June 29, 2014), <https://www.nytimes.com/2014/06/30/arts/design/sale-of-hopi-religious-items-continues-despite-us-embassys-efforts.html> [https://perma.cc/R8SH-GJ2J].

17. See discussion *infra* Part II.B.

culturally significant items.¹⁸ According to a report prepared by the United States Government Accountability Office, the customs law “could” have prevented the sale of the Hopi Katsinam.¹⁹ However, the customs law depends on the United States and other countries with cultural property interests identifying cultural property items and creating legislation “requir[ing] export certificates” for such property.²⁰ As of the time of this writing, the United States has not implemented such legislation.²¹ Indeed, EVE held auctions containing Native American items in December 2016,²² June 2017,²³ December 2017,²⁴ June 2018,²⁵ and October 2018.²⁶ Herbelin, another auction house,²⁷ auctioned off two Hopi Katsinam from the 1940s in December 2018.²⁸

To alleviate uncertainty in future indigenous repatriation claims, the United Nations General Assembly should adopt a resolution that creates procedural rights for indigenous peoples to assert

18. See Loi 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l’architecture et au patrimoine [Law 2016-925 of July 7, 2016 Relating to the Freedom of Creation, Architecture and Heritage], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 2016, No. 0158 (modifying Chapter 4 of the Heritage Code via Art. L. 124-1); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-537, NATIVE AMERICAN CULTURAL PROPERTY: ADDITIONAL AGENCY ACTIONS NEEDED TO ASSIST TRIBES WITH REPATRIATING ITEMS FROM OVERSEAS AUCTIONS 18 n.30 (2018) [hereinafter GAO REPORT] (elaborating that the French statute derived its language from the 1970 UNESCO Convention).

19. See GAO REPORT, *supra* note 18, at 18.

20. See *id.*

21. See *id.* at 16, 18–22 (addressing shortcomings of current United States cultural property legislative protections).

22. See ART PRÉCOLOMBIEN – ARTS PREMIERS – ART AMÉRINDIEN: Lundi 12 Décembre 2016 14:00, EVE (Dec. 12, 2016), <http://www.auctioneve.com/html/index.jsp?id=77197&lng=fr&npp=150> [https://perma.cc/Q8U3-SLAV] (several “KACHINA” listed).

23. See ARTS PRÉCOLOMBIENS – ARTS PREMIERS – ART AMÉRINDIEN: Vendredi 23 Juin 2017 14:00, EVE (June 23, 2017), <http://www.auctioneve.com/html/index.jsp?id=80558&lng=fr&npp=150> [https://perma.cc/BY43-2GPM] (several “KACHINA” listed).

24. See ARTS AMERINDIEN, PRECOLOMBIEN, AFRIQUE ET OCEANIE: Mercredi 20 Décembre 2017 13:30, EVE (Dec. 20, 2017), <http://www.auctioneve.com/html/index.jsp?id=86832&lng=fr&npp=150> [https://perma.cc/JA8J-5BLJ] (several “KACHINA” listed).

25. See ARTS AMERINDIEN, PRECOLOMBIEN, AFRIQUE & OCEANIE: Mercredi 27 Juin 2018 10:30, EVE (June 27, 2018), <http://www.auctioneve.com/html/index.jsp?id=89758&lng=fr&npp=150> [https://perma.cc/4YSA-F8KE] (“MEDICINE BAG” listed).

26. See VENTEE LISTEE #4: Jeudi 04 Octobre 2018 14:00, EVE (Oct. 4, 2018), [http://www.auctioneve.com/html/index.jsp?id=90222&np=2&lng=fr&npp=150&ordre=&aff=1&r=\[https://perma.cc/WEM6-MAYB\]](http://www.auctioneve.com/html/index.jsp?id=90222&np=2&lng=fr&npp=150&ordre=&aff=1&r=[https://perma.cc/WEM6-MAYB]) (several “KACHINA” listed).

27. See generally HERBELIN, <https://www.christophe-herbelin.fr/#page0> (last visited Mar. 30, 2019) [https://perma.cc/AU4G-GNPG] (informational website).

28. See HERBELIN, RÉSULTAT DE LA VENTE DU 05/12/2018 - 1 (May 12, 2018), https://docs.prod-indb.io/2018/12/06/104049_535232267_c6ee8279a2e8b1177bcb93fcd91b7788.pdf [https://perma.cc/7V3J-46FD] (Lots 102 and 103 list “Kachina maïs Ka’e, Hopi, Arizona, circa 1940.”).

interest or injury related to moveable cultural property deprivation under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)²⁹ by (1) explicitly recognizing indigenous conceptions of collective ownership; (2) granting indigenous *jus standi* in foreign courts; and (3) giving notice to private collectors of indigenous moveable cultural property that they will be subject to suit by indigenous peoples to reclaim cultural property upon transfer or sale from the current owner. Part II of this Note addresses current international mechanisms under which indigenous peoples may bring repatriation claims for moveable cultural property, and reviews regional and State efforts to implement these international mechanisms and to enact additional protections. Part III recommends that the United Nations promulgate a resolution providing repatriation procedural protections under the UNDRIP due to indigenous conceptions of collective ownership, the necessity of international recognition of indigenous legal personality such that indigenous groups may bring claims to moveable cultural property, and the ineffectiveness of existing statutes of limitations models for protecting older indigenous works. Part IV concludes by discussing the ramifications of these procedural protections.

II. BACKGROUND

Several international instruments protect moveable cultural property. This Section will define indigenous moveable cultural property for the purposes of this Note, discuss select current international repatriation mechanisms, and detail State mechanisms for filling the gaps in the international repatriation scheme.

A. *Indigenous Moveable Cultural Property is a Discrete Subset of Property*

Indigenous moveable cultural property may be considered a “distinctive” form of moveable cultural property.³⁰ For purposes of this Note, “moveable cultural property”³¹ in general is a category of

29. See discussion *infra* Part II.B.

30. See KAROLINA KUPRECHT, *INDIGENOUS PEOPLES’ CULTURAL PROPERTY CLAIMS: REPATRIATION AND BEYOND* 40 (2013).

31. “Move-able cultural property” is the term used in Erica-Irene Daes (Special Rapporteur), Prot. of the Heritage of Indigenous People: Final Rep. of the Special Rapporteur, Mrs. Erica-Irene Daes, in Conformity with Subcommission Resolution 1993/44 & Decision 1994/105 of the Comm’n on Human Rights, ¶ 19, U.N. Doc. E/CN.4/Sub.2/1995/26 (June 21, 1995) [hereinafter Final Report E/CN.4/Sub.2/1995/26]. Moveable cultural property may also be referred to as “cultural patrimony.” See, e.g., Samantha Anderson, Note, *Do as I Say, Not as I Do: Inconsistencies in International Cultural Property Repatriation*, 24

works “which, on religious or secular grounds” holds “importance” to a certain group of people.³² Moveable cultural property objects can be integral to a society’s functioning and understanding of its past.³³ Works of indigenous moveable cultural property, however, are generally created by specially qualified indigenous artisans seeking to fulfill a religious purpose.³⁴ An object of indigenous moveable cultural property may be considered to have unique ceremonial capacities.³⁵

Indigenous moveable cultural property may be further distinguished from other forms of moveable cultural property because items of indigenous moveable cultural property that are not currently in the possession of the original indigenous owners may have been stolen or violently removed from the indigenous owners during colonial occupation of the indigenous owners’ territory.³⁶ Indigenous moveable cultural property was often taken without the permission of the indigenous owners during Western colonization

CARDOZO J. INT’L & COMP. L. 315, 317–21 (2016) (Anderson distinguishes “cultural property” from “cultural patrimony,” arguing that cultural patrimony is a category of objects within the cultural heritage designation that are important to a particular society, not the world at large, and which are more distinctive than items of cultural property); *see also* Human Rights Council, Rep. of the Indep. Expert in the Field of Cultural Rights, ¶ 4, U.N. Doc. A/HRC/17/38 (Mar. 21, 2011) [hereinafter 2011 Report A/HRC/17/38] (“Noting that no list is exhaustive, the independent expert describes cultural heritage in the questionnaire as: . . . tangible heritage (e.g. sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value), intangible heritage (e.g. traditions, customs and practices, aesthetic and spiritual beliefs; vernacular or other languages; artistic expressions, folklore) and natural heritage (e.g. protected natural reserves; other protected biologically diverse areas; historic parks and gardens and cultural landscapes.”); Press Release, Ass’n on Am. Indian Affairs, Auction Houses Must Consult Tribes on Sales of Native American Cultural Heritage (Dec. 11, 2018), https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-12-11_bonhams_auctions_pr.pdf [<https://perma.cc/CMR7-QTHK>] (stating that items may be referred to as “cultural or sacred patrimony”).

