SEEKING AN EQUITABLE STANDARD FOR TRANSACTIONS IN THE INTERNATIONAL ANTIQUITIES TRADE: A CRITIQUE OF THE 1995 UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

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ABSTRACT

Due to the large-scale nature of antiquities looting and the illicit trade of cultural objects, the property rights of good faith purchasers and original owners are often contentious and difficult to establish. In most instances, resolving the conflicting ownership claims leaves at least one innocent party losing out in the end. In 1995, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects attempted to resolve this by allowing qualified good faith purchasers to receive compensation for returning cultural objects. However, the Convention does not follow through with this provision and instead provides an opt out measure, making it ineffective in practice. Overall, the UNIDROIT Convention's fundamental flaws are that it fails to balance the rights and responsibilities of these two innocent parties in the best way to maximize efficiency and it fails to treat the good faith purchaser as an innocent party. To maximize each party's efficiency and properly incentivize them, the original owner should be held to the same due diligence standard that the good faith purchaser is held to. Furthermore, the good faith purchaser should be treated as an innocent party and compensated fairly, rather than treating them as a thief and demanding restitution.

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I. INTRODUCTION

In October 2017, the New York District Attorney's office seized Helen Fioratti's coffee table that had been in her possession for the last forty-five years.[1] The artifact, turned coffee table, was an intricate mosaic that was found washed up on the shores of Lake Nemi in the nineteenth century, dating

[1] Claudio Lavanga & Saphora Smith, *Artifact from Caligula's Ship Found to be a Coffee Table in New York Apartment*, NBC NEWS (Oct. 20, 2017, 11:14 AM), https://www.nbcnews.com/news/us-news/piece-caligula-s-ship-found-new-york-apartment-n812511.html.

back to Emperor Caligula's reign over the Roman Empire.[2] Caligula had ordered the construction of two enormous ships for lavish parties on Lake Nemi,[3] and the mosaic in question is thought to have originated from these lavish party barges and repatriated as an important part of Roman history.[4] One can imagine how surprised Mrs. Fioratti was when she learned of the origins of the mosaic, which she had mounted on a table top and used as a coffee table since the 1960s. When Mrs. Fioratti purchased the mosaic from an aristocratic Italian family, she had no reason to know that they did not own the piece; even the family thought that they owned the piece.[5] The Fiorattis were completely innocent purchasers and even arranged the transaction through an Italian policeman.[6] Despite paying thousands of dollars for the mosaic itself and for the shipment of the four-foot square piece to New York, Mrs. Fioratti did not intend to fight the repatriation of the antiquity.[7] After consulting with an attorney, who informed her that it could take an upwards of twenty years to litigate, Mrs. Fioratti said, "I'm A, too old and B, too poor [to fight the repatriation]".[8]

In another instance, New York philanthropist Shelby White gave up ten ancient Greek and Etruscan artifacts in 2008 after Italy made requests for repatriation.[9] Ms. White had loaned these artifacts, which were in her private collection, to the Metropolitan Museum of Art (hereinafter "the Met") in New York.[10] While on display at the Met, these artifacts were identified by Italian officials as ones illegally trafficked out of Italy.[11] As it turns out, some of the artifacts could be traced back to an Italian dealer, Giacomo Medici, who was convicted for illegal trafficking in antiquities in 2004.[12] As for the remainder of the artifacts, photographs that showed the artifacts encrusted in dirt[13] were

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[2] *Id.*

[3] *Id.* The Nemi ships were thought to have been sunk by the Roman senate after the overthrow of Caligula. *See* Paul Cooper, *Nemi Ships: How Caligula's Floating Pleasure Palaces Were Found and Lost Again*, DISCOVER MAGAZINE (Nov. 7, 2018, 3:00 PM), https://www. https://www.discovermagazine.com/planet-earth/nemi-ships-how-caligulas-floating-pleasure-palaces-were-found-and-lost-again.html.

[4] Lavanga & Smith, *supra* note 1.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Elisabetta Povoledo, *Collector Returns Art Italy Says Was Looted*, N.Y. TIMES (Jan. 18, 2008), https://www.nytimes.com/2008/01/18/arts/18collect.html.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Antiquities that are encrusted with dirt, or otherwise look like they had been recently unearthed, are big red flags as this is often a sign of a hurried illegal excavation. Artifacts that come from known and legal sources are more carefully disinterred and are generally treated with ore care and cleaned for further study.

seized in 1995 in a raid on Swiss warehouses belonging to Medici.[14] To be clear, Ms. White was never accused of any impropriety. During the arduous, and sometimes bitter, negotiations over these artifacts, Ms. White insisted that she purchased the artifacts in good faith and had no knowledge of their less-than-noble origins.[15] In the hard-fought negotiations, Italian officials agreed to allowed the return of one artifact, the Euphronios vessel, to be delayed for two years before returning it to Italy.[16] In the end, like Mrs. Fioratti, Ms. White received nothing for returning these artifacts to Italian officials despite purchasing them in good faith.[17]

Lastly, even museums face difficulty in ensuring that their acquisitions are safe from claims on the validity of their acquisition.[18] For example, the Met returned a gilded coffin that was looted from Egypt. The Met acquired the coffin in July 2017 from a dealer in Paris for 3.5 million euros, or around $4 million.[19] The New York District Attorney's investigation of this acquisition revealed that the museum was provided with fraudulent documentation about the coffin's history, which included a forged Egyptian export license.[20] The forged export license stated that the coffin had been legally exported from Egypt in 1971; however, in truth, the coffin was originally looted from Egypt in October 2011, in the wake of the Egyptian Revolution.[21] Kenneth Weine, a spokesperson for the museum, stated that the Met planned to take any and all available steps to recover the money lost by this purchase.[22] Ultimately, the likelihood of the Met recovering its cost for this transaction is slim to none since the person who sold the coffin to the Met could be another innocent party. Meanwhile, the actual wrongdoer is likely long gone, or so far down the line that finding him may be impossible. This leaves the Met without any recourse for recovering its costs for this transaction and nothing to show for its purchase.

These few examples represent a much larger class of people who have experienced the harsh inequalities of the antiquities trade when faced

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[14] *See* Povoledo, *supra* note 9.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Colin Moynihan, *Met Museum to Return Prize Artifact Because It Was Stolen*, N.Y. TIMES (Feb. 16, 2019), https://www.nytimes.com/2019/02/15/arts/design/met-museum-stolen-coffin.html.
[19] *Id.*
[20] *Id.*
[21] *Id.* Unfortunately, it is very common for looters to pilfer countries that are embroiled in internal conflict or war because this disrupts a government's ability to adequately protect historic sites and catch the thieves. *See generally* Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245 (2006) (providing historical background on the development of the law of warfare related to cultural sites and antiquities and discussing how the war in Iraq was conducted based on the legal regimes that protected cultural sites and antiquities within the war zone).
[22] Moynihan, *supra* note 18.

with conflicting ownership claims. Individuals, as well as museums and auction houses, are frequently required to restore antiquities to their nation of origin, even though there was no evidence to suggest that they were ever stolen.[23] On the other hand, the nations of origin that have been the victims of artifact looting and theft struggle under insurmountable burdens[24] when bringing a claim for the return of looted antiquities.[25] Nations, as well as museums and individuals, have difficulty proving their claim when seeking the return of stolen antiquities because it is all but impossible to establish ownership as most antiquities have no provenance.[26] An object's provenance

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[23] Such as in Mrs. Fioratti's case, where the Italian family that sold the mosaic thought that they owned it, so all parties believed the transaction was valid. *See also* Lavanga & Smith, *supra* note 1.

[24] One of the main problems is the difficulty in determining which jurisdiction is controlling and therefore which legal regime applies. Looted antiquities can often be tied to multiple jurisdictions, which complicates the question of which laws apply. This largely depends on where the wrongful transaction took place, however, this is often unknown as many antiquities have a long history of being bought and sold after they were stolen. *See generally* Patricia Y. Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 962 (2001).

[25] For example, Greece has been unsuccessful in their attempts to petition Great Britain to return a set of marble friezes that adorned the Parthenon, colloquially called the Elgin Marbles, which were removed from Greece in the early 19th century by Lord Elgin. In this case, a legal claim from Greece for the return of the marbles would be extremely difficult to pursue, since as a preliminary matter, the claim would likely be barred by the statute of limitations, since they have been in Great Britain for nearly 200 years. *See* Renee Maltezou, *Greece Wants Parthenon Marbles Back, Tsipras Tells May*, REUTERS (June 26, 2018), https://www.reuters.com/article/us-britain-greece-marbles/greece-wants-parthenon-marbles-back-tsipras-tells-may-idUSKBN1JM2T6; *see also* Liz Alderman, *Greece Rules Out Suing British Museum Over Elgin Marbles*, N.Y. TIMES (May 14, 2015), https://www.nytimes.com/2015/05/15/world/europe/greece-british-museum-elgin-marbles.html (discussing the Greek culture minister's reluctance to sue for the return of the Elgin Marbles).

