Echoes of the Occupation: The Case for the Repatriation of Culturally Significant Family Swords Seized During U.S. Occupation of Japan

I. Introduction

In times of war, objects of cultural importance often become unintended casualties. Works of art and antiquities are vitally important for a nation or ethnic group's shared culture, but they are often fragile and mobile making them prey to plunder or destruction by enemy forces. The vulnerability of cultural heritage objects was highlighted to the international community in the global conflicts of World War II. Apart from horrific crimes against humanity and countless lives lost, another great tragedy unfolded wherever there was conflict: the loss and destruction of irreplaceable human culture through theft and destruction of antiquities, art, and architecture.

During World War II Nazi Germany, the USSR, and the Japanese Empire all had systems in place for government approved looting from territories they occupied.[1] While the United States did not systematically loot for profit or promote looting as a wartime strategy, some items of cultural significance were nonetheless taken by U.S. soldiers from territories the United States defeated and controlled.

This Note will focus on one particular form of taking of cultural artifacts in the Pacific theater of World War II and the potential for legal repatriation of those artifacts: the taking of culturally significant, family heirloom swords from the general population of Japan at the end of the war, during the U.S. occupation of Japan. The sword's mobility and the ease of their concealment, their dual purpose as a weapon and not just a piece of art, and the legal issues surrounding the status of a post-war occupation, rather than a live conflict, muddy the legal

[1] See Stephan Wilske, *International Law and the Spoils of War: To the Victor the Right of Spoils*, 3 UCLA J. Int'l L. & Foreign Aff. 223, 246 (1998); Geoffrey R. Scott, *Spoliation, Cultural Property, and Japan*, 29 U. Pa. J. Int'l L. 803, 876 (2008).

waters and make the case for repatriation of these swords stand apart from many of the high profile European World War II art theft cases that have been litigated.[2] Nevertheless, Japanese civilians who held culturally significant family swords and had them taken during the occupation can make a compelling legal argument for their return. This Note will look at the legal issues surrounding the taking of the swords, and the legal principles that could be utilized for a successful repatriation case today. The goal of this note is to demonstrate the possibility that these swords could be returned to their original owners. The issues that will arise in a sword repatriation case are ones that center on the nature of what is cultural heritage or art, on the legality of the seizure under international agreements and customary international law, and ultimately, as so many art repatriation cases do, on the various laws concerning the statutes of limitation that could be applied.

Section II of this Note will focus on the importance of swords in Japanese culture, the difference between art swords and mass-produced swords, and the role played by the Nihon Bijutsu Token Hozon Kyokai. Section III will focus on the historical background of the Japanese surrender and civilian disarmament. Section IV will briefly lay out the potential scenario for a repatriation case that could occur in the United States. Section V will lay out and assess potential legal arguments for repatriation, including the 1907 Hague Agreement, Japanese cultural heritage law, and customary international law. Section VI focuses on issues relating to statutes of limitation and bona fide purchasers. Section VII will highlight recent incidents of voluntary repatriation. Finally, Section VIII will propose a course of action for an individual looking to have a seized Japanese sword returned.

[2] A list of prominent World War II Era art restitution cases can be found at the International Foundation for Art Research ("IFAR") Website: https://www.ifar.org/case_law.php?ID=1.

II. Pure Weapons vs. Important Cultural Heritage

It is important to consider how the sword is viewed in Japanese society and the uniqueness of some ancient swords to be able to understand when a Japanese sword becomes more than just a mere weapon, but something with artistic and cultural value worth preserving. Many of the swords used in World War II and ultimately seized by U.S. forces were cheap, mass produced swords without the weight of history and traditional technique.[3] It is vital for potential repatriation cases to come up with a standard to separate these pure weapons of war from swords of artistic and cultural significance.

A. Importance of Swords in Japanese Culture

The reason many Japanese swords ended up in American hands as compared to other art and cultural objects lies in their dual nature. Unlike most objects of cultural significance, the swords also serve the purpose of weapons of war. Even in the twentieth century amongst guns and bombs, many Japanese carried swords to the war.[4] If the family of a Japanese soldier held a centuries-old culturally significant antique sword, this often meant carrying said sword into battle.[5]

Traditionally swords held religious significance to the Japanese.[6] A sword was not meant to just be carried for physical self-defense, but for spiritual protection as well.[7] Families would traditionally hold their family sword in high honor and reverence, and because of their protective

[3] Paul Martin, *Do Japanese Art Swords Surrendered after WWII Constitute War Loot?*, JAPAN FORWARD, (Sep. 6, 2019), https://japan-forward.com/do-japanese-art-swords-surrendered-after-wwii-constitute-war-loot/.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

properties, young men going to war would be given the family sword to protect them spiritually as well as physically.[8] Many antique Japanese swords are unsurpassed pinnacles of design, art, and, craftsmanship that play an important role in Japanese cultural heritage as well as our shared world heritage. Beauty, as well as precise functional perfection, were of upmost importance to traditional swordsmiths.[9]

B. Art Swords vs. Mass-Produced Swords

The traditional Japanese sword making processes that create the type of unique sword that represents our modern conception of a Japanese sword date back at least a thousand years.[10] Many changes to technique and sword design have occurred throughout Japanese history, largely due to changes in military need.[11] For example, during the invasion of Japan by Mongolia in the thirteenth century, a period of particularly intense conflict, military need led swordsmiths to move away from slender, light swords that could break easily, to stronger, wider swords which were more durable.[12] The early Showa period (1926-1945) was another time period where the typical sword making processes would again be restructured in the face of outside events.[13]

