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Duplicate, Decolonize, Destroy: Current Topics in Art and Cultural Heritage Law

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Duplicate, Decolonize, Destroy: Current Topics in Art and Cultural Heritage Law

Cover Page Footnote

* These summaries are brought to you by the Symposium Committee of the Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXXIII. The Journal would like to extend a very special thank you to Lily Paulson Stephens, IPLJ's Volume XXXIII Symposium Editor, for organizing this 30th Annual Symposium. For their help creating these summaries, the Journal would like to thank the Symposium Committee: Zoya Alam, Natalie Alexander, Gaby Bloom, Emily Cohen, Emma DePaola, Joseph Gergel, Ellie Grasso, Stephanie Huang, Marie Kessel, Mike Margolis, Ashira Pollack, Josh Rosenberg, Alec Smyth, and Rebecca Temkin. The Journal also extends its thanks to Ryan Purdy, Editor-in-Chief; Grace L. Sullivan, Managing Editor; and Jamie O'Neill, Online Editor, for their support. Finally, the Journal would like to thank all of the Symposium's Speakers, Panelists and Moderators. Video of the entire Symposium can be found on the Fordham IPLJ YouTube channel: <https://www.youtube.com/watch?v=zUK2T13rEyY>.

Duplicate, Decolonize, Destroy: Current Topics in Art and Cultural Heritage Law

Fordham Intellectual Property, Media & Entertainment Law Journal*

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I. PURPLE FAME: *WARHOL V. GOLDSMITH* AND THE LIMITS OF ARTISTIC TRANSFORMATION UNDER FAIR USE

The opening panel discussed the upcoming case before the United States Supreme Court, *Andy Warhol Foundation for the*

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Visual Arts, Inc. v. Goldsmith.¹ Panelists included Amelia K. Brankov, Founder, Brankov PLLC and Chair of the New York City Bar Association Art Law Committee; Joel L. Hecker, Principal Attorney, Law Offices of Joel L. Hecker; and Philippa S. Loengard, Director of the Kernochan Center for Law, Media & the Arts and Lecturer-in-Law at Columbia Law School. The case is compelling because the Court rarely hears copyright cases, especially those addressing the affirmative defense of fair use. Moderated by Christopher J. Robinson, Of Counsel, Rottenberg Lipman Rich, P.C., the panel discussed the case, the fair use issues it raises,² and their respective hopes and fears for the outcome.

The copyright dispute at the heart of *Warhol* stems from a 1981 portrait of the musician Prince, by well-known photographer Lynn Goldsmith, who applied makeup to Prince and adjusted the lighting to enhance his bone structure.³ In 1984, after Prince's album *Purple Rain* achieved critical acclaim, Goldsmith's agency licensed the photograph to *Vanity Fair Magazine* for use as an artist reference.⁴ *Vanity Fair* commissioned artist Andy Warhol to create an artwork based on Goldsmith's photo of Prince for one-time publication in their 1984 issue.⁵ When the magazine published Warhol's image, it appropriately credited Goldsmith.⁶ Warhol went on to make fifteen other pieces (the "Prince Series") using the reference photo, but the

¹ *The Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 212 L. Ed. 2d 402 (2022).

² "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. §107.

³ See, e.g., *Supreme Court Hears Landmark Copyright Case Pitting Prince Against Warhol*, ARTFORUM, (Oct. 13, 2022), <https://www.artforum.com/news/supreme-court-hears-landmark-copyright-case-pitting-prince-against-warhol-89432> [<https://perma.cc/NWU5-J6H8>].

⁴ See *id.*

⁵ See, e.g., Nina Totenberg, *All Things Considered, the Supreme Court Meets Andy Warhol, Prince, and a Case That Could Threaten Creativity*, NPR, (Oct. 12, 2022), <https://www.npr.org/2022/10/12/1127508725/prince-andy-warhol-supreme-court-copyright> [<https://perma.cc/EZH6-M82L>].

⁶ See *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 34 (2d Cir. 2021).

pieces remained unpublished and unexhibited until after Warhol's death in 1987.⁷ After Warhol's passing, the Andy Warhol Foundation ("the Foundation") began to exhibit and license the images.⁸ After Prince's death in 2016, Condé Nast, Vanity Fair's parent company, obtained a commercial license from the Foundation for *Orange Prince*, one of the fifteen Warhol works based on Goldsmith's photo.⁹ When Condé Nast published *Orange Prince*, it did not credit Goldsmith.¹⁰ Upon discovering the Prince series, Goldsmith registered her original photograph with the Copyright Office and approached the Foundation for compensation.¹¹ The Foundation preemptively sued Goldsmith seeking declaratory judgment of non-infringement for the entire Prince series or, alternatively, a finding of fair use.¹² Goldsmith counter-sued for copyright infringement with respect to the use of *Orange Prince* only.¹³

The Southern District of New York granted the Foundation's motion for summary judgment, holding that the Foundation's entire *Prince* series was a fair use of Goldsmith's photograph.¹⁴ The court closely followed the Supreme Court's analysis of the first fair use factor in *Campbell v. Acuff-Rose*¹⁵ and the Second Circuit's ruling in *Cariou v. Prince*.¹⁶ The opinion emphasized that Warhol transformed Goldsmith's work aesthetically, and thus Warhol's series had an inherently different character.¹⁷ Finding that the trial court's result was largely driven by its analysis under the first fair-use

⁷ See *id.* at 32.

⁸ See *id.* at 35.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.* at 32.

¹³ See, e.g., Ronald Mann, *Justices to Consider Whether Warhol Image is "Fair Use" of Photograph of Prince*, SCOTUSBLOG, (Oct. 9, 2022), <https://www.scotusblog.com/2022/10/justices-to-consider-whether-warhol-image-is-fair-use-of-photograph-of-prince/> [https://perma.cc/Y2K4-JQQT].

¹⁴ See *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 331 (S.D.N.Y. 2019), rev'd, 992 F.3d 99 (2d Cir. 2021), and 11 F.4th 26 (2d Cir. 2021).

¹⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (finding 2 Live Crew's use of Roy Orbison's song "Oh, Pretty Woman" did not violate fair use).

¹⁶ See *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (holding new works using artist's photographs must be transformative to qualify as fair use); *Goldsmith*, 382 F. Supp. at 325.

¹⁷ *Goldsmith*, 382 F. Supp. at 325–26.

factor, the Second Circuit reversed the District Court's decision.¹⁸ The court noted that a mere departure in aesthetics or artistic intent from the original work is not enough to find that the secondary use is transformative, where the secondary work clearly "retain[s] the essential elements of its source material."¹⁹ If aesthetic modifications alone constituted fair use, there would be little to distinguish the secondary artwork from a derivative work under the law.²⁰ The court found that Goldsmith's photograph was "instantly recognizable" within Warhol's image, which weighed heavily against fair use.²¹ The court relied on the fourth factor of the fair use analysis, giving great weight to whether the infringing work affects the value or potential market for the original.²² The Second Circuit found that Warhol's use could have a highly detrimental effect on Goldsmith's market to license the photograph to other publications about Prince and to create and license derivatives.²³

Amelia Brankov opened the panel discussion by summarizing the Foundation's position in its upcoming appeal before the Supreme Court.²⁴ Hoping to overturn the Second Circuit decision, the Foundation will argue that the Court of Appeals applied a very narrow interpretation of fair use. The Supreme Court most recently analyzed the fair use of a creative work in *Campbell*, holding that a secondary use is transformative where it gives effect to a new meaning or message.²⁵ In Brankov's opinion, applying the Second Circuit's visual similarity test could place many works outside the scope of the fair use defense, even where the use clearly departs from the meaning of the original work. Brankov addressed policy concerns and practical considerations for protecting Goldsmith's licensing claims and expressed concern over the potential ramifications of a Supreme Court decision in Goldsmith's favor. For

¹⁸ See *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 32 (2d Cir. 2021).

¹⁹ See *id.* at 43.

²⁰ See *id.* at 41.

²¹ *Id.* at 47.

²² *Id.* at 48.

²³ *Id.* at 50.

²⁴ Petition of Certiorari, *Andy Warhol Found. For the Visual Arts v. Goldsmith*, U.S. (2022) (No. 21-869) 2021 WL 5913520 (*cert. granted* March 28, 2022).

²⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

example, works currently on display in museums that fail under the Second Circuit's interpretation of fair use could potentially be taken off view to avoid liability for infringement. Collectors' sales of such works might also be considered copyright infringement. Additionally, Brankov expressed concern that the holding could chill artistic expression for artists who are not confident that their use would fall within the scope of a fair use defense.

Hecker, who represented Goldsmith at the trial level, spoke next. He summarized the photographer's position and response to the Foundation's arguments. He responded to Brankov's concern regarding works already in existence in museums and private collections, arguing that the issue is a "red herring." A claim related to the sale or disposition of the Prince Series was not at issue at the trial level—and will not be raised in the Supreme Court—because the statute of limitations had already expired by the time Vanity Fair published *Orange Prince*.²⁶ Put simply, he said, "This is a case about licensing." Hecker clarified that Goldsmith was not aware that Warhol would use her work as a reference and that she did not see it reproduced in Vanity Fair when the magazine published it.²⁷ Hecker stated that when Goldsmith saw the Warhol image on the 2016 cover, she immediately recognized her photograph as the underlying work because her distinct lighting choices were clearly visible in the secondary work.²⁸ Hecker noted that Goldsmith assumed that the Foundation indemnified Vanity Fair in the agreement to license the image of *Orange Prince* and therefore did not bring a claim against the magazine. However, Goldsmith has a stand-still agreement with the magazine that tolls the statute of limitations until the final judgment is rendered in the case against the Foundation. Goldsmith could pursue her claim against the magazine, provided that the Court does not completely reverse or dismiss the action against the Foundation.

Robinson invited Loengard to discuss her *amicus* brief in support of Goldsmith and her perspective on the potential effects of the case on photographers. Loengard observed a common theme across

²⁶ 17 U.S.C. § 507(b).

²⁷ See, e.g., Totenberg, *supra* note 5.

²⁸ See *id.*

the *amici* briefs in support of Goldsmith: an outcome favorable to the Foundation could be detrimental to the photography industry. She echoed Hecker’s statement that the case is about licensing and “a market that is not only viable, but essential to photographers.” She highlighted that photographers depend on licensing for a large portion of their income.²⁹ In an increasingly digital world, photographers face growing difficulties in protecting their copyrights.³⁰ Licensing is a more durable revenue stream for photographers than prints because original photographs decrease in value as the number of multiples increases.³¹ Diminishing the licensing market would pose risks to the viability of photography as a career, especially considering the high costs associated with the medium.³²

Robinson asked the panel to speak to the issue of orphan works that is raised in some neutral or pro-Warhol *amicus* briefs,³³ by posing the following question: “If you are an artist that appropriates work and incorporates it into your work—if licensing is the key to all of this—how is an artist supposed to be able to find out who to license from?”³⁴ Loengard responded first, pointing out that while some *amicus* briefs raised the issue of orphan works, the minimal number of *amici* in favor of Warhol may indicate that the issue is not actually before the Court. She acknowledged orphan works do present issues regarding fair use, but argued that it is nevertheless unfair to allow a free pass for everyone solely because there are a few works with authors or copyright holders who are unknown or cannot be located. Hecker also shared his thoughts on the issue, contending that the concern surrounding orphan works is another “red herring” in this case. He noted that it can be difficult to discern the

²⁹ Brief for Philippa S. Loengard as Amicus Curiae Supporting Respondents at 18, Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 142 S. Ct. 1412 (No. 21-869).

³⁰ *See id.* at 12.

³¹ *See id.* at 18–19.

³² *See id.* at 18.

³³ *See, e.g.*, Brief of Amici Curiae Electronic Frontier Foundation and Organization for Transformative Works in Support of Petitioner at 5, Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith 142 S. Ct. 1412 (No. 21-869); Brief of Amici Curiae Library Futures Institute, the Software Preservation Network, the Everylibrary Institute, the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries in Support of Neither Party at 15–16, Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith 142 S. Ct. 1412 (No. 21-869).

³⁴ *See id.*

precise message, meaning, and character of orphan works for the purpose of a fair use analysis when the identity of the author is unknown. Hecker argued that fair use does not seem to apply to orphan works, especially in a licensing context, because a licensor typically has permission from and access to the artist.

Shifting the conversation to licensing, Brankov exposed the other panelists' assumption that all licensors are available, reasonable, and have fair pricing. When an artist asks a copyright holder for permission to reference their work in a secondary use with a new meaning and message, the copyright holder could simply say no. In response to Brankov's comment, Hecker stated that the statute clearly gives copyright holders the right to deny permission to others who wish to use their work.³⁵ Brankov elaborated on her statement, arguing that narrowing the scope of fair use would require artists to ask for permission or licenses to reference works more frequently; such uncertainty would lead artists to ask copyright holders for permission as a precautionary measure, even when the secondary use will likely have a different meaning and message from the original. These requests create more opportunities for copyright owners to deny artists permission to use original works for uses that are truly transformative. This situation also puts copyright holders on notice that their original works may be used as references, encouraging them to bring claims for willful infringement where permission was expressly withheld. For Brankov, this argument supports the need for a robust fair use doctrine.

Robinson asked the panelists to comment on the state of fair use, considering the desire for greater parity between copyright holders and authors of secondary works. He noted that there is a yearning for a case that would clarify the first fair use factor generally and, in turn, help attorneys counsel their artist-clients.³⁶ Hecker responded first, pointing out that the Foundation did not address the fourth fair-use factor in its appeal to the Supreme Court, but did ask the Court

³⁵ See 17 U.S.C. § 106 (granting copyright owners "exclusive rights" to various uses of their work).

³⁶ See, e.g., Jasmin Jackson, *Justices Urged to Clarify Fair Use Through Warhol IP Row*, LAW360 (Aug. 12, 2022) <https://www.law360.com/articles/1520799/justices-urged-to-clarify-fair-use-through-warhol-art-ip-row> ("[A] clarified standard would aid the protection of artists' creative expression.").

to address the first factor.³⁷ Some clarity regarding the application of the fair use doctrine's first prong may therefore result from the case. Loengard then mentioned that Congress did have an opportunity to create bright-line rules within the statute, but they purposely opted for an amorphous test. She argued that it is almost impossible to codify the fair use doctrine in a way that is fair to both authors of original works and authors of secondary works because there are many different variables to consider. Loengard expressed that she is looking forward to having more guidance from the Court on fair use; however, she doubts that this case is the ideal opportunity for the Court to consider this issue. Loengard fears that Congress will attempt to codify the outcome of *Warhol v. Goldsmith* in a way that tips the scale too far in one direction or the other. Robinson added that there is also a fear that the Supreme Court will be too broad, creating a rule that applies to copyright across all media, rather than one tailored to the facts of this case.

Robinson asked the panelists whether the secondary user's artistic intent should be relevant to an analysis of the purpose and character of the work under the first fair use factor. Loengard responded that meaning and message are not the same thing as purpose and character. She also pointed out that "intent" is not in the statute,³⁸ and that it is "a loaded word" that could refer to an artist's intent in the market, in the creation of the work, and in the final product, among other things. Hecker agreed that meaning and message do not necessarily correspond to intent, giving the example of art critics imparting meaning to artworks without consulting the artist. In response, Brankov referenced Richard Prince's work *Untitled (cowboy)*, exhibited at the Guggenheim, in which the artist copied a Marlboro advertisement exactly, reframed it, enlarged it, and removed the text.³⁹ She wondered if artistic intent is the reason why such a

³⁷ Brief for Petitioner at 8, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 142 S. Ct. 1412 (No. 21-869) ("This case centers on the first statutory fair use factor, addressing 'the purpose and character of the use.'").

³⁸ See 17 U.S.C. § 107 (omitting the term "intent" under the description of "fair use").

³⁹ See generally *Richard Prince: Spiritual America, Cowboys*, GUGGENHEIM, <https://www.guggenheim.org/teaching-materials/richard-prince-spiritual-america/cowboys> [<https://perma.cc/UX3M-L64D>] (describing Prince's process in the Cowboy series as "rephotograph[ing] Marlboro cigarette ads, cropping out all text and framing them like fine art.").

work would be considered a fair use of the original advertisement. “What you’re doing with the work and if you’re saying something different” is “totally relevant to the analysis,” Brankov argued. Hecker noted in response that it is not settled whether artists’ appropriation of advertising images is infringement. This practice was assumed to be fair use because the copyright holders—corporations who were benefitting from the positive publicity⁴⁰—never challenged it. Loengard corrected Hecker, reminding him that some copyright holders did confront Andy Warhol about his appropriation art, leading the artist to obtain licenses (a fact Hecker acknowledged was important.)⁴¹ Condé Nast licensed Warhol’s image of Prince many years after Warhol’s death,⁴² suggesting that the artist did not assume he had the right to license the work during his lifetime. Robinson stated that criticism, comment, news reporting, parody, teaching, and research are all fair uses under the statute.⁴³ He opined that, without inquiring into the intent of the secondary user, it would be difficult to determine whether these exceptions apply. Another question, he added, is whether courts should inquire into the secondary user’s intent, or what a reasonable observer perceived as the secondary user’s intent. Loengard quipped in response, “If you can’t tell it’s a parody, it’s not a parody.”

The discussion of intent led Brankov to pose the question of whether a determination of transformative use should be a jury issue. Loengard argues that no party could be the best interpreter of meaning and message. She predicted that artists would be concerned

⁴⁰ See, e.g., Kate Donahue, *Andy the Appropriator: The Copyright Battles You Won't Hear About at The Whitney's Warhol Exhibit*, COLUM. J.L. & ARTS (Aug. 2, 2019), <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/112> [<https://perma.cc/H5Z8-DC9P>] (stating that in the context of Andy Warhol’s series of soup cans, “Campbell’s Soup tacitly approved of his use because of the free marketing they were receiving . . .”).

⁴¹ See *id.* (stating that “Warhol was sued at least three times by photographers who filed copyright infringement claims against him” including Patricia Caufield, Charles Moore, and Fred Ward).

⁴² See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp.3d 312, 321 (S.D.N.Y. 2019) (describing how Condé Nast obtained a commercial license to use Warhol’s image of Prince in 2016, despite Warhol’s death in 1987).

⁴³ See 17 U.S.C. § 107 (stating that fair use applies “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”).

if twelve people who may or may not have experience in the arts were instructed to decide the meaning and message of their works.

Robinson next asked the panel to consider Warhol's fame relative to Goldsmith's, and whether the "David and Goliath" factor at play in this case should be relevant to the fair use analysis. Hecker argued that the perception that "a Warhol is recognizable as a Warhol on its face," despite the artist's use of copyrighted material, underscored the trial court's opinion. Loengard added that the manner in which the Foundation's brief essentially mocks a challenge by "a photographer" against an "internationally recognized creative genius," is telling.⁴⁴ She implied that it is unfortunate to position the stature of the artists against each other in this way. Brankov responded that argued that it is relevant to a discussion of the different markets in which each artist operates, and therefore relevant to the fourth factor analysis.⁴⁵ Hecker disagreed entirely, replying that, in this case, the market for licensing is at issue, not the market for the original work. The fair market value of each artist's original work is therefore less relevant to the analysis.