[26] More often than not, nations that seek the return of looted antiquities choose to do so through diplomatic channels and negotiation rather than litigation. This is because litigation is simply inaccessible for many nations that are victims of antiquities theft. For example, if Greece did want to sue for the Elgin Marbles, they would likely have to do so in an English court and their claim would need to be proven under English law. This puts the Greeks at a disadvantage, because not only are they less familiar with English law, but also the laws of a nation are generally paternalistic meaning they will favor the nation's interests. This leads to another burden for nations bringing a claim for restitution, which is the expense of hiring attorneys and litigating in a foreign nation. For many would-be claimants, this is the ultimate barrier to litigation since a number of nations rich in cultural artifacts and antiquities have less stable economies due to internal strife, war, of other economic woes. Another hurdle that can cause problems, particularly for claims brought in the United States, is the fact that the laws designed to prohibit importation of looted or illegal antiquities do not apply retroactively. This means that to bring a claim, one must know when it was brought into the United States in order to prove that the law applies and to discern which law of the numerous versions of cultural heritage laws applies to this particular transaction. Furthermore, a claim brought for an artifact that was imported prior to any legal restrictions on its import being in place would fail as there is no legal

is essentially its life story. An object's provenance may begin at the object's origin or discovery and will document the object's history of ownership as it passes from buyer to buyer.[27] An object's provenance serves the important functions of preventing forgeries and evidencing ownership rights.[28]

Transactions for the purchase of antiquities are wrought with inequity and strife. It is unfair to strip a good faith purchaser (hereinafter "GFP") of their rights to an antiquity without any form of compensation. Yet, it is also unfair to strip nations of their cultural heritage through plunder and pillage without allowing them to recover the antiquities that were stolen. Therefore, a balance must be found between the rights of a GFP and those of the dispossessed owner[29] or nation of origin to ensure equitable dealings within the antiquities market, facilitate trade,[30] and prevent theft.[31]

Under the international conventions currently in force, both GFPs and dispossessed owners suffer under unequal burdens that fail to incentivize them to act efficiently. There are two main conventions of international law which apply to the commercial dealings in the antiquities trade. The first convention is the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (hereinafter "UNESCO Convention"), which was enacted by the United Nations Educational, Scientific and Cultural Organization (hereinafter

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basis for the claim based on when it was imported. Even more to this point, knowing when an artifact was imported and being able to prove it may well be impossible given that a large percentage of illegally imported antiquities are illegally excavated, meaning that there is a large time delay in authorities being aware that they are missing. This makes pinpointing the time in which they were imported exceedingly difficult. *See generally* Abby Seiff, *How Countries Are Successfully Using the Law to Get Looted Cultural Treasures Back*, ABA J. (Jul. 1, 2014, 10:40 AM CDT), https://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasur (discussing how it is especially difficult for countries to bring suit for restitution in the U.S. because the National Stolen Property Act requires that they prove that the antiquity was stolen within the nations boarders and what legal regime was in place at the time of the theft).

[27] *See* Leo Caffaro, *What's Yours is Mine: Issues in Private Legal Disputes Regarding Title of Stolen Art and Artifacts*, 8 APPEAL 46, 49 (2002); *see also* Lisa J. Borodkin, *Note: The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 383 at n. 40 (1995).

[28] *See* Derek Fincham, *Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 SYRACUSE J. INT'L L. & COM. 145, 153 (2010).

[29] Nations, as well as individuals, and museums can be dispossessed owners by claiming ownership under of national heritage laws.

[30] Since it is impossible to halt the trade of antiquities altogether, the antiquities trade should be allowed to continue but on a legal basis. *See* Fincham, *supra* note 28, at 149 (discussing how prohibitionism (i.e., restricting the supply) will only make the illegal trade of antiquities more profitable).

[31] Theft of antiquities can occur in a number of forms. Antiquities may be stolen form museums or private owners, exported contrary to the laws of its home nation, and through the illegal excavation of antiquities that have yet to be discovered.

"UNESCO") in 1970.[32] This Convention sets out a narrow definition of "cultural property"[33] and proscribes different measures that member nations should take to protect their cultural property.[34] However, this Convention was limited in its usefulness, in part due to its narrow definition of cultural property, since it unintentionally excluded undiscovered antiquities from its definition. This led to the creation of the second convention, the Convention on Stolen or Illegally Exported Cultural Objects (hereinafter "UNIDROIT Convention"), which was implemented by International Institute for the Unification of Private Law (hereinafter "UNIDROIT") in 1995.[35] A major feature of the UNIDROIT Convention is its attempt to compensate GFPs[36] who acted diligently in their transactions, in exchange for the restitution[37] of an antiquity to the dispossessed owner. Many believed that the UNIDROIT Convention could affect serious change in the antiquities trade by providing recourse for GFPs to be indemnified.[38] However, in reality, the UNIDROIT Convention suffers from several weaknesses that hinders its effectiveness. A truly equitable standard for determining the ownership rights between GFPs and dispossessed owners may be impossible due to the complex and multifaceted nature of international antiquities transactions as a whole. Regardless, this Article sets out to formulate a more equitable solution than what had been proposed by the UNIDROIT Convention, as the UNIDROIT Convention fails to balance the conflicting rights of the dispossessed owner and GFP to achieve an equitable result.

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[32] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

[33] *Id.* art. 1; *see* Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, 1 UNIF. L. REV. 59, 62 (1996) (comparing how the UNESCO Convention's definition of cultural property makes it necessary for cultural objects to be designated by the state with the UNIDROIT Convention's definition which does not have this limitation).

[34] UNESCO Convention, s*upra* note 32, art. 1.

[35] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, art. 2, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention] (defining cultural objects as "those which, on religious or secular grounds, are of importance for archeology, prehistory, literature, art or science and belong to one of the categories listed in the Annex to this convention").

[36] *Id.* art. 4(1) ("The possessor of a cultural object required to return it shall be entitled . . . to payment of fair and reasonable compensation . . .").

[37] *See* RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT §1(a) (AM. L. INST. 2010) (defining the liability for restitution as "deriv[ing] from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant").

[38] *See, e.g.*, Ian M. Goldrich, Comment, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 FORDHAM INT'L L.J. 118, 159-61 (1999) (arguing that the United States should implement the UNIDROIT Convention because it "strikes the proper balance between the noble cause of repatriation and the interests of bona fide purchasers").

The four important questions that determine whether the UNESCO and UNIDROIT conventions apply are: who, what, when, and where. Both Conventions are only applicable to claims brought by nations that have ratified the conventions; these Conventions do not apply to claims from individual persons, or from nations which had not yet ratified the Conventions.[39] Because more nations have signed on to the UNESCO Convention than the UNIDROIT Convention, the UNESCO Convention is more widely used than the UNIDROIT Convention.[40] The UNIDROIT Convention only applies to items that fall within its definition of "cultural objects,"[41] while the UNESCO Convention only applies to items that fall within its definition of "cultural property,"[42] meaning that anything which falls outside of these two narrow definitions is outside of the scope of the Conventions. Furthermore, a claim brought under either of these Conventions may be barred if it is made after the applicable statute of limitations has lapsed.[43] Lastly, if the claim is brought by an individual in a nation that has not signed on to the Conventions, the courts of that nation are not necessarily required to apply the Conventions and may instead rely on their own legal tradition. This means that the use and applicability of either Convention is relatively narrow in scope.

In brief, this Article will argue that the UNIDROIT Convention fails to adequately balance the needs of the GFP with those of the original owners or nations of origin. The UNIDROIT Convention fails to consider equity or efficiency when meting out the differences between two innocent parties. Part II of this Article provides background on the laws governing transactions of antiquities by first outlining the diversity in laws regulating the antiquities trade, and then comparing the international conventions that seek to regulate the antiquities trade. Part III analyzes the shortcomings of the UNIDROIT Convention by looking at the effects and causality of each issue, which

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[39] *See generally* UNIDROIT Convention, *supra* note 35; UNESCO Convention, *supra* note 32.

[40] *See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) – Status*, UNIDROIT, https://www.unidroit.org/status-cp (last updated Dec. 2, 2019) [hereinafter UNIDROIT Convention Status]; *see also United Nations Educational, Scientific, and Cultural Organization, Illicit Trafficking of Cultural Property, States Parties*, UNESCO, https://en.unesco.org/fighttrafficking/1970 (last visited March 23, 2019).

[41] UNIDROIT Convention, *supra* note 35, art. 2 ("[C]ultural objects are those which, on religious or secular grounds, are of importance for archeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.").

[42] *See* discussion of undefined or inadequately defined terms *infra* Section II.B. The definition of "cultural property" in the UNESCO Convention requires that the object be designated as cultural property by the State. *See* UNESCO Convention, *supra* note 32, art. 1. This unnecessarily restricts the scope of the convention since not-yet discovered objects or illegally excavated objects could not be designated as cultural property by the state, which is required for them to be protected by the UNESCO Convention. *See id.*

[43] *See* UNIDROIT Convention, *supra* note 35, at art. 3; *see generally* Patricia Y. Reyhan, *supra* note 24, at 977-1003 (discussing the complications that arise in art and antiquity related disputes regarding statute of limitations determinations).

prevent it from making meaningful contributions to the prevention of the inequitable consequences of transactions in the antiquities trade. Part IV discusses three proposed solutions to combat the inequities in the antiquities trade for both the GFP and the dispossessed owner.

II. BACKGROUND

A. Diversity in Laws Regulating the Antiquities Trade

When purchasing antiquities on the market, GFPs often have no way of knowing that their purchased item was stolen since few antiquities have a provenance[44] that would list past owners. In fact, with antiquities, this problem becomes even muddier[45] as the provenance or history of ownership of antiquities can span centuries, and many times the provenance of an antiquity is largely unknown.[46] Additionally, if the good or item that they are purchasing was stolen, GFPs have little to no recourse against the original thief, since the thief is normally long gone by the time their crimes come to light.[47] For the same reason, dispossessed owners are also unable to seek remedy from the true wrongdoer, or the thief.

Almost all legal systems follow some form of the Latin maxim *nemo dat quod non habet*, meaning one cannot give what one does not have.[48] This means that a thief will never be able to give good title because he never had good title himself. Thus, if a thief sells to an auction house, which in turn sells to a GFP, the end purchaser would not acquire good title because the thief could not pass good title. This rule ignores the good faith dealings of a GFP and treats them no better than the original thief. Arguably, GFPs are treated worse under this rule than a thief. Where the thief has lost nothing, the GFP

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[44] *See* Seiff, *supra* note 26 (discussion of provenance); s*ee also* Caffaro, *supra* note 27, at 49 (defining provenance as the history of an object going back to its origin including all subsequent transactions); *see also* Fincham, *supra* note 28, at 153-55 (citing several studies which demonstrate that the vast majority of antiquities on the market have little to no provenance listed). This makes it especially difficult for GFPs to know anything about the art and antiquities they are purchasing. *See id.*

[45] For example, imagine if we had a complete provenance for a Greek krater dating back to the early Iron Age, around 1000 B.C. Let's say this krater had three owners until the 15th century at which time it was lost for a time due to an earthquake. Upon its rediscovery by a tourist in the late 19th century, it was brought to the United States for resale. It was then sold to the Metropolitan Museum of Art in 1890. Since then, a private collector purchased it in 2005. In this problem, can you spot the thief? If Greece sues the private collector for ownership, what is the result?

[46] Caffaro, *supra* note 27, at 49.

[47] *See* Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1338 (2011) (discussing how the only parties we are concerned with in these transactions are the original owner and the ultimate purchaser because the "thief is commonly judgment-proof and seldom can be found").

[48] *Id.* at 1335.

has lost his payment for the good that has now been taken and is ultimately left worse off than he was before he purchased the good. To make the matter more complex, nations around the globe differ as to what exceptions should apply to this general theft rule, if any.[49]

In common law legal systems, such as the United States or the United Kingdom, the General Theft Rule states that a GFP cannot get good title to an antiquity if it had been stolen, regardless of the purchaser's good faith. However, there are two well-known exceptions that would allow for passage of good title to the purchaser in common law systems despite the item being stolen. The first exception occurs where the "true owner," or the last person with good title, entrusts the goods to someone with the purpose of selling those goods, and the goods were then sold without the true owners' permission.[50] For example, say the owner of a piece of artwork takes the artwork to a dealer to sell, stating that she will take no less than five million dollars for it. If the dealer then sells the artwork for one million dollars, there is nothing that the owner can do to get the artwork back from the purchaser, even though it was sold for much less than she intended. The second exception occurs where the true owner is deceived or defrauded by someone who then sells the item to a GFP.[51] For example, say an unwitting owner of a piece of artwork goes to an appraiser to find out its worth, and the unscrupulous appraiser lies to the owner saying that the artwork is worth very little and offers to take it off their hands. If the appraiser turns around and sells it for quadruple the value, the owner can do nothing to get the piece of art back, even though they were defrauded into thinking it was worth very little. In these instances, it makes sense to allow the GFP to keep what they purchased in good faith because they are innocent and often unaware of any wrongdoing.

Outside of these two exceptions, only an expired statute of limitations could cause the dispossessed owner to lose in a claim for restitution.[52] Otherwise, the dispossessed owner will always win over a GFP of stolen

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[49] *See generally* Schwartz & Scott, *supra* note 47 (indexing seventeen different nations' rules and exceptions to the GFP issue).

[50] U.C.C. § 2-403(1) (AM. L. INST. & UNIF. L. COMM'N 1977) (amended 1988) ("A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though a) the transferor was deceived as to the identity of the purchaser, or b) the delivery was in exchange for a check which is later dishonored, or c) it was agreed that the transaction was to be a "cash sale", or d) the delivery was procured through fraud punishable as larcenous under the criminal law.").

[51] *Id.* The reasoning behind these exceptions is that unlike in the case of a true theft, here the owner voluntarily relinquished ownership with the intention of giving the other person a right to the goods.

[52] *See also* Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49 (1995) (further discussing the problems involving statute of limitations in antiquities claims).

goods. In the end, the GFP is dispossessed of his goods, loses the price paid for the goods, and incurs expenses such as attorney's fees , if the claim is litigated, and any other expenses incurred along the way.[53] Since common law systems consider the GFP to have been unjustly enriched at the claimant's expense, the GFP would get no compensation despite their innocence.[54]

In civil law systems, however, such as France or Italy, having the GFP return the antiquity without compensation would amount to spoliation.[55] Spoliation is wrongfully taking something from someone or depriving them of something they have a right to. In other words, these countries interpret making the GFP return the antiquity without compensation as taking a benefit that properly belongs to the GFP.[56] In civil law systems, the market overt exception applies to the General Theft Rule. According to this exception, if a merchant dealer sells stolen goods to a bona fide (i.e., good faith) purchaser for value, good title will be passed to the GFP.[57] So long as the GFP bought from a merchant, they would have superior title over the dispossessed owner.[58] While cases of entrustment and fraud are rare in the antiquities market, transactions falling under this exception are not. Due to the way the antiquities trade functions, with the vast majority of antiquities sold at auctions with no provenance,[59] this exception strips dispossessed owners of their rights to their stolen antiquities. For example, auction houses like Christie's and Sotheby's are famous for auctioning off antiquities, the majority of which have no provenance.[60] By funneling possibly stolen antiquities through auction houses, those dispossessed of the antiquities will not be able to make a claim for them since the GFP has gained good title through their purchase at the auction if the market overt exception applies.

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[53] For example, the Fiorattis paid several thousand dollars for the mosaic, paid to have it shipped from Italy, paid to have it made into a coffee table, and attached significant sentimental value to the piece after owning it for almost half a century. *See* Lavanga & Smith, *supra* note 1.

[54] *See* RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT, *supra* note 37.

[55] *See* Schwartz & Scott, *supra* note 47, at 1372; *see also* Marina Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, 6 UNIFORM L. REV. 476, 514-16 (2001).

[56] *Spoliation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[57] Schwartz & Scott, *supra* note 47, at 1335-36.

[58] *Id.*

[59] *See, e.g.*, Neil Brodie, *Auction Houses and the Antiquities Trade*, *in* INTERNATIONAL CONFERENCE OF EXPERTS ON THE RETURN OF CULTURAL PROPERTY 71 (Suzanne Choulia-Kapeloni ed., Athens Archaeological Receipts Fund 2014) ("Auction houses operate as merchants under a market overt exception. This makes them a prime source of stolen or illegally exported goods because many auction houses operate on a 'don't ask, don't tell' basis of provenance.").

[60] *Id.*

1. Export Versus Import Nations

Nations rich in art and antiquities, such as Egypt and Italy, are considered "export" nations because they are the source of the antiquities that are legally and illegally traded on the world market.[61] On the other hand, nations like the United States, Canada, and much of Europe are considered "import" nations as they are the largest importers of the antiquities on the market.[62] For these purposes, the dispossessed owners can be private owners, museums, or more commonly, the export nation from which the antiquity originated. While generally the GFP is from an import nation.

The incentives for import nations and export nations to participate in a Convention are fundamentally different due to their differing interests in the antiquities trade. For instance, litigation over ownership claims is more likely to be brought in an import nation as they are most commonly where the end purchaser lives. On the other hand, export nations need much stronger protections for their cultural objects, as well as assurances that they can seek the return of their cultural antiquities. To be effective, a regulatory framework for the antiquities market must balance the needs of the export nations against those of the import nations to provide incentives for participation from both parties.

2. Contrasting Two UNIDROIT Convention Member Nations

Countries interpreting the UNIDROIT Convention have broad discretion to make laws which suit their legal system and traditions. Often times, nations known for their abundance of preserved artifacts and antiquities are proactive about protecting their cultural heritage. For instance, Italy is extremely rich in preserved antiquities and is known to have strong ties to its cultural heritable. Therefore, it is no surprise that Italy is known for its stringent laws favoring the restitution of cultural objects.[63] On the other hand, Switzerland is not normally associated with being rich in antiquities and is not as steeped in cultural heritage as Italy is. Thus, it makes sense that Switzerland

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[61] The terms "import nation" and "export nation" are synonymous with "market nation" and "source nation". The terms import and export are generally less inflammatory to potential bias. *See* Borodkin, *supra* note 27, at 385 n.50 (describing the confusing nature of how nations are characterized by their resources and the biases that these characterizations create.); *see also* Jane Warring, *Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 233 n. 32 (2005) (discussing the controversy of the terms "market" and "source").

[62] *Id.*

[63] *See* Dante Figueroa, *Italy: New Code of Cultural Heritage and Landscape*, LIBR. OF CONG. (May 20, 2016), http:// www.loc.gov/law/foreign-news/article/italy-new-code-of-cultural-heritage-and-landscape.

has less strict laws protecting antiquities and is a known safe haven for antiquities thieves because of its laws favorable to GFPs.[64]

Switzerland's statute of limitations to bring a claim for restitution of antiquities begins running on the date of loss, barring the dispossessed owner from bringing a claim before they even get a chance to locate their goods.[65] The statute of limitations period is only five years in Switzerland,[66] so many merchants that deal with stolen antiquities will store them in a bank for five years, ensuring that no claim for restitution will be successful. Additionally, Swiss law requires the dispossessed owner to indemnify the GFP before he may reclaim possession of his goods.[67] This may prevent dispossessed owners from bringing a claim if they believe that they will not be able to pay the compensation required for restitution.

Like most other civil code systems, Italian law dictates that dispossessed owners must compensate the GFP when they return cultural objects to the dispossessed owner.[68] Additionally, Italy has one of the most buyer-friendly market overt exceptions to the traditional *nemo dat quod non habet* rule, allowing a GFP to acquire title through possession.[69] On the other hand, Italy has eliminated the statute of limitations on cultural property that has been removed from Italy, allowing the dispossessed owner to bring a claim for restitution at any point in time.[70] This is clearly illustrated in Mrs. Fioratti's case, where she had the artifact for forty-five years before Italy claimed possession. Additionally, the Italian government claims ownership of all cultural objects and can compel private owners of legally protected cultural property to carry out conservation projects or relinquish the property to a museum for better care.[71] Finally, the Italian definition of cultural property is extremely broad. It encompasses all works of living authors that are more than fifty years old and all creations that are more than seventy years old.[72] It is clear that within the antiquities trade, there is much diversity as to how a GFP may obtain good title.

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[64] *See* Geoffrey R. Scott, *Spoliation*, *Cultural Property, and Japan*, 29 U. PA. J. INT'L L. 803, 867 n.225 (2008) (discussing how Swiss law favors good faith purchasers); *see also* Michele Kunitz, Comment, *Switzerland and the International Trade in Art and Antiquities*, 21 NW. J. INT'L L. & BUS. 519, 531 (2001).
[65] Caffaro, *supra* note 27, at 51.
[66] *See* Kunitz, *supra* note 64, at 534.
[67] Caffaro, *supra* note 27, at 51.
[68] Decreto Legislativo 22 gennaio 2004, n.42, G.U. Feb. 24, 2004, n.45, art. 79(2) (It.).
[69] Schwartz & Scott, *supra* note 47, at 1372-73, n.137.
[70] D.Lgs. n. 42/2004, art. 78(3) (It.).
[71] *Id.* art. 34, 43, 44.
[72] *Id.* art. 10(5).

B. A Comparison of International Conventions that Seek to Regulate the Antiquities Trade

In this section, we will look to the legal regimes that predate the UNIDROIT Convention, and more specifically how they shaped the framework of the UNIDROIT Convention. The goal of the UNIDROIT Convention was to overcome the gaps that led to the downfall of its predecessors. While the UNIDROIT Convention was able to overcome some of the flaws of previous legal regimes, it still has gaps and flaws that render it ineffective at balancing interests in title disputes and regulating the antiquities market.

To begin, the UNESCO Convention demonstrated an enormous shift from its predecessors' focus on wartime protections[73] to protections for antiquities outside of conflict.[74] The UNESCO Convention begins by specifically defining cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archeology, prehistory, history, literature, art or science" and falls under one of the eleven categories of cultural property listed.[75] Commentators have noted, however, that this highly specific definition limits its scope to items specifically designated by the state.[76] This leaves undiscovered or privately owned antiquities unprotected by the Convention because they do not fall within the definition of cultural property.[77]

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[73] *See, e.g.*, Katherine Novak, *Antiquities, War, and International Law: The Role of International Law in Protecting Looted Antiquities During Armed Conflict*, 9 GEO. MASON J. INT'L COM. L. 326 (2018) (further discussion regarding wartime regulations on cultural heritage).

[74] *See generally* UNESCO Convention, *supra* note 32, art. 1.

[75] *Id.* ("a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objections of paleontological interest; b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance; c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; d) elements of artistic or historical monuments or archaeological sites which have been dismembered; e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; f) objects of ethnological interest; g) property of artistic interest, such as: i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); ii) original works of statuary art and sculpture in any material; iii) original engravings, prints and lithographs; iv) original artistic assemblages and montages in any material; h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; i) postage, revenue and similar stamps, singly or in collections; j) archives, including sound, photographic and cinematographic archives; k) articles of furniture more than one hundred years old and old musical instruments.").

[76] *See* Goldrich, *supra* note 38, at 137-38.

[77] *See id.* at 137-39.

The UNESCO Convention is also criticized for exclusively allocating the benefits of the Convention to export nations rich in antiquities, while the burdens fall on the major art-importing nations.[78] Importing nations are generally the forum in which claims for restitution are brought because its citizens are more likely to be GFPs, meaning the import nation bears the transaction costs of the claims. Thus under the UNESCO Convention, the import nation bears the burden of the high transaction cost of litigation, as well as the burden on its courts, while the exporting nations receive all of the protections. This could explain why many importing nations, whose citizens bear the heaviest burden under the Convention, have not signed on to the UNESCO Convention.

Despite its criticisms, the UNESCO Convention outlines methods of national protection for cultural property and mandates that parties to the Convention should enact export controls to prevent the illegal exportation of cultural property.[79] Also, the UNESCO Convention encouraged its member nations to give appropriate publicity to the theft of cultural objects[80] in hopes of finding them once again. However, the UNESCO Convention is ultimately ineffective due to its inability to protect undiscovered cultural objects and effectively regulate the market.[81] For example, under the UNESCO Convention, antiquities that are illegally excavated without the nation of origin's knowledge, are entirely outside of its scope. Since this is unfortunately a common practice among antiquities traffickers, a large portion of the illegal antiquities trade is ignored under the UNESCO Convention.

In 1992, the Charter of Courmayeur (hereinafter "Charter")[82] was developed while the drafting of the UNIDROIT Convention, which would come into effect just three years later, was contemplated. The Charter made recommendations with the intention of providing a guide for the drafting of the UNIDROIT Convention to avoid the shortcomings of its predecessor, the UNESCO Convention.[83] One of its recommendations was the creation of inventories of cultural objects and their patrimony to facilitate the restitution of cultural antiquities.[84] For this, the Charter recommended a public register that would "identif[y] by categories" the antiquities and link them to their possessors.[85] Additionally, the Charter explained that "friendly settlement" or binding arbitration to reclaim cultural property should be preferred over

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[78] *See* Borodkin, *supra* note 27, at 389.
[79] *See* UNESCO Convention, *supra* note 32, art. 6.
[80] *See* Warring, *supra* note 61, at 250.
[81] *See* Goldrich, *supra* note 38, at 138.
[82] *Charter of Courmayeur*, UNESCO, http://www.unesco.org/culture/laws/courmayeur.html (last updated Aug. 23, 2001) [hereinafter *Charter*].
[83] *See generally id.*
[84] *Id.*
[85] *Id.*

litigation to save in time and expense.[86] This may look similar to Ms. White's case, in which she negotiated with Italian officials and was able to come to an agreement that allowed her to keep the Euphronois vessel for two years before returning it to Italy. Coming together and having these kinds of negotiations for a "friendly settlement," as the Charter recommends, allows for creative solutions that may be more equitable to both parties. Had the UNIDROIT Convention included these recommendations, it may have profited from them.

Finally, when the UNIDROIT Convention came into effect in 1995,[87] many believed that it would distribute its benefits more fairly because there of a provision that allowed GFPs to receive compensation for restitution.[88] In part, this assessment was made based on the generous language in Article 4(1) which says:

> …the possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew or ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.[89]

On its face, Article 4(1) would grant just compensation to GFPs as long as they can prove that they had no knowledge that the antiquity was stolen, and that they were diligent in their purchase.[90] Here, the GFPs' burden of proving that they exercised due diligence is much higher than any burden that a dispossessed owner has to prove in searching for stolen antiquities.[91] The Convention justifies the unequal burdening with the argument that any negligence on the claimant's part only affects the claimant.[92] However, negligence on the buyers' part would perpetuate the theft and make it more difficult for the claimant to recover.[93] This argument is illogical because when the claimant does not diligently search for stolen antiquities, the chances of finding the thief is decreased and the GFP is allowed to become more attached to the antiquity, making the restitution more difficult. Next, the UNIDROIT Convention defines due diligence in Article 4(4) as:

> In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other

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[86] *Id.*
[87] *See generally* UNIDROIT Convention, *supra* note 35.
[88] *See* Warring, *supra* note 61, at 253.
[89] UNIDROIT Convention, *supra* note 35, art. 4(1).
[90] *Id.*
[91] *See* Schneider, *supra* note 56, at 516.
[92] *See id.*
[93] *Id.*

> relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstance.[94]

The two main components of this definition give regard to all the circumstances of the acquisition, including any other steps that a reasonable person in the same circumstances would have taken. This makes each determination very dependent upon the unique facts of each case, leaving it to courts to decide what constitutes due diligence.[95]

Even after proving that they were unaware that the antiquity was stolen and that they exercised due diligence in the transaction, GFPs may still be left without any compensation. Under Article 9(1) of the UNIDRIOT Convention, nations may apply any rules more favorable to the restitution of cultural objects.[96] The explanatory report clarifies this by saying that legal systems that make restitution of cultural objects without paying compensation are free to withhold compensation from GFPs under Article 9.[97] This grants member nations free reign to disregard the requirement of compensation made in Article 4.

III. THE SHORTCOMINGS OF THE UNIDROIT CONVENTION PREVENT IT FROM MAKING MEANINGFUL CHANGES IN THE INEQUITIES OF THE ANTIQUITIES TRADE

A. Lack of Participating Nations

There are far too few nations that have become a party to the UNIDROIT Convention for it to be an effective governing standard in the antiquities trade. At this time, there are only forty-eight nations[98] that have become signatories to the UNIDROIT Convention, most of which are export nations (i.e., rich in cultural objects).[99] However, by comparison, 140 nations have ratified the UNESCO Convention, a number of which are importing nations, including the United States.[100] Thus, in terms of effectiveness on an

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[94] *See* UNIDROIT Convention, *supra* note 35, at 4(4).
[95] *See* Schneider, *supra* note 55, at 520-22.
[96] UNIDROIT Convention, *supra* note 35, art. 9(1).
[97] *See* Schneider, *supra* note 55, at 514-16.
[98] UNIDROIT Convention Status, *supra* note 40.
[99] *See supra* commentary accompanying note 61.
[100] *United Nations Educational, Scientific, and Cultural Organization, Illicit Trafficking of Cultural Property, States Parties*, UNESCO, https://pax.unesco.org/la/convention.asp?order=alpha&language=E&KO=13039 (last visited Jan. 5, 2021).

international scale, the UNIDROIT Convention does not have enough participation from larger importing nations[101] to be truly effective.