32. 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. 232 [hereinafter 1970 UNESCO Convention]; *see* Anderson, *supra* note 31, at 318.

33. *See* 19 C.F.R. § 12 (2013).

34. *See* KUPRECHT, *supra* note 30, at 40–41.

35. *Id.* at 41. Some scholars have termed indigenous moveable cultural property as “cultural heritage” because the object is considered to be accompanied by such powerful non-material qualities. *Id.* at 42; *see also* Saby Ghoshray, *Repatriation of the Kohinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage*, 31 FORDHAM INT’L L.J. 741, 771–72 (2008) (distinguishing “cultural heritage” from other forms of property by displaying that “cultural heritage” has “other-worldly aspects” that distinguish such objects from other moveable property). However, this Note will refer to significant objects produced and claimed by indigenous groups as moveable cultural property to emphasize the physical nature of the cultural items in discussion for purposes of repatriation. This Note will only address items, not human remains.

36. *See* Honor Keeler, *Indigenous International Repatriation*, 44 ARIZ. ST. L.J. 703, 710–12 (2012).

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efforts.³⁷ During periods of “forced assimilation,” colonizers treated indigenous items of moveable cultural property with “disdain,”³⁸ even as they collected such works as art.³⁹ Early colonizers even stole indigenous peoples’ bodies while taking indigenous moveable cultural property from grave sites.⁴⁰ Taking indigenous moveable cultural property was not considered illicit by colonial powers during occupation.⁴¹

The international community may have come to the “moral consensus” that a market for exhumed bodies is undesirable, but that moral stance does not seem to impact the market for indigenous moveable cultural property.⁴² Western owners continue to collect and display indigenous moveable cultural property as art, even though these items may not be considered works of art within the indigenous community because of the items’ functional roles within the indigenous society.⁴³ While international law recognizes and addresses moveable cultural property in general,⁴⁴ “[t]here is no discrete category of sacred property in most legal systems.”⁴⁵ Indeed, before the 2013 Katsinam auction, Néret-Minet told participants that the Katsinam “were no longer sacred but had become

37. *Id.*; see also KUPRECHT, *supra* note 30, at 90 (“The international community has proved to be more willing to support the repatriation of indigenous cultural material removed in colonial or historic times than it is to endorse the return of other cultural material.”).

38. U.N. Secretary-General, *Universality, Cultural Diversity and Cultural Rights*, ¶ 8, U.N. Doc. A/73/227 (July 25, 2018).

39. Robert K. Paterson, *Collecting “Tribal Art”—Sacred or Secular?*, 21 INT’L J. CULTURAL PROP. 305, 310–11 (2014).

40. Keeler, *supra* note 36, at 710, 716.

41. KUPRECHT, *supra* note 30, at 7.

42. Paterson, *supra* note 39, at 314.

43. See Gabriella Angeleti, *Native American Group Denounces Met’s Exhibition of Indigenous Objects*, ART NEWSPAPER (Nov. 6, 2018, 5:44 PM), <https://www.theartnewspaper.com/news/native-american-group-denounces-met-s-exhibition-of-indigenous-objects> [https://perma.cc/R9PK-P7WA] (the Association on American Indian Affairs (AAIA) stated that the Metropolitan Museum of Art misclassified moveable cultural property as “art,” stating that some items in the museum collection “are not art: they are ceremonial or funerary objects that belong with their original communities”); see also Maddy Hayden, *Acoma Pueblo Celebrates Return of Cultural Items*, ALBUQUERQUE J. (Dec. 19, 2018, 12:13 PM), <https://www.abqjournal.com/1259272/tribal-officials-in-new-mexico-mark-return-of-cultural-items.html> [https://perma.cc/B2NH-RMB7] (the Pueblo of Acoma Governor stated that “[a]ccording to our traditional laws here at the pueblo, these items are not pieces of art.”); Quinton Chandler, *Tlingit Artist Protests Auction of Native Artifacts in Paris*, KTOO (June 6, 2016), <https://www.ktoo.org/2016/06/06/tlingit-artist-protests-auction-native-artifacts-paris/> [https://perma.cc/LQ96-BZLT] (art auction house item for sale was a “shaman’s rattle” that “was used in the past and continues to be used today as [an] item[] [that] brings spirits to [Tlingit] ceremonies.”).

44. See discussion *infra* Part II.B.

45. Paterson, *supra* note 39, at 313.

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'important works of art.'"⁴⁶ However, Hopi people "feed and care for" the Katsinam because they perceive the Katsinam to be "sacred being[s]."⁴⁷ The French court nevertheless declined to stop the Hopi Katsinam auction in part because the French Civil Code does not address such objects.⁴⁸

B. *Existing International Repatriation Instruments Protect Some Cultural Property and Indigenous Rights*

Several instruments of international law address cultural property generally, with some instruments specifically focusing on indigenous cultural property. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) was the first international instrument to recognize "cultural property" as a discrete property category.⁴⁹ The Hague Convention directs signatories to "refrain[] from any act of hostility directed against"⁵⁰ or "theft"⁵¹ of moveable cultural property when signatories are engaged in "armed conflict."⁵²

In 1970, UNESCO promulgated the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).⁵³ Article I of the UNESCO Convention tasks States to identify items of moveable "cultural . . . property which, on religious or secular grounds," are significant to the State's "archaeology, prehistory,

46. Mashberg, *supra* note 8.

47. *Id.*; *see also* ASS'N ON AM. INDIAN AFFAIRS, A GUIDE TO INTERNATIONAL REPATRIATION: STARTING AN INITIATIVE IN YOUR COMMUNITY 6, https://www.indian-affairs.org/uploads/8/7/3/8/87380358/international_repatriation_guide.pdf (last visited Apr. 7, 2019) [<https://perma.cc/5N3J-RNJS>] ("It is within the rights of Indigenous Peoples to self-determination and, therefore, it is the right of Indigenous Peoples to be able to self-identify their Indigenous Ancestors, funerary objects, sacred objects, and objects of cultural patrimony.").

48. *See* Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Apr. 12, 2013, 13/52880 (distinguishing moveable cultural property from human remains such that they are not protected under French law); *see also* Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 6, 2013, 13/59110 (noting that selling ceremonial items is legal under French law); Paterson, *supra* note 39, at 314 ("The French Civil Code no longer contains any reference to property considered as sacred or divine.").

49. *See* Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2009 (2007).

50. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4(1), May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

51. *Id.* art. 4(3).

52. *Id.* art. 4(1).

53. 1970 UNESCO Convention, *supra* note 32, para. 1.

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history, literature, art or science” traditions.⁵⁴ Article III then outlaws “import, export or transfer” of such identified items⁵⁵ unless the State assigns the specific item of moveable cultural property a certificate that confirms that the item is “authorized” to leave the State.⁵⁶ States party to the UNESCO Convention further agree to ensure that “museums and similar institutions” in the State do not obtain “illegally exported” items.⁵⁷ Additionally, signatories commit to “prohibit[ing] the import of [catalogued] cultural property stolen from a museum . . . or similar institution.”⁵⁸ Signatories also commit to repatriating these items to other member parties if the State makes the request “through diplomatic offices” and that State can show “documentation and other evidence necessary to establish its claim for recovery and return.”⁵⁹

The colonial history of many indigenous communities makes these communities particularly likely to be impoverished and “marginaliz[ed],”⁶⁰ so international law also specifically considers and addresses issues pertaining to indigenous peoples.⁶¹ In 1989, the International Labour Organization Indigenous and Tribal Peoples Convention (ILO Convention), promulgated as a human rights instrument,⁶² called for signatories to adopt “special measures” to protect the “property” of indigenous peoples.⁶³

In 1993, the United Nations Commission on Human Rights released a study (U.N. Study) regarding indigenous moveable and intellectual cultural property.⁶⁴ The U.N. Study explicitly stated

54. *Id.* art. 1.

55. *Id.* art. 3.

56. *Id.* art. 6(a).

57. *Id.* art. 7(a).

58. *Id.* art. 7(b)(i).

59. *Id.* art. 7(b)(ii).

60. U.N. Dep’t of Econ. & Soc. Affairs, Div. for Inclusive Soc. Dev., Promoting Inclusion Through Soc. Prot.: Rep. on the World Soc. Situation 2018, at 99–100, U.N. Doc. ST/ESA/366 (2018).

61. *Id.* at 97–98.

62. See Human Rights Council, Promotion & Prot. of the Rights of Indigenous Peoples with Respect to Their Cultural Heritage: Study by the Expert Mechanism on the Rights of Indigenous Peoples, ¶ 12, U.N. Doc. A/HRC/30/53 (Aug. 19, 2015) [hereinafter Study by the Expert Mechanism A/HRC/30/53] (discussing the ILO Convention under the heading “Human rights instruments”).

63. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 4(1), June 27, 1989, 1650 U.N.T.S. 385 [hereinafter ILO Convention].

64. Erica-Irene Daes (Special Rapporteur), *Discrimination Against Indigenous Peoples: Study on the Prot. of the Cultural & Intellectual Prop. of Indigenous Peoples*, by Erica-Irene Daes, Special Rapporteur of the Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities & Chairperson of the Working Grp. on Indigenous Populations, ¶ 1, U.N. Doc. E/CN.4/Sub.2/1993/28 (July 28, 1993) [hereinafter U.N. Study E/CN.4/Sub.2/1993/28].

that “[i]ndigenous peoples are the true collective owners of their works, arts and ideas.”⁶⁵ The U.N. Study led to a Final Report by the Special Rapporteur, Ms. Erica-Irene Daes (Final Report), including Principles and Guidelines for the Protection of the Heritage of Indigenous People (Principles).⁶⁶ The Principles called for States and UNESCO to facilitate the repatriation of indigenous moveable cultural property to indigenous peoples,⁶⁷ and further specified that public and private collectors of moveable cultural property should only retain possession of that property “in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.”⁶⁸ Daes also called for the United Nations to “establish international jurisdiction” for indigenous repatriation efforts.⁶⁹ In 2015, the General Assembly called for States to “revisit the draft Principles and [G]uidelines . . . with a view to adopting them as an instrument to protect the cultural heritage of indigenous peoples.”⁷⁰

Also in 1995, the International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) noted “deep[] concern[]” over the “illicit trade in cultural objects” of “national, tribal, indigenous or other communities.”⁷¹ The UNIDROIT Convention was intended to target “art market operators” with cooperation from the States.⁷² The UNIDROIT Convention provides that State signatories “shall” return indigenous objects that were “illegally exported” and are of “traditional or ritual use” upon request by the indigenous owners’ home State.⁷³ UNIDROIT is regarded as having the potential to “harmoni[ze] . . . legal systems” in consultation with U.N. efforts.⁷⁴ However, only forty-eight States participate in

65. *Id.* ¶ 171.

66. Final Report E/CN.4/Sub.2/1995/26, *supra* note 31, at annex ¶¶ 1, 31. R

67. *Id.* at annex ¶¶ 19–20.

68. *Id.* at annex ¶ 22.

69. *Id.* at annex ¶ 60.

70. Study by the Expert Mechanism A/HRC/30/53, *supra* note 62, at annex ¶ 11. R

71. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects para. 3, June 24, 1995, 2421 U.N.T.S. 457 [hereinafter UNIDROIT Convention].

72. Marina Schneider, *The Unidroit Convention on Cultural Property: State of Play and Prospects for the Future*, 2 UNIFORM L. REV. 494, 506 (1997).

73. UNIDROIT Convention, *supra* note 71, art. 5(3)(d). R

74. U.N. Educ., Sci. & Cultural Org., Intergovernmental Comm. for Promoting the Return of Cultural Prop. to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, Rep. on the Work of Its Seventeenth Session, June 30, 2011–July 1, 2011, Recommendation No. 4, U.N. Doc. CLT-2011/CONF.208/COM.17/5 (July 1, 2011).

the UNIDROIT Convention, and while France is a signatory, the United States is not.⁷⁵

More recently, international law instruments have addressed repatriation of indigenous moveable cultural property in the context of human rights.⁷⁶ In 2007, the UNDRIP became a “universally-recognized text” that “legitimiz[ed indigenous people] as subjects of international law.”⁷⁷ The UNDRIP is a human rights mechanism that links indigenous “cultural rights” to the right of self-determination.⁷⁸ Article 11 of the UNDRIP recognizes indigenous peoples’ “right to . . . protect . . . manifestations of their cultures, such as . . . [artifacts],” and dictates that “States shall provide redress . . . which may include restitution” to indigenous peoples for moveable “cultural . . . property” that had been “taken . . . in violation of their laws, traditions and customs.”⁷⁹ Article 12 further specifies that “[i]ndigenous peoples have . . . the right to the use and control of their ceremonial objects,” and encourages States to cooperate with indigenous peoples to “enable the access and/or repatriation of ceremonial objects . . . through fair, transparent and effective mechanisms.”⁸⁰ The UNDRIP ultimately gives States discretion in how to apply these articles,⁸¹ and it is not a binding instrument.⁸² However, the Expert Mechanism on the Rights of Indigenous Peoples has since further clarified that “[t]he right to . . . restitution” under Article 11 includes returning moveable cultural property to indigenous communities.⁸³ This interpretation

75. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995)*—Status, UNIDROIT, <https://www.unidroit.org/status-cp> (last updated Dec. 2, 2019) [<https://perma.cc/R2JB-CF4G>].

76. See KUPRECHT, *supra* note 30, at 90, 189.

77. *The Declaration on the Rights of Indigenous Peoples*, OFF. HIGH COMMISSIONER HUM. RTS. (Apr. 2008), <https://www.ohchr.org/en/newsevents/pages/declarationip.aspx> [<https://perma.cc/8ZL4-2CFB>].

78. Study by the Expert Mechanism A/HRC/30/53, *supra* note 62, ¶ 10.

79. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art. 11 (Sept. 13, 2007) [hereinafter UNDRIP].

80. *Id.* art. 12.

81. KUPRECHT, *supra* note 30, at 77.

82. *Indigenous Peoples: International Treaties, Conventions, Etc.*, USAID, <https://www.usaid.gov/environmental-policy-roadmap/indigenous-peoples> [<https://perma.cc/LLY3-GAP2>] (last updated Apr. 1, 2020).

83. Study by the Expert Mechanism A/HRC/30/53, *supra* note 62, ¶¶ 69–71. The Expert Mechanism on the Rights of Indigenous Peoples is a seven-member committee established by the U.N. Human Rights Council that provides the U.N. Human Rights Council with guidance on indigenous issues. *Expert Mechanism on the Rights of Indigenous Peoples*, OFF. HIGH COMMISSIONER HUM. RTS., <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx> [<https://perma.cc/4N4K-KV5Q>] (last visited May 12, 2020).

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derives from broader human rights priorities that seek “restitution” for human rights breaches.⁸⁴

In 2011, the Independent Expert in the Field of Cultural Rights recommended that States provide avenues, “including judicial remedies,” through which indigenous peoples could cure rights violations related to cultural property.⁸⁵ Also in 2011, the Human Rights Council recognized that indigenous peoples engage in international forums and processes in conjunction with States,⁸⁶ and recommended that UNESCO develop indigenous participation methods in UNESCO endeavors “relevant to indigenous peoples.”⁸⁷

In 2015, the General Assembly adopted a Resolution (2015 Resolution) calling for States to obligate “all actors involved in the trade of cultural property, including but not limited to auction houses, art dealers, [and] art collectors” to chronicle the ownership and customs history for “any [moveable] cultural property imported, exported or offered for sale, including through the Internet.”⁸⁸ The 2015 Resolution also called for museums and “those who deal with trade in cultural property” to abide by relevant codes of ethics.⁸⁹ A 2018 General Assembly Resolution (2018 Resolution) further called for the private sector to “respect all” human rights.⁹⁰

84. Study by the Expert Mechanism A/HRC/30/53, *supra* note 62, ¶ 69.

85. 2011 Report A/HRC/17/38, *supra* note 31, ¶ 71.

86. Human Rights Council, Final Rep. of the Study on Indigenous Peoples & the Right to Participate in Decision-Making, ¶¶ 73, 75, U.N. Doc. A/HRC/18/42 (Aug. 17, 2011) [hereinafter 2011 Human Rights Council Report] (highlighting the Advisory Council of the Andean Community and the Arctic Council as examples).

87. *Id.* at annex ¶ 38.

88. G.A. Res. 70/76, ¶ 15 (Dec. 9, 2015); *see also* 2011 Report A/HRC/17/38, *supra* note 31, ¶ 72 (aligning with independent experts that view cultural rights as human rights and emphasizing that States should take action to achieve the fulfilment of these rights).

89. G.A. Res. 70/76, *supra* note 88, ¶ 27. In 1999, UNESCO enacted an International Code of Ethics for Dealers in Cultural Property, which stipulated that such professionals should not handle cultural property that they “have reasonable cause” to think came into their possession illicitly. *See* U.N. Educ., Soc. & Cultural Org., International Code of Ethics for Dealers in Cultural Property, art. 1, U.N. Doc. CLT/CH/INS.06/25 REV (Nov. 1999). *See infra* note 98.