Following a period around the end of the nineteenth century where much of the Japanese military lost interest in carrying swords, military sword carrying resurged again in the Showa period.[14] During the rise of imperialism and militarism in Japan, the military pushed to rekindle an interest in Japanese swords, and eventually all Japanese officers, both in the Army and Navy,

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[8] *Id.*
[9] John Teramoto, *Nihontō: The Samurai Sword*, Newfields website (Apr 29, 2019), https://discovernewfields.org/newsroom/nihonto-samurai-sword.
[10] CLIVE SINCLAIRE, SAMURAI SWORDS - A COLLECTOR'S GUIDE: A COMPREHENSIVE INTRODUCTION TO HISTORY, COLLECTING AND PRESERVATION 30 (2017).
[11] *Id.* at 30-53.
[12] *Id.* at 35.
[13] *Id.* at 52.
[14] *Id.* at 51-53.

were required to carry a sword.[15] To fill this heightened demand, modern processes to mass produce swords became widely used.[16] The swords mass-produced during this time period (known as "Showa-to" swords) were not produced using traditional methods, and are not considered "true" Japanese swords by experts.[17] During the years leading up to World War II most swords were made following these mass-production methods, although some experts continued following traditional techniques during this time period.[18]

Mass-produced Showa-to swords differ from traditionally made swords considered to be works of art in several ways. Something that makes traditional Japanese swords unique from other types of swords is the process of smelting and type of steel used in the swords.[19] Traditionally Japanese swords are composed of "tamahagane" steel made in a traditional type of furnace.[20] Tamahagane steel is known for having a high carbon count, that allows it to bend without breaking.[21] This unique feature is part of what makes traditionally made swords highly esteemed, and what gives them important cultural significance. The mass-produced Showa-to swords instead used foundry poured steel rather than the traditional tamahagane steel produced in the traditional method.[22] The steel used in Showa-to swords could be repurposed from discarded scrap metal from items such as abandoned railroad tracks.[23]

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[15] *Id.* at 52.
[16] *Id.* at 52.
[17] *Id.* at 52.
[18] *Id.* at 52.
[19] YOSHINDO YOSHIHARA, LEON KAPP & HIROKO KAPP, THE ART OF THE JAPANESE SWORD: THE CRAFT OF SWORDMAKING AND ITS APPRECIATION, loc. 1523 (2012) (ebook).
[20] *Id.* at loc. 1523.
[21] *Id.* at loc. 1523.
[22] *Id.* at loc.1343.
[23] *Id.* at loc. 1353.

The methods for forging Showa-to swords were much cheaper and less time consuming than traditional methods to meet a high demand.[24] These swords should be easily identifiable by experts based on their quality, and the fact that the Japanese government decided in 1937 that all of these mass-produced swords were required to have a stamp showing they were not made from the traditional tamahagane steel.[25]

The majority of swords carried to war by Japanese officers that were later confiscated during surrender or occupation by U.S. authorities were likely lower quality mass-produced Showa-to swords.[26] Accordingly, most U.S. military members and their descendants most likely need not worry about swords taken home with permission of the U.S. military. All the legal arguments for the return of the swords to be discussed in section V focus on swords that can be classified as cultural heritage items. Swords considered to be antiquities or works of art are what would mostly likely be repatriated in a court case, not mass-produced military weapons. It is unlikely any case for the repatriation of a mass-produced sword would ever even arise, and the identicality of the swords would make finding out who possess any one particular mass-produced sword an insurmountable challenge.[27]

The mass-produced Showa-to blades were created by recruited blacksmiths with little knowledge of traditional sword making.[28] These mass-produced swords can be identified by their low quality as compared to swords forged by traditional methods.[29] Further, these mass-produced swords bear recognizable stamps showing where the sword was originally forged.[30] An

[24] *Id.* at loc. 1353.
[25] *Id.* at loc. 1353.
[26] SINCLAIRE, *supra* note 10, at 78.
[27] *Id.* at 78.
[28] *Id.* at 77-78.
[29] *Id.* at 78.
[30] *Id.* at 78.

expert in the field should be able to easily determine whether a sword fall into this mass-produced class or should be considered a more unique art sword.

C. The Nihon Bijutsu Token Hozon Kyokai

The Nihon Bijutsu Token Hozon Kyokai (the "NBTHK"), or the Society for the Preservation of Japanese Art Swords in English, is an agency of the Japanese government that currently works to preserve culturally significant Japanese swords. [31] This organization was founded during the occupation in 1948.[32] Part of the NBTHK's role is authenticating and classifying swords sent in to them.[33] There are four levels of honorable distinctions given to authenticated swords by the NBTHK: Hozon (Worthy of Preservation), Tokubetsu Hozon (Especially Worthy of Preservation), Juyo Token (Important Work), and Tokubetsu Juyo Token (Especially Important Work).[34] Even the lowest level distinction passes a rigorous check verifying various aspects of the sword, including that the signature on the sword is accurate, and that the blade comes from the time period claimed.[35] The NBTHK was founded by Dr. Junji Honma and Kan'ichi Sato, two scholars who had a key role in convincing U.S. occupation command that certain swords must be preserved over others.[36] The founders closeness to the original circumstances of the occupation, and the organization's continued importance today, would make the NBTHK the best candidate for judging which swords should be considered culturally significant.