Due to the UNIDROIT Convention's lack of signatories, it has been largely inapplicable in legal battles for restitution of cultural objects, since at most one party is a signatory to the Convention in most cases. For example, the case of *Iran v. Barakat Galleries, Ltd.*, the UNIDROIT Convention was not applied because between the two parties, only Iran was a signatory to the Convention.[102] In this case, Iran sought the return of a number of carved jars, cups, and other vessels from the possession of Barakat Galleries because these items were illegally excavated from its Jiroft region.[103] However, Barakat Galleries disagreed about the origins of these antiquities.[104] Barakat Galleries argued that even if these antiquities originated from Iran, they had good title to them because they were purchased in Germany, France, and Switzerland, which all employ the market overt exception.[105] In its deliberations, the court specifically looked to Article 3(2) of the Convention, which allows a contracting state to request the court of another contracting state to order the return of a cultural object.[106] However, the court did not substantively apply the UNIDROIT Convention because the United Kingdom had not ratified the Convention, and specifically noted that "it has not been ratified by many potentially importing countries."[107]

The involvement of import nations is fundamental in effectively combating the illicit trade of cultural objects and, more specifically, in remediating the inequalities currently faced by GFPs and dispossessed owners. The lack of involvement, from importing nations in particular, causes problems because the Convention can only regulate the "source," but not the "market."[108] Without regulating the market, the demand for antiquities will simply increase because closing off the source will only raise the market value of the antiquities. At some point, the value of the antiquities will outweigh the

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[101] *See* UNIDROIT Convention Status, *supra* note 40.

[102] *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited* [2007] EWCA (Civ) 1374 [161] (Eng.) [hereinafter *Iran v. Barakat Galleries, Ltd.*]; *see also* Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J. L. & ARTS 111, 118-21 (2008) (discussing how *Iran v. Barakat Galleries, Ltd.* was a watershed moment for U.K. heritage law in that it established that English courts will recognize foreign ownership claims, even when they are not specified, as long as the public law of the foreign state grants rights to the nation similar in nature to the ownership requirements under English law).

[103] *See Iran v. Barakat Galleries, Ltd., supra* note 102, at [4].

[104] *Id*. at [5].

[105] *Id.*

[106] *Id.* at [161]; *see also* UNIDROIT Convention, *supra* note 35, art. 3(2).

[107] *Iran v. Barakat Galleries, Ltd., supra* note 102, at [161].

[108] *See* Fincham, *supra* note 28, at 148; *see also* John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 848 (1986) (describing how when export controls are tight there is more pressure to form an illicit market).

risks involved with obtaining them and black-market trade will occur.[109] Thus, as long as the market remains unregulated, the underground market for stolen antiquities will continue to thrive despite heightened protections.

Next, the UNIDROIT Convention's lack of import nation signatories could be attributed to how it primarily protects the interests of export nations, thereby alienating powerful import nations. The Convention's mandatory restitution of cultural objects[110] is primarily beneficial to export nations and burdens import nations with the requirement of returning cultural objects.[111] However, conversely, the protections provided for GFPs are fundamentally weak and since most GFPs reside in importing nations, the incentives for those nations to adopt the UNIDROIT Convention are slim.[112]

Finally, it should be noted that the majority of the signatory nations to the UNIDROIT Convention are civil law nations,[113] whereas a number of large importing nations that have not signed on to the Convention, such as the United States, Canada, the United Kingdom, and Australia, are common law nations.[114] In fact, of the forty-eight nations that have signed on to the Convention,[115] Zambia, Pakistan, and New Zealand are the only pure common law nations to have signed on while an additional seven nations are considered common law mixed nations.[116] This disparity is indicative of a convention that is favored by civil law legal systems as opposed to common law legal systems.[117]

B. Undefined Terms and Lack of Specificity for Defined Terms

The UNIDROIT Convention gives inadequate definitions for two terms relating to the relationship between GFPs and dispossessed owners.

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[109] *See* Merryman, *supra* note 108, at 848.
[110] *See* UNIDROIT Convention, *supra* note 35, art. 3(1).
[111] *But see* Schneider, *supra* note 56, at 500 (stating that "from the outset, it has been realized that the goal should be to reconcile two equally legitimate interests: that of the person [usually the owner] dispossessed of a cultural object by theft and that of a good faith purchaser of such an object").
[112] Despite the goals stated in the Explanatory report, in practice, the UNIDROIT Convention has yet to have a recorded case of compensation being given for restitution.
[113] *See* UNIDROIT Convention Status, *supra* note 40; *see also* University of Ottawa, *Common Law Systems and Mixed Systems with a Common Law Tradition*, JURIGLOBE, http://www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php (last visited April 28, 2019) [hereinafter JuriGlobe].
[114] *See generally id.*
[115] *See* UNIDROIT Convention Status, *supra* note 40.
[116] *See* JuriGlobe, *supra* note 113.
[117] *But see* Schneider, *supra* note 55, at 502 (stating that "the prime objective was to curb illicit trafficking, not by favoring the solution offered by one legal system over another, but by formulating minimal rules that would leave room for the application of more favorable treatment").

Specifically, the UNIDROIT Convention references the term "due diligence" and "fair and reasonable compensation"; however, the definition of these terms is vague at best.[118] To be most effective, the UNIDROIT Convention must define these important terms with specificity so that the Convention can be applied as intended. By specifically defining terms that would otherwise be too broad, the Convention could also eliminate the possibility that its members may apply the same term in a different fashion. After all, international conventions are meant to bring uniformity to regulations and provide guidance to its members as to how to handle specific issues. If fundamental terms are not defined, or if the given definition of these terms is too broad, the meaning of the Convention could be different depending on the readers' interpretation of those terms.

First, in order for a GFP to be eligible for compensation upon returning an antiquity, they must be able to prove that they "neither knew nor ought reasonably to have known that the object was stolen *and* can prove that it exercised *due diligence* when acquiring the object."[119] However, the UNIDROIT Convention fails to adequately define due diligence in a way that would provide clear guidance to a court when determining for how the actor must act with due diligence. The UNIDROIT Convention, in Article 4(4) says that in determining due diligence:

> . . . regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.[120]

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[118] Schneider, *supra* note 55, at 516 (for example, the Explanatory Report defines "due diligence" as "a greater degree of diligence than would usually be expected in a normal commercial transaction," and the convention itself does not truly define "due diligence," despite the Explanatory Report's reference to Art. 4(4) as the definition for "due diligence."); *see also* discussion of Art. 4(4) *infra* notes 120 and 121 and accompanying text; *see also* Schneider, *supra* note 55, at 518 (the definition provided by the Explanatory Report is inadequate because it is vague and uses terminology that is both objective and ambiguous, and regarding the definition of "fair and reasonable compensation," the Convention fails to provide any context for how this is to be measured as the Explanatory Report tells us that this is purposeful, with the intent that parties should rely on the discretion of the court.); *see infra* note 126 and accompanying text (this method is entirely unreliable as a method for determining how much compensation should be paid would drastically vary between nations, between courts, an even potentially, between justices.); *see infra* notes 124-129 and accompanying text (discussing the issues that will arise from leaving "fair and reasonable compensation" undefined).

[119] UNIDROIT Convention, *supra* note 35, art. 4(1) (emphasis added).

[120] *Id*. art. 4(4).

This definition[121] is lacking the purpose by which they should act with due diligence. The Merriam-Webster dictionary defines due diligence as "the care that a reasonable person exercises *to avoid harm to other persons or their property*."[122] This definition tells the reader that the person is to act with due diligence for the purpose of avoiding harm to other persons or their property. The Cambridge dictionary defines due diligence as an "action that is considered reasonable for people to be expected to take *in order to keep themselves or others and their property safe*."[123] With this definition, one's purpose for acting with due diligence is to keep themselves or others and their property safe. If due diligence is defined by a list of actions which show due diligence, it would be difficult to clearly determine if the actor exercised due diligence since a court would not know what the actors' purpose should be. However, by establishing a clear-cut definition, where the actor's purpose clearly defined, courts could readily see whether the person acted with due diligence. For example, if the definition of due diligence was "the reasonable exercise of care to ascertain the objects authenticity," a court could look to any actions taken to ascertain authenticity as acting with due diligence. The information given by the UNIDROIT Convention does not give courts any clarity when determining if a GFP was, in fact, acting with due diligence when he purchased the antiquity.

Another section that is likely cause conflict due to its lack of specificity is the definition for the "fair and reasonable compensation"[124] that may be awarded to GFPs who exercised due diligence in their purchase. The only comment on what exactly the dispossessed owner should pay a diligent GFP is that the compensation must be "fair and reasonable."[125] However, this leaves many possible remedies which may unfairly reimburse the parties. For example, it is possible that "fair and reasonable compensation" could be the price paid by the GFP, the fair market value, or any number of other remedial solutions. The explanatory report notes that "[s]ince the concepts of fair and reasonable are well established in domestic case law, it was felt to be preferable to rely on the discretion of the courts rather than refer to any specific criterion such as the price paid or the commercial value."[126]

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[121] Here, I used the term "definition" loosely, as UNIDROIT Convention Article 4(4) never actually defines the term "due diligence," but rather provides a fact finder with a list of actions to consider to determine whether due diligence has been exercised.

[122] *Due Diligence*, MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/due%20diligence (last visited April 28, 2019).

[123] *Due Diligence*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/due-diligence (last visited April 28, 2019).

[124] *See* UNIDROIT Convention, *supra* note 35, at art. 4(1).

[125] *Id.*; *see also* Schneider, *supra* note 55, at 518.

[126] Schneider, *supra* note 55, at 518.

To ensure uniformity, the UNIDROIT Convention should explicitly declare the type of remedy (e.g., legal remedy, equitable remedy, contract-based remedies, tort-based remedies) and what form of remedy within that type that should be given (e.g., compensatory damages, punitive damages, reliance damages). One concern emphasizing the need for an explicit definition for the form of compensation that ought to be paid to a GFP is the claimant's ability to pay.[127] By not making it clear how much a dispossessed owner ought to give in compensation for restitution, there is an increased risk on the claimant (i.e., the dispossessed owner) that the award of compensation is far greater than they can bear. The explanatory report describes "fair and reasonable compensation" as covering only the possessors' loss of the cultural object, noting that "no specific provision is made for the cost of arranging for the restitution (i.e., transport costs, insurance, etc.)."[128] The Convention does not determinatively state whether the GFP should bear the costs associated with the restitution or whether this is left to the claimant.[129] The Convention's failure to clarify what is to be paid, and by whom, harms both of the parties involved as it can lead to surprise expenses that were not expected. Take, for example, a poor nation that brings a claim for a lost antiquity with the expectation that costs associated with restitution are borne by the GFP, who is halfway across the globe. If the deciding body interprets the Convention to mean that the claimant nation was required to pay for restitution, the poor nation could end up with more expenses than it can handle for the return of its cultural heritage. Leaving compensation undefined may allow courts to look to the relative positions of the parties, such as specifically looking to claimant's ability to pay, to determine which parties should bear expenses and how much compensation is "fair and reasonable." [130] However, this protectionist view only muddles the issue by not providing a bright line for a dispossessed owner to know the expected cost prior to initiating litigation.

C. Lack of Enforcement (of the Convention)

GFPs may not receive any compensation even after meeting their burden of proof with regard to their due diligence because of an exception that grants signatories the ability to opt out of providing compensation.[131] Article 9(1) specifies that "nothing in this Convention shall prevent a Contracting State from applying any rules more favorable to the restitution or the return

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[127] *Id.* (". . . several delegations argued that the claimant's ability to pay should be explicitly referred to [in the Convention].".).
[128] *Id.*
[129] *See id.*
[130] *See generally* Schneider, *supra* note 55, at 518 (making the argument that by not defining compensation, the UNIDROIT Convention gives the courts flexibility in this determination).
[131] *Id.* at 514.

of stolen or illegally exported cultural objects than provided for by this Convention."[132] The explanatory report elaborates that legal systems that make restitution of cultural objects without paying compensation are free to withhold compensation from GFPs under the pretext of Article 9 of the Convention.[133] Perhaps this blanket statement was intended to ensure the Convention did not act as a "maximum" for the level of protection given by contracting states.[134]

While allowing nations to make stricter laws may allow for flexibility, considering the different needs of signatory nations, it is illogical to establish protection for a class of people under one Article and allow signatories to disregard this protection in another Article.[135] This places a huge burden on buyers within the market because it requires them to know the regulations of each individual nation within this Convention. Whereas if the Convention sets uniform regulations that were enforced within each member nation, the guesswork could be eliminated and the buyers would know where they stand. The exemption created by Article 9 becomes especially troublesome when dealing with the compensation afforded to GFPs. Even signatory nations that would compensate GFPs under their legal system, may forego compensation when it is unable to get restitution where it is insolvent and cannot pay the compensation mandated by the court. Logically speaking, when a signatory nation can choose between the option to pay for the return of a stolen antiquity or the option to not to pay for the return of a stolen antiquity, most nations would say that the latter option is the better deal. The explanatory report seems to be taking a leap when they classify withholding the right to compensation as more favorable to restitution.[136] This argument is not logical because, without any form of compensation, GFPs are going to be less cooperative in the restitution process.

D. Inefficient Burdening

Finally, the UNIDROIT Convention does not efficiently balance the burdens placed on the GFPs and dispossessed owners to incentivize them to take actions that will protect antiquities.[137] In its current form, the Convention only places a burden on the GFPs by holding them to a higher standard of due diligence in their dealings.[138] To make the most efficient use of its burdens

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[132] UNIDROIT Convention, *supra* note 35, art. 9(1).
[133] *See* Schneider, *supra* note 55, at 514-16.
[134] *See supra* commentary accompanying note 117.
[135] *See generally* UNIDROIT Convention, *supra* note 35, art. 4(1), 9(1).
[136] *See* Schneider, *supra* note 55, at 546.
[137] *See* Schwartz & Scott, *supra* note 47, at 1338-40.
[138] *See* UNIDROIT Convention, *supra* note 35, at art. 4(1).

and incentives, the Convention must balance its burdens between the GFPs and dispossessed owners, with adequate incentives to ensure compliance.

For GFPs, there should be incentives allocated to encourage them to check the provenance of the cultural objects they purchase.[139] By placing heavy burdens on them to use due diligence[140] in their dealings, while removing the compensation element with Article 9,[141] there is no incentive for GFPs to act diligently. In fact, this may encourage purchasers to get antiquities at a lower price by doing little to no search into its provenance, since there is no legitimate incentive to act in good faith.[142] They may purchase the antiquities illegally and simply hope the dispossessed owner would not discover its whereabouts. Alternatively, if payment of compensation is assured for diligent GFPs, purchasers may inquire more into the provenance of their purchases, since it would be worth their time to do so. This incentive will aid in the elimination of theft and allow a legitimate market for antiquities to thrive.

On the other hand, dispossessed owners must also be incentivized to protect their cultural objects, so that they are less likely to be stolen, and to search diligently for their dispossessed cultural objects.[143] In the UNIDROIT Convention, however, there are no required measures, only recommendations to protect cultural objects from theft whenever possible and practical.[144] Thus, the legal protections granted to antiquities can vary drastically between nations that are parties to the Convention, which causes confusion and complications when a court determines what laws apply.[145] As for the incentives to search for stolen antiquities, the Convention provides a complex statute of limitations period in Article 3.[146] However, the exceptions to the statute of limitations period are very broad, meaning that dispossessed owners

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[139] *See* Schwartz & Scott, *supra* note 47, at 1339 (describing the incentives of the buyer by arguing that the buyer "should invest in ensuring that his title is good until the marginal increase in the probability of receiving a good title times the goods' value to him equals the marginal inquiry cost").

[140] *See* UNIDROIT Convention, *supra* note 35, art. 4(1).

[141] *See id*. art. 9(1).

[142] *See generally* Schwartz & Scott, *supra* note 47, at 1339; *see also* Merryman, *supra* note 108, at 848.

[143] *See* Schwartz & Scott, *supra* note 47, at 1339.

[144] *See generally* UNIDROIT Convention, *supra* note 35.

[145] *See* discussion of two member nations to the UNIDROIT Convention which have implemented drastically different regulations on antiquities *supra* Section II.A.2.

[146] UNIDROIT Convention, *supra* note 35, art. 3(3)-(6) (providing an initial statute of limitations of 3 years from the time the claimant knew the location of the cultural object and 50 years from the time of the theft). In Article 3(4), this was modified in the case of cultural object forming an integral part of an identified monument or archeological site, or belonging to a public collection to only 3 years from the time the claimant knew of the object's location. *Id.* Next, in Article 3(5) any contracting state may declare a statute of limitations of 75 years "or such longer period as is provided in its law. *Id.*

may not be properly incentives to search for their stolen antiquities.[147] By failing to provide adequate incentives to search for lost antiquities, the restitution of antiquities can be made at any time and laziness on the part of the dispossessed owner is encouraged. Thus, it is clear that the Convention has not appropriately allocated the burdens and incentives between GFPs and dispossessed owners.

IV. PROPOSED SOLUTIONS

A. Uniform Compensation for the Repossession of Antiquities from a GFP

Despite its ineffectiveness in some aspects, the UNIDROIT Conventions had the right idea by proposing some form of compensation for diligent purchasers acting in good faith.[148] This solution, if enforced, could act as an incentive for the involvement of importing nations as their citizens are the GFPs that would receive the benefits. Additionally, by providing compensation, the GFPs' innocence can be recognized and they do not need to be punished for the thief's wrong-doings.

In common law legal systems, the remedy of restitution is appropriate when the defendant is found to have been unjustly enriched, or gained a benefit through improper means.[149] Unjust enrichment is defined as "enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective[150] to work a conclusive alteration in ownership rights."[151] In the case of a GFP of an antiquity, restitution is given to the dispossessed owner because the GFP is considered to have been legally unjustly enriched when it received the benefit of having the antiquity.[152] While it may be odd to consider a GFP as unjustly enriched, since they acted in good faith, the GFP did gain the benefit of the antiquity where the dispossessed owner had better rights to it.[153] Since the common law remedy of restitution places an implication of wrongdoing on the party giving restitution, common law systems do not compensate those responsible for

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[147] *Id.*
[148] *Id.* art. 4(1).
[149] *See generally* RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT, *supra* note 37.
[150] *Id.* § 1(b) (describing an ineffective transaction as "one that is nonconsensual" and "Such a transaction may occur when . . . the defendant acquires benefits by wrongful interference with the claimant's rights").
[151] *Id.* § 50(1)(d). Note that the Restatement of Restitution and Unjust Enrichment recognizes that innocent recipients may be involved and that they still must provide restitution for the reasonable value of the benefit received.
[152] *Id.* § 1(b).
[153] *Id.*

giving restitution traditionally.[154] However, refusing compensation based on this argument is fundamentally inequitable and unjust, since the GFP is innocent in the transaction.

One of the problems that comes up when discussing compensation for GFPs is whether the obligation of providing compensation should belong to the dispossessed owner. Since both parties are innocent in this case, it is not necessarily fair to make an innocent dispossessed owner pay for the return of stolen antiquities. Whereas, if an international fund[155] were developed that could issue payment to the GFP as opposed to the dispossessed owner bearing the burden, a more equitable result could be reached. Additionally, nations with common law legal systems may be more inclined to permit compensation in this way,[156] since it places both parties back in the position they would have been in had the antiquity not been stolen.