90. *See* G.A. Res. 73/156, at 3 (Dec. 17, 2018). The 2018 Resolution was promulgated four years after the International Work Group for Indigenous Affairs (IWGIA) stated that “indigenous peoples whose human rights are harmed due to business operations have the right to effective remedy and redress,” which “includes the right to judicial recourse, to a prompt cessation of violations, and a guarantee of non-repetition, restitution and compensation.” JOHANNES ROHR & JOSÉ AYLWIN, IWGIA REPORT 16 - BUSINESS AND HUMAN RIGHTS: INTERPRETING THE UN GUIDING PRINCIPLES FOR INDIGENOUS PEOPLES 44–45 (IWGIA ed.) (2014), https://www.iwgia.org/images/publications//0684_IGIA_report_16_FINAL_eb.pdf [<https://perma.cc/DY8L-SF9L>] [hereinafter IWGIA REPORT 16]. IWGIA also concludes that these rights “cannot be extinguished by national legislation.” *Id.* at 45.

Indigenous rights continue to be advanced through the United Nations Permanent Forum on Indigenous Issues (UNPFII), an entity that provides guidance to United Nations organizations under the auspices of the United Nations Economic and Social Council (ECOSOC),⁹¹ the Expert Mechanism on the Rights of Indigenous Peoples, which works with States on indigenous concerns through the United Nations Human Rights Council (UNHRC),⁹² and the Special Rapporteur on the Rights of Indigenous Peoples, an official who studies indigenous issues and provides legislative and policy guidance through the UNHRC.⁹³ The Inter-Agency Support Group (IASG) provides assistance to United Nations bodies in realizing the goals of the UNDRIP and the UNPFII.⁹⁴ In 2018, the UNPFII recommended that “all” United Nations bodies acknowledge “the collective rights of indigenous peoples to lands, territories and resources” and integrate these rights “at the country level.”⁹⁵

C. *Regional and State Efforts Supplement International Repatriation Measures to Protect Moveable Cultural Property*

The 1980s saw a surge of indigenous activism to reclaim cultural property.⁹⁶ States have been the primary actors in repatriation claims and processes,⁹⁷ although “public and private law entities, regional or territorial government authorities, and even museums” are beginning to emerge as drivers of repatriation methods.⁹⁸

91. *Permanent Forum*, UNITED NATIONS DEP’T ECON. & SOC. AFF.: INDIGENOUS PEOPLES, <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html> [https://perma.cc/537V-3YST] (last visited Mar. 30, 2019).

92. *Expert Mechanism on the Rights of Indigenous Peoples*, *supra* note 83.

93. *Special Rapporteur on the Rights of Indigenous Peoples*, OFF. HIGH COMMISSIONER HUM. RTS., <https://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx> [https://perma.cc/BNC9-363C] (last visited Mar. 30, 2019).

94. *See Inter-Agency Support Group (IASG)*, UNITED NATIONS DEP’T ECON. & SOC. AFF.: INDIGENOUS PEOPLES, <https://www.un.org/development/desa/indigenouspeoples/about-us/inter-agency-support-group.html> [https://perma.cc/YM4C-YXLA] (last visited Mar. 30, 2019).

95. Econ. & Soc. Council, Permanent Forum on Indigenous Issues: Rep. on the Seventeenth Session (16-17 April 2018), ¶ 17, U.N. Doc. E/2018/43-E/C.19/2018/11 (2018).

96. *See Paterson*, *supra* note 39, at 311.

97. Marie Cornu & Marc-André Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, 2 JOURNAL DU DROIT INTERNATIONAL 493 (2009) (Fr.), translated in 17 INT’L J. CULTURAL PROP. 1, 4 (2010).

98. *Id.* For example, the International Council on Museums (ICOM) bars any “person or institution” that “trades (i.e. buys or sells for profit) cultural property” from becoming an ICOM member. INT’L COUNCIL OF MUSEUMS, THE STATUTES OF THE INTERNATIONAL COUNCIL OF MUSEUMS art. 4(1) (2017), https://icom.museum/wp-content/uploads/2018/07/2017_ICOM_Statutes_EN.pdf [https://perma.cc/JK2V-YCN5] (defining cultural prop-

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The UNESCO Convention allows signatories to enact the Convention as “appropriate”⁹⁹ and “necessary.”¹⁰⁰ States may also pass “vesting laws,” which enable States to identify moveable cultural property and become the owner of that property.¹⁰¹ If an unauthorized person exports moveable cultural property from the State that owns the property, the moveable cultural property is considered “stolen” such that the unauthorized person may be “punish[ed]” and the moveable cultural property can be “recover[ed]” from the original transporter “or a subsequent purchaser.”¹⁰² In general, State laws are directed toward restricting export of the State’s moveable cultural property rather than monitoring the import of cultural property.¹⁰³ These laws also reflect a sentiment that moveable cultural property belongs to the State, not a particular indigenous group.¹⁰⁴

Some States have legislation pertaining to indigenous moveable cultural property.¹⁰⁵ In the United States, the Native American Graves Protection and Repatriation Act (NAGPRA) obliges anyone who “has discovered Native American cultural items on Federal or

erty as “including works of art and natural and scientific specimens”). Further, ICOM advises its members to “be prepared to initiate dialogue for the return of cultural property to a country or people of origin,” and that members should repatriate “an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country’s or people’s cultural or natural heritage.” INT’L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS arts. 6.2, 6.3 (2017), <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> [<https://perma.cc/WFU6-VBQA>].

99. 1970 UNESCO Convention, *supra* note 32, art. 5.

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100. *Id.* art. 7(a). Switzerland and Colombia, for example, formed a bilateral agreement creating repatriation mechanisms for both countries under the UNESCO Convention. See Agreement Between the Swiss Federal Council and the Government of the Republic of Colombia on the Import and Repatriation of Cultural Property, Colom.-Switz., art. I(1), para. 1, Feb. 1, 2010, 2081 U.N.T.S. 101. The United States implements the UNESCO Convention under the Convention on Cultural Property Implementation Act (CPIA), through which the President can form agreements with other States upon request by those States. See Anderson, *supra* note 31, at 322; 19 U.S.C. § 2602(a)(1), (a)(2)(A)–(B) (2018). Germany details a process in which States can ask for the return of moveable cultural property under the auspices of the UNESCO Convention, European Union principles, and German law in its 2016 Act on the Protection of Cultural Property. See BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], §§ 50–52, 58–60, *translation at* https://www.gesetze-im-internet.de/englisch_kgsg/englisch_kgsg.html#p0421 [<https://perma.cc/UQ4M-FNFA>] (Ger.).

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101. Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 U.S. ATT’Y’S BULL., Mar. 2016, at 5, 7.

102. *Id.*

103. See Mariam Hai, *Selling the Sacred: An Examination of Sacred Objects in Legal Contexts*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 193, 202 (2013).

104. KUPRECHT, *supra* note 30, at 105.

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105. Cornu & Renold, *supra* note 97, at 6.

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tribal lands after November 16, 1990” to alert the appropriate branch of the federal government to assess the finding,¹⁰⁶ and requires that both the federal government and museums alert indigenous peoples in the United States as to “Native American human remains and associated funerary objects” in their possession.¹⁰⁷ Native American peoples, however, cannot use NAGPRA to recover cultural property overseas.¹⁰⁸

Additionally, States may choose to resolve repatriation disputes through negotiation or mediation.¹⁰⁹ The UNIDROIT Convention also allows for cultural property to be recovered through arbitration.¹¹⁰ Parties may choose to arbitrate disputes over cultural property because the arbitration process has flexibility, “privacy,” and “confidentiality.”¹¹¹ Further, many countries “voluntarily repatriat[e] cultural property whose origin has been questioned.”¹¹²

Regional organizations may also enact measures to protect moveable cultural property.¹¹³ The ASEAN Declaration on Cultural Heritage purports to assist in repatriating moveable cultural property “stolen from a museum, site, or similar repositor[y]” to its “rightful owners.”¹¹⁴ The Council of Europe has enacted the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention), aimed at “conserva-

106. 25 U.S.C. § 3002(d)(1) (2018).

107. 25 U.S.C. § 3003(a), (d)(1) (2018).

108. KUPRECHT, *supra* note 30, at 72.

109. See Cornu & Renold, *supra* note 97, at 12; Germany’s Act on the Protection of Cultural Property specifically calls for such a process. See BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], § 58, *translation at* https://www.gesetze-im-internet.de/englisch_kgsg/englisch_kgsg.html#p0421 [<https://perma.cc/24EF-KMMB>] (Ger.). In an instance where a State returned moveable cultural property to an indigenous group after mediation, Sweden repatriated a totem pole to the Canadian Haisla Nation, and the Haisla Nation created a copy of the totem pole for display in Sweden. See Cornu & Renold, *supra* note 97, at 10; see also *The Haisla Prepare to Welcome Their Totem Pole Back Home*, TURTLE ISLAND NATIVE NETWORK (June 27, 2006), <http://www.turtleisland.org/culture/culture-haisla.htm> [<https://perma.cc/TA2A-X3BP>] (noting that the Premier of British Columbia’s wrote to the Swedish Minister of Culture to ask that the totem pole be repatriated in 1993).

110. See UNIDROIT Convention, *supra* note 71, art. 8(2).

111. Giselle Barcia, *After Chabad: Enforcement in Cultural Property Disputes*, 37 YALE J. INT’L L. 463, 471 (2012); see also U.N. Study E/CN.4/Sub.2/1993/28, *supra* note 64, ¶ 84 (explaining that some indigenous peoples may wish not to reveal if a piece of moveable cultural property is culturally significant because that information may be part of a body of “sacred knowledge” available only to “particular individuals and organizations within the community” and therefore “confidential”).

112. Anderson, *supra* note 31, at 341.

113. Cornu & Renold, *supra* note 97, at 4.

114. ASS’N OF SE. ASIAN NATIONS, ASEAN DECLARATION ON CULTURAL HERITAGE ¶ 10 (July 25, 2000), <http://arc-agreement.asean.org/file/doc/2015/02/asean-declaration-on-cultural-heritage.pdf> [<https://perma.cc/6CZP-VYTU>].

tion.”¹¹⁵ The 2016 Organization of American States American Declaration on the Rights of Indigenous Peoples (ADRIP), provides that “[S]tates shall recognize fully the juridical personality of the indigenous peoples.”¹¹⁶ The Draft Nordic Saami Convention between Norway, Finland, and Sweden¹¹⁷ provides for the “documentation, protection and care of Saami” moveable cultural property.¹¹⁸

III. ANALYSIS

Despite the international, regional, national, and private mechanisms in place, the Hopi still could not gain standing in French court to recover their Katsinam masks.¹¹⁹ Cornu has identified the flaws in the French Civil Code that brought about such a result as (1) not recognizing that “some objects cannot be subject to ownership”;¹²⁰ (2) not providing the Hopi with sufficient legal personality to bring a claim;¹²¹ and (3) the inability of the Hopi to bring a claim due to restrictive statutes of limitations.¹²² The U.N. General Assembly should protect indigenous peoples’ procedural rights by

115. Council of Europe Framework Convention on the Value of Cultural Heritage for Society art. 1(b)(c), Oct. 27, 2005, C.E.T.S. No. 199, <https://rm.coe.int/1680083746> [<https://perma.cc/L9U7-YUV2>].

116. rganization of American States [OAS], *American Declaration on the Rights of Indigenous Peoples*, art. IX, OAS Doc. AG/RES.2888 (XLVI-O/16) (June 15, 2016) [hereinafter *American Declaration*]; see also Elvia Arcelia Quintana Adriano, *The Natural Person, Legal Entity or Juridical Person and Juridical Personality*, 4 PA. ST. J.L. & INT’L AFF. 363, 366 (2015) (“[J]uridical persons . . . [are] those entities endowed with juridical personality who are usually known as a collective person, social person, or legal entity.”).

117. Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned — 2007–2017: Preliminary Draft Rep. of the EMRIP for Discussion at its 10th Session — Circulated for Consultation Only, ¶ 56, U.N. Doc. A/HRC/EMRIP/2017/CRP.2 (July 2017) [hereinafter Draft Report A/HRC/EMRIP/2017/CRP.2].

118. NORDIC SAAMI CONVENTION (TEXT OF THE CONVENTION IN ENGLISH) art. 32, <https://www.sametinget.se/105173> [<https://perma.cc/5S52-5E5D>] (last visited Apr. 7, 2019). The Convention does not necessarily provide for the repatriation of Saami moveable cultural property, but states that moveable cultural property now located outside Saami territory will be “entrusted to suitable museums or cultural institutions” in consultation with the Norway, Finland, and Sweden Saami parliaments. *Id.*

119. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, June 27, 2014, 14/55733; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 6, 2013, 13/59110.

120. Marie Cornu, Case Note, *About Sacred Cultural Property: The Hopi Masks Case* (Mary Barker ed., Marie Trape trans.), 20 INT’L J. CULTURAL PROP. 451, 452 (2013).

121. *Id.* at 456.

122. See *id.* at 458.

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promulgating a resolution that addresses each of these issues under the UNDRIP human right to restitution.¹²³

A. *The United Nations Should Issue Procedural Guidance on
Indigenous Procedural Rights Under the UNDRIP Right to
Restitution*

In the current international regime, cultural property is often affiliated with States, rather than with particular peoples within the States.¹²⁴ Indigenous peoples likely do not have much influence over their home State's actions on the international plane, and therefore may have limited control over their home State's international repatriation efforts.¹²⁵ States may also be reluctant to grant indigenous peoples powers that may appear to fragment State cohesiveness.¹²⁶

The UNDRIP and ILO Convention are human rights instruments, and therefore place the protection and repatriation of indigenous moveable cultural property within the sphere of State human rights obligations.¹²⁷ Under the UNDRIP, failure to restitute indigenous moveable cultural property under existing instruments may be considered an "ongoing human rights violation[]."¹²⁸ However, neither of these instruments clearly detail how States should fulfill the human rights obligation to repatriate indigenous moveable cultural property.¹²⁹ States therefore may attempt to fulfill their human rights obligation to protect indigenous moveable cultural property through implementing existing procedures in the international repatriation instruments,

123. See Study by the Expert Mechanism A/HRC/30/53, *supra* note 62, ¶¶ 69–71.

124. See Grant Strother, Note, *Resolving Cultural Disputes in the Shadow of the Law*, 19 HARV. NEGOT. L. REV. 335, 357–58 (2014).

125. See Ravi Soopramanien, *International Trade in Indigenous Cultural Heritage: What Protection Does International Law Provide for Indigenous Cultural Goods and Services in International Commerce*, 53 STAN. J. INT'L L. 225, 227 (2017).

126. See Benedict Kingsbury, *Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 424 (1998).

127. KUPRECHT, *supra* note 30, at 189.

128. Keeler, *supra* note 36, at 711–12.

129. See International Law Association Sofia Conference, *Report of the Seventy-Fifth Conference Held in Sofia August 2012*, at 524 (Aug. 2012) (noting that the UNDRIP does not provide for specific actions States must take to be in compliance); see also Kristen Ann Mattiske, Note, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 BROOK. J. INT'L L. 1105, 1118–19 (2002) (stating that the ILO Convention offers "broad, arguably vague propositions"). The ILO Convention merely instructs States to adopt "special measures" to protect the "property" and "cultures" of indigenous peoples. ILO Convention, *supra* note 63, art. 4(1). While the UNDRIP provides for the right to "restitution," it does not detail how States should return indigenous moveable cultural property. See UNDRIP, *supra* note 79, art. 11.

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national and regional legislation, and third-party requirements discussed in Part II.¹³⁰

The vast majority of States have approved the UNDRIP,¹³¹ so may be willing to adhere to procedural guidance under the UNDRIP rather than to an entirely new instrument.¹³² Therefore, the General Assembly should issue a resolution regarding specific procedural rights that indigenous peoples possess under the UNDRIP right to international restitution of their moveable cultural property and the procedures that States must follow to protect and address those rights.¹³³

B. *The Procedural Rights Should Include Recognition of Collective Ownership*

The French Civil Code does not address collectively-owned objects.¹³⁴ The French court noted that Survival International claimed that the Hopi had some property interest in the Katsinam, which the court stated belied the concept that no Hopi could individually own the masks.¹³⁵ However, indigenous people may consider some moveable cultural property to be collectively owned, meaning that those objects “cannot be alienated, ceded permanently or sold.”¹³⁶ In the case of collective property, “only the

130. The French law promulgated in 2016, for example, relied on UNESCO procedures. See Loi 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l’architecture et au patrimoine [Law 2016-925 of July 7, 2016 Relating to the Freedom of Creation, Architecture and Heritage], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 2016, No. 0158 (modifying Chapter 4 of the Heritage Code via Art. L. 124-1); see also GAO REPORT, *supra* note 18, at 18 n.30 (elaborating that the French statute derived its language from the 1970 UNESCO Convention).

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131. See *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS DEP’T ECON. & SOC. AFF.: INDIGENOUS PEOPLES, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> [https://perma.cc/P859-X8DW] (last visited Apr. 7, 2019).

132. See COUNCIL FOR INT’L DEV., *supra* note 82, at 1 (noting that the UNDRIP process took “over 20 years” and accommodated multiple States’ input); see also KUPRECHT, *supra* note 30, at 184 (while Kuprecht calls for an international instrument that recognizes a “binding international human rights entitlement” to repatriation that recognizes “indigenous peoples’ customs and customary law,” such that repatriation is “not at the mercy of changing governmental policies and [programs],” she ultimately calls on States to develop specific repatriation procedures).

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133. See UNDRIP, *supra* note 79, arts. 11, 12; G.A. Res. 69/2, ¶ 27 (Sept. 22, 2014); Study by the Expert Mechanism A/HRC/30/53, *supra* note 62, ¶¶ 69–71.

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134. Cornu, *supra* note 120, at 452.

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135. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 6, 2013, 13/59110.

136. Athanasios Yupsanis, *Cultural Property Aspects in International Law: The Case of the (Still) Inadequate Safeguarding of Indigenous Peoples’ (Tangible) Cultural Heritage*, 58 NETH. INT’L L. REV. 335, 341 (2011).

group” can decide when to allow another to take ownership of an item, and this decision may be done through a “specific decision-making proces[s].”¹³⁷ Western documents, including U.N. documents, do not conceptualize moveable cultural property this way.¹³⁸ The UNESCO Convention recognizes “the importance of cultural property to collectives,” but does not give collective ownership rights to indigenous peoples.¹³⁹

The Association on American Indian Affairs (AAIA) has stated that moveable cultural property in the United States is often “inalienable” such that moveable cultural property “items cannot be legitimately taken away from their origin communities without violating Tribal laws.”¹⁴⁰ Further, AAIA views sales documentation for such items as suspect because moveable cultural property “cannot be properly removed by an individual.”¹⁴¹ The Director of the Hopi Tribe’s Cultural Preservation office stated, for example, that the Katsinam “do not have a market value. Period.”¹⁴² Further, contributors to the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People recognized that it would be “atypical” for indigenous peoples not to collectively own moveable cultural property.¹⁴³ NAGPRA defines moveable cultural property as “central to the Native American group or culture itself, rather than property owned by an individual Native American,” such that it “cannot be alienated, appropriated, or conveyed by any individual.”¹⁴⁴ However, only Tribes “recognized” by the United States can make a claim under NAGPRA.¹⁴⁵

137. *Id.* at 341–42; *see also* Rebecca Clements, *Misconceptions of Culture: Native Peoples and Cultural Property under Criminal Law*, 49 U. TORONTO FAC. L. REV. 1, 7 (1991) (detailing how indigenous individuals who “lacked the authority” to sell items sold them to Canadian settlers).

138. Yupsanis, *supra* note 136, at 340–41.

139. KUPRECHT, *supra* note 30, at 43.

140. Press Release, Ass’n on Am. Indian Affairs, Rago Auction Withdraws Native American Cultural Heritage Scheduled for Sale (Oct. 17, 2018), https://www.indian-affairs.org/uploads/8/7/3/8/87380358/2018-10-17_rago_pr.pdf [<https://perma.cc/CU9F-Z4WT>].

141. Press Release, Ass’n on Am. Indian Affairs, *supra* note 31.

142. *Survival Goes to Court to Stop Hopi Sacred Objects Auction*, SURVIVAL INT’L (Apr. 9, 2013), <https://www.survivalinternational.org/news/9126> [<https://perma.cc/U47R-DDH6>].

143. *See* Erica-Irene Daes, *Human Rights of Indigenous Peoples: Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, 13 SAINT THOMAS L. REV. 391, 398 (2000).

144. 25 U.S.C. § 3001(3)(D) (2018).

145. *Id.* § 3001(7).

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In the U.N. Study, Daes called for the “General Assembly [and] relevant specialized agencies such as WIPO and UNESCO, and . . . regional intergovernmental organizations” to “adopt[]” the position that “indigenous peoples are the true collective owners of their works.”¹⁴⁶ She further recommended that “national or international law” reflect that indigenous “works, arts and ideas” cannot be “alienat[ed] . . . unless [such alienation is] in conformity with indigenous peoples’ own traditional laws and customs and with the approval of their own local institutions.”¹⁴⁷ Daes also noted that that “[i]ndigenous peoples’ ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.”¹⁴⁸

Recognition of indigenous collective ownership would necessarily include recognition that the moveable cultural property claimed by certain indigenous peoples can be returned to that indigenous community.¹⁴⁹ That an object cannot be owned, and therefore cannot be alienated, must be combined with recognition of an indigenous peoples’ collective ownership of the item of moveable cultural property such that the indigenous group can bring a claim to repossess the item.¹⁵⁰ While States and organizations such as museums have power to “receive” moveable cultural property, the returning State “usually” determines the “capacity” of the petitioner to accept the property.¹⁵¹ However, the law is not consistent where the petitioner is a “community.”¹⁵²

Collective land ownership concepts may also be helpful in creating an explicit framework for moveable cultural heritage ownership.¹⁵³ Collective ownership of land in general is accepted broadly in the international community.¹⁵⁴ In 2017, the African Court on Human and People’s Rights held that Article 14 of the

146. U.N. Study E/CN.4/Sub.2/1993/28, *supra* note 64, ¶ 171.

147. *Id.*

148. Final Report E/CN.4/Sub.2/1995/26, *supra* note 31, at annex ¶ 5.

149. See Cornu & Renold, *supra* note 97, at 10.

150. See *id.*

151. *Id.*

152. *Id.*

153. See Alessandro Fodella, *International Law and the Diversity of Indigenous Peoples*, 30 VT. L. REV. 565, 575–80 (2006) (discussing indigenous “collective right to land”); see also KUPRECHT, *supra* note 30, at 164–65 (using “property rights in land” as an example of how courts have incorporated “indigenous customs and customary law”).

154. See Liz Alden Wily, *Collective Land Ownership in the 21st Century: Overview of Global Trends*, LAND, May 2018, at 6–7 (“Legal provision for social entities to be legal owners, such as the family, clan, village or community, is historically uncommon. It is therefore noteworthy to find that 73 percent of countries in this sample do provide for collective tenure by communities.”).

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African Charter on Human and Peoples' Rights creates a "right to property" that "can be individual or collective."¹⁵⁵ Further, the Inter-American Court of Human Rights has recognized the "communal property right" of the indigenous Awas Tingni Community in Nicaragua.¹⁵⁶ This recognition of collective ownership in real property, combined with the guidance provided by the U.N. Study and NAGPRA language, provides a framework for explicit recognition of collective ownership in indigenous moveable cultural property that should be incorporated into the General Assembly procedural rights resolution.

C. *The Procedural Rights Should Include Jus Standi Rights for Indigenous Peoples*

Indigenous peoples are "subjects of international law"¹⁵⁷ and have some powers separate from their home State because they have the "right to self-determination."¹⁵⁸ The United Nations has also recognized that indigenous communities work in conjunction with States in international forums.¹⁵⁹ However, indigenous peoples' operation as "legal personalit[ies]"¹⁶⁰ is currently handled on a "case-by-case basis," which renders the law "inconsistent" regarding treatment of indigenous peoples as legal personalities.¹⁶¹

The international framework requires that States recognize indigenous peoples as having legal personality before indigenous peoples can claim such personality.¹⁶² States have previously recognized indigenous peoples as having legal personalities through a

155. African Comm'n on Human and Peoples' Rights v. Republic of Kenya, Application No. 006/2012, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 122–23 (May 26, 2017), <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf> [https://perma.cc/A2EP-GZSD].

156. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 149, 153 (Aug. 31, 2001) ("Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.").

157. *The Declaration on the Rights of Indigenous Peoples*, *supra* note 77.

158. UNDRIP, *supra* note 79, arts. 3–5.

159. See 2011 Human Rights Council Report, *supra* note 86, ¶¶ 73, 75 (highlighting the Advisory Council of the Andean Community and the Arctic Council as examples).

160. An entity with legal personality has "legal status" that is "distinct" from that of the individuals that make up that entity. LORI FISLER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW CASES AND MATERIALS* 391 (6th ed. 2014).