[31] NBTHK AMERICA, http://www.nbthk-ab.org/ (last visited Jun. 28, 2020).
[32] *Id.*
[33] *Id.*
[34] *NBTHK Certification Paper Ranking (Origami) for Japanese Swords*, UNIQUE JAPAN, FINE ART DEALER (last visited Jun. 28, 2020), http://new.uniquejapan.com/nbthk-nihon-bijutsu-token-hozon-kyokai-certification-paper-ranking/.
[35] *Id.*
[36] Teramoto, *supra* note 9.

III. Historical Background

A. Japanese Surrender

In August 1945, shortly after the bombing of Hiroshima and Nagasaki, Japan began negotiating their surrender to the United States and the war in the Pacific came to an end.[37] Japan signed the formal instrument of surrender to the United States on September 2, and on the same day the United States began issuing orders for the disarmament of the Japanese military.[38] U.S. and Japanese forces participated in surrender ceremonies held in Japan and many of Japan's former overseas colonies.[39] One part of these ceremonies was the handing over of weapons held by Japanese soldiers, including swords.[40] Regardless of their cultural significance, or the fact that a family sword held largely a symbolic purpose as a spiritual protector of the family member,[41] Japanese soldiers in locations from Japan to New Guinea handed over their swords in these ceremonies.[42] It is likely that Japanese soldiers thought the handing over of swords was going to be solely a symbolic act, and that the swords would be returned later.[43] Many Japanese soldiers attached name tags with their address and contact information for the expected return of the swords.[44]

Aside from the swords turned over during surrender ceremonies, there was also a mass seizure of swords from Japanese civilians by the United States during its occupation of Japan.

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[37] Sadao Asada, *The Shock of the Atomic Bomb and Japan's Decision to Surrender: A Reconsideration*, 67 PAC. HIST. REV. 477, 496 (1998).
[38] Naoyuki Kinoshita, *From Weapon to Work of Art: "Sword Hunts" in Modern Japan*, 54 SENRI ETHNOLOGICAL STUD. 119, 121 (2001).
[39] Martin, *supra* note 3.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*

The occupation of Japan by U.S. military forces began on August 28, 1945.[45] General Douglas MacArthur landed in Tokyo two days later and took over as Supreme Commander of the Allied Powers.[46] MacArthur was given wide latitude to make far reaching decisions affecting the lives of the Japanese people, with President Truman informing the general that "[y]ou will exercise your authority as you deem proper to carry out your mission."[47]

B. Civilian Disarmament

On September 2, MacArthur issued General Order No. 1 calling for the disarmament of the Japanese military.[48] U.S. occupation command included instructions for the general populace to be disarmed as well in the disarmament order.[49] Thereafter, the U.S. occupation authorities issued a series of conflicting orders regarding disarmament and Japanese swords. On September 7th U.S. occupation command issued an order which included privately owned swords in the list of arms to be collected.[50] U.S. occupation command recalled this order four days later on the 11th.[51] On September 24th, U.S. occupation command issued another order, this time excluding swords that were "actually objects of art."[52] U.S. occupation command went on to issue subsequent orders on October 23, 1945 and January 10, 1946 with explicit exceptions for privately owned swords considered to be works of art.[53] However, in between these two orders that provided exceptions for art swords, U.S. occupation command issued a November 11 order calling for the destruction of all privately owned swords as symbols of militarism.[54] U.S.

[45] Kinoshita, *supra* note 38, at 121.
[46] *Id.* at 121.
[47] SEYMOUR MORRIS JR., SUPREME COMMANDER: MACARTHUR'S TRIUMPH IN JAPAN, 10 (2014).
[48] Kinoshita, *supra* note 38, at 121.
[49] *Id.* at 121.
[50] *Id.* at 121.
[51] *Id.* at 121.
[52] *Id.* at 121.
[53] *Id.* at 121.
[54] *Id.* at 122.

occupation command issued a final order on Japanese civilian disarmament on May 29, 1946, rescinding all prior memos.[55] This memo included an exception for swords which were "objects of art, antiques, or family heirlooms."[56]

The above list of conflicting orders shows the confusion that faced U.S. officials who were tasked with the collection of the swords. It seems what would be considered exempt from seizure one day, could be back on the list of items to seize the next day, only to return as an exemption later. A trend does emerge though of exempting heirloom art swords, suggesting that the military occupation forces were considering the importance of leaving culturally significant family swords with the families that possessed them. Even if this concern existed, it is not surprising that many family heirloom swords were rounded up and collected anyway in the face of this confusion. In December 1945, several privately owned swords were seized from a Japanese collector, around twenty of which had already been designated as "Important Cultural Properties."[57] The collector ultimately demanded the swords return, helping bring this issue to light.[58]

The final May 1946 memo remedied a lot of the problems with the earlier memos by included provisions allowing the Japanese government the right to inspect the swords and determine if they were culturally significant art swords.[59] Swords falling into the following categories would be deemed worthy of an ownership permit after inspection:

(i) Swords which had been designated as National Treasures or Important

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[55] *Id.* at 121-22.
[56] Scapin-2099: Instruction on Surrender of Arms by Japanese Civilians (May 29, 1950) (can be found at the National Diet Library Digital Collections online - http://dl.ndl.go.jp/info:ndljp/pid/9887569?__lang=en).
[57] Kinoshita, *supra* note 38, at 123.
[58] *Id.* at 123.
[59] *Id.* at 123.

Cultural Properties, or which were acknowledged by experts to be of the same quality.

(ii) Swords made by the outstanding swordsmiths of each era, or which, though unrecorded, were recognized by experts as being of artistic value.

(iii) Heirlooms or keepsakes of artistic value.[60]

The occupation command later set up a sword inspection committee that would issue around 80,000 permits for privately owned swords.[61]

Estimates have shown that around 172,000 swords were confiscated during the first six months of U.S. occupation.[62] Among these 90,000 were classified as "Japanese Swords".[63] Many of the swords turned in to U.S. officials during occupation were needlessly destroyed.[64] Swords were burned in furnaces and dumped into Tokyo bay. [65]

Ultimately, a portion of the swords seized during surrender and occupation made their way to the United States as souvenirs brought back by U.S. soldiers.[66] Veterans who ended up possessing the swords have claimed that they were permitted to go into the stockpiles to take whatever swords they wanted as souvenirs.[67]

IV. Potential Modern Repatriation Case

While there have not been prominent court cases in the United States regarding repatriation of swords, this Note will focus on a scenario where a culturally significant family

[60] *Id.* at 123.
[61] *Id.* at 123.
[62] *Id.* at 122.
[63] *Id.* at 122.
[64] Teramoto, *supra* note 9.
[65] Teramoto, *supra* note 9.
[66] See e.g., Jim Anderson, *Across Years, Across Miles, Sword Returning Home*, STAR TRIBUNE (Sep. 21, 2013), http://www.startribune.com/after-70-years-sword-taken-from-japan-during-wwii-going-home/224629411/.
[67] *Id.*

sword is discovered in the possession of someone in the United States today after initially being seized by occupation forces. This Note will focus on whether the taking by U.S. authorities of culturally significant swords could be deemed an illegal taking under U.S. law, either as a violation of a treaty or customary international law, and if that would invalidate the claim of possession of a bona fide U.S. owner, warranting the return of the sword to the original family owners. One of Japan's most famous swords, the Honjo Masamune, was turned over during the occupation, and may currently be in the United States.[68] If the whereabouts of this or other important cultural swords are discovered in the future, it is important to know whether claims could successfully be brought for the return of the sword.

V. Legal Arguments for Repatriation

In a case for the reparation of a Japanese sword seized during the occupation, the important question that will need to be considered will be whether the U.S. military and occupation command acted lawfully in taking the sword from Japan. As this case is an international conflict in nature, it is important to look at the how the United States treats and follows international law. The supremacy clause of the U.S. constitution lists treaties, along with federal laws, as the supreme law of the land, directly below the Constitution itself.[69] Additionally, when there are no treaties or federal laws on point for an international legal issue, customary international law can be considered a part of U.S. law, and customs that meet the standard of customary international law can be applied by U.S. courts as law.[70] In this case a treaty exists that could potentially be viewed as covering the seizure of the swords: the 1907

[68] Martin, *supra* note 3. *See also* Ian Harvey, *Epic Saga of the Greatest Samurai Sword Ever Made*, THE VINTAGE NEWS (Nov. 20, 2018), https://www.thevintagenews.com/2018/11/20/samurai-sword-of-power/.
[69] SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 290 (3d ed. 2006).
[70] *Id.* at 297-300.

Hague Agreement. If a court were to determine that this case does not fall within this treaty, then the seizures may still be considered a violation of the international customary law norm against the taking of cultural heritage objects from another state during conflict and occupation.

A. 1907 Hague Agreement

The United States and Japan were both signatories to the 1907 Hague Agreement (the "1907 Agreement") at the time of Japanese surrender and occupation.[71] Included in the 1907 Agreement was Article 56 stating: "[a]ll seizure of, destruction or wilful[sic] damage done to . . . works of art . . . is forbidden, and should be made the subject of legal proceedings."[72] Article 56 falls in Section III of the agreement "concerning military authority over the territory of the hostile state."[73] Logically one may assume that this definition should cover the American occupation of Japan. There has been some debate, however, as to whether the 1907 Agreement covers active belligerent occupations only, and whether post-surrender occupations, such as those in Japan and Germany were exempt. [74] Court cases concerning the similar post-war occupation of Germany mostly agreed that the Hague convention did not cover that post-surrender occupation.[75] Given the weight of these previous decisions and the similar nature and circumstances to the occupation in Japan, it is likely courts would consider the Japanese occupation not subject to the 1907 Agreement. Regardless of similar case precedent, however, a

[71] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, (Oct. 18 1907) (International Committee of the Red Cross website - https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788).
[72] *Id.*
[73] *Id.*
[74] Adam Roberts, *What is a Military Occupation?*, 55 BRIT. Y.B. OF INT'L L. 249, 270 (1984).
[75] *Id.* at 270.

case could still be made that the occupation of Japan was "military authority over the territory of a hostile state" within the text and meaning of the 1907 Agreement.[76]

If a court can be convinced that the Japanese occupation is subject to the 1907 Agreement, the defense may still argue that the seizure of these swords should be justified as a military necessity. However, the quick amendments to the disarmament order exempting culturally important swords show that the takings of these items were not done through even perceived necessity. A strong argument can be made that the act of individual U.S. soldiers taking the swords to the United States was done not through any necessity, but solely to enrich the individual taking them as souvenirs to be displayed or sold.

B. Japanese Cultural Heritage Laws at Occupation

In addition to the treaty between the United States and Japan, it is useful to look at domestic Japanese law at the time of the U.S. occupation. There are two Japanese cultural heritage laws that may be considered relevant to the seizure of the swords during occupation. The first, the National Treasures Preservation Law of 1929, allowed the Japanese government to designate objects as "National Treasures" and then execute plenary authority over their movement and use (even if the "National Treasure" was privately held).[77] The second, the Law on the Preservation of Important Art Objects of 1933, concerned the exportation of objects not already designated National Treasures, and allowed the government to designate additional items as "Important Art Objects."[78] Swords were specifically covered as potential Important Art

[76] Convention (IV), *supra* note 71.
[77] Geoffrey R. Scott, *The Cultural Property Laws of Japan: Social, Political, and Legal Influences*, 12 PAC. RIM L. & POL'Y J. 315, 348-350 (2003).
[78] *Id.* at 350-51.

Objects by the Preservation of Important Art Objects of 1933, which would have governed cultural property during occupation.[79]

The problem with litigation on these grounds today is that both pre-occupation laws rely on the prior designation of objects.[80] If one of the swords was designated as a National Treasure or Important Art Object before the seizure, then a case may be made that Japanese cultural heritage law was violated by the taking. If a particular sword was not on one of these lists, however, neither the National Treasures Preservation Law of 1929 nor the Law on the Preservation of Important Art Objects of 1933 may be cited in a modern case seeking repatriation of a sword.

Today, Japan has more robust cultural heritage laws following the passage of the 1950 Law for the Protection of Cultural Properties, which was drafted and passed with input and pressure applied by the Arts and Monuments Branch of occupation command.[81]

C. Customary International Law

Since courts have treated the post-war occupations as outside the scope of the 1907 Agreement, and in the absence of other treaties or laws directly on point, the doctrine that will likely be most influential in a case for repatriation of a seized Japanese sword will be customary international law.[82] The Restatement (Third) of the Foreign Relations Law of the United States says "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[83] Accordingly, to hold that the takings of the

[79] *Id.* at 351.
[80] *Id.*
[81] *Id.* 379-87.
[82] Murphy, *supra* note 69, at 297-300.
[83] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

swords was a violation of customary international law (making the seizure invalid for transferring title under U.S. law), the court needs to show that prohibiting looting from foreign states during war and after surrender is a (1) "general and consistent practice of states" (2) followed by a "sense of legal obligation."[84] In the United States, international law was most famously recognized as "a part of our law" in the Paquete Habana case, with international customary law norms to be ascertained under federal common law.[85] Courts today look to see if a practice is widespread among states, and look to see that the state in question has followed this custom as if it were law to see if customary international law should be applied in a case.[86]

i. General and Consistent Practice of States

An argument for the return of a Japanese sword based on customary international law must first prove that prohibiting the taking of cultural property of another nation during and after war was a general and consistent practice of states.[87] The growth in reverence toward the idea of people and nations retaining their cultural artifacts during and after war can be seen in cases starting around 200 years ago. The British victors of the Napoleonic Wars chose to return art plundered across Europe to the original owners after Napoleon's defeat.[88] While British culture could have greatly benefitted from England seizing all the priceless artworks Napoleon had gathered, nevertheless the victors chose to repatriate them to the other European nations from which the works had originally been seized.[89] This decision shows a deliberate choice to condemn the widespread policy of looting artworks from defeated nations that Napoleon had

[84] *Id.*
[85] The Paquete Habana, 175 U.S. 677, 700 (1900).
[86] Yu Zhang, *Customary International Law and the Rule Against Taking Cultural Property as Spoils of War,* 17 CHINESE J. OF INT'L L. 943, 947 (2018).
[87] RESTATEMENT, *supra* note 83.
[88] Wilske, *supra* note 1, at 246.
[89] PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 540 (3d ed. 2012).

followed.[90] The British government went on to strengthen the norm of not taking cultural property from enemy states in its decision to return cultural items heading to the United Stated for the Museum of Fine Art in Philadelphia that had been seized during the War of 1812.[91] These cases show that by the early-nineteenth century a principle was being formed in the international sphere: a principle that nations should refrain from seizing important cultural heritage from foreign states and private individuals in foreign states.[92] As shown in the British decision to not take objects from the defeated empire of Napoleonic France, this principle extended past times of conflict into the post-war periods of occupation and rebuilding.[93]

A practice followed by one country alone, however, does not show a general widespread norm.[94] The first component of customary international law relies on looking back at historical practice to determine if a majority of states adhere to a particular practice.[95] In the United States, the Paquete Habana case is famous for establishing a practice of taking a deep look at the historical practice of many nations to establish a customary international law norm that can be brought into U.S. law.[96] This case revolved around the legality of the seizure of Cuban fishing vessels by the United States at the start of the Spanish-American war.[97] The Court in the Paquete Habana case looked back at the previous 100 years to determine that a customary international law norm had developed against the seizing of fishing vessels operated by civilians of an enemy state during times of war, and that the seizure of the vessels represented a violation of

[90] *Id.* at 540.
[91] Wilske, *supra* note 1, at 246.
[92] *Id.* at 245-47.
[93] *Id.* at 246.
[94] Murphy, *supra* note 69, at 297-300.
[95] *Id.* at 297-300.
[96] William S. Dodge, *The Paquete Habana: Customary International Law as Part of Our Law*, *in* INTERNATIONAL LAW STORIES 175, 175-206 (John E. Noyes, Laura A. Dickinson, & Mark W. Janis eds. 2007).
[97] *Id*. at 176-80.

international law.[98] Undertaking a similar analysis, the end of the Napoleonic wars shows the start of a custom of not taking cultural heritage objects, and the later steps (discussed below) taken by the United States and the worldwide legal community with the Lieber Code and Hague Agreements cement the prohibition as a general, consistent practice of nations.