The final question Robinson posed was whether the current ideological makeup of the Court will impact the decision. Hecker noted that in the recent *Google* decision, the Court made a fair use determination that applied very narrowly to the specific facts of the case.⁴⁶ He doubted, however, that this outcome was influenced by the political views of any given Justice. Loengard noted that the *Google* opinion was written by Justice Breyer, who is no longer on the bench.⁴⁷ She hypothesized that the current Court might value the protection of individual property rights, which could result in a ruling for Goldsmith. Brankov also observed that Justice Clarence

⁴⁴ See, e.g., Brief for Petitioner at 20, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 142 S. Ct. 1412 (2022) (No. 21-869) (describing how Warhol "used the tools of visual art to express a completely different message than Goldsmith's original photograph" as "a comment on the dehumanizing nature of celebrity . . . rather than just being the actual human being that made the music.") (internal citations omitted).

⁴⁵ See 17 U.S.C. § 107(4) (stating the fourth factor of the fair use analysis as "the effect of the use upon the potential market for or value of the copyrighted work").

⁴⁶ *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021).

⁴⁷ *Id.* at 1190.

Thomas is the only Justice on the bench who took part in the Court's *Campbell* decision.

In response to a question from the audience regarding the applicability of fair use to social media artists or influencers, Brankov responded that meme culture is an example of a context in which there should be a broad fair use. Hecker argued that social media poses a greater issue for copyright holders than secondary users. Enforcing copyright law in the social media space is difficult considering the breadth of users and the viral nature of the platform.

Another audience member asked the panelists how to draw the line between transformative fair use and derivative works under a broad interpretation of fair use. Loengard replied that the line is especially blurry in visual arts compared to other media, such as film. Hecker agreed that the variables to consider across different media makes this question difficult to answer.

Lastly, the panelists responded to a question about whether judges are in a position to make determinations about transformative use, and potentially artistic intent, when analyzing a secondary use under the first factor. Loengard said that juries are not any better positioned than judges to make that determination. Robinson pointed out that District Court judges might be particularly knowledgeable and experienced with copyright law because all copyright cases must go before them. He further acknowledged that it is a fundamental issue but hopes that judges would have balanced opinions on the issue.

II. OUT OF CONTEXT: REFRAMING AND REPATRIATING OBJECTS IN MUSEUM AND PUBLIC SPACES

Out of Context: Reframing and Repatriating Objects in Museum and Public Spaces explored the decolonization of cultural institutions and attempts to re-contextualize historical objects with fraught lineage through a contemporary lens. Topics included the recent movement in a longstanding debate on the return of Benin bronzes to Nigeria, the role of customs law enforcement in regulating the importation of historical artifacts into the United States, and the Nepal Heritage Campaign's grassroots efforts to return a sacred statue to its original shrine in Kathmandu. Moderated by Steven R.

Schindler, Founding Partner, Schindler Cohen & Hochman LLP, this panel included panelists Rudyard W. Ceres, Partner, Freeborn and Peters LLP; Nicholas M. O'Donnell, Partner, Sullivan and Worcester LLP; and Erin L. Thompson, Professor of Art Crime, John Jay College (CUNY). Schindler opened the panel by discussing the 1998 Washington Principles of Nazi-Confiscated Art⁴⁸ and the balance between the fiduciary and ethical obligations of museums. He pointed to a shift in museums' approach, as they start to internally examine their own collections, especially those objects that were taken by colonial powers.

Ceres began his discussion on the Benin bronzes with a simple yet powerful statement: "Context is everything." Thousands of Benin artifacts were looted in an 1897 British expedition into present day Nigeria and have since been dispersed between Western museums.⁴⁹ Ceres connected the dots from the initial Benin Expedition, the call for restitution by African countries during the Independence movement of the 1960s, and the present Black Lives Matter movement. African nations have historically pushed for the repatriation of African art in the hands of Western nations. In 1973, the president of Zaire raised the problem of restitution to the United Nations, pointing out that the value of artifacts taken during colonial raids had increased to such a point that it was impossible for African countries to buy them back.⁵⁰

Western museums have historically given many excuses for retaining these works, arguing that the objects were lawfully obtained,⁵¹ that they would not be returned if loaned to the original

⁴⁸ U.S. Dept. of State, *Washington Conference Principles on Nazi-Confiscated Art* (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>.

⁴⁹ Dan Hicks, *THE BRITISH MUSEUMS: THE BENIN BRONZES, COLONIAL VIOLENCE AND CULTURAL RESTITUTION*. London: Pluto Press 2020, at 3.

⁵⁰ Nosmot Gbadamosi, *Africa's Stolen Art Debate Is Frozen in Time*, FOREIGN POL'Y (May 15, 2022), <https://foreignpolicy.com/2022/05/15/africa-art-museum-europe-restitution-debate-book-colonialism-artifacts/> [<https://perma.cc/857S-L4LD>].

⁵¹ BÉNÉDICTE SAVOY, *AFRICA'S STRUGGLE FOR ITS ART 2* (Susanne Meyer-Abich trans. 2022).

countries;⁵² that Western institutions offer superior care for them;⁵³ or that the objects benefit the public at large as a “universal museum.”⁵⁴ As Ceres stated, many Western museums use the same playbook: “deny, delay and do not return.” In fact, laws often support such an approach. Until recently, the U.K. Charity Act prevented museums from breaking up collections.⁵⁵ This approach has led to a divided response. While some stress the moral and legal imperative for returning such objects of historical importance to their countries of origin,⁵⁶ others argue that allowing restitution would be akin to opening a Pandora’s box, emptying European museums of many of their most prized holdings.⁵⁷

Recently, however, there has been a new call to action for the return of the Benin bronzes. French officials recently announced the planned return of twenty-six objects from Dahomey—present-day Benin—looted during a war with French colonial forces in the 1890s and displayed in French museums since 1900.⁵⁸ In addition, the University of Cambridge announced the return of their Benin bronze holdings to Nigeria,⁵⁹ followed by London’s Horniman Museum,

⁵² See, e.g., Marc-Andre Renold, *Cultural Co-Ownership: Preventing and Solving Cultural Property Claims*, 22 INT’L J. CULTURAL PROP. 163, 168 (2015) (citing the example of the Korean Uigwe manuscripts case, where Korea accepted a loan with no intention of returning the objects to France).

⁵³ See, e.g., James Cuno, *Culture War: The Case Against Repatriating Museum Artifacts*, 93 FOREIGN AFF. 119, 127–28 (2014) (discussing the destruction of cultural heritage in conflict zones in the Middle East and Africa).

⁵⁴ See, e.g., *id.* at 120 (arguing against repatriation because cultural property is “the legacy of human-kind”).

⁵⁵ See Jo Lawson-Tancred, *A New U.K. Law Gives Museums Unprecedented Power to Deaccession Art and Repatriate Objects in Their Collections*, ARTNET (Sep. 27, 2022), <https://news.artnet.com/art-world/charities-act-museums-repatriate-2182298> [<https://perma.cc/7GPQ-32KQ>] (reporting that a new amendment to the UK Charity Act allows museums to return objects if there is a moral obligation to do so).

⁵⁶ Savoy, *supra* note 51, at 3.

⁵⁷ Hicks, *supra* note 49, at 4.

⁵⁸ Kate Brown, *26 Royal Objects Looted from Benin by French Soldiers Are Going on View in Paris – Briefly—Before Being Returned*, ARTNET (Oct. 25, 2021), <https://news.artnet.com/art-world/quai-branly-benin-restitution-2025098> [<https://perma.cc/HBN7-B4K2>].

⁵⁹ Hannah McGivern, *Cambridge University College Becomes First UK Institution to Return Looted Benin Bronze To Nigeria*, THE ART NEWSPAPER (Oct. 28, 2021), <https://www.theartnewspaper.com/2021/10/28/cambridge-university-college-becomes->

which announced the return of seventy-two objects, including Benin bronzes, to the Nigerian government.⁶⁰ The German government has also agreed to return two Benin bronzes and has signed a political agreement for return of hundreds of other objects.⁶¹

Still, problems remain. In all, there were over 10,000 objects taken from Benin.⁶² While the recent announcements by Western institutions are an important step, they are a small bite of the apple when compared to the vast number of objects still in the possession of Western museums. In other instances, these objects are boxed away in universities and remain uncatalogued and without records.⁶³ Thus, while these recent announcements are a good start in the process of restitution, there is much more action that needs to be taken.

Nicholas M. O'Donnell discussed the role of museums in abiding by customs law and the ability of the government to seize objects that have been illegally imported. Historically, American museums have been built through the philanthropy of private individuals and non-profit corporations. However, museums and cultural institutions are subject to the laws of property and tax law. O'Donnell provided various examples, including the *Portrait of Wally* by Egon Schiele, which was seized by authorities after its display at a

first-uk-institution-to-return-looted-benin-bronze-to-nigeria [https://perma.cc/98XN-78XJ].

⁶⁰ Josh Halliday, *London Museum to Return 72 Benin Treasures to Nigeria*, GUARDIAN (Aug. 7, 2022, 5:31 PM), <https://www.theguardian.com/culture/2022/aug/07/london-museum-horniman-returns-72-benin-treasures-to-nigeria> [https://perma.cc/97D2-54BG].

⁶¹ Rachel Treisman, *Germany Will Repatriate Benin Bronzes, Plundered from Africa in the 19th Century*, NPR (Apr. 30, 2021, 2:01 PM), <https://www.npr.org/2021/04/30/992496264/germany-will-repatriate-benin-bronzes-plundered-from-africa-in-the-19th-century> [https://perma.cc/4S9N-59BY].

⁶² Harriet Sherwood, *Oxford University Identifies 145 Artefacts Looted In Benin Raid*, GUARDIAN (Nov. 19, 2021, 1:28 PM), <https://www.theguardian.com/education/2021/nov/19/oxford-university-identifies-145-artefacts-looted-in-benin-raid> (“About 10,000 objects looted during the raid on Benin are held in 165 museums and many private collections across the world.”).

⁶³ Erin Thompson & Mackenzie Priest, *Small Museums, Big Problems: Failure to Comply with the American Alliance of Museums' Policies on Archaeological Materials and Ancient Art*, CRIME & ART (Nov. 6, 2021), <https://link.springer.com/chapter/10.1007/978-3-030-84856-9> [https://perma.cc/JV2T-BSUT].

Museum of Modern Art exhibition in New York;⁶⁴ *Christ carrying the cross* by Girolamo Romano, which was on loan at the Mary Brogan Museum of Art & Science in Tallahassee when it was identified as illegally imported;⁶⁵ and the *Mask of Ka-Nefer-Nefer* in the collection of the St. Louis Art Museum.⁶⁶ O'Donnell queried whether these institutions originally considered that the objects they acquired were stolen property in the first place. He provided the example of the *Tablet of Gilgamesh*, which was illegally imported from Iraq and was seized by customs officials after Hobby Lobby acquired the work for the Museum of the Bible.⁶⁷

O'Donnell observed that the Department of Homeland Security has taken an active role in identifying and repatriating stolen artworks. In addition to federal actors, the Manhattan District Attorney is actively facilitating repatriations for objects in New York City collections.⁶⁸ Other countries have also started initiatives centered on retrieving their own art via repatriation. In *Republic of Turkey v. Christie's*, the Turkish government claimed that the *Guennol Stargazer*, a marble figure which had once been owned by collector Michael Steinhardt, had been illegally exported under a 1906 Turkish law.⁶⁹ Ultimately, the District Court found that, based on the trial record, Turkey did not show the art was exported prior to the 1906

⁶⁴ Marisa Carroll, *The Painting That Launched a Thousand Lawsuits*, HYPERALLERGIC (May 23, 2012), <https://hyperallergic.com/51575/andrew-shea-portrait-of-wally/> [<https://perma.cc/Y8G4-USYD>].

⁶⁵ Michael Peltier, *U.S. Agents Seize Painting Believed Stolen by Nazis*, REUTERS (Nov. 11, 2011, 9:06 AM), <https://www.reuters.com/article/us-usa-painting-nazis-f/u-s-agents-seize-painting-believed-stolen-by-nazis-idUSTRE7AA3A720111111> [<https://perma.cc/6MT8-MKSQ>].

⁶⁶ Sarah Cascone, *Curse of the Mummy's Mask Lifts in St. Louis*, ARTNET (July 30, 2014), <https://news.artnet.com/art-world/curse-of-the-mummys-mask-lifts-in-st-louis-68953> [<https://perma.cc/K33Z-PMZG>].

⁶⁷ James Doubek, *An Ancient Tablet, Stolen Then Acquired by Hobby Lobby, Will Be Returned to Iraq*, NPR (Sept. 21, 2021, 7:38 PM) <https://www.npr.org/2021/09/21/1039380004/gilgamesh-dream-tablet-hobby-lobby-iraq-return> [<https://perma.cc/7QPC-5FLX>].

⁶⁸ Press Release, Alvin Bragg, Manhattan District Attorney, D.A. Bragg Returns 192 Stolen Antiquities to Pakistan (Nov. 10, 2022), <https://www.manhattanda.org/d-a-bragg-returns-192-stolen-antiquities-to-pakistan/> [<https://perma.cc/9UTZ-WV4Y>].

⁶⁹ 425 F. Supp. 3d 204, 209 (S.D.N.Y. 2019).

decree, and was additionally barred by laches.⁷⁰ However, the case indicated that courts are receptive to honoring a foreign jurisdiction's laws that would have caused an interruption in the chain of title. Greece has also followed with its own repatriation request, evident in the country's pleading in *Barnet v. Ministry of Culture and Sports of the Hellenic Republic*.⁷¹ Greece requested that an object, a bronze horse figurine, be withdrawn from a sale at Sotheby's.⁷² Ultimately, O'Donnell attributed these cases to the recent restitution efforts for African cultural heritage, positing a new awareness of ethics, even as seen through popular culture in the film *Blank Panther*'s museum heist scene. More people are on notice about customs violations today than they were just twenty years ago.

Erin L. Thompson began her discussion of the Nepal Heritage Recovery Campaign by boldly stating that "cultural property law does not exist" since many acts of repatriation happen outside of the law. Thompson recounted the story of a statue stolen from a shrine in the Kathmandu Valley in Nepal in the 1960s that resurfaced in 2022.⁷³ This object represented a deity that was worshiped in the context of its original placement in the shrine.⁷⁴ Nepal banned the export of cultural antiquities earlier in the century,⁷⁵ so there was no moral or legal authority for it to be outside Nepal.

The statue remained lost until artist Joy Lynn Davis began creating artwork focused on lost objects, including a photograph of a shrine with the missing work painted in gold.⁷⁶ When the statue was found on a long term loan at the Dallas Museum of Art, Thompson

⁷⁰ Republic of Turk. v. Christie's, Inc., No. 17-cv-3086 (AJN), 2021 U.S. Dist. LEXIS 169215, at *3-4 (S.D.N.Y. Sep. 7, 2021).

⁷¹ 391 F. Supp. 3d 291, 295 (S.D.N.Y. 2019).

⁷² *Id.* at 297.

⁷³ Press Release, Alvin Bragg, Manhattan District Attorney, D.A. Bragg Returns the Durga Stele to the People of Nepal (Aug. 24, 2022), <https://www.manhattanda.org/d-a-bragg-returns-the-durga-stele-to-the-people-of-nepal/> [<https://perma.cc/A98A-KBB6>].

⁷⁴ Erin L. Thompson, *Returned to Nepal by the FBI, a Sculpture Becomes a God Again*, HYPERALLERGIC (Dec. 17, 2021), <https://hyperallergic.com/700760/returned-to-nepal-by-the-fbi-a-sculpture-becomes-a-god-again/> [<https://perma.cc/EB48-CZ7Z>].

⁷⁵ *Products Banned for Exports*, EMBASSY OF NEPAL, <https://pk.nepalembassy.gov.np/products-banned-exports/> [<https://perma.cc/A68U-QLRB>].

⁷⁶ *Art Exhibit: Joy Lynn Davis*, LENFEST CTR. OF THE ARTS, <https://my.wlu.edu/lenfest-center/past-seasons/art-exhibit-joy-lynn-davis-remembering-the-lost-community-response-to-the-theft-of-nepals-sacred-sculptures> [<https://perma.cc/UEK2-FVJU>].

wrote an article in *Hyperallergic* about its history,⁷⁷ which garnered enough public pressure that the museum returned the work to Nepal.⁷⁸ Before its return, the museum requested the advice of the FBI Art Crime squad.⁷⁹ However, Thompson argued that this move was more of a delay tactic than any real way to aid in the repatriation of the object. She stressed that though repatriation laws exist, they are not followed, positing that museums do not always have the resources to lawfully abide and often fear upsetting their donors. There is tension between a museum's ability to research provenance fully and maintain good donor relations. With respect to repatriation, the threat of bad publicity may have stronger effects than the law. The statue was finally reinstalled in the shrine in December 2021, placing it back into its original context of worship.⁸⁰ Thompson's efforts reveal how journalism and activism can result in successful repatriation.

Through the discussion, the panelists pointed to a growing awareness of the need to reconsider cultural heritage objects, especially as museums and institutions reassess their holdings and history. The panelists considered different avenues for repatriation efforts, including political diplomacy in the case of the Benin bronzes, law enforcement and international customs law for illegally imported objects, and artistic and community-driven campaigns that lead to decisive action. These panelists also acknowledged that such efforts have only recently gained traction, and thousands of objects still remain in limbo and in need of reconsideration.

⁷⁷ Thompson, *supra* note 74.

⁷⁸ *Id.*

⁷⁹ Melinda Urbina & Katie Chaumont, *FBI Dallas and Dallas Museum of Art Announce Transfer of Stele of Lakshmi-Narayana to Government of Nepal*, FBI (March 5, 2021) <https://www.fbi.gov/contact-us/field-offices/dallas/news/press-releases/fbi-dallas-and-dallas-museum-of-art-announce-transfer-of-stele-of-lakshmi-narayana-to-government-of-nepal> [<https://perma.cc/YVB4-KCGG>].

⁸⁰ Ashish Dhakal, *Laxmi-Narayan Is Home*, NEPALI TIMES (Dec. 4, 2021), <https://www.nepalitimes.com/banner/laxmi-narayan-is-home/> [<https://perma.cc/2NAQ-YBL8>].

III. KEYNOTE ADDRESS: UKRAINE ON MY MIND

In her Keynote, Irena Tarsis, Founder and Managing Director of the Center for Art Law, discussed the destruction and protection of cultural heritage throughout the armed conflict unfolding in Ukraine. Tarsis opened with a clip of a viral video of a remixed Ukrainian folk song, created in an effort to energize the global community and raise money for the Ukrainian war effort. The video set the tone for Tarsis' discussion about Ukrainian resiliency and the ways in which lawyers and non-lawyers can support the country during this difficult time.

Tarsis began her presentation by demonstrating how the effects of prior wars may serve to predict the effects of the Russian invasion on Ukrainian cultural heritage. She displayed a photograph of the Ukrainian flag flying in a public square in Zurich—an impactful symbol from a historically neutral nation. Despite this show of support, discourse critical of displaying the Emil Georg Bührle collection at Zurich's *Kunsthau*s has caused controversy surrounding the country's historic neutrality. Bührle was a Swiss weapons manufacturer who made a large fortune selling ammunition to the Nazis.⁸¹ Part of the wealth he earned as an arms dealer was used to build a large art collection that included many works looted from Jewish collections during the war.⁸² While his estate has returned a number of works, the fact that much of the collection is still on display has led to the criticism of the *Kunsthau*s.⁸³ Tarsis suggested that “this is not a nice legacy,” and one that she felt can be avoided for future generations if efforts are made to protect and prevent the trafficking of Ukrainian cultural heritage.

Tarsis went on to discuss how we define culture and its ownership, noting that organizations like UNESCO aid in identifying the important places and traditions that help shape those same definitions. UNESCO's World Heritage List, for example, includes at least seven sites in Ukraine.⁸⁴ International norms, treaties, and

⁸¹ Kito Nedo, *The Ugly Provenance of Kunsthau*s Zürich's Collection, FRIEZE (Feb. 8, 2022), <https://www.frieze.com/article/ugly-provenance-kunsthau-s-zurichs-collection> [https://perma.cc/EWB4-U2CU].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *World Heritage List*, UNESCO, <https://whc.unesco.org/en/list/>.

guidelines have also attempted to provide answers. Despite the numerous conventions seeking to prevent wars, there are nearly thirty ongoing armed conflicts worldwide.⁸⁵ Tarsis referred to two prior conventions aimed at protecting cultural heritage: the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict,⁸⁶ which followed World War II, and the 2003 Convention on the Safeguarding of Intangible Cultural Heritage.⁸⁷ Tarsis then recited a quote commonly attributed to Confucius: “Signs and symbols rule the world, not words nor laws.” To illustrate her point, Tarsis referenced the cultural artifacts destroyed in the Balkans in the late 1990s and early 2000s⁸⁸ and the objects looted from the Iraq Museum in 2003.⁸⁹ Both exploits took place in the face of the two conventions. Optimistically, she called on the legal community to help prevent wars before they begin, by using the law or other methods to undermine the hostile parties.

According to Tarsis, “the war did not start in 2022.” There is a long history of disputes over contested territories in Ukraine and the effects on cultural heritage. In 2014, at the time of the Maidan Revolution, a number of artworks from Ukraine’s Crimea were on loan in the Netherlands.⁹⁰ After Russia’s annexation of Crimea, questions arose about whether or not the Crimean objects should be returned

⁸⁵ See *Global Conflict Tracker*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/global-conflict-tracker> [<https://perma.cc/G82B-KT5R>].

⁸⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, May 14, 1954, 249 U.N.T.S. 3511 [hereinafter *Hague Convention*].

⁸⁷ Convention on the Safeguarding of Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 42671.

⁸⁸ See Anna Burgess, *Harvard Librarian Puts This War Crime on the Map*, HARV. GAZETTE (Feb. 21, 2020), <https://news.harvard.edu/gazette/story/2020/02/harvard-librarian-puts-this-war-crime-on-the-map/> [<https://perma.cc/8CF3-ZT34>].

⁸⁹ See Sami Ramadani, *Iraq Was Turned into the World Centre for the Destruction and Looting of Some of Humanity’s Most Ancient Symbols of Civilisation*, ART NEWSPAPER (Mar. 31, 2006), <https://www.theartnewspaper.com/2006/04/01/iraq-was-turned-into-the-world-centre-for-the-destruction-and-looting-of-some-of-humanitys-most-ancient-symbols-of-civilisation> [<https://perma.cc/E35L-9ZX3>].

⁹⁰ Sophia Kishkovsky, *Bitterly Contested Trove of Crimean Gold Artefacts Must Return to Ukraine, Not Russia, Dutch Court Rules*, ART NEWSPAPER (Oct. 27, 2021), <https://www.theartnewspaper.com/2021/10/27/crimean-gold-trove-must-return-to-ukraine-not-russia-dutch-court-rules> [<https://perma.cc/57E5-VVJT>].

to now Russian-held Ukraine.⁹¹ To Tarsis's knowledge, these objects are still in the Netherlands. This territorial dispute also affected other countries' cultural objects. For example, works from a museum in Aachen, Germany that were displaced during World War II surfaced in a Crimean museum.⁹² Negotiations for their return ensued, but halted after Russia's annexation of Crimea.⁹³ Tarsis also referenced disputes over the Donbass region, Scythian gold, and other objects and territories.

Tarsis continued by explaining that after the Russian invasion of Ukraine in February 2022, the public immediately sought accountability, answers, and solutions. Upon the Russian invasion, a number of international organizations and art historians issued statements to draw attention to the imperiled position of Ukrainian cultural heritage. In particular, Tarsis noted the establishment of the ICOM Red List, which categorizes Ukrainian cultural heritage as at risk of destruction.⁹⁴ In addition, Attorney General Merrick Garland established a task force to hold corrupt Russian oligarchs responsible for the war by locating the assets of persons on the Sanctioned Persons List.⁹⁵ Sanctioned persons are restricted from buying, selling, or importing art or luxury goods.⁹⁶ Building off these efforts, Tarsis called on the legal community to come forward with any information about assets or artworks belonging to corrupt Russian oligarchs. The

⁹¹ *Id.*

⁹² Konstantin Akinsha, *Vladimir Putin's Martial Law Decree Has Given Russian Forces 'Legal' Cover to Loot Art in Ukraine*, ART NEWSPAPER (Oct. 28, 2022), <https://www.theartnewspaper.com/2022/10/28/vladimir-putin-martial-law-ukraine-looting> [<https://perma.cc/WSK3-J4SG>].

⁹³ *Id.*

⁹⁴ *ICOM is Preparing an Emergency ICOM Red List of Cultural Heritage at Risk for Ukraine*, INT'L COUNCIL OF MUSEUMS (June 28, 2022), <https://icom.museum/en/news/icom-is-preparing-an-emergency-icom-red-list-of-cultural-heritage-at-risk-for-ukraine/> [<https://perma.cc/G47T-E9SU>].

⁹⁵ *Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture*, U.S. DEP'T OF JUST. (Mar. 2, 2022), <https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture> [<https://perma.cc/98CZ-K6WX>].

⁹⁶ *Id.*

Ukrainian Ministry of Culture is attempting to catalog cultural losses as they occur,⁹⁷ a list that sadly continues to grow.

Objects representative of Ukraine's rich history and culture, such as stone *stelae*, are being destroyed.⁹⁸ UNESCO is tracking the damage and victims⁹⁹ and added Ukrainian borscht to their list of Intangible Cultural Heritage.¹⁰⁰ Tarsis explained that this step by the organization, while it seems small, sends an important message that cultural heritage comes in many forms and should be protected as much as possible.

Tarsis next described the multitude of ways that people have mobilized to help Ukraine, including efforts by non-lawyers and non-Ukrainians to archive materials. Saving Ukrainian Cultural Heritage Online (SUCHO) and other organizations composed of cultural heritage professionals are working to identify and archive at-risk sites, digital content, and data in Ukrainian cultural heritage institutions.¹⁰¹ The hope is that their work will eventually help Ukraine rebuild. She mentioned the use of blockchain technology to raise money for Ukraine through DAOs and NFTs¹⁰² and charitable concerts and exhibitions held by artists and arts professionals. The National Agency for Corruption Prevention is attempting to fight

⁹⁷ *Save Ukrainian Culture*, MINISTRY OF CULTURE & INFO. POL'Y (Ukr.), <https://restore.mkp.gov.ua/en> [<https://perma.cc/3BSD-XDYY>].

⁹⁸ Sophia Kishkovsky, *Ukrainian Stone Statues—Likened to Easter Island's Moai—Destroyed During Russian Invasion*, ART NEWSPAPER (Sept. 21, 2022), <https://www.theartnewspaper.com/2022/09/21/ukrainian-stone-statueslikened-to-easter-islands-moaidestroyed-during-russian-invasion> [<https://perma.cc/4BVZ-WNQM>].

⁹⁹ *Damages and Victims*, UNESCO, <https://www.unesco.org/en/ukraine-war/damages-and-victims?> [<https://perma.cc/J7NQ-LTYL>].

¹⁰⁰ *Culture of Ukrainian Borscht Cooking Inscribed on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding*, UNESCO (July 1, 2022), <https://www.unesco.org/en/articles/culture-ukrainian-borscht-cooking-inscribed-list-intangible-cultural-heritage-need-urgent> [<https://perma.cc/HA3Z-ER7F>].

¹⁰¹ *Saving Ukrainian Cultural Heritage Online*, SUCHO, <https://www.sucho.org/> [<https://perma.cc/46U5-6FUA>].

¹⁰² See Ornella Hernández, *UkraineDAO Raises Over \$6M Via NFT Sale to Aid Ukrainian Citizens*, COINTELEGRAPH, (Mar. 3, 2022), <https://cointelegraph.com/news/ukraine-dao-raises-over-6m-via-nft-sale-to-aid-ukrainian-citizens> [<https://perma.cc/FXB4-GWNE>].

corruption within Ukraine to ensure that charitable dollars are directed appropriately.¹⁰³

Tarsis provided candid advice to the arts community. She encouraged those transacting in the art market to consult the sanctioned persons list before buying or selling art. Referring back to her discussion of Emil Bührle, she also encouraged museums to refrain from accepting “contaminated” gifts from Russian oligarchs even decades down the line to avoid embarrassment. To prevent tainted art from circulating on the market, she encouraged art professionals to report art that surfaces on the market if it is known to be in the collection of a Russian oligarch. She advised that the Center for Art Law will make these reports on behalf of others to maintain anonymity. Tarsis ended her keynote with a call to action: whether you are donating your time or your money, “pick your cause and stick to it.”

Audience questions for Tarsis centered on how art lawyers and arts professionals could aid the effort to preserve cultural heritage in Ukraine. One audience member asked whether there have been efforts by Russian artists to condemn the war. Tarsis replied that there are some, but they have been difficult to document because of the danger that comes with speaking out against the Russian Federation. Another audience member asked for ways that the legal community could support Ukraine at this time. Tarsis suggested sharing information about sanctioned individuals and art collections, hiring and supporting Ukrainian artists, and providing legal assistance to those seeking asylum. Later, if a special court is established to manage claims for compensation, lawyers will play an integral part in presenting the evidence that has been captured by photographers and groups of arts professionals and demonstrates the magnitude of damage. Tarsis punctuated a Keynote with a warning to the audience: “To destroy is much easier than to create, but doing nothing could be even easier. Don’t do nothing.”

¹⁰³ See *National Agency on Corruption Prevention*, NETWORK FOR INTEGRITY, <https://networkforintegrity.org/continents/europe/national-agency-corruption-prevention-nacp/> [https://perma.cc/9XG5-XW2R].

IV. ERASED: PROTECTING CULTURAL HERITAGE IN TIMES OF ARMED CONFLICT

Moderated by Leila Amineddoleh, Founding Partner, Amineddoleh & Associates LLC, and Adjunct Professor of Law at Fordham, the panel *Erased: Protecting Cultural Heritage in Times of Armed Conflict* discussed various contexts in which war and hostility have threatened cultural heritage. The panelists included Yelena Ambartsumian, Founder, Origen; Jennifer Kreder, Of Counsel, Rottenberg Lipman Rich P.C.; and Michael McCollough, Partner, Pearlstein & McCullough LLP. The panel discussed the history of the destruction of cultural property and looting from the Nazi-Era to the present day, the legal tools available to victims, and the responsibilities and rights of collectors.

Professor Amineddoleh began the panel by summarizing the long history of looting and an overview of tools that exist to protect cultural property. She listed various motivations for intentional destruction and looting, including military strategy, ethnic or religious intimidation or cleansing, or retaliation. It can also result from negligence or failure to intervene.

Early laws of war distinguish art from other types of property. Trials in Ancient Rome are some of the earliest examples of the prosecution of looting that set the precedent for modern art law jurisprudence.¹⁰⁴ Amineddoleh also noted a critical failure to address the protection of heritage in the 1814 and 1815 Treaties of Paris following the Napoleonic Wars.¹⁰⁵ She asserted that, in the absence of a binding legal consensus surrounding looted items, colonial despoliation unfortunately became the norm rather than the exception.

After World War II, the 1954 Hague Convention and its two protocols set parameters for the protection of cultural heritage during armed conflict.¹⁰⁶ However, Amineddoleh noted that this

¹⁰⁴ See Amineddoleh & Associates LLC, *The Illicit Trafficking of Cultural Goods: A Long and Ignoble History*, ANCIENT ROME LIVE (Aug. 7, 2021), <https://ancientromelive.org/the-illicit-trafficking-of-cultural-goods-a-long-and-ignoble-history/> [https://perma.cc/S3FC-C3UK].

¹⁰⁵ See, e.g., Paige S. Goodwin, *Mapping the Limits of Repatriable Cultural Heritage: A Case Study of Stolen Flemish Art in French Museums*, 157 UNIV. PA. L. REV. 673, 680 (2008).

¹⁰⁶ See generally Hague Convention, *supra* note 86.

convention failed to recognize that art is often at risk outside of the context of war. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property urged state parties to take measures to prevent the illicit trafficking of art and artifacts.¹⁰⁷ This convention was later expanded by the 1995 UNIDROIT Convention to include private law restitution claims.¹⁰⁸

Kreder was the first panelist to present. She discussed Nazi-era looting, one of the most destructive periods of art theft in Europe. The exhaustive record of the objects stolen distinguishes this period of theft from others.¹⁰⁹ In Kreder's words, "this was open theft," not clandestine stealing in the chaos of war. Despite the unprecedented volumes of records kept by the Nazis, much of the theft nevertheless went undocumented. Gaps in information, especially for lesser-known or lower-value works, create difficulties for reuniting artworks with their original owners. The Monuments, Fine Arts, and Archives ("MFAA") program—famously known as the "Monuments Men"—was first established with the goal of safeguarding art.¹¹⁰ The U.S. position shifted after the war to prioritize the restitution of looted art to source countries.¹¹¹ However, due to corruption, administrative failures, and antisemitism, source countries largely failed to connect owners with their stolen art.¹¹² While some organizations were created to assist with restitution, only the wealthiest families with legal representation could afford to make claims.¹¹³ The United States, however, embraced a policy in favor of returning artworks, which is reflected in its jurisprudence.¹¹⁴

¹⁰⁷ See Leila Amineddoleh, *The Politicizing of Cultural Heritage*, 45 N.C. J. INT'L L. 333, 341 (2020).

¹⁰⁸ See *Overview —The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, UNIDROIT, <https://www.unidroit.org/instruments/cultural-property/1995-convention/overview/> [https://perma.cc/DT7S-EV2J].

¹⁰⁹ See Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, 20 CHAP. L. REV. 1, 2 (2017).

¹¹⁰ See *id.* at 7.

¹¹¹ Jennifer Anglim Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 NW. L. REV. COLLOQUY 315, 318 (2011).

¹¹² See Kreder, *supra* note 109, at 8.

¹¹³ See *id.* at 9.

¹¹⁴ See Kreder, *supra* note 111, at 319.

The 1966 landmark case *Menzel v. List* paved the way for litigation involving Nazi looted art.¹¹⁵ However claimants seeking restitution of Nazi-looted art saw little success until the 2004 case, *Republic of Austria v. Altmann*, in which Maria Altmann successfully recovered Gustav Klimt's *Portrait of Adele Bloch-Bauer I*,¹¹⁶ also known as *Woman in Gold*.¹¹⁷ Kreder explained that *U.S. v. Portrait of Wally*,¹¹⁸ launched the modern Nazi-looted art restitution movement. *Portrait of Wally* was seized by the American government after being loaned to MoMA, but its possession by the government of Austria prevented the true owners from recovering it.¹¹⁹ Kreder asserts that the country's defense was "a fraud." Austria claimed to have obtained the work honestly, when in fact they traded for it with a well-known Nazi profiteer, who had a reputation for acquiring looted objects.¹²⁰

The controversy surrounding *Portrait of Wally* encouraged the issuance of the 1998 Washington Principles on Nazi-Confiscated Art ("the Principles"), signed by forty-four nations.¹²¹ The Principles intended to encourage the assertion of restitution claims, and set guidelines for handling mixed evidence on a case-by-case basis with just and fair solutions.¹²² Nevertheless, since *Altman*, there has only been one successful restitution achieved in American courts.¹²³ Additionally, a number of collectors and museums have undermined the Principles by directly suing heirs of looting victims.¹²⁴ These cases have created a body of case law hostile to American restitution efforts. Efforts have been made to attempt to strengthen the Principles, including the passage of the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"),¹²⁵ but to no avail. Kreder

¹¹⁵ 267 N.Y.S.2d 804, 820 (Sup. Ct. 1966).

¹¹⁶ See Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 75, 84 (2012).

¹¹⁷ *The Woman in Gold*, NEUE GALERIE, <https://www.neuegalerie.org/womaningold>.

¹¹⁸ 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

¹¹⁹ See Kreder, *supra* note 109, at 10.

¹²⁰ See *id.*

¹²¹ See *id.* at 11.

¹²² See *id.*

¹²³ See *Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008).

¹²⁴ See Kreder, *supra* note 116, at 18.

¹²⁵ See S. 2763, 114th Cong. (2016).

points out that there is a gap in the HEAR Act where the word “laches” was removed.¹²⁶ She argues that restitution cases are decided on tactical defenses and the statute of limitations, not the merits of the case or principles of justness and fairness. In closing, Kreder predicted that it will be crucial to consider the passage of time and the transparency of information when addressing the protection and recovery of art in future conflicts.

Amineddoleh asked Kreder how World War II restitution efforts can inform restitution efforts in other contexts. Kreder replied that the art market must play a significant role in the success of restitution claims. The restitution of Nazi-era looted art elucidated that information and transparency are essential. She acknowledged that collectors are hesitant to be transparent out of fear that their collections will be seized, but she advocated that art market participants must confront issues on the front-end through due diligence to avoid disputes down the line. She argues, however, that recently, collectors have been hesitant to purchase an object unless it can be verified that it was in the country before the 1970 UNESCO Convention. Nazi-era art restitution “shows that there will be a reckoning, and now you’re seeing it in the antiquities market as well.” In addition, Kreder noted that the litigation around Nazi-looted art has established the procedural mechanisms essential to the outcome of a given case, such as burdens of proof, choice of law, laches, title vesting, and statutes of limitations. Kreder argued that the law should not put unrealistic expectations on victims of genocide to come forward in a certain timeframe. Additionally, Kreder explained that World War II restitution efforts have exposed the shortcomings of foreign sovereign immunity law. In these restitution cases, international law was inapplicable where a sovereign nation brought harm to its own citizens, making it impossible for Germans to sue the German State.¹²⁷ Secondly, in allowing claims to be brought against victims’ families to block title to stolen property, the Foreign Sovereign Immunities Act, “has been used as a sword, instead of the shield it was intended to be.”

¹²⁶ See Kreder, *supra* note 109, at 19.

¹²⁷ See *Westfield v. Fed. Republic of Germany*, 633 F.3d 409 (6th Cir. 2011) (holding that Germany could not be sued under the Foreign Sovereign Immunities Act for any wartime taking of property because the taking had no “direct effect” on the United States).

McCullough presented next, bringing attention to other examples of cultural heritage theft outside of Europe. He gave examples of title disputes arising in the auction context to shed light on the application of art merchants' warranties art transactions. He first discussed the *Duryodhana*, a statue that originally stood at the base of a temple in Koh Ker, Cambodia.¹²⁸ The object was stolen during the Cambodian Civil War.¹²⁹ In 2010, with the base of the sculpture still *in situ*, it was consigned to Sotheby's.¹³⁰ Sotheby's imported the work,¹³¹ a decision that McCullough said "had to have been a mistake," although the auction house has never offered an explanation. American law enforcement seized the sculpture and instituted a forfeiture action against it.¹³² The Cambodian records procured by the U.S. government demonstrated that the sculpture was likely stolen in 1972, leading the court to find probable cause for forfeiture.¹³³ Because Sotheby's and the possessor of the statue could not prove that the work was legally owned, they returned the statue.¹³⁴

McCullough then discussed the *Archaic Bull's Head*, a statue stolen from Lebanon during its Civil War.¹³⁵ London antiquities dealer Robin Symes sold the piece to the Beierwaltes, a Colorado couple, for one million dollars.¹³⁶ Later, they sold it to private collector Michael Steinhardt through New York art gallery, Phoenix Ancient Art.¹³⁷ Steinhardt loaned the work to the Metropolitan

¹²⁸ See Hrag Vartanian, *A 'Priceless Piece of Cambodia's Cultural History' Has Been Returned After 40 Years*, HYPERALLERGIC (May 7, 2014), <https://hyperallergic.com/125064/a-priceless-piece-of-cambodias-cultural-history-has-been-returned-after-40-years/> [https://perma.cc/QAP6-XF63].

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See Tom Mashberg & Ralph Blumenthal, *Disputed Statue to Be Returned to Cambodia*, N.Y. TIMES (Dec. 12, 2013), <https://www.nytimes.com/2013/12/13/arts/design/disputed-statue-to-be-returned-to-cambodia.html> [https://perma.cc/78U5-MJAX].

¹³² *United States v. A 10th Century Cambodian Sandstone Sculpture*, No. 12 Civ. 2600, 2013 WL 1290515, at *1, *1 (S.D.N.Y. 2013).

¹³³ *Id.* at *7.

¹³⁴ See *id.* at *8.

¹³⁵ Colin Moynihan, *Looted Antiquity, Once at Met Museum, to Return to Lebanon*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/arts/design/looted-antiquity-once-at-met-museum-to-return-to-lebanon.html> [https://perma.cc/K8NV-9RWT].

¹³⁶ *Id.*

¹³⁷ *Id.*

Museum of Art, which raised questions about its provenance and ultimately turned the work over to the Manhattan District Attorney after receiving complaints from the Lebanese government.¹³⁸ Steinhardt approached Phoenix Ancient Art about rescinding the sale, and the Beierwaltes agreed to refund Steinhardt.¹³⁹ McCullough's law firm represented the Beierwaltes in an action against the Lebanese government and the District Attorney's office to clear title. Discovery revealed that the *Archaic Bull's Head* was actually excavated legally, but stolen from a museum during the Lebanese Civil War.¹⁴⁰ The Beierwaltes decided to relinquish the piece.¹⁴¹

The last subject that McCullough touched on was the *Gilgamesh Dream Tablet*, which was purchased by Hobby Lobby Stores in building a collection of historical biblical artifacts for the Museum of the Bible.¹⁴² Hobby Lobby acquired the object from Christie's, who represented to the buyer that the object likely arrived in the United States in the 1970s.¹⁴³ This provenance was, in fact, false.¹⁴⁴ McCullough recalled that the object surfaced in London in 2003 when ancient coin dealer Frank Kovacs purchased it from a Jordanian antiquities dealer. Kovacs imported the tablet into the United States illegally, fabricated its provenance, and consigned it to Christie's. American law enforcement seized the tablet and instituted a forfeiture action.¹⁴⁵ McCullough, representing Hobby Lobby,

¹³⁸ Georgi Kantchev, *How an Ancient Statue Sparked a Global Legal Battle*, WALL ST. J. (Sept. 27, 2017, 1:08 PM), <https://www.wsj.com/articles/how-an-ancient-statue-sparked-a-global-legal-battle-1506532132> [<https://perma.cc/H4NN-GBWA>].

¹³⁹ *Id.*

¹⁴⁰ Moynihan, *supra* note 135.

¹⁴¹ *See id.*

¹⁴² Brigit Katz, *Smuggled Gilgamesh Dream Tablet Returns to Iraq*, SMITHSONIAN MAG. (Sept. 23, 2021), <https://www.smithsonianmag.com/smart-news/hobby-lobby-forfeits-rare-gilgamesh-tablet-smuggled-iraq-180978314/> [<https://perma.cc/6VL3-JT6C>].

¹⁴³ James Doubek, *An Ancient Tablet, Stolen Then Acquired by Hobby Lobby, Will Be Returned to Iraq*, NPR (Sept. 21, 2021, 7:38 PM), <https://www.npr.org/2021/09/21/1039380004/gilgamesh-dream-tablet-hobby-lobby-iraq-return> [<https://perma.cc/3EUZ-9THF>].

¹⁴⁴ Alison Frankel, *Hobby Lobby, Christie's and the Epic of Gilgamesh: A New Chapter for Ancient Saga*, REUTERS (May 20, 2020, 6:23 PM), <https://www.reuters.com/article/us-otc-tablet/hobby-lobby-christies-and-the-epic-of-gilgamesh-a-new-chapter-for-ancient-saga-idUSKBN22W37G> [<https://perma.cc/7TN3-5LZS>].

¹⁴⁵ Azmi Haroun & Haven Orecchio-Egresitz, *DOJ Seized the Gilgamesh Dream Tablet—A Portion of the Epic of Gilgamesh—From Hobby Lobby*, INSIDER (July 27, 2021,

challenged the forfeiture,¹⁴⁶ which gave his team access to information about the theft through discovery, and empowered Hobby Lobby to sue Christie's for breach of warranty.¹⁴⁷ McCullough emphasized the difficulty in proving provenance. While most stolen objects have provenance records, they are often incomplete or false. He noted, however, that collectors and museums accept the risk associated with purchasing antiquities because "everyone wants the good stuff." Participation in the antiquities market is "tough" but inevitable for museums and serious collectors.

Yelena Ambartsumian gave the final presentation, shedding light on the ongoing destruction of Armenian cultural heritage Azerbaijan. Ambartsumian recognized that the audience might lack awareness of the current situation facing Armenians. She attributed the slow spread of information about this conflict to the State Oil Company of the Azerbaijan Republic ("SOCAR"), whose influence and power quiets voices both domestically and abroad. A photograph of Azerbaijan's President Aliyev and Turkey's President Erdoğan celebrating a pipeline that cuts through Armenia, connecting their two countries, set the scene for Ambartsumian's discussion.

Ambartsumian introduced a discussion of Armenia's ancient and rich history when she displayed an image of the oldest surviving map, the Babylonian Map or *Imago Mundi*. Armenia is the only civilization referenced on this map that is still in existence.¹⁴⁸ Armenians believe that Mount Ararat is where Noah's Ark came to rest after the Great Flood, and that the Armenian people are Noah's descendants.¹⁴⁹ Recent genealogical studies have shown that modern-day

3:35 PM), <https://www.businessinsider.com/doj-seizes-the-gilgamesh-dream-tablet-from-hobby-lobby-2021-7>, [https://perma.cc/7SV5-YG4D].

¹⁴⁶ See Alisha Ebrahimji, *US Wants to Send Ancient Artifact Hobby Lobby Bought for \$1.6 Million Back to Iraq*, CNN (May 20, 2020, 10:14 PM), <https://www.cnn.com/2020/05/20/world/hobby-lobby-gilgamesh-tablet-iraq-trnd> [https://perma.cc/LW2R-832F].

¹⁴⁷ *Id.*

¹⁴⁸ Rouben Galichian, *A Brief History of the Maps of Armenia*, 1 J. ARMENIAN STUDIES 83, 83 (2013).

¹⁴⁹ See James Blake Wiener, *Mount Ararat*, WORLD HIST. ENCYC. (Jan. 24, 2018), https://www.worldhistory.org/Mount_Ararat/ [https://perma.cc/U889-B3KZ].

Armenians are indigenous to the Armenian Highlands.¹⁵⁰ Their DNA can be traced back to local, Bronze-Age peoples.¹⁵¹ Armenians' occupation of the region for millennia has led to important archaeological discoveries, such as the earliest evidence of wine-making,¹⁵² leather shoes,¹⁵³ and metallurgy.¹⁵⁴ Armenia's landscape is dotted with ancient *vishapakars* or dragon-stones, and *khachkars* or cross-stones. The symbol of the cross is sacred and deeply significant to Armenian religion and culture. The shape forms the cruciform plan of Armenia's churches, some of which date back to the beginnings of Christianity. Ambartsuman's discussion of the significance of Armenian cultural heritage greatly contrasted with her summary of the bigoted and antagonistic remarks made by the leaders of Turkey and Azerbaijan.

After the two countries invaded Armenia in 2020, Turkey's president, Recep Tayyip Erdoğan, praised the architect of the Armenian Genocide by saying "may the soul of Envar Pasha be blessed."¹⁵⁵ Turkey, however, continues to claim that the Armenian Genocide never occurred, and imprisons those who allege otherwise.¹⁵⁶ Azerbaijan has a state policy to pursue pan-Turkism with the goal of

¹⁵⁰ See Marc Haber et al., *Genetic Evidence for an Origin of the Armenians from Bronze Age Mixing of Multiple Populations*, EUR. J. OF HUMAN GENETICS (Jun. 2016), ("Our tests suggest that Armenians had no significant mixture with other populations in their recent history and have thus been genetically isolated since the end of the Bronze Age, 3000 years ago.").

¹⁵¹ *Id.*

¹⁵² See James Owen, *Earliest Known Winery Found in Armenian Cave*, NAT'L GEOGRAPHIC (Jan. 12, 2011), <https://www.nationalgeographic.com/culture/article/110111-oldest-wine-press-making-winery-armenia-science-ucla> [<https://perma.cc/2WHV-EY5V>].

¹⁵³ See Kate Ravilious, *World's Oldest Leather Shoe Found—Stunningly Preserved*, NAT'L GEOGRAPHIC (Jun. 11, 2010), <https://www.nationalgeographic.com/culture/article/100609-worlds-oldest-leather-shoe-armenia-science> [<https://perma.cc/YHV7-QNMR>].

¹⁵⁴ See generally Arsen Bobokhyan et. al., *Transition to Extractive Metallurgy and Social Transformation in Armenia at the End of the Stone Age*, in *STONE AGE OF ARMENIA* 283–314 (Kanazawa Univ., 2014).

¹⁵⁵ See *At Baku Victory Parade, Aliyev Calls Terevan, Zangezur, Sevan Historical Azerbaijani Lands, Erdogan Praises Enver Pasha*, ARMENIAN MIRROR-SPECTATOR (Dec. 11, 2020), <https://mirrorspectator.com/2020/12/11/at-baku-victory-parade-with-erdogan-aliyev-calls-yerevan-zangezur-sevan-historical-azerbaijani-lands-erdogan-praises-enver-pasha/> [<https://perma.cc/FL7S-MEGG>].

¹⁵⁶ See Elaine Velie, *Turkish Philanthropist Osman Kavala Sentenced to Life in Prison*, HYPERALLERGIC (Apr. 25, 2022), <https://hyperallergic.com/727114/turkish-arts-philanthropist-osman-kavala-sentenced-to-life-in-prison/> [<https://perma.cc/7V7Z-7YS7>].

forming a single Turkish state.¹⁵⁷ Its textbooks teach students that Armenians are invaders who were brought to the region by Russians and Persians only 200 years ago, and therefore, all Armenian cultural heritage is fake and must be destroyed.¹⁵⁸ Turkey and Azerbaijan hope to connect their two countries, each absorbing part of Armenia's mineral-rich southern region.¹⁵⁹

In 2020, Armenia filed with the International Court of Justice ("ICJ") an application under the Convention for the Elimination of All Forms of Racial Discrimination ("CERD") to enjoin Azerbaijan from destroying Armenian cultural heritage and territory.¹⁶⁰ The ICJ granted the application,¹⁶¹ which allows Armenia to bring the destruction of cultural heritage by Azerbaijan immediately to the attention of the UN Security Council.¹⁶² Nevertheless, Azerbaijan has continued its assault on Armenia. Caucasus Heritage Watch confirmed that, since 1997, Azerbaijan has destroyed 108 Armenian monasteries and the world's largest medieval Armenian cemetery in Julfa.¹⁶³ "Because after all," Ambartsumian explained, "it's much easier to say that the Armenian people never existed in this region once there is no cultural heritage as evidence to speak to."

¹⁵⁷ See Mira Nalbandian, *Azerbaijan Won't Stop at Artsakh*, HARVARD POL. REV. (Jan. 22, 2023), <https://harvardpolitics.com/azerbaijan-wont-stop/>.

¹⁵⁸ Ani Tatoyan, *The Distortion of Historical Facts at the Basis of Azerbaijan's Anti-Armenian Policy*, CTR. FOR TRUTH & JUSTICE (Sept. 12, 2022), <https://www.cftjustice.org/the-distortion-of-historical-facts-at-the-basis-of-azerbajians-anti-armenian-policy/> [<https://perma.cc/H2CP-2FLE>].

¹⁵⁹ Sarah Khojayan & Zulfugar Agayev, *At Least 99 Killed in Worst Azeri-Armenian Clashes in Years*, BLOOMBERG (Sept. 13, 2022, 12:20 AM), <https://www.bloomberg.com/news/articles/2022-09-13/armenia-accuses-azerbaijan-of-attack-as-us-appeals-for-calm?leadSource=uverify%20wall> [<https://perma.cc/AH56-FV9R>].

¹⁶⁰ Press Release, International Court of Justice, *The Republic of Armenia Institutes Proceedings Against the Republic of Azerbaijan and Requests the Court to Indicate Provisional Measures* (Sept. 16, 2021).

¹⁶¹ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Judgment, 2021 I.C.J. 34 (Dec. 7, 2021).

¹⁶² *Id.*

¹⁶³ See Lori Khatchadourian et al., *Silent Erasure: A Satellite Investigation of the Destruction of Armenian Cultural Heritage in Nakchivan, Azerbaijan*, CAUCUS HERITAGE WATCH, 6 (Cornell Univ. 2022) (abridged version); see also Simon Maghakyan, *Emboldened by Ukraine Crisis, Azerbaijan Escalates its War on Armenian Heritage Sites*, HYPERALLERGIC (Feb. 4, 2022), <https://hyperallergic.com/709512/azerbaijan-escalates-its-war-on-armenian-heritage-sites/>.

Amineddoleh asked Ambartsumian what role UNESCO plays in the protection of Armenian cultural sites and whether other international agencies have been asked to intervene. Ambartsumian first replied that the 1954 Hague Convention is aimed at protecting cultural heritage during periods of armed conflict, whereas much of the destruction of Armenian cultural sites occurs during peacetime. Additionally, UNESCO Conventions are organized around the principle of the sovereign equality of states.¹⁶⁴ UNESCO therefore does not protect Armenian heritage located within Azerbaijan's borders. For instance, in 2020, Azerbaijan objected to UNESCO's plans to conduct a fact-finding mission on the state of Armenian cultural sites, and UNESCO was required to honor their demand.¹⁶⁵ Ambartsumian argued that totalitarian states are "exposing the hypocrisy of the world's organizations and their lack of effectiveness."

After the presentations concluded, Amineddoleh asked the panelists how to protect collectors against falsified or forged provenance documents. In particular, she asked McCullough how he advises his high-profile clients to avoid potentially embarrassing seizures or litigation related to their collections. McCullough replied that art market norms have changed, and provenance is scrutinized more than ever. Collectors should therefore attempt to be as diligent as they can, but it is difficult to authenticate historical documents. Some level of risk underlies collecting antiquities. If collectors refuse to buy anything unless its authenticity is undeniable, this could diminish the whole market for antiquities. Amineddoleh, however, raised the issue of "willful ignorance." McCullough acknowledged that some collectors purchase art without regard to where it came from, however there are also inexperienced purchasers who simply do not know what legal exposure they might face in the art market. Kreder observed that, as the market stands, there is a lack of transparency and trust between buyers and sellers when there is no objective third party, arguing that that the market needs an objective

¹⁶⁴ Economic and Social Council Res. 1966/14 Declaration of Principles of International Cultural Co-operation (Nov. 4, 1996).

¹⁶⁵ See Mushvig Mehdiyev, *Azerbaijan Responds to UNESCO's Claims of Karabakh Mission Delay*, CASPIAN NEWS (Dec. 24, 2020), <https://caspiannews.com/news-detail/azerbaijan-responds-to-unesco-claims-of-karabakh-mission-delay-2020-12-24-0/> [https://perma.cc/CVF8-JKDU].

clearinghouse that will review provenance documents, publish examples of legitimate documents for buyers' reference, and identify forged documents to expedite the repatriation process.

An audience member asked whether a person who initially purchases an artifact that was illegally exported from a country in a time of conflict in order to preserve or protect it should be entitled to *quantum meruit* or other expenses when the source country eventually claims it. McCullough replied that most people would not agree to a rule requiring claimants to pay a fee—likely to a wealthy person—when retrieving their stolen property. Kreder added that the concept of bailment might serve as a precedent for reimbursing someone who cared for property for a long period of time. Nevertheless, “the rescue myth is a myth,” she argued. A person who truly bought an artwork to protect it is typically happy to return it. Ameddoleh noted that a country's patrimony laws could provide for payments for those who rescue art, but countries are rarely unwilling to pay out. Kreder added that under civil law, good-faith purchasers are sometimes reimbursed for the purchase price. Ameddoleh noted, however, that it might be impossible to be a good-faith purchaser when acquiring an object concurrently with or shortly after a highly publicized armed conflict.

Kreder asked Ambartsumian for her opinion on what should be done to protect cultural heritage and address looting in times of armed conflict. As a survivor of state-sanctioned ethnic cleansing, Ambartsumian knows that people in a crisis are not thinking about their art or its accompanying documentation; they are simply trying to survive. She agreed with Kreder's stance on reforming the doctrine of laches to make it easier for victims, their children, and their grandchildren to succeed in restitution claims.

Referencing Azerbaijan's destruction of the cemetery Julfa, an audience member asked a related question about how to hold Azerbaijan accountable for its actions. Ambartsumian replied that in 2019, UNESCO was considering placing the cemetery on its list of world heritage sites.¹⁶⁶ Despite disqualifying the cemetery due to its

¹⁶⁶ Simon Maghakyan, *This Year's UNESCO Session Was an Insult to World Heritage*, HYPERALLERGIC (July 9, 2019), <https://hyperallergic.com/508663/2019-unesco/> [<https://perma.cc/L3PD-D54P>].

destruction by Azerbaijan, UNESCO held its World Heritage session for that year in Azerbaijan.¹⁶⁷ Ambartsumian believes that the lack of accountability for Azerbaijan's blatant crimes is part of the reason Armenia sought relief through the CERD Convention. CERD would enable Armenia to seek accountability for the destruction of Armenian cultural sites that Azerbaijan claims are within its borders; however, the application process through the ICJ is lengthy.

Before the Symposium came to a close, Ambartsumian emphasized one last time the importance of *khachkars* to Armenian culture. "For Armenians, we've died over and over and over again for our Christian faith. The cross is such an important spiritual symbol to us . . . It's more than just someone destroying a gravestone. For us, it's really hurting the core of our identity and of our culture."

¹⁶⁷ See *id.*