When dealing with the form of compensation to give GFPs for their return of an antiquity, the most appropriate form of remedy can be found in traditional contract remedies. Contract remedies, as opposed to tort remedies, deal with transaction costs and compensate for losses that can be easily quantified.[157] Tort remedies deal with concepts like "pain and suffering" and punitive damages[158] that compensate for physical injuries and the negligence that lead to those injuries. Tort damages, which take into consideration circumstances outside of the monetary losses, would lead to disparate results if used to compensate GFPs for the return of an antiquity. That is because tort damages assign value to certain injuries based on the individual circumstances of the person involved.[159] For example, an award-winning pianist would be compensated differently for the loss of a finger than an ordinary person. The diversity in compensation, based on individual circumstances makes sense in the case of a personal injury tort. However, in providing compensation to a GFP for returning an antiquity, the goal is to compensate for monetary losses. Since transaction costs and the relative value of the antiquity are of a larger concern in these cases, contract remedies are most appropriate as they are more readily quantifiable and can be applied in a more uniform manner.

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[154] *Id.*

[155] This fund could be created quite easily by creating a 1% tax on the purchase of art, artifacts, and antiquities. Since the international marketplace for art, artifacts, and antiquities accounts for $6 billion annually, a very small tax or fee could easily amount to a large fund. *See* Caffaro, *supra* note 27, at 46 (stating that the international marketplace for art, artifacts and antiquities amounts to $6 billion USD annually when the article was published in 2002).

[156] Common law nations may consider allowing third party compensation as opposed to compensation from the dispossessed owner since the dispossessed owner is an innocent party.

[157] *See* RESTATEMENT (SECOND) OF THE LAW OF TORTS § 901 cmt. a-c (AM. L. INST. 1977) (distinguishing contracts remedies from tort remedies by emphasizing that the purpose of tort remedies is to put the injured person in the position they were in prior to the tort, assert rights where common law is unable, and provide punitive damages).

[158] *Id.* § 901 cmt. c.

[159] *Id.*

Of the many possible forms of contract-based damages, expectation damages, restitution damages, and reliance damages are the most applicable for compensating GFPs for their return of antiquities to the dispossessed owner.[160] First, expectation damages are used to put the nonbreaching party of a contract in the same position they would have been in had the contract been fulfilled as intended.[161] In the context of compensating GFPs, this would be equivalent to giving the purchaser the value of their investment or fair market value.[162] In this context, it would be inappropriate to give expectation damages as compensation to GFPs because fair market value is often much higher than what was actually paid by GFPs for the antiquities they purchased. [163] Additionally, the market value for goods fluctuates too frequently for it to be applied in a uniform manner. Not to mention, it can be difficult to assign a value to antiquities that are one of a kind or priceless. Providing compensation based on expectation damages could compensate the GFP for much more than what they actually paid. In the context of compensating a GFP for the return of an antiquity, using expectation damages would be like paying the GFP for buying stolen antiquities , since they would often make a profit this way.

Next, restitution damages are intended to return money or other goods that were obtained through improper means.[164] For example, restitution is used to return the stolen antiquities to the dispossessed owner because the GFP never obtained good title to the antiquities. This form of remedy would not be appropriate to compensate GFPs since the dispossessed owner was not unjustly enriched in this case, only the seller or thief was.[165] In order to properly give restitution in this case, courts would need to obtain restitution of the GFP's money from the seller or the thief as restitution traditionally is taken from the "wrong-doer" and given to the aggrieved party. If we put GFPs in the place of the aggrieved party, it follows that the wrongdoer is either the seller of the stolen antiquities or the thief. This form of remedy is impractical

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[160] *See* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 344 cmt. a (AM. L. INST. 1981).
[161] *Id.* § 344(a) (describing the promisee's expectation interest as "his interest in having the benefit of his bargain by being put in as good a position as he would have been had the contract been performed").
[162] *See* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS, *supra* note 160, § 344, at cmt. b (explaining that in principle, the expectation interest is based on the subjective parties valuation of the contract, but in reality "his recovery is often limited by the objective standard of market price").
[163] This is because antiquities rapidly increase in value as they age and often can double in value in a short period of time. *See, e.g.,* Caffaro, *supra* note 27 at 46 (describing how the market value of the *philae* had increased fifty-fold by the time it ended up in a private collection).
[164] *See* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS, *supra* note 160, §344(c) (describing the promisee's restitution interest as "his interest in having restored to him any benefit which he has conferred on the other party").
[165] *See generally id.* § 344 cmt. d.

because the original thief, and possibly even the seller, is long gone at the late stage of compensating GFPs for the return of an antiquity to the dispossessed owner.

Finally, reliance damages are intended to put the nonbreaching party in the same position that they were in prior to forming the contract.[166] In the context of compensating GFPs, this would mean paying the GFP for what he had paid for the antiquity, including reasonable incidental expenses [167] damages involved in their purchase of the antiquity. This form of remedy is the most equitable remedy because it returns the parties to their relative starting points had the antiquity never been stolen.[168] Reliance damages are traditionally given to parties who suffer economic losses because they acted in reliance on the other parties promise or obligation which was not fulfilled.[169] This can be directly applied to GFPs since they suffered an economic loss in the payment given for the antiquities. The GFPs suffered this loss because they relied on the implied promise that they would be the owner of the antiquity, free and clear from the claims of another. If the antiquity was stolen, this promise would be broken and the GFP would not gain good title. Therefore, reliance damages, which help return the parties to the position that they were in prior to the antiquity being stolen,[170] are the most equitable remedy to ensure that no party is "winning" at the other's expense.

B. Negotiated Accords

In 2006, the Met entered into Met-Italy Euphronios Accord, a groundbreaking agreement with the Italian government.[171] In this Accord, the Met agreed to return twenty-one antiquities that were looted and illegally exported from Italy prior to its purchase of them.[172] In return, the Italian government has agreed to lend "objects of equivalent beauty and artistic or historical significance" to the Met.[173] Rocco Buttiglione, Italy's culture

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[166] *Id.* § 344(b) (explaining the promisee's reliance interest as "his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made").
[167] *Id.* § 347(c) (describing the injured parties right to recover for all loss actually suffered including incidental and consequential damages).
[168] *See generally id.* § 344 cmt. c.
[169] *See generally id.*
[170] *See generally id.*
[171] *See* Elisabetta Povoledo, *Italy and U.S. Sign Antiquities Accord*, N.Y. TIMES, (Feb. 22, 2006), https://www.nytimes.com/2006/02/22/arts/design/italy-and-us-sign-antiquities-accord.html#:~:text=ROME%2C%20Feb.,archaeological%20sites%20within%20its%20borders; *see also* Elisabetta Povoledo, *Met to Sign Accord in Italy to Return Vase and Artifacts*, N.Y. TIMES, (Feb. 21, 2006), https://www.nytimes.com/2006/02/21/arts/design/met-to-sign-accord-in-italy-to-return-vase-and-artifacts.
[172] *See id.*
[173] *Id.*

minister, said that "Italy has won, the Met hasn't lost, and what has benefited is culture" when asked for his opinion about the results of the agreement.[174] This type of agreement, where no one is the loser and both parties leave satisfied, would normally be impossible between GFPs and dispossessed owners when considering the parties' diametrically opposed goals. This agreement is noteworthy in that it accomplished a much more equitable solution than any court would have.

The Met-Italy Euphronios Accord should be the ideal to strive for when negotiating between the GFPs and dispossessed owners. After all, museums need to be able to acquire artifacts and cultural art from places around the world to be a museum of any worth. Consider what the world would be like if one had to travel the globe to see artifacts and historical pieces from countries other than one's own.[175] Not only would museums lose much of their attractiveness for patrons, the fields of history and culture studies would also lose a great deal if this actually happened. It is mutually desirable to allow people to experience other cultures and learn history through art and antiquities.

Agreements like the Met-Italy Euphronios Accord promote pareto efficiency because Italy has regained their lost antiquities without causing losses for the Met. Pareto efficient reallocations of resources make at least one person better off and ensures that no one is worse off because of the reallocation.[176] However, the standard antiquities reallocation seems to follow the Kaldor-Hicks efficiency model, since the GFP must make restitution to the dispossessed owner oftentimes without any compensation.[177] Kaldor-Hicks efficiency is much more concerned with whether those who gain from the reallocation gain enough to fully compensate those who lose from it.[178] This model does not require those who gain to actually compensate those who lose.[179] This is a direct parallel to how the UNIDROIT Convention fails to enforce the compensation of diligent GFPs.[180] While the Kaldor-Hicks model is known as a wealth maximization model, it does not provide for an equitable

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[174] *Id.*

[175] *See generally* Fincham, *supra* note 28, at 183 (commenting on the idea that rigorous due diligence standards would encourage nations of origin to "pillage back" from museums of the world).

[176] *See* Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817, 821 (1989) (describing what could be deemed a "win-no loss" situation).

[177] *See* Christopher T. Wonnell, *Efficiency and Conservatism*, 80 NEB. L. REV. 643, 646-47 (2001) (arguing that the traditional pareto criterion of efficiency should be expanded not in the direction of Kaldor-Hicks efficiency but rather towards ex-ante efficiency).

[178] *Id.*

[179] *Id.*

[180] *See infra* Section III.C.

result.[181] On the other hand, the Met-Italy Euphronios Accord shows that it is possible to reach a pareto efficient agreement when it comes to determining ownership between the GFP and dispossessed owner. Therefore, this form of agreement should be encouraged.[182]

C. Comprehensive Catalogue of Ownership of Antiquities

Instead of dispossessed owners reporting when an antiquity is stolen, a mandatory reporting system for the ownership of antiquities would better aid in preventing theft, as well as identifying and returning stolen antiquities. For example, if descriptions of antiquities and the names of their owners were logged into a system once discovered, stolen antiquities would be more easily identified on the market. If the item is out on the open market, but the catalog does not display a status of "for sale" for that antiquity, all potential buyers would be put on notice that it is stolen. Since buyers gain no right to antiquities that they know are stolen, its sale would be impossible. Therefore, the sale of stolen antiquities would be drastically reduced. Additionally, if cultural artifacts are required to be documented when they are excavated, the sale of illegally excavated artifacts could be halted as well, since they would not be logged in the system. A comprehensive catalog of this kind could effectively fix the antiquities trade in a way that eliminates the issue of GFPs.