The prohibition against looting in times of war was first codified by the United States in the Lieber Code of 1863.[99] The Lieber Code Article 36 states:

> [i]f such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.[100]

Additionally, with respect to private property, Article 38 of the Code states:

> [p]rivate property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States. If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity. [101]

Drafted by Dr. Francis Lieber the 1863 Lieber Code expresses that conquering armies should not take into possession the private property or cultural objects of the conquered.[102]

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[98] *Id.* at 183-84.
[99] Zhang, *supra* note 86, at 971-72.
[100] General Orders No. 100: The Lieber Code, Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) (from Yale Law School Lillian Goldman Law Library website: https://avalon.law.yale.edu/19th_century/lieber.asp#sec2).
[101] *Id.*
[102] Wilske, *supra* note 1, at 247.

The Lieber Code inspired many of the international agreements against looting that followed.[103] It can be argued that the Lieber Code, and subsequent declarations against plunder, culminating in the Hague Agreements of 1899 and 1907, were all merely manifestations of existing customary international law.[104] The anti-plundering provisions of the Hague agreement were agreed upon with little argument suggesting that at least the nations in attendance at the 1907 convention believed in a prohibition against taking cultural property.[105]

The Nuremberg trials after the defeat of Nazi Germany also hold important expressions of anti-looting in customary international law.[106] When applying the 1907 Agreement, the tribunal expressed that they considered the Hague conventions to be "founded upon customary international law that all civilized nations recognized."[107] This suggests that the prohibition on the taking of cultural artifacts and artworks from foreign countries in and immediately after wartime was a widespread norm followed by the United States and its contemporaries at the time of the sword seizure. The first criteria of customary international law, general widespread use, should be satisfied.

The defense in a sword reparation case could potentially point to the German and Japanese Empires' practices of looting on a global scale as evidence that the prohibition of cultural heritage looting was not a general widespread practice. The Nuremberg trials, however, treated the incidents of lack of compliance with international law norms of the Nazi regime as illegal breaches of those international law norms, rather than treating them as evidence that a

[103] *Id.* at 247-48.
[104] Zhang, *supra* note 86, at 971-72.
[105] *Id.* at 976.
[106] *Id.* at 983.
[107] *Id.* at 983.

general adherence to the norm did not exist.[108] At Nuremberg, Germans were found to have committed war crimes held as breaches of international customary law and these actions amounted to illegal breaches of the norms, rather than rendering the norms no longer general international legal practice.[109]

ii. Acceptance as Law

The second question in customary international law analysis is whether the United States has followed the norm against taking cultural heritage from other nations as if it were law. The United States was the first to codify the prohibition against looting in the Lieber Code.[110] A reverence toward cultural property and a prohibition on seizing it from the conquered had been codified and followed by the United States for almost 100 years at the time of the taking of the swords.[111] By the time of the occupation of Japan, the United States had consistently tried to protect the cultural heritage of other nations while at war against them, one example of this being the decision not to bomb Kyoto with an atomic bomb.[112] This decision was made by the Secretary of War's direct appeal to the President on grounds that the cultural heritage loss in destroying the city would be unacceptable.[113]

To look at another manifestation of the acceptance of the international custom of not looting or destroying another country's cultural heritage, one need only look at the actions taken by U.S. command in Japan during the occupation. After the first disarmament order, the first

[108] Theodor Meron & Jean Galbraith, *Nuremberg and Its Legacy*, *in* INTERNATIONAL LAW STORIES 13, 13-43 (John E. Noyes, Laura A. Dickinson, & Mark W. Janis eds. 2007).
[109] *Id.* at 39-41.
[110] Zhang, *supra* note 86, at 971-72.
[111] *Id.* at 971-72.
[112] Mariko Oi, *The man who saved Kyoto from the atomic bomb*, BBC NEWS (Aug. 9, 2015), https://www.bbc.com/news/world-asia-33755182.
[113] *Id.*

exception for art swords followed within a month.[114] Within the first years of occupation the United States proved supportive of protecting Japanese cultural heritage, amending the sword seizure orders and listening to appeals by Japanese experts.[115] Occupation command even set up the Arts and Monuments branch that worked to help strengthen Japan's cultural heritage laws.[116] This all indicates U.S. command acknowledged the importance of keeping cultural heritage in Japan and the desire not to go against international norms by seizing culturally significant objects. A strong argument can be made that none of the art swords were ever meant to leave Japan or be destroyed. Exceptions to the initial order came quickly. As the orders and exceptions were issued in a confusing way and often conflicted with each other, those tasked with collecting the items most likely seized cultural heritage against the true will of U.S. occupation command.

Another example of how U.S. occupation command apparently accepted the international prohibition against looting as law is how the Arts and Monuments Branch of occupation command worked to strengthen Japanese cultural heritage law with the promotion of the 1950 Law for the Protection of Cultural Properties.[117] The Arts and Monuments Branch had been concerned that Japanese law did not adequately protect Japan's cultural heritage and pushed the bill to help strengthen Japanese cultural heritage law.[118] While this law was enacted after the taking of the swords, it is beneficial to the argument that the United States followed the customary international norm against taking cultural objects from other countries as if it was law, since the work of the Arts and Monuments branch shows that the United States considered protection of a nation's cultural property as an important legal principle.

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[114] Kinoshita, *supra* note 38, at 121.
[115] *Id.* at 121-23.
[116] Scott, *supra* note 77, at 379-80.
[117] *Id.* at 379-87.
[118] *Id.* at 379-87.

It may be argued that customary international law allows for military necessity to be grounds for seizure of cultural objects. The exceptions issued for art swords, however, clearly show that occupation command did not find their seizure and destruction a military necessity, even just days after entering Japan. Also, there is no necessity in allowing soldiers to take art swords home as souvenirs. There is certainly no military necessity that can be invoked for not returning the swords to the original owners today.

One counterargument is that the customary international law prohibition on the taking of cultural heritage objects only applies to active war, and not to post-surrender occupation. This is illogical. It seems hard to believe that courts would view this international norm to exist only until the point active warfare ceases. When one country occupies another that is when they are most able to turn their sights on seizing the property of the occupied nation. Holding that customary international law applies to the governance of occupied nations will be crucial to any case brought on this matter if a defense that the 1907 Agreement does not apply succeeds. If one truly believes the 1907 Agreement applies only to active combat, then the time after surrender is a blank space in the law that can be filled by valid customary international law.

VI. Statute of Limitations and Bona Fide Purchasers

Finally, it is important to look at statute of limitations law when dealing with art and cultural heritage takings that occurred so long ago, since most statutory time periods have likely run out, absent a legal mechanism for stopping the statute of limitations from running. If a suit for the return of the swords is brought in U.S. courts, determination will need to be made as to which country's laws to apply. In this case, a plaintiff would likely prefer U.S. law, rather than Japanese.

For this analysis it is important to remember the swords went through at least two sets of hands, whoever initially collected the swords, and whatever soldier was allowed to go in and take the swords for himself. Additionally, any case today will likely only be discovered after a public sale, or if the object turns up in a museum, as the portability of the swords and deficiencies in keeping records of the seizures makes the discovery of their whereabouts difficult. Therefore, for purposes of this analysis, this Note will discuss the possible repatriation of an art sword taken by a U.S. soldier originally, that is now with a presumed bona fide buyer and owner.

Two prominent common law rules that could affect the statute of limitation rules in art repatriation cases in the United States are the discovery rule and the demand and refusal rule. The discovery rule, articulated in *O'Keefe v. Snyder*, requires an original owner to have shown due diligence in trying to discover the whereabouts of the object taken from them.[119] Under the discovery rule "a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action."[120] If the jurisdiction whose laws govern the case follows the discovery rule, the Japanese owner will need to show reasonable diligence in attempting to discover the whereabouts of the sword after the takings. If this burden is met, the statute of limitations may be considered tolled, and if the court holds the original taking of the sword unlawful, then the Japanese owner can stand a strong chance of having the sword repatriated from the person in the United States who currently possesses it. If the Japanese owner on the other hand cannot show

[119] O'Keeffe v. Snyder, 416 A.2d 862, 869 (N.J. 1980).
[120] *Id.* at 869.

that they took reasonably diligent efforts to find the sword, then suit will be barred as the statute of limitations would have run out, and the bona fide purchaser will be allowed to keep the sword.

The demand and refusal rule is much more favorable to original owners. Under this rule the statute of limitations does not begin to run until after the original owner demands the return of the item and is refused.[121] The laws of a jurisdiction that follows the demand rule will be most favorable to the Japanese original owner, as no showing of reasonable diligence in locating the whereabouts of the sword will be required. New York, home to the United States' largest art market, follows the demand and refusal rule.[122]

Unlike the United States, which has implemented extensive legal protection for original owners, Japan offers less original owner protection.[123] Japanese law favors a bona fide purchaser, even when there has been a theft in the chain of title, if the purchaser acted in good faith and showed reasonable diligence in the transaction.[124] This strong protection of bona fide purchasers has contributed to giving Japan a reputation as a haven for stolen art.[125] Under Japanese law, as long as the current owner was a bona fide purchaser, it is difficult for the original owner to recover an item through the court system. Even if a U.S. court applying Japanese law could be convinced that legal title in the original transfer was never passed, as long as the current owner is a good-faith, bona fide purchaser who was not negligent, it will be difficult for the original owner to recover the item.

[121] Menzel v. List, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966).
[122] 23 N.Y. Jur. 2d Conversion, Etc. § 182 (May 2020).
[123] *See* Scott, *supra* note 1, at 876-78 for a discussion on the protection of bona fide purchasers under Articles 192-194 of Japan's Civil Code.
[124] *Id.* at 876.
[125] *Id*. at 813.

Japan's laws highly favoring bona-fide buyers may be what would ultimately kill a sword repatriation case. If a valid case could be made for the return of a sword found in the United States, then under the demand and refusal rule, and possibly under the discovery rule, the swords can be returned to the Japanese original owner even if the current possessor was a bona fide purchaser. The Japanese preference to vest title in bona fide purchasers, however, would mean that even if the court viewed the original taking from Japan as illegitimate, as soon as the taken sword is sold to a bona fide purchaser, the action to recover could be barred. This shows the danger and risk a country takes when they pursue laws strongly favoring bona fide purchasers. This preference could ultimately block the return home of Japan's own cultural heritage.