161. William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42 *BROOK. J. INT'L L.* 207, 226 (2016).

162. See *id.* at 229.

“practical” approach based on the State’s own governmental capacity.¹⁶³ States may treat indigenous groups as having lost their international legal personality following colonization by their current home State,¹⁶⁴ while some indigenous peoples have been able to regain their international legal personality “following decolonization” of the State.¹⁶⁵ The U.N. High Commissioner for Human Rights, the International Court of Justice (ICJ), and some States recognize that indigenous peoples may have some capacity to engage in international relations, but the ICJ does not view indigenous peoples as States.¹⁶⁶ In civil law courts, indigenous peoples currently “must . . . prove process capability either as a public or private entity.”¹⁶⁷ Therefore, indigenous peoples often form “private law” organizations that may be capable of being recognized by a foreign court or partner with existing organizations that may have standing in a foreign court to bring repatriation claims, which may or may not be successful.¹⁶⁸

The Hopi claimed that the UNDRIP would provide for repatriation of the Katsinam.¹⁶⁹ However, the UNDRIP could not compel the French court to recognize indigenous group standing.¹⁷⁰ The French court held that recognition of the Hopi by the United States did not grant the Hopi sufficient legal personality to bring a claim in French court,¹⁷¹ even though the Hopi had filed a constitution and bylaws with the United States Department of the Interior Office of Indian Affairs¹⁷² and have a “government-to-

163. *See id.* at 228.

164. *See id.* at 226–27.

165. *See id.* at 227.

166. *See id.* at 225–26.

167. *See* KUPRECHT, *supra* note 30, at 133–34.

168. *Id.*

169. Brad Poole, *Native American Tribe Seeks to Halt Paris Artifact Auction*, CHI. TRIB. (Apr. 3, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-04-03-sns-rt-us-azona-artifactsbre93303y-20130403-story.html> [<https://perma.cc/KZ8H-A5YH>] (explaining that a Hopi representative “said the Katsinam, which are used during religious ceremonies related to the farming calendar, are ‘objects of cultural patrimony’ protected by . . . UNDRIP . . . [which] the French government signed”).

170. Samantha K. Nikic, Note, *Liberté, Égalité, Fraternité: The United Nations Declaration of the Rights of Indigenous Peoples Fails to Protect Hopi Katsinam from the Auction Block in France*, 41 BROOK. J. INT’L L. 407, 410 (2015).

171. *See* Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, June 27, 2014, 14/55733.

172. *See* CONSTITUTION AND BY-LAWS OF THE HOPI TRIBE, Dec. 19, 1936, <https://www.loc.gov/law/help/american-indian-consts/PDF/37026339.pdf> [<https://perma.cc/A8ZN-EL7B>].

government relationship with the United States.”¹⁷³ The French court held that while the Hopi Constitution allows the Tribe to protect its moveable cultural property, it does not follow that such powers enable the Hopi to bring legal action in a foreign court.¹⁷⁴ Further, the court held that the Hopi and Survival International could not argue that Article 11 of the UNDRIP applied to auction houses that were auctioning items on behalf of an allegedly rightful owner.¹⁷⁵

This result indicates that the French court did not consider the Hopi to have the ability to bring a claim in a foreign court, or *jus standi*, which is distinct from being a “subject of [international] law” or having “international legal capacity.”¹⁷⁶ *Jus standi* may be a subcategory of international legal personality that allows the legal person, in this case the indigenous peoples, to “brin[g] international claims.”¹⁷⁷ Therefore, the General Assembly resolution must go beyond “recognition of indigenous communities as separate legal entities,”¹⁷⁸ because some courts may not view indigenous peoples “as legal entities capable . . . of bringing legal actions in national courts,”¹⁷⁹ such that indigenous peoples cannot independently access “judicial remedies.”¹⁸⁰

In the Principles, Daes calls for “international jurisdiction” for indigenous moveable cultural property claims.¹⁸¹ The American Declaration goes further by expressly providing that “[S]tates shall recognize fully the juridical personality of the indigenous peo-

173. HOPI TRIBE OFFICE OF CMY. PLANNING & ECON. DEV. & LAND INFO. SYS., HOPI TRIBE COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY 14 (2018), <https://www.hopinnsn.gov/wp-content/uploads/2018/10/2018-Hopi-Tribe-CEDS.pdf> [<https://perma.cc/BKL3-ZZE2>].

174. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Dec. 6, 2013, 13/59110; see also Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, June 27, 2014, 14/55733 (holding that the Hopi Constitution does not grant the Hopi sufficient legal personality to bring a claim); Pierre Ciric, *Opinion: Hopi and Navajo Masks Auction Precedent in France is Dangerous*, ARTNET NEWS (July 25, 2014), <https://news.artnet.com/market/opinion-hopi-and-navajo-masks-auction-precedent-in-france-is-dangerous-66975> [<https://perma.cc/ZS9M-X8LE>] (“If the Board holds that the Hopi Constitution is lacking in establishing its legal existence, then no Native American tribe will be able to bring cultural claims on French soil.”).

175. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Apr. 12, 2013, 13/52880; Paterson, *supra* note 39, at 314.

176. ANNA MEIJKNECHT, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW 24, 58–59, 61 (2001).

177. *Id.* at 26, 56–58.

178. See KUPRECHT, *supra* note 30, at 190.

179. U.N. Study E/CN.4/Sub.2/1993/28, *supra* note 64, ¶ 158.

180. 2011 Report A/HRC/17/38, *supra* note 31, ¶ 71.

181. Final Report E/CN.4/Sub.2/1995/26, *supra* note 31, at annex ¶ 60.

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ples.”¹⁸² The international framework therefore includes an international guide and large regional instrument that recognize the need to provide guidance for indigenous standing in foreign courts, so the international community at large may be primed to accept indigenous peoples’ *jus standi* power relating to the narrow category of moveable cultural property in foreign domestic courts.¹⁸³ The General Assembly should reflect such *jus standi* procedural rights in the resolution.

D. *The Procedural Rights Should Include a Notice Provision to Address Statutes of Limitations Issues*

There is a specific market for indigenous works,¹⁸⁴ largely centered in Paris and Brussels.¹⁸⁵ Art collectors may enjoy collecting indigenous works because of the “presumed connoisseurship” of the people who originally acquired the works from the indigenous peoples, such as James Cook, and heightened belief that the works are authentic.¹⁸⁶ Native American moveable cultural property became popular in Europe as a result of traveling Wild West shows and World’s Fairs.¹⁸⁷ During World War II, many indigenous works contained in European museums in the early twentieth century were relocated and distributed to different owners across Europe.¹⁸⁸ The Hopi Katsinam were “more than a century old” at the time of the 2013 auction, and Néret-Minet Tessier & Sarrou claimed that the French owner had possessed them for “decades.”¹⁸⁹

Additionally, it is likely that the indigenous works existing in the current market were acquired in the distant past because the high-quality preservation of the materials makes it unlikely that ancient objects would be in such good condition if they had stayed with their original indigenous owners and had been used for a long period of time.¹⁹⁰ Newer indigenous works of moveable cultural property are less appealing on the market because they do not show “evidence of age or traditional use” which is desirable to col-

182. *American Declaration*, *supra* note 116, art. IX.

183. *See id.*; Final Report E/CN.4/Sub.2/1995/26, *supra* note 31, at annex ¶ 60.

184. *See* Paterson, *supra* note 39, at 305–11 (detailing the historical and current state of the market for indigenous art).

185. *See id.* at 310 (noting that Sotheby’s and Christie’s auction houses have lucrative auctions of indigenous works).

186. *Id.* at 311.

187. Keeler, *supra* note 36, 739–41.

188. *Id.* at 743–44.

189. Mashberg, *supra* note 8.

190. *See* Paterson, *supra* note 39, at 311.

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lectors.¹⁹¹ Indeed, one purchaser at the April 2013 Katsiman auction “praised the anonymous collector for preserving” the items, bidding over \$36,000 for two works.¹⁹² One Katsinam, believed to have been made in the late 1800s, was sold at auction for \$209,000.¹⁹³

This market for indigenous works therefore favors older works, which may predate the statute of limitations for current international cultural property protections.¹⁹⁴ Currently, the “severe lack of retroactiv[e]” application of international repatriation instruments may prevent moveable cultural property from being returned to its originating community.¹⁹⁵ The UNESCO and UNIDROIT Conventions do not apply to property taken before the Conventions were enacted, so for indigenous groups to be able to begin repatriation procedures under the UNESCO or UNIDROIT Conventions, the cultural object would have had to have been illicitly moved after the Conventions were in place.¹⁹⁶ Domestic legislation may also impose statutes of limitations that prevent repatriation; NAGPRA, for example, does not apply to indigenous moveable cultural property that was acquired before NAGPRA was promulgated.¹⁹⁷ Courts in civil law countries give “full title to” those who buy moveable cultural property in good faith.¹⁹⁸ In France, a plaintiff hoping to recover stolen property “from a possessor who acquired it in good faith” must bring the claim less than three years “from the date of the loss or theft.”¹⁹⁹ If the acquirer of

191. *Id.*; see generally Scott Reyburn, *Masterpiece or Mistake? A Hawaii Museum's \$7.5 Million Question*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/arts/design/hawaii-sculpture-bishop-museum-marc-benioff.html> [https://perma.cc/EJY5-DG54] (buyer purchased an indigenous Hawaiian figurine depicting a god for \$7.5 million in Paris because the auction house claimed the figurine was “about 200 years old.” However, if the figurine had been made in the 1900s, as is now speculated, the figurine would be “worth less than \$5,000”).