Granted, not every owner will want to document their ownership of antiquities. In this system, that simply means they are waiving their right to the restitution of their antiquities in the event that they are stolen, since their ownership cannot be verified. This allows owners who are unwilling to comply with the reporting system to opt out of the system at their own expense, rather than at the expense of another. Even so, there should be no logical reason to opt out of this system, since the ownership list prevents their resale if the antiquities are stolen and makes the potential buyers the reporters of theft. To support the voluntary reporting of stolen items by buyers on the market, a small monetary reward could be given for any information that aids in the restitution of an antiquity.[183] A program of this kind could lead to the

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[181] *See generally* Wonnell, *supra* note 177, at 646.

[182] If the parties are unable to reach an amenable accord, the solutions proposed in Sections IV.A and D will alleviate much of the inequity and inefficiency that is pervasive in the issue of competing ownership claims between the GFP and dispossessed owner.

[183] This is similar to Crime Stoppers programs which are extremely effective in catching criminals and getting convictions. One statistic shows that Crime Stoppers programs have helped solve around half a million crimes around the world and have a 95% conviction rate. Additionally, Crime Stoppers programs are known to bring awareness to the community of the crime problem, improve community cooperation and willingness to fight against crime given the opportunity, and has improved relationships between citizens and the police. All of the benefits of this type of program are desperately needed in the fight against antiquities thefts. *See History*, CRIME STOPPERS USA, https://www.crimestoppersusa.org/history (last visited Apr. 29, 2019). [is there a source for this?]

capture and prosecution of more thieves, since programs of a similar nature have proven very effective in combating crime.[184]

Currently, INTERPOL[185] and other international organizations have databases of stolen art and antiquities, but these lists are inaccurate when used to determine which antiquities are stolen due to severe underreporting.[186] Many private owners and museums fail to report art and antiquities theft simply because the theft went unnoticed.[187] If a cultural artifact is just one of many in a museum's warehouse, its disappearance is likely to go overlooked for months, or even years. Additionally, museums are especially hesitant to report thefts because of the loss of reputation that is associated with being the victims of theft.[188] Conversely, some museums fail to report because they think that by reporting thefts, it may actually lead to more thefts; the reasoning is that the populace begins to think that the security is weak.[189] In addition to willful underreporting, many antiquities thefts go unreported because the antiquities are illegally excavated, and no one knew of their existence. The current system of reporting thefts does not contemplate antiquities that have yet to be discovered and are stolen through illegal excavation.[190] Because of this, the current system of reporting thefts is ineffective at catching thieves and returning antiquities, and it cannot be used to check if the antiquity is stolen[191] since illegally excavated antiquities will not be reported.

However, if the system of reporting were turned on its head, and antiquities are reported when owned, rather than after they were stolen, then fewer antiquities would find their way into the market. This system provides the appropriate amount of incentives for both dispossessed owners and for

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[184] *Id.*

[185] *See, e.g.*, *Stolen Works of Art Database*, INTERPOL, https://www.interpol.int/en/How-we-work/Databases/Stolen-Works-of-Art-Database.html (last visited Apr. 29, 2019).

[186] Another problem that prevents the widespread use of art databases is the cost involved. Creating and maintaining international databases is very expensive, which has contributed to the difficulty in checking an items provenance. This may also be the largest obstacle standing in the way of creating a uniform catalog of ownership as I have proposed.

[187] *See* Chris Rovzar, *Why Art Thieves Are So Successful*, INS. J. (June 15, 2015), https://www.insurancejournal.com/news/national/2015/06/15/371743.htm.

[188] Saša Kuhar, *Art Crime and Preventative Measures for Museums, Churches and Sacred Objects*, 2 VARSTVOSLOVJE J. OF CRIM. JUST. AND SEC. 202, 204 (2018).

[189] *Id.*

[190] It is especially important to protect against this form of theft because when thieves remove antiquities from their excavation site, many important cultural historical indicators are destroyed. Once the artifact is removed, much of its historical context is destroyed. Whereas if left in situ and studied by archeologists, the artifact can develop deeper meaning. *See generally* Neil Brodie, *Uncovering the Antiquities Market, in* THE OXFORD HANDBOOK OF PUBLIC ARCHEOLOGY 230, 237 (Oxford University Press 2012) (describing archaeological site damage caused by looting and the prevalence of looting).

[191] Most databases that list stolen antiquities require membership to access the list which further impairs the GFPs ability to check the provenance of the antiquities they purchase.

GFPs, so that no one party is overburdened. GFPs are incentivized to report stolen antiquities that are on the market because they would receive a reward and could not purchase them with good faith. This means that the antiquities can be returned to the dispossessed owner very quickly. Even if someone were to purchase the stolen antiquity, he would do so knowingly. This would mean that when faced with restitution by the dispossessed owner, there would not be a battle between two innocent parties and the solution would be quite simple. Additionally, dispossessed owners are incentivized to report their ownership claims since choosing not to means they knowingly accept that in a conflict over ownership, they will have no better claim to the antiquities than anyone else. Therefore, in order to better prevent the theft of antiquities on all fronts, and to encourage the legal sale of antiquities, a system of reporting ownership would be most effective.

D. Uniform Due Diligence Standard for Dispossessed Owners as Well as Good Faith Purchasers

In antiquities transactions, both GFPs and dispossessed owners need to be held to a higher standard of due diligence in their dealings since they are literally dealing in cultural heritage.[192] It is all but impossible to define due diligence by example, absent the purpose of the due diligence standard.[193] The context of the situation significantly changes how due diligence is defined by indicating the purpose of the heightened standard of care as indicated by the morals of society. In the context of transactions dealing with antiquities, it is prudent to base the definition of due diligence on how the parties act, considering that the purpose should be to preserve and protect the antiquity. For example, a GFP who buys, and later stores, a fragile Egyptian scroll from a back-alley dealer, without any covering or protection, in a shed that perpetually leaks would not be acting diligently. Conversely, if it were the dispossessed owner who stored a delicate antiquity in a leaky shed, and due to a lack of security did not notice its disappearance for months, he would not be acting diligently.

After determining whether the parties acted diligently, the question then turns to how the transaction is affected by due diligence. If one party is diligent and the other is not, the result should be apparent. Say the dispossessed owner, in the example above, took care to store the scroll in a protective case and a climate-controlled environment that was guarded at all times, he would have discovered the theft very quickly. Compare this to the GFP who purchased the scroll from a back-alley dealer without questioning how it was obtained and did not care for it properly while he retained it. It is

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[192] *See generally* Fincham, *supra* note 28, at 150; *see also infra* Section II.C.
[193] *See* Fincham, *supra* note 28, at 150 n.19.

clear to see that the dispossessed owner was the most diligent of the two in how he retained the scroll and guarded against its theft, so he would be the more suitable owner.

However, what happens if both parties act with utmost diligence? Say the GFP diligently checked the provenance of the antiquity, completed a search of stolen art databases, and then took the scroll to an expert in preservation for repair. Meanwhile, the diligent dispossessed owner from the example above is diligently searching for the antiquity and listed it on some international registers of stolen goods. In this case, the parties ought to consider negotiating an accord like the one created between Italy and the Met in 2006[194] because both parties would be able to bargain to reach a more equitable result than what may be had by the court. Achieving an equitable result may not always be possible, but an agreement that is made outside of court stands the best chance of reaching a fair result for both parties because a lawsuit inevitably culminates in at least one winner and one looser. However, if the GFP and dispossessed owner cannot come to an agreement, the antiquity's historical and cultural significance should be weighed to determine the most appropriate owner. For example, if the GFP is stubbornly refusing to cooperate, and the dispossessed owner can show that the scroll is a priceless piece of a larger work,[195] the GFP should then return the scroll to the dispossessed owner and receive compensation. This would provide an additional level of protection that would ensure that dispossessed owners would not be prevented from priceless pieces of history and culture returned to them.

In a pricklier situation, where neither party has acted diligently, the antiquity should be given to a third-party international organization for its preservation. This would be a fallback procedure to ensure the preservation of antiquities in cases where returning the antiquity to either party would put it at risk. In this case, if the dispossessed owner is later able to demonstrate that it has the ability and motivation to properly preserve the antiquity, the third-party organization should return the antiquity to the dispossessed owner.[196] This may seem quite extreme, however, when considering that the conflict is about an irreplaceable piece of human history, surely anyone would agree that its preservation takes precedence.

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[194] *See infra* Section IV.B.

[195] The dispossessed owner may prove its historical significance in a number of ways, including a showing that this is a part of a larger collection.

[196] *See Elgin Marbles*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Elgin-Marbles (last visited Apr. 29, 2019). This is unlike the case of the Elgin Marbles, where England took architectural details from the Parthenon in Greece with the intent of preserving them but refused to return them to Greece even after a museum was specially built to house them.

V. CONCLUSION

The UNIDROIT Convention is solely concerned with the return of antiquities to their nations of origin, but without consideration for equity or efficiency. Mrs. Fioratti was innocent in her purchase of the ancient mosaic that she had repurposed as a coffee table because she had no reason to know that who she bought it from did not have the right to sell it to her. On the other hand, the mosaic was an important piece of Italian history, since the remains of the Nemi ships have been lost to time. A delicate balance of rights and duties is necessary to allow for the most equitable and efficient result between two innocent parties. The current legal framework that determines ownership rights between the GFP and the dispossessed owner fails to consider that both parties to the transaction are innocent. Therefore, the UNIDROIT Convention is ineffective as it stands.