Whether Japanese law or a particular U.S. state's statute of limitations rules will govern will be a determination for the court to make based on the choice of law rules of the forum state.[126] The two main choice of law rules that have been used in similar art restitution cases are the situs rule and the interest rule.[127] The situs rule bases the statute of limitations law on the law of the location were the challenged transfer occurred (Japan in this case).[128] The interest rule instead bases the statute of limitations rules on "the law of the jurisdiction having the greatest interest in the litigation."[129] In Bakalar v. Vavra, the court applied the interest rule to conclude that New York's interest in "preventing the state from becoming a marketplace for stolen goods" was greater than Switzerland's interest in the case (the location where the initial transaction in question occurred).[130]

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[126] Rebecca E. Hatch, Esq., *Litigation Under Common Law for Recovery of Nazi Looted Art*, 141 Am. Jur. Trials 189, § 34 Choice of law (Originally published in 2015).
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] Bakalar v. Vavra, 619 F.3d 136, 145 (2d Cir. 2010).

VII. Voluntary Repatriations

It is worth noting that attempts at voluntary repatriations have occurred in recent years when former U.S. soldiers or their descendants have been able to locate the families of the original owners in Japan.[131] Vladimir Putin has also recently publicly returned several swords to Japan as a gesture of goodwill.[132] One sword Putin returned was reportedly one of the swords taken during U.S. occupation that somehow made its way to Russia.[133] These repatriations show the willingness of many possessors for returning these items to the original owners, and the international recognition of the importance of these artifacts to Japan. In many cases, the need to litigate could be completely bypassed through appeals to the possessors.

VIII. Proposal

A Japanese owner of an art sword taken during the U.S. occupation of Japan should, before all else, appeal to current possessors for voluntary repatriation when the current possessor becomes known. If recent stories of repatriations are indicative of a willingness to repatriate seized swords, current possessors may be more amenable to voluntary repatriation than expected. If appeals for voluntary repatriation are unsuccessful, this is what should be argued in court: that there was U.S. policy against seizing cultural property in war since at least the time of the Lieber Code, that the 1907 Agreement should cover the sword seizures, and if the court believes the

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[131] *See* Anderson *supra* note 66. *See also* Carolyn Carver, *Sword seized after WWII may return to Japan after 50+ years,* THE ARIZONA REPUBLIC (Apr. 21, 2017) (from TUSCON.COM: https://tucson.com/news/state-and-regional/sword-seized-after-wwii-may-return-to-japan-after-years/article_c1f67f0d-6462-5544-8492-19f1e37327b9.html).

[132] Paul Martin, *As Sign of Goodwill, President Putin Returns Swords to Japan*, JAPAN FORWARD (Dec. 16, 2017), https://japan-forward.com/as-sign-of-goodwill-president-putin-returns-swords-to-japan/.

[133] *Id.*

1907 Agreement does not cover post-surrender occupation, any gaps left behind should be filled by customary international law.

Courts in the United States should hold that the takings of these swords represent illegitimate takings. The takings should have been prohibited by the 1907 Agreement. In the case that courts hold that the 1907 Agreement does not cover this situation, the customary international law norm against taking cultural heritage objects in times of war and post-war occupation should fill in the gap to invalidate the seizure.

Further when considering the United States' adherence to the norm against taking cultural property, an argument should be made that the United States never meant to go against the norm in the first place, and that orders were never meant to result in the takings of culturally significant swords. Any takings of culturally significant swords were done by accident. It should be argued that the real purpose of the orders was to collect the widespread mass-produced swords, and the exemptions to the orders clearly prove that any culturally significant swords taken got swept up in the confusion. As the seizures of art swords were mistakenly done in violation of customary international law, it should then be argued that legitimate title never left the original owners, and that the swords should be returned to the families.

Additionally, a distinction will have to be made on which swords are culturally significant objects and which are purely weapons to determine if a violation of the 1907 Agreement or customary international law occurred. Courts should hold that the NBTHK is the body best suited for determining when a sword is culturally valuable enough to warrant litigation over repatriation. At the very least, the lowest level of NBTHK certification, Hozon (worthy of preservation), should be used as a minimum bar for concluding that a sword is a culturally

significant art sword and for this authentication level to be proof enough to a court that the sword in question is an important cultural heritage property. Additionally, a potential plaintiff should note that U.S. statute of limitations law will be much more favorable for bringing suit against a bona fide purchaser than Japanese law. In a situation with a bona fide purchaser, plaintiffs should push for the application of U.S. statute of limitations law.

IX. Conclusion

While few cases for the repatriation of Japanese art swords taken during the U.S. occupation have been litigated in U.S. courts, Japanese plaintiffs likely have a strong case for repatriation in these cases. U.S. courts should be sympathetic to the damage done by the takings of such important family heirlooms, and recognize the imbalance in value of having one of these artifacts sitting in a private home in the United States, rather than on display in their native Japan or in the possession of Japanese families who have owned the sword for centuries. The United States has a history of respecting the rights of other states to retain their cultural heritage during and after war, and this historical custom should not be disregarded because of an oversight at the start of the occupation of Japan.