192. Mashberg, *supra* note 8.

193. See Mike Boehm, *Sacred Hopi Tribal Masks Are Again Sold at Auction in Paris*, L.A. TIMES (June 28, 2014, 10:00 AM), <https://www.latimes.com/entertainment/arts/culture/la-et-cm-native-american-hopi-sacred-mask-auction-paris-20140627-story.html> [https://perma.cc/ZU2Z-8MCG].

194. Ghoshray, *supra* note 35, at 756.

195. *Id.* at 767.

196. See Laura Booth, Note, *Spirits Up for Sale: Advocating for the Adoption of Ethical Guidelines to Govern the Treatment of Sacred Objects by Auction Houses*, 28 GEO. J. LEGAL ETHICS 393, 397–99 (2015); see also UNIDROIT Convention, *supra* note 71, para. 6; 1970 UNESCO Convention, *supra* note 32, arts. 7, 15.

197. See Booth, *supra* note 196, at 402.

198. See *id.*

199. Paige S. Goodwin, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 U. PA. L. REV. 673, 696 (2008).

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moveable cultural property did not obtain the work in good faith, a plaintiff may bring a stolen property claim within thirty years.²⁰⁰ Rather than an explicit removal of statutes of limitations²⁰¹ or more flexible approaches to statutes of limitations,²⁰² the General Assembly resolution should include a notice provision. This notice provision would specify that courts should effectively recognize (1) indigenous collective ownership of moveable cultural property and (2) *jus standi* for indigenous peoples to reclaim moveable cultural property in foreign courts after a certain timeframe when a current possessor of indigenous moveable cultural property transfers that property, when the current possessor offers the items for sale, or when that property becomes part of the current possessor's estate.²⁰³

Daes proposed a stricter approach: the Principles specify that public and private collectors of indigenous moveable cultural property should only maintain possession of that property "in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property."²⁰⁴ However, a notice provision would provide a procedural right, unlike the Principles, and address issues with good faith purchasers in civil law systems by providing a method for indigenous peoples to bring a claim for older works while not depriving current owners of their property.²⁰⁵

The timeframe specified in the notice provision should be far enough into the future that private collectors of indigenous movea-

200. See *id.*

201. See Ghoshray, *supra* note 35, at 767.

202. See Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 310–11 (2009). Under the "discovery rule," the statute of limitations begins when the owner of the moveable cultural property, in this case the indigenous group, identifies and locates the item, assuming "due diligence in [their] search." *Id.* Alternatively, the "demand and refusal" method triggers the statute of limitations when the creator or first owner of moveable cultural property requests that an item be returned, and the current possessor "refuses" to return the item. *Id.*

203. See, e.g., Loi 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine [Law 2016-925 of July 7, 2016 Relating to the Freedom of Creation, Architecture and Heritage], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 2016, No. 0158 (modifying Chapter 4 of the Heritage Code via Art. L. 124-1) (describing transfer circumstances in which a party may make a claim to moveable cultural property under the 1970 UNESCO Convention). Another helpful model may be the Ivory Act of 2018, in which the United Kingdom restricted the transfer of ivory subject to some exceptions that must be determined by an official on a case-by-case basis. See Ivory Act 2018, c. 30, §§ 1–5 (Eng.).

204. Final Report E/CN.4/Sub.2/1995/26, *supra* note 31, at annex ¶ 22.

205. See Booth, *supra* note 196, at 402; see also Goodwin, *supra* note 199, at 696 (defining French statutes of limitations for good faith acquirers).

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ble cultural property would be able to decide whether to appraise their collection, alert relevant State or indigenous authorities of their possession, as well as give potential transferees and sales facilities, such as auction houses, notice that the transferred indigenous moveable cultural property would be subject to these procedural protections.²⁰⁶ It may be effective to incentivize collectors to alert such authorities of existing collections by following the UNESCO Convention model of providing “just compensation to an innocent purchaser or to a person who has valid title to that property” within a certain number of years if they come forward with their items of indigenous moveable cultural property prior to transfer.²⁰⁷ All transferees that receive indigenous moveable cultural property, after that notice timeframe, would be subject to suit by indigenous peoples to reclaim their moveable cultural property.²⁰⁸

The procedural protections should explicitly state that the UNDRIP and ILO Convention, as human rights instruments, create due diligence obligations for auction houses.²⁰⁹ These due diligence obligations may apply to private entities in all States that “have . . . formally accepted or ratified” these documents,²¹⁰ and any subsequent human rights mechanisms.²¹¹ Therefore, auction houses and businesses dealing with indigenous moveable cultural property would be obligated to observe the notice procedures detailed in the resolution.

IV. CONCLUSION

The Hopi disputes with French auction houses from 2013 to 2014 and continued auctions of indigenous moveable cultural property reveal a need for procedural protections for indigenous peoples when bringing a repatriation claim. This Note proposes

206. The United Nations Convention on the Law of the Sea may be a useful model for this procedural right, as it only went into effect one year after the “date of deposit of the sixtieth instrument of ratification or accession.” United Nations Convention on the Law of the Sea art. 308(1), Dec. 10, 1982, 1833 U.N.T.S. 397.

207. 1970 UNESCO Convention, *supra* note 32, art. 7(b)(ii).

208. *See, e.g.*, Loi 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l’architecture et au patrimoine [Law 2016-925 of July 7, 2016 Relating to the Freedom of Creation, Architecture and Heritage], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 2016, No. 0158 (modifying Chapter 4 of the Heritage Code via Art. L. 124-1) (allowing judicial remedy under the 1970 UNESCO Convention under certain transfer circumstances).

209. *See* James Anaya (Special Rapporteur), *Rep. of the Special Rapporteur on the Situation of Human Rights & Fundamental Freedoms of Indigenous People*, James Anaya, ¶ 47, U.N. Doc. A/HRC/15/37 (July 19, 2010).

210. *See id.*

211. *See* IWGIA REPORT 16, *supra* note 90, at 44.

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that the United Nations General Assembly issue a resolution outlining procedural protections for repatriation claims that explicitly provides for (1) collective ownership of indigenous moveable cultural property; (2) *jus standi* for indigenous peoples in foreign courts; and (3) notice to owners of indigenous moveable cultural property that they will be subject to suit on the merits of their ownership claim upon transfer of that property.

It is important to consider that this resolution would apply only to indigenous moveable cultural property. This is a narrow property category, as it only applies to objects identified as culturally significant to indigenous peoples.²¹² However, this instrument may create some room for indigenous peoples to navigate international jurisdictions independently of their home State.²¹³ The collective ownership right would grant property ownership to the indigenous peoples separately from the State and regardless of the State's domestic laws.²¹⁴ Further, the *jus standi* power of indigenous people, while only discussed in relation to moveable cultural property in this context, would add to the legal personality of indigenous people in foreign and international courts.²¹⁵ Finally, the notice provision permitting these rights upon the collector's transfer, sale, or death recognizes the unique aspects of the indigenous art market.²¹⁶ These elements combined create a procedural right to a perpetual claim to collectively owned items after the initial transfer, independent of the indigenous peoples' home or foreign State action or recognition. These procedural rights may be a significant step toward indigenous peoples' conducting international affairs independently of their home State systems.

212. See KUPRECHT, *supra* note 30, at 40–41.

213. See, e.g., Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 300–01 (2007) (determining that States are reluctant to recognize indigenous peoples as entities separate from but within the State because this “challenges the notion of national unity”); see also Soopramanien, *supra* note 125, at 227 (explaining that indigenous peoples may assert economic rights separately from their home State through human rights mechanisms).

214. See Cornu & Renold, *supra* note 97, at 10.

215. See MEIJKNECHT, *supra* note 176, at 26, 56–58.

216. See Paterson, *supra* note 39, at 305–11.

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