

# “SPAIN FOR THE SPANIARDS”: AN EXAMINATION OF THE PLUNDER & POLEMIC RESTITUTION OF THE SALAMANCA PAPERS

*Emily T. Behzadi\**

## I. INTRODUCTION

Though often sought to be forgotten, the looting, theft, and destruction of cultural property plays an innate, and perhaps uncomfortable, role in Spain’s domestic history. From colonial looting of gold and codices to the confiscation of property from Jews and Muslims during the Spanish Inquisition,<sup>1</sup> it is without dispute that these illicit acts of plunder are a permanent stain on the history of the Spanish Empire. Although often perceived as primitive events or conducted during a time where the laws of armed conflict served more as a suggestion rather than a mandatory practice, it is nevertheless incumbent on modern scholars to recognize this previously institutionalized practice during times of armed conflict.

Modern scholarship regarding plunder and restitution of cultural property primarily focuses on World War II-era confiscations.<sup>2</sup> Scholarly developments in this jurisprudential area have not only spurred widespread codification of international policy towards restitution of Nazi-looted art, but have also illuminated the need for analogous solutions for cultural property plundered during similar times of armed conflict. One such example of this need is property taken during the Spanish Civil War, which occasioned vast plunder and destruction of art and cultural property from 1936 to 1939. Perhaps the most notoriously devastating attack on cultural heritage during the Spanish Civil War was the looting of thousands of documents,

---

\* J.D., Georgetown University Law Center, 2015; M.A. Twentieth Century Spanish Art from New York University Institute of Fine Arts. I wish to express gratitude to Dean Leticia Diaz, Ana Luisa Solis Escobosa, Taylor Holmes, and Candy Heller for their invaluable comments regarding this article, although any errors or omissions are purely my own. I also wish to thank Dr. Norbert Baer for his valued guidance with the initial conception of this article. A draft of this article was presented at the Southeastern Association of Law Schools Annual Conference Cultural Heritage “Work in Progress” August 1, 2019. Thank you to those who offered comments and feedback.

<sup>1</sup> During the Spanish Inquisition, the Spaniards confiscated an extraordinary number of Jewish and Islamic property from those refusing to convert to Catholicism. The number of properties seized and destroyed is unknown, but generally accepted to be in large quantity. For a detailed history of this period, see HENRY CHARLES LEA, *A HISTORY OF THE INQUISITION OF SPAIN* (1907). Michelina Restaino, *The 1492 Jewish Expulsion from Spain: How Identity Politics and Economics Converged*, University Honors Program Theses. 325 (2018).

<sup>2</sup> Understandably so, as the devastating years of combat and occupation during World War II resulted in the greatest displacement of cultural property in modern history. For a full discussion of the vast plunder and destruction that occurred during World War II see LYNN NICHOLAS, *THE RAPE OF EUROPA* (1994).

photographs, prints, and artworks from private citizens and institutions that were politically adverse to General Francisco Franco's totalitarian regime.<sup>3</sup> The property seized included two hundred tons of historical documents and culturally significant objects taken from various autonomous communities throughout Spain. Catalonia, an autonomous community with a particularly contentious history with Spain, bore the brunt of this war-time plunder. The objects taken from Catalonia and other autonomous communities were stored in an archive in the historic town of Salamanca for over forty-years without disturbance.<sup>4</sup> After questions over the ownership of these objects emerged in the 1990s, the moniker "*Los Papeles de Salamanca*" ("The Salamanca Papers") became a symbol of Catalonia's continual struggle to overcome the past injustices of the Spanish Civil War.

Under existing principles of Spanish and international law, difficulties have arisen when evaluating whether the Spanish State or Catalonia are the bona fide owners of this historical archive. Given the historically tumultuous relationship between the Spanish Government and the Catalan Government, it is not surprising that over eighty years have passed since the end of the Spanish Civil War, and yet the return, or lack thereof, of the Salamanca Papers continues to be an indignantly contested issue. The conflict over the ownership of the Salamanca Papers is one rarely discussed outside of Spain, and this issue is particularly vexing, as scholarship and policy often only consider international armed conflicts, rather than those of a domestic nature. The question then arises, what happens if, as in the case of Spain, the dispute over the restitution of cultural property is chiefly a domestic matter and a consequence of civil unrest? Since the Salamanca Papers retain historical and cultural significance for both Spaniards and Catalans alike, the perfunctory notion that there is an ethical and moral duty to restitute the property solely to Catalonia becomes more challenging to conceptualize.

The purpose of this article is to examine the ongoing legal dispute over the ownership of the Salamanca Papers from both national and international perspectives. Part II provides a historical overview of the Spanish Civil War and the ensuing plunder of the Salamanca Papers. Part III will then discuss the controversy and ongoing litigation surrounding the restitution of the Salamanca Papers and their subsequent return to Catalonia. Part IV provides a survey of Spain's cultural heritage laws and their application to the case of the Salamanca Papers. Part V applies this conflict to international laws regarding the plunder and restitution of cultural property. Finally, Part VI concludes that individual claimants, as opposed to state or regional governments, should retain ownership over their portion of the Salamanca Papers. Overall, this article reveals the weaknesses in Spain's legal regime of restitution, which, as a result of competing political factions,

---

<sup>3</sup> PAUL PRESTON, *THE SPANISH HOLOCAUST: INQUISITION AND EXTERMINATION IN THE TWENTIETH-CENTURY SPAIN* 488 (2012).

<sup>4</sup> *Id.*

has ultimately failed to provide redress to those Spaniards victimized by Franco's regime. The fundamental goal of this article is to advance the notion that States, like Spain, have both a moral and legal obligation to sustain a meaningful and effective restitution program, specifically after civil wars or similar armed conflicts. Restitution of the Salamanca Papers may serve as the first step toward mending the deep fissures of the Spanish Civil War, which still tacitly remain undisturbed in Spain.

## II. SPANISH CIVIL WAR & PLUNDER OF CULTURAL PROPERTY

### A. *The Spanish Civil War & the Counter-Revolution*

The Spanish Civil War and the decades-long dictatorship that ensued thereafter were consequences of a clash of sociopolitical ideals between the democratically elected government of the Spanish Second Republic (the so-called "Republicans," or sometimes referred to as the "Leftists") and the devoted, Catholic Church-endorsed military rebellion led by General Francisco Franco (referred to often as the "Nationalists," "Francoists," or the "Falange").<sup>5</sup> While Spain is one of the oldest countries in Europe, it had trouble becoming a modernized and politically stable nation during the nineteenth and twentieth centuries.<sup>6</sup> The formation of the Second Spanish Republic and the abdication of King Alfonso XIII relegated the clerical, military, and land elites to lower ranks of the Spanish government, and the Republicans did little to ease the resulting tensions from this demotion.<sup>7</sup> Between 1931 and 1936, Leftists groups, which were comprised mainly of the anarcho-syndicalist trade union, the National Confederation of Labor (CNT), the Spanish Socialist Workers' Party (PSOE), the Communist Party of Spain (PCE), the General Union of Labor (UGT), and the "Center-left Republicans," were fighting amongst themselves for control over the central government in Spain.<sup>8</sup>

Although the Leftists all agreed that they needed to unite to defeat their conservative opponents, they were sharply polarized on the means and subsequent ends of doing.<sup>9</sup> The divisive nature of the Leftist *movimientos* (movements) arguably created a vacuum for the rise of the Nationalists.

---

<sup>5</sup> To be clear, the Vatican never took a firm side during the Spanish Civil War. However, the Catholic Church in Spain was well-supported by Franco's troops. See STANLEY G. PAYNE, *THE SPANISH CIVIL WAR* (2008) (ebook).

<sup>6</sup> STANLEY G. PAYNE, *THE SPANISH CIVIL WAR* (2008) (ebook); For a comprehensive overview of Spain's cultural transition to modernity, see *THE CAMBRIDGE COMPANION TO MODERN SPANISH CULTURAL* (David T. Gies ed., 1999).

<sup>7</sup> James Friedberg, *The Wane in Spain (Of Universal Jurisdiction): Spain's Forgetful Democratic Transition And The Prosecution Of Tyrants*, 114 W. VA. L. REV. 825, 843 (2012).

<sup>8</sup> STANLEY G. PAYNE, *THE SPANISH CIVIL WAR* 47 (2008) (ebook); For an account of the conflicts within the various factions of the Republican army from pre-Civil War origins to its defeat in 1939, see MICHAEL ALPERT, *THE REPUBLICAN ARMY IN THE SPANISH CIVIL WAR 1936-1939* (1st ed. 2013).

<sup>9</sup> See ALPERT, *supra* note 8.

According to Edward E. Malefakis,<sup>10</sup> “[t]he tragedy of Republican Spain, in short, was that a civil war of its own always lurked within its ranks as it fought the greater Civil War against the Nationalists.”<sup>11</sup> Erstwhile, the Nationalists devoted themselves to building mass militias, which included garnering the support of the most trained and equipped colonials of the Second Republic’s army for the rebellion.<sup>12</sup> Between July 1936 and April 1939, chaos ensued in the country, with the essential breakdown of authority occurring in most parts of Spain.<sup>13</sup> The military insurrection of July 1936, which arguably commenced the Spanish Civil War, resulted in a large number of executions and unlawful killings by the Republicans and Franco’s Nationalists.<sup>14</sup> Richard Herr, a noted scholar of Spanish history, characterizes this stage of the Civil War as bound with “ferocious cruelty.”<sup>15</sup>

While the Civil War was primarily a consequence of civil unrest, it was also a profoundly international conflict, with roots from foreign influences across the globe. The Nationalist *causa* (cause) supported by Nazi Germany and Fascist Italy, primarily fought to annihilate the labor unions, the socialists, and those against the Catholic church.<sup>16</sup> On the other hand, the Republican faction, backed by Mexico and Russia, fought against Hitler and Nazism, the Catholic Church, the military castes, and, of course, the wealthy landowners.<sup>17</sup> However, this war was not solely a product of political tensions, but rather a divergence of struggles in all aspects of society, including religion, education, and culture, with both sides demanding a singular and uncompromising resolution.<sup>18</sup> As a consequence of this global and national clash of political and cultural ideologies, the Spanish Civil War

<sup>10</sup> Edward E. Malefakis was a well-known American Spanish history professor, who among his other notable accomplishments, was commissioned in 2004 by the government of Spain to advise over the subject Salamanca Papers. See *The Committee of Experts Considers It 'Fair and Legitimate' to Return the Archive of Salamanca to Catalonia*, ELMUNDO.ES (Dec. 24, 2004, 2:23), <https://www.elmundo.es/elmundo/2004/12/23/cultura/1103821126.html>.

<sup>11</sup> Edward E. Malefakis, *Internal Political Problems and Loyalties*, in CIVIL WARS IN THE 20TH CENTURY 111 (Robin Higham ed., 1st ed. 1972).

<sup>12</sup> Juan J. García Blesa & Víctor L. Gutiérrez Castillo, *The Rights Of The Victims of Past Atrocities in Spain: Reparation Without Truth and Justice?*, 29 CONN. J. INT'L L. 227, 229 (2014).

<sup>13</sup> *Id.* at 230.

<sup>14</sup> Peter Burbridge, *Waking the Dead of the Spanish Civil War: Judge Baltasar Garzon and the Spanish Law of Historical Memory*, 9 J. INT'L CRIM. JUST. 753 (2011).

<sup>15</sup> RICHARD HERR, AN HISTORICAL ESSAY ON MODERN SPAIN 190 (1st ed. 1974).

<sup>16</sup> Luc Reydam, *A la guerre comme à la guerre: patterns of armed conflict, humanitarian law responses and new challenges*, 88 INT'L REV. OF THE RED CROSS, 729, 738 (2006).

<sup>17</sup> *Id.*

<sup>18</sup> For an examination of the social and cultural tensions occurring during the Spanish Civil War, see Claudio Hernández Burgos, *Bringing back Culture: Combatant and Civilian Attitudes during the Spanish Civil War, 1936-1939*, 101 THE J. OF THE HIST. ASS'N 448, 449-463 (2016).

resulted in violence, extra-judicial killings, torture, and the destruction and pillaging of private real and personal property.<sup>19</sup>

The Spanish Civil War served as “the destruction of the past, or rather the social mechanisms linking the individual’s experience with previous generations...and the damage to cultural heritage was particularly serious.”<sup>20</sup> Notably, an enormous wave of vandalism, destruction, and pillaging of art was rife on both the Republican and Nationalist sides. Systematic looting and pillaging were carried out in many parts of the Republican zone, specifically in Catholic churches.<sup>21</sup> However, the tremendous mass of systematic confiscations and destruction of cultural property is greatly attributed to the Nationalist side. Indeed, as the Nationalists began to gain strength and take over more territories, their coordination of the seizure and destruction of cultural property increased as well.<sup>22</sup>

### B. Franco’s Campaign of Systematic Confiscations

As Hitler had accomplished in World War II, General Francisco Franco similarly designed an organized and methodical program intended to systematically acquire cultural property from each region he conquered.<sup>23</sup> This program informally began in 1937, a year after Franco launched the uprising that led to the civil war.<sup>24</sup> Franco established the *Oficina de Investigación y Propaganda Anticomunista* (“OIPA”) (the Office of Anti-Communist Investigation and Propaganda), which sought to create an index of evidence, for the prosecution of communists and Marxists, and a library and museum, to educate the public about the threat of communism.<sup>25</sup> One of OIPA’s early initiatives was to confiscate Masonic documents and symbolic objects, which the organization saw as directly related to communism.<sup>26</sup> As the Nationalists took over more territory, their targets began to expand,

---

<sup>19</sup> PAUL PRESTON, *THE SPANISH HOLOCAUST: INQUISITION AND EXTERMINATION IN THE TWENTIETH-CENTURY SPAIN 475-488* (2012) (providing a detailed account of the systematic violence and damage to cultural heritage, which occurred during the Spanish Civil); *see also* OLIVIA MUÑOZ-ROJAS, *ASHES AND GRANITE: DESTRUCTION AND RECONSTRUCTION IN THE SPANISH CIVIL WAR AND ITS AFTERMATH* (2011).

<sup>20</sup> Julián Esteban-Chapapria, *The Spanish Civil War and Cultural Heritage*, 14 *FUTURE ANTERIOR: J. OF HIST. PRESERVATION, HIST., THEORY, AND CRITICISM*, 79, 79 (2017).

<sup>21</sup> PAYNE, *supra* note 6, at 105-106. Madrid was an exception as the Board of Confiscation and Protection of Artist Treasure protected existing artwork in buildings seized by political and union organizations, which were defending the public; Esteban-Chapapria, *supra* note 20, at 81-82.

<sup>22</sup> PRESTON, *supra* note 3, at 488.

<sup>23</sup> *Id.* at 486. In particular, to “recover all documentation related to secret sects and their activities in Spain found in possession of individuals or official entities, storing it carefully in a place far removed from danger where it can be catalogued and classified in order to create an archive that will permit the exposure and punishment of the enemies of the fatherland.”

<sup>24</sup> Peter Anderson, *The ‘Salamanca Papers’: Plunder, Collaboration, Surveillance and Restitution*, 89 *BULL. OF SPANISH STUD.*, 171, 175 (2012).

<sup>25</sup> *Id.* at 176.

<sup>26</sup> *Id.* at 177.

specifically into northern Spain.<sup>27</sup> OIPA apprehended a large bounty of documentary material from the Basque government, which OIPA thereafter exploited to produce criminal files to later prosecute political adversaries.<sup>28</sup> OIPA's efforts were part of an expansive international campaign to fight "*contra el comunismo*" (against communism) and to "immunize the country of the Marxist virus."<sup>29</sup>

Ramón Serrano Suñer, Franco's minister of the interior and an admirer of the Nazis, subsequently created the *Delegación del Estado para la Recuperación de Documentos* or the State Office for the Recovery of Documents ("DERD") on April 26, 1938.<sup>30</sup> DERD's primary mission was the confiscation of documents from organizations and individuals that were considered a threat to the insurgent Nationalist regime or opposed its societal and political views.<sup>31</sup> The main targets of DERD included institutions devoted to military service, police stations, social workers, propaganda offices, foreign correspondences, as well as public education, political parties, trade unions, and freemasons, among many others.<sup>32</sup> The Nationalists believed these institutions not only supported the Second Republic, but were also "*enemigos de la patria*" ("enemies of the nation").<sup>33</sup> This belief served as Franco's rationale behind the creation of DERD and the ongoing confiscations that succeeded the Nationalists' victory.<sup>34</sup>

Henceforth, DERD adopted and enhanced OIPA's scheme of confiscation. In addition to documents, DERD also confiscated books, magazines, periodicals, posters, paintings, sculptures, and other objects of cultural significance.<sup>35</sup> With respect to Masonic organizations, DERD targeted symbolic ceremonial objects, such as furniture and clothes.<sup>36</sup> As the Nationalists invaded new cities, they would seize what they considered to be the most important material owned by both private citizens and public and private institutions.<sup>37</sup> In addition to cities, the Francoists set up *Comisiones Provinciales de Bienes Incautados* (Provincial Commissions of Confiscated

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 176.

<sup>30</sup> See Marc Balcells, *The Knife that Still Divides: The Archive of Salamanca and the Heritage of Spain's Civil War in the 21<sup>st</sup> Century*, 5 ARTS SOC. SCI. J. 1, 2 (2014).

<sup>31</sup> See *id.*; see also PRESTON, *supra* note 3, at 466 (explaining DERD's purpose).

<sup>32</sup> See THE DIGNITY COMM'N, THE ARCHIVES FRANCO STOLE FROM CATALONIA: THE CAMPAIGN FOR THEIR RETURN 8-9 (Editorial Milenio 2004) (2004).

<sup>33</sup> See Anderson, *supra* note 24 at 174; see also Jesús Espinosa Romero & Sofía Rodríguez López, *El Archivo de Guerra Civil De Salamanca. De La Campaña a la Transición*, CENTRO DOCUMENTAL DE LA MEMORIA HISTÓRICA 131, 137 (2015), [https://www.ucm.es/data/cont/docs/446-2015-11-23-j2015\\_maq\\_espinosa%20romero%20jesus.pdf](https://www.ucm.es/data/cont/docs/446-2015-11-23-j2015_maq_espinosa%20romero%20jesus.pdf).

<sup>34</sup> See Anderson, *supra* note 24, at 174.

<sup>35</sup> THE DIGNITY COMM'N, *supra* note 32, at 16.

<sup>36</sup> *Id.*; For an examination of Franco's treatment of freemasonry during the Spanish Civil War, see generally Julius Ruiz, *Fighting the International Conspiracy: The Francoist Persecution of Freemasonry, 1936-1945*, 12:2 POL., RELIGION AND IDEOLOGY 179 (2011).

<sup>37</sup> Anderson, *supra* note 24, at 177.

Property) in small occupied provincial areas to seize the assets of those countrymen considered enemies of the regime.<sup>38</sup> The seizures of these small provincial areas seemingly served as practice for DERD's larger targets.

DERD's highest priority was Catalonia, specifically Barcelona, which had its provisional seat on both the national Republican and Basque governments.<sup>39</sup> On January 28, 1939, two days after the occupation of Barcelona, approximately six DERD-designated search teams carried out a massive program of two thousand search and confiscation operations throughout the city.<sup>40</sup> The teams began seizing objects at random and in substantial quantity, with the most desirable targets being newspapers, magazines, books, and printing presses from private institutions.<sup>41</sup> With respect to the Catalan government, the DERD teams ransacked official buildings, the headquarters of major political parties and movements, and the private homes of politicians and union leaders.<sup>42</sup> Due to the vast quantity of objects seized, DERD could not process and organize all objects effectively.<sup>43</sup> Nonetheless, it is estimated that over two hundred tons of documents were confiscated in Catalonia alone.<sup>44</sup>

Most of the confiscated materials were then sent to Salamanca, where archivists would extract information about the social and political activities of thousands of private individuals.<sup>45</sup> After the Civil War, DERD used the extrapolated information to not only punish political enemies, but to also return objects to those private owners who swore fidelity to Franco's regime.<sup>46</sup> However, most of the objects were not returned to their rightful owners, and those that were not sent to Salamanca were subject to a worse fate, as the Nationalists created the Department of Press and Publicity, which succeeded at "purging" materials considered to be against the Nationalist movement from public libraries, cultural institutions, publishers' offices, and bookshops.<sup>47</sup> This Department destroyed at least seventy-two tons of published material, and the profits from the sale of that destruction were aimed to fund DERD's activities.<sup>48</sup>

After the end of the Civil War, Franco enacted laws to legitimize the confiscations that had occurred during the conflict. On February 9, 1939, Franco's regime instituted the *Ley de Responsabilidades Políticas* (Law of Political Responsibilities), which essentially served as a legal means to

---

<sup>38</sup> Conxita Mir, *The Francoist Repression in the Catalan Countries*, 1 CATALAN HIST. REV., 133, 140 (2008).

<sup>39</sup> See THE DIGNITY COMM'N, *supra* note 32, at 9.

<sup>40</sup> See Balcells, *supra* note 30, at 2.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See THE DIGNITY COMM'N, *supra* note 32, at 10.

<sup>44</sup> See *id.* at 13.

<sup>45</sup> See Balcells, *supra* note 30, at 2.

<sup>46</sup> See THE DIGNITY COMM'N, *supra* note 32, at 10-11.

<sup>47</sup> See *id.* at 11.

<sup>48</sup> See *id.*

financially punish those members of the Republican contingent.<sup>49</sup> Due to the alleged “magnitude of intentional and material consequences of grievances inflicted on Spain” by the Republicans, the Law of Political Responsibilities sought to “harmonize the sacred interests of the country” through mandatory economic sanctions and monetary reparations.<sup>50</sup> Under Chapter 1, Article 3.0 of the Law of Political Responsibilities, all parties or groups declared “*fuera de la ley*” (“out of the law”)<sup>51</sup> suffered “the absolute loss of their rights of all kinds and the total loss of their assets. These assets will be wholly owned by the State.”<sup>52</sup> The confiscated assets were then used to benefit the new Francoist state, which included a pathway to refinance the rebuilding of the country.<sup>53</sup> On March 1, 1940, the Franco Regime, passed *La Ley de Represión de la Masonería y el Comunismo del 1 de Marzo de 1940* (the Law of the Repression of Masonry and Communism of March 1, 1940), which, among other things, criminalized Freemasonry, communism, and “other clandestine societies”; created a special court for the suppression of Freemasonry and communism; and permitted the seizure of the personal property and ritual objects associated with Masonic rites from the freemasons.<sup>54</sup>

While it never came to fruition, May 1939 records suggest that Franco desired to display the captured property in a museum to be called the “Museum of the Crusade.”<sup>55</sup> Similar to the “Museum of the Revolution” in Havana, Cuba, the “Museum of the Crusade,” was meant to show the world the moral lessons taught by the Spanish fight against Communism.<sup>56</sup> It is not clear why the Nationalists never established the museum. Perhaps it is because they principally desired to punish their political enemies more than educating the public on the faults of communism. It is possible that the

<sup>49</sup> *Ley de Responsabilidades Políticas* [Law of Political Responsibilities] pmb. (B.O.E. 1939, 44) (Spain).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at ch. 1, art. 2.0. According to Chapter 1, Article 2.0 these groups included the following: the Action Republican Party, Republican Left, Republican Union, Federal Party, National Confederation of Labor, General Union of Workers, Socialist Workers Party, Communist Party, Trade Union Party, Pestaña Trade Union, Iberian Anarchist Federation, National Party, Basque Country, Basque Nationalist Action, Solidarity of Basque Workers, Catalan Esquerra, Gallego Party, Marxist Unification Workers Party, Libertarian Athenaeum, Red Relief International, Unified Socialist Party of Catalonia, Rabassaires Union, Catalan Action Republican Party, Republican Catalan Party, Democratic Union of Catalonia, State of Catalonia, the Masonic Lodges and any other entities with views expressing sympathies banned by the law.

<sup>52</sup> *Id.* at ch. 1, art. 3.0.

<sup>53</sup> See Mir, *supra* note 38, at 140; see also Ramón Arnabat Mata, LA REPRESIÓN: EL ADN DEL FRANQUISMO ESPAÑOL, 39 CUADERNOS DE HISTORIA 33, 36 (2013).

<sup>54</sup> See *Ley de 1 de Marzo de 1940 Sobre Represión de la Masonería y del Comunismo* [Law of the Repression of Masonry and Communism of March 1, 1940] art. 1 (B.O.E. 1940, 62) (Spain).

<sup>55</sup> Anderson, *supra* note 24, at 176.

<sup>56</sup> *Id.*; Claire Boobbyer, *On The Trail Of Fidel Castro: 10 Must-Visit Sights In Cuba*, THE TELEGRAPH, (Nov. 28, 2016) (discussing the “Museum of the Revolution” in Havana, Cuba which showcases, through various galleries, the history of the country’s revolutionary struggle), <https://www.telegraph.co.uk/travel/destinations/caribbean/cuba/articles/in-the-footsteps-of-fidel-castro-historical-attractions-in-cuba/>.

immense volume of disorganized objects was too big of a task to actualize in the middle of rebuilding a country. Whatever the reason, the two hundred tons of confiscated objects were instead transported to Salamanca to establish an archive of civil war assets.<sup>57</sup>

While the archives were not particularly well organized, the regime did achieve its intended purpose: to punish its political enemies.<sup>58</sup> The Nationalists managed to create card files from all of the objects in the archives, which described suspects' ideological leanings and alleged crimes.<sup>59</sup> These card files would then, in turn, be used as evidence to prosecute alleged crimes.<sup>60</sup> The purpose of these records was ultimately to punish political adversaries, but the itemized records kept by the regime also contained reports on opponents with alleged connections to the freemasons, Jews, evangelists, Rotary Club members, and other spiritualist organizations.<sup>61</sup> Although the classification process may have successfully created a police record, it ultimately failed at achieving any semblance of a professional archive. From 1939 until the termination of DERD in 1977, the archives remained a source for Franco's regime to institutionalize repression within varying subjugated groups.<sup>62</sup> The collection was thereafter transferred to the newly democratic institution, the Ministry of Culture and Sports in 1979.<sup>63</sup> Even after the transition to democracy, the archives remain an *aide-mémoire* of the government that produced them, as those archives detail an account of the repression and violence that occurred during the civil war and the dictatorship that followed.

### III. THE POLEMIC RESTITUTION CONTROVERSY OF THE SALAMANCA PAPERS

The massive archive in Salamanca and the controversy over its contents remains a little-known matter to anyone outside of Spain. Since the transition from dictatorship to democracy, the discussion over the restitution of these objects serves as an enduring vestige of the atrocities of the Spanish Civil War. Two years after the death of Franco, the new democratic government worked to convert what was essentially a repository of the objects confiscated during the Spanish Civil War into a legitimate historical

---

<sup>57</sup> Balcells, *supra* note 24, at 2.

<sup>58</sup> *See id.*

<sup>59</sup> *Id.*; *see also* Preston, *supra* 3, at 489.

<sup>60</sup> THE DIGNITY COMM'N, *supra* note 32, at 14.

<sup>61</sup> *Id.* at 15.

<sup>62</sup> *Id.*

<sup>63</sup> Culture Ministry, *Orden de 7 de mayo de 1979 por la que se dispone se adscriban al Archivo Histórico Nacional los fondos documentales de la extinguida Sección de Servicios Documentales, formando en el mismo una División independiente*, (June 21, 1979), <https://www.boe.es/eli/es/o/1979/05/07/2>).

archive.<sup>64</sup> During this transition, the Spanish government introduced no measures to restitute the property to their rightful owners, nor did the government apprise the public of the existence of the archive or its contents.<sup>65</sup>

The contents within the archive were, and still are, of great importance to the citizens of Catalonia, as much of the cultural property stored in Salamanca came from the 1938 confiscations in Barcelona.<sup>66</sup> Josep Bargalló i Valls, former Prime Minister of the *Generalitat de Catalunya* (the Government of Catalonia), affirmed the great importance of the archive to the Catalan people:

It can therefore surprise no one that the Catalan people want to recover the documents that bear witness to their country's age-old identity. No nation may steal from another elements that are essential to the framework of national history; no nation may steal from another the cultural trappings that sustain national memory. Thus it is that the people of Catalonia today call for the return of what was taken from them as a symbol of their submission, the spoils of war taken on their defeat. If there is a genuine desire to build a State of brother nations, in which respect for the plural nature of the different historical communities involved is truly guaranteed, the historical memory of these nations must also be maintained. To turn a blind eye to their demands is to wreck the chance of furthering dialogue and the possibility of peaceful coexistence. Turning a blind eye to their demands also shows a desire to perpetuate the symbols of defeat. The documents retained at Salamanca signify much more than mere historical heritage. They represent the defeat of the Catalan people in 1939.<sup>67</sup>

While the question of whether to return the objects to Catalonia is one that Spain's Ministry of Culture and Sports insists is a legal and not a "political problem," the history of the restitution of the objects has proven to be inherently partisan.<sup>68</sup> A year after the reestablishment of the *Generalitat* of Catalonia in 1977, Josep Benet, a noted Catalan historian and senator in

<sup>64</sup> Toni Strubell, *Address at the London School of Economics: From Pillage to Reparation: The Struggle for Salamanca Papers* (Nov. 8, 2006), [http://www.fundacioemilidarder.cat/documentos/D\\_35.pdf](http://www.fundacioemilidarder.cat/documentos/D_35.pdf).

<sup>65</sup> Elena Yeste Piquer, *Guerra de Archivos: el Patrimonio Documental de la Memoria*, LAS CUARTAS JORNADAS ARCHIVO Y MEMORIA. LA MEMORIA DE LOS CONFLICTOS: LEGADOS DOCUMENTALES PARA LA HISTORIA 1, 5 (Madrid, 2009).

<sup>66</sup> THE DIGNITY COMM'N, *supra* note 32, at 12.

<sup>67</sup> *Id.* at 1 [hereinafter the "Generalitat"].

<sup>68</sup> *El Gobierno insiste en que el traslado de los papeles de Salamanca es una cuestión de cumplimiento de la ley*, LA GACETA (June 20, 2019), <https://www.lagacetadesalamanca.es/salamanca/el-gobierno-insiste-en-que-el-traslado-de-los-papeles-de-salamanca-es-una-cuestion-de-cumplimiento-de-la-ley-CD1162235>.

the first democratically elected Spanish parliament, made the initial demand for restitution of, what is now coined, the "Salamanca Papers."<sup>69</sup> Notably, Manuel Fraga, one of the founding fathers of the Spanish *Partido Popular* ("Popular Party"), which is now ironically one of the conservative parties in Spain, followed this appeal by making a formal request to the Spanish Parliament on March 18, 1980 for the return of the objects to Catalonia.<sup>70</sup>

Although these requests were mostly unsuccessful, they did lead to some significant legislative measures introduced by both the Spanish and Catalanian governments. On May 18, 1989, the Parliament of Catalonia passed Resolution 73/III *La Recuperació Del Material Documental Requisat a Catalunya a Partir del 1939* (the "Recovery of Material Documents Requisitioned from Catalonia Since 1939"), which served as a formal demand to the Spanish government for the return of all cultural property belonging to the Catalan government and its private citizens.<sup>71</sup> While this resolution went unanswered, the issue of the Salamanca Papers became a topic of fervent controversy by 1995, when on March 15, 1995, Carmen Alborch, the Spanish Minister of Culture, pronounced that Civil War documents would be returned to the Catalan Government, but "with sufficient delicacy to implement it legally and ensure that the documentation of Catalonia can be continued in Salamanca, through microfilming."<sup>72</sup>

This pronouncement was marred with controversy, resulting in over 55,000 people from Salamanca demonstrating against the transfer.<sup>73</sup> On April 25, 1995, the Mayor of Salamanca delivered to the Minister of Culture 97,000 signatures protesting the return of the contents of the archive to Catalonia.<sup>74</sup> In November 1995, the Ministry of Culture created *La Junta Superior De Archivos* (the "Superior Board of Archives"), a judicial body specifically created to decide the future location of the archives.<sup>75</sup> In January 1996, Minister Alborch appointed a commission of experts to study the archives and to determine their provenance.<sup>76</sup> While some work had

---

<sup>69</sup> Piquer, *supra* note 65. For purposes of this paper, the objects at issue shall hereinafter be called the "Salamanca Papers." However, note that the archive contains more than just documents, but also posters, paintings, books, flags, and other objects of cultural and historical significance.

<sup>70</sup> Anderson, *supra* note 24, at 172 n.6.

<sup>71</sup> See *Proposició No De Llei Sobre La Recuperació Del Material Documental Requist a Catalunya a Partir Del 1939*, (May 22, 1989), <https://www.parlament.cat/document/bop/48856.pdf>, at 4624-4625.

<sup>72</sup> *El Gobierno devuelve a Cataluña los archivos históricos requisados en 1939*, EL PAÍS, (March 18, 1995), [https://elpais.com/diario/1995/03/18/cultura/795481201\\_850215.html](https://elpais.com/diario/1995/03/18/cultura/795481201_850215.html).

<sup>73</sup> José Ángel Montañés, *Una Histórica Reclamación*, EL PAÍS, (Dec. 24, 2004), [https://elpais.com/diario/2004/12/24/cultura/1103842801\\_850215.html](https://elpais.com/diario/2004/12/24/cultura/1103842801_850215.html).

<sup>74</sup> *Los 'papeles de Salamanca': del franquismo a la actualidad*, EL MUNDO (January 31, 2006), <https://www.elmundo.es/elmundo/2005/06/09/cultura/1118336528.html>.

<sup>75</sup> *La Junta Superior de Archivos Sólo «Prestaba» los Documentos*, ABC, (Jan. 09, 2005), [https://www.abc.es/hemeroteca/historico-09-01-2005/abc/Cultura/la-junta-superior-de-archivos-solo-prestaba-los-documentos\\_9631371227468.html](https://www.abc.es/hemeroteca/historico-09-01-2005/abc/Cultura/la-junta-superior-de-archivos-solo-prestaba-los-documentos_9631371227468.html).

<sup>76</sup> *Los 'papeles de Salamanca': del franquismo a la actualidad*, EL MUNDO (January 31, 2006), <https://www.elmundo.es/elmundo/2005/06/09/cultura/1118336528.html>.

occurred towards the recuperation of the archive, that work soon ceased in May of 1996 with the electoral triumph of the Popular Party, a conservative political party in Spain, which subsequently pronounced that the documents “no se moverán” (“will not move”).<sup>77</sup>

On November 27, 1996, the Superior Board of Archives forwarded the report of the commission of experts to the Spanish Congress.<sup>78</sup> The report recommended the creation of an “Archive of the Civil War in Salamanca” to hold and eventually display all objects from the Spanish Civil War.<sup>79</sup> However, the report also recommended objects that were not from the Civil War to be returned to Catalonia in the form of a “deposit,” with the national government still retaining ownership.<sup>80</sup> On March 12, 1999, by Royal Decree, the Spanish parliament officially established “The General Archive of the Spanish Civil War,” to house all of the documents confiscated during the Civil War.<sup>81</sup> That same year, the Ministry of Culture established *El Patronato del Archivo de la Guerra Civil* (“The Patronage of the Archive of the Civil War”), a new body in charge of dealing with “technical decisions” about the Archive, including those claims of restitution by the government of Catalonia.<sup>82</sup> In 2002, a group of journalists, historians, archivists, writers, and cultural activists launched the *Comissió de la Dignitat* (the “Dignity Commission”) to promote and lobby for the repatriation of the looted materials to Catalonia.<sup>83</sup> That same year, the Archive announced that it planned to produce an exhibition entitled *Propaganda en Guerra*, with the very materials the Dignity Commission desired to repatriate.<sup>84</sup> In response, the Commission demanded the return of the property and, in Madrid’s major newspaper *El País*, called for the suspension of the exhibition.<sup>85</sup>

The *Patronato del Archivo de la Guerra Civil* rejected the transfer of the archive to Catalonia, opining that the archive needed to stay in Salamanca to preserve its unity, per recommendations from the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”).<sup>86</sup> On December 23, 2004, the commission of experts again submitted a non-

---

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Real Decreto 426/1999, de 12 de Marzo, de Creación del Archivo General de la Guerra Civil Española*, B.O.E., 1999, 426 (Spain), <https://www.boe.es/eli/es/rd/1999/03/12/426/dof/spa/pdf>.

<sup>82</sup> Ignacio Francia, *Constituido el Patronato del Archivo de la Guerra Civil*, *El País* (Jun. 18, 1999), [https://elpais.com/diario/1999/06/18/cultura/929656806\\_850215.html](https://elpais.com/diario/1999/06/18/cultura/929656806_850215.html).

<sup>83</sup> THE DIGNITY COMM’N, *supra* note 32, at 8-9.

<sup>84</sup> Ignacio Francia, *Una exposición con estos fondos augura polémicas*, *El País* (Jun. 25, 2002), [https://elpais.com/diario/2002/06/25/cultura/1024956003\\_850215.html](https://elpais.com/diario/2002/06/25/cultura/1024956003_850215.html).

<sup>85</sup> *Id.*

<sup>86</sup> *El Patronato del Archivo de Salamanca deniega el traslado de documentos a Cataluña*, *EL PAÍS*, (July 21, 2002), [https://elpais.com/cultura/2002/07/22/actualidad/1027288801\\_850215.html](https://elpais.com/cultura/2002/07/22/actualidad/1027288801_850215.html).

binding report recommending the return of the documents to Catalonia.<sup>87</sup> After the change of parliamentary majority in 2004, the Spanish government pronounced a desire to initiate “a process of dialogue with the Government of the *Generalitat*, through the appropriate institutional channels, to timely resolve the dispute raised in relation to the seized documentation that is currently collected in the General Archive of the Civil War of Salamanca.”<sup>88</sup> On November 16, 2005, after several attempts to block its approval, the Spanish Government passed *Ley 21/2005* (Law 21/2005), which accomplished two important things: (1) it mandated restitution of the Salamanca Papers to their rightful owners or heirs in Catalonia, and (2) it created a new archive with the purpose of documenting the events of the Civil War.<sup>89</sup> Unsurprisingly, after the passage of *Ley 21/2005*, the municipal government of Salamanca and the autonomous government of Castilla-León, run by the conservative *Partido Popular*, as well as thirty-three senators from Spanish Parliament, immediately appealed the law as unconstitutional and sought to suspend the return, which was to occur on January 19, 2006.<sup>90</sup>

On March 14, 2013, Spain’s highest court ruled that the law was constitutional, finding that the objects seized from Catalan organizations and individuals must be returned to their rightful owners in Catalonia.<sup>91</sup> To arrive at this conclusion, the Court considered the Appellant’s<sup>92</sup> primary argument: that restitution of the Salamanca Papers would damage the integrity of the archive and would ultimately result in “a spoliation” of the archive and a “disturbance of the fulfillment of the [Archive’s] social function.”<sup>93</sup> In arguing against the constitutionality of the law, the Appellant further contended under Article 149.1.28 of the Spanish Constitution, that it has the

<sup>87</sup> *Los 'papeles de Salamanca': del franquismo a la actualidad*, EL MUNDO (January 31, 2006), <https://www.elmundo.es/elmundo/2005/06/09/cultura/1118336528.html>.

<sup>88</sup> *Los 'papeles de Salamanca' ya se encuentran en el Archivo Municipal de Cataluña*, EUROPA PRESS, (Jan. 31, 2006), <https://www.europapress.es/cultura/noticia-papeles-salamanca-ya-encuentran-archivo-municipal-cataluna-20060131121221.html>.

<sup>89</sup> *Ley 21/2005, de 17 de Noviembre, de Restitución a la Generalidad de Cataluña de los Documentos Incautados con Motivo de la Guerra Civil Custodiados en el Archivo General de la Guerra Civil Española y de Creación del Centro Documental de la Memoria Histórica* [Law 21/2005, of November 17, on the return to the Generalitat of Catalonia of the documents seized on the occasion of the Civil War kept in the General Archive of the Spanish Civil War and the creation of the Documentary Center of Historical Memory] art.4, art. 6 (L.O. 2005).

<sup>90</sup> *Recurso de inconstitucionalidad 9007-2005, Interpuesto por la Junta de Castilla y León en relación con diversos preceptos de la Ley 21/2005, de 17 de noviembre, de restitución a la Generalitat de Cataluña de los documentos incautados con motivo de la guerra civil custodiados en el Archivo General de la Guerra Civil Española y de creación del Centro Documental de la Memoria Histórica*, <https://global.economistjurist.es/BDI/class/descarga.php?id=55060>.

<sup>91</sup> Tereixa Constenla, *El Constitucional avala el envío de los 'papeles de Salamanca' a Cataluña*, EL PAÍS (Feb. 1, 2013) [https://elpais.com/cultura/2013/02/01/actualidad/1359721614\\_077469.html](https://elpais.com/cultura/2013/02/01/actualidad/1359721614_077469.html).

<sup>92</sup> For purposes of this note, the “Appellant” shall be referred to as the municipal government of Salamanca and the autonomous government of Castilla-León, as well as thirty-three senators from Spanish Parliament, which appealed the constitutionality of Ley 21/2005.

<sup>93</sup> S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 151) (Spain) (Discussing the “social function” is a concept under Spain’s cultural heritage laws, which will be discussed *infra*.)

exclusive power of the “defense of the Spanish cultural, artistic and monumental heritage against exportation and exploitation” concerning “museums, libraries and archives of state ownership, without prejudice to their management by the Autonomous Communities.”<sup>94</sup> It argued that not allowing the Spanish Government to properly dispose of the property would be in violation of Article 149.1.28 of the Spanish Constitution, which obligates the Spanish Government to adopt the necessary measures to deal with the issue of cultural property despoliation and to guarantee the preservation of the historical and cultural heritage of Spain.<sup>95</sup>

The Constitutional Court disagreed with the Appellant’s assertions and held that Catalonia had the competency (essentially the power or jurisdiction) to effectuate the purpose of the law, i.e., to restitute the property to the rightful owners and heirs.<sup>96</sup> In ruling in favor of the law’s constitutionality, the Court considered whether the law had a reasonable purpose and was not “arbitrary or irrational.”<sup>97</sup> According to the Constitutional Court, a law has a reasonable purpose if it is “not devoid of any foundation” and, “although one can legitimately disagree with the concrete solution adopted,” it does not make it “arbitrary or irrational.”<sup>98</sup> The Constitutional Court found that because the Spanish Government enacted the Spanish Historical Heritage Law, which explicitly permits the transfer of cultural property assets to other administrations, including governments of autonomous communities, *Ley 21/2005* did not infringe on Article 149.1.28 of the Spanish Constitution.<sup>99</sup> Furthermore, *Ley 21/2005* was held to have a rational purpose, as the restoration of the objects to their rightful owners could not be deemed “arbitrary or unreasonable.”<sup>100</sup>

However, this ruling by Spain’s Constitutional Court was not enough to end this dispute over the archives.<sup>101</sup> While over 400,000 materials have been returned to the *Generalitat* of Catalonia, litigation continues as to some of the remaining materials.<sup>102</sup> After the Spanish Constitutional Court’s judgment in 2013, the *Asociación Salvar el Archivo* (Save the Archive Association) (“SAA”), an association devoted to lobbying for the Salamanca Papers to remain in Salamanca, filed a new lawsuit in the *Tribunal Superior*

---

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 152.

<sup>96</sup> *Id.* at 161.

<sup>97</sup> *Id.* at 160.

<sup>98</sup> *Id.* at 161.

<sup>99</sup> *Id.* at 161-162.

<sup>100</sup> *Id.* at 160.

<sup>101</sup> See Aina Grau, *Papeles de Salamanca, ¿un viaje de ida y vuelta?*, EL NACIONAL, (April 24, 2017), [https://www.elnacional.cat/ca/cultura/papers-salamanca-viatge-anada-tornada\\_152202\\_102.html](https://www.elnacional.cat/ca/cultura/papers-salamanca-viatge-anada-tornada_152202_102.html).

<sup>102</sup> See *El Supremo confirma la devolución de una remesa de papeles de Salamanca a la Generalitat cinco años después*, LA VANGUARDIA, (June 17, 2019), <https://www.lavanguardia.com/politica/20190617/462925468391/supremo-devolucion-papeles-salamanca-cinco-anos-despues.html>.

*de Justicia de Cataluña* (Superior Court of Justice of Catalonia) (“TSJC”).<sup>103</sup> The TSJC outlined the essential arguments of the case as being: (1) the legality of the procedure outlined in *Ley 21/2005*, which transferred the Salamanca Papers to Catalonia, (2) the legality of the delivery of property transferred to different persons and institutions that were not the original owners or heirs, and (3) the failure of the *Generalitat* to digitize the transferred documents as required by *Ley 21/2005*.<sup>104</sup> In support of its argument, SAA maintained that the deadline imposed by *Ley 21/2005*, which required claimants to come forward within one year after the law’s enactment, had well-since passed and required Catalonia to transfer back all of those unclaimed objects to the Salamanca Archive.<sup>105</sup> The SAA further accused Catalonia of conveying ownership to people or entities who were not the legitimate owners or their successors.<sup>106</sup>

In late 2017, the TSJC dismissed the SAA’s claim for primarily procedural issues, noting that the Catalan court did not have the jurisdiction to resolve the matter, since it was the Spanish Ministry of Culture who authorized the return of the documents between 2006 and 2011.<sup>107</sup> The Catalonia Superior Court did not reach the substance of the SAA’s claim because it lacked the “competence” to do so.<sup>108</sup> In fact, the TSJC required the SAA to pay €1,500 euros for payment of the court costs for bringing the inadmissible lawsuit.<sup>109</sup> The TSJC instead indicated that *Ley 21/2005* was controlling over all matters related to this dispute and that the State Administration retained sole competence to decide about the return of the documents.<sup>110</sup>

In October 2018, Minister of Culture José Guirao announced the convening of a commission to “resolve the pending issues” of the Salamanca Papers “in accordance with the law,” noting that “there are not many...[a]t some point it got stuck on political issues.”<sup>111</sup> In the interim, the State decided not to give any more property to Catalonia until the situation was corrected.<sup>112</sup> In a meeting in November 2018, Spain’s Minister of Culture and Sports, the Minister of Culture of Castilla y León, and the Mayor of

---

<sup>103</sup> T.S.J., Nov. 24, 2017 (R.O.J. No. 12334, p. 2) (Spain).

<sup>104</sup> *Id.* (Providing an analysis about documentary funds for which are allegedly owed to the rightful owners.).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 5.

<sup>108</sup> *Id.* at 2.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Ministerio de Cultura y Generalitat catalana deshuelan su relación en los 'papeles de Salamanca'*, EL MUNDO (Oct. 18, 2018), <https://www.elmundo.es/cultura/2018/10/18/5bc7be2be5fdeac7208b463c.html>.

<sup>112</sup> *Guirao: No saldrán más 'papeles' del Archivo de Salamanca que no estén amparados por la ley de 2005*, LA GACETA DE SALAMANCA (Dec. 11, 2018), <https://www.lagacetadesalamanca.es/hemeroteca/guirao-compromete-saldran-archivos-salamanca-GTGS255388>.

Salamanca entered into a dual agreement, wherein the government would limit the transfer of documents from the Salamanca Archive and strictly comply with *Ley 21/2005*.<sup>113</sup> In exchange, the Minister of Culture and Sports agreed to “enhance the Documentary Center of Historical Memory and expand its content” to be “a large center, the most complete possible, for the study of a historical period from Spain.”<sup>114</sup>

Although the Minister of Culture announced that the issue of the Salamanca Papers would be resolved in 2019, this optimistic outlook has yet to come to fruition. The SAA called this a “false closing” of the issue, as it fails to address the issues with the papers brought up in the Catalonia court case.<sup>115</sup> Following the court cases, three political parties in the Spanish Government, the *Partido Popular* (“PPs”), *Ciudadanos* (“Cs”) and *Vox*, signed the SAA’s manifesto, demanding return of those documents already sent to Catalonia and affirming that no more transfers will be made to the so-called “separatists who want to break the unity of Spain.”<sup>116</sup> On January 22, 2019, the Spanish Senate approved a motion to give “its strongest support to the integrity of the Salamanca Archive, complying with laws and judicial resolutions,” as well as requiring the *Generalitat* to immediately return any of the objects that have not been restored, as well as those that were returned to individuals who were not the rightful owner.<sup>117</sup>

Simultaneously, in a case before the *Tribunal Supremo*, the court of highest original jurisdiction, the *Generalitat* reiterated its right for the return of “all documents and assets confiscated by DERD from the *Generalitat* and private individuals or legal entities with residence, domicile, delegation, or sections in Catalonia.”<sup>118</sup> Some of the objects requested from the archive include 1,675 boxes of documents, 938 books, ten posters, three maps, and

<sup>113</sup> *Ministerio, Junta y Ayuntamiento de Salamanca acuerdan ceñir la salida y regreso de papeles del Archivo de Salamanca al estricto cumplimiento de la Ley de 2005*, MINISTERIO DE CULTURA Y DEPORTE (Nov. 11, 2018), <http://www.culturaydeporte.gob.es/actualidad/2018/12/20181211-ministro-salamanca.html>.

<sup>114</sup> *Id.*

<sup>115</sup> *Cierre en falso del caso de los papeles del Archivo de Salamanca*, LA GACETA (Dec. 15, 2018), <https://gaceta.es/espana/cierre-en-falso-del-caso-de-los-papeles-del-archivo-de-salamanca-20181215-0009/>.

<sup>116</sup> Pilar Santos, *PP, Cs y Vox apoyan que la Generalitat devuelva parte de los 'papeles de Salamanca'*, EL PERIÓDICO (Mar. 7, 2019), <https://www.elperiodico.com/es/politica/20190306/pp-cs-vox-manifiesto-archivo-salamanca-7340120>.

<sup>117</sup> *El Senado insta al Gobierno a que pida la restitución de documentos al Archivo*, EL NORTE DE CASTILLO (Jan. 23, 2019), <https://www.elnortedecastilla.es/salamanca/senado-insta-gobierno-20190123080936-nt.html>.

<sup>118</sup> S.T.S., June 11, 2019 (R.O.J., No. 1885, p. 3) (Spain) (stating the appeal before the Tribunal Supreme was based on a previous dismissal of Catalonia’s claims due to “administrative silence.” The National Court held in favor of Catalonia and the State Administration appealed.).

four flags.<sup>119</sup> The State Administration argued that the *Generalitat*'s retention of the assets of legal entities or heirs which have disappeared violates "the spirit, purpose, and literalness of Law 21/2005," which serve to protect "the interest of the original owners or their successors to recover what... was seized."<sup>120</sup> Instead, the State Administration argued that Catalonia's entrustment of the remains of the archive was used to serve "its own purpose and a particular interest of theirs not covered by Law 21/2005."<sup>121</sup> On June 18, 2019, the *Tribunal Supremo*, reiterated the Constitutional Court's finding of the constitutionality of *Ley 21/2005* and mandated that the rest of the archival documents be returned to the *Generalitat*, bearing in mind that it must only be documents or effects seized in Catalonia by the DERD.<sup>122</sup> However, the *Tribunal Supremo* held the *Generalitat* does not retain ownership of the assets, and that the transfer of documentation to the *Generalitat* was only for a very specific purpose – to return the assets to the original owners.<sup>123</sup>

Notwithstanding these decisions, the SAA and its proponents continue to demand that the Spanish government mandate Catalonia to return any of the 400,000 objects that, according to it, were given to "front organizations" in order to avoid their return to Salamanca.<sup>124</sup> Other opponents argue the Salamanca Papers are an important point of research on the Civil War, and that it is more practical to keep all them gathered together in one place.<sup>125</sup> Another contended argument is that the transfer of the property to Catalonia unduly discriminates against other autonomous communities.<sup>126</sup> While much of the property belonging to the Catalan government has been returned, anti-independence tensions in Spain have created an atmosphere where Rightists want to see the return of the property

---

<sup>119</sup> *El Supremo confirma la devolución de una remesa de papeles de Salamanca a la Generalitat cinco años después*, LA VANGUARDIA (June 17, 2019), <https://www.lavanguardia.com/politica/20190617/462925468391/supremo-devolucion-papeles-salamanca-cinco-anos-despues.html>.

<sup>120</sup> S.T.S., June 11, 2019 (R.O.J., No. 1885, p. 8) (Spain).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 7.

<sup>123</sup> *Id.* at 8.

<sup>124</sup> Begoña F. Orive, *200.000 'papeles' de Salamanca están en 'organizaciones pantalla' de Cataluña según Salvar el Archivo*, LA GACETA DE SALAMANCA (Mar. 14, 2019), <https://www.lagacetadesalamanca.es/salamanca/200-000-papeles-de-salamanca-estan-en-organizaciones-pantalla-de-cataluna-segun-salvar-el-archivo-EH779868>.

<sup>125</sup> Asociación Salvar de Archivo de Salamanca, *Manifiesto De La Asociación Salvar El Archivo De Salamanca En Apoyo Del Archivo General De La Guerra Civil Española, Con Sede En Salamanca*, <https://www.salvararchivosalamanca.es/wp-content/uploads/2019/04/Manifiesto-apoyo-Archivo-de-Salamanca.pdf>.

<sup>126</sup> Miguel Rojo, *El traslado de papeles del Archivo es un robo que hay que reparar urgentemente*, EL NORTE DE CASTILLA (Jan. 13, 2015), <https://www.elnortedecastilla.es/salamanca/201501/13/traslado-papeles-archivo-robo-20150113131003.html>.

to the archive as a form of patriotism.<sup>127</sup> Catalans see the return of the Salamanca Papers as a form of reparation for the atrocities of the Spanish Civil War and an affirmation of democracy.<sup>128</sup> They also desire to be able to retain all of the Salamanca Papers and be the final arbiters of their disposal.<sup>129</sup> Ultimately, both sides' arguments are seeded in zealous political factions, which are uncompromising in their desired solution for the Salamanca Papers. Notwithstanding these various arguments, the debate over the rightful ownership over the archive raises important multifaceted moral, political, and legal issues, which must be examined through the lenses of national and international law.

#### IV. SPAIN'S LEGAL FRAMEWORK FOR RESTITUTION OF THE SALAMANCA PAPERS

##### A. *Spain's Cultural Heritage Laws & the "Social Function" of the Salamanca Papers*

The constant struggle between Spain and Catalonia over the Salamanca Papers is, in part, a reflection of the country's ambiguous cultural heritage laws on the restitution of property. With over forty-eight world heritage sites, the significance that Spain and its citizens hold in its cultural property is evident in the fact that its constitution specifically enumerates the importance of their protection. Article 46 of the Spanish Constitution charges the government to "guarantee the preservation and promote the enrichment of historical, cultural, and artistic heritage of Spain and of the property of which it consists, regardless of their legal status and their ownership."<sup>130</sup> This provision of the Spanish Constitution gives the government seemingly unobstructed powers to promote and protect Spanish cultural heritage, regardless of individual ownership.<sup>131</sup> Spain's concept of ownership is found under Article 33 of the Spanish Constitution, which states:

1. The right to private property and inheritance is recognized.
2. The social function of these rights shall determine the limits of their content in accordance with the law.

---

<sup>127</sup> See, e.g., *Partido Popular, Vox y Ciudadanos apoyan la unidad del Archivo de Salamanca*, ACTUALL (Aug. 03, 2019), <https://www.actuall.com/democracia/partido-popular-vox-y-ciudadanos-se-suman-a-la-lucha-por-la-unidad-del-archivo-de-salamanca/> (identifying numerous right-wing parties, which maintain that "Catalonia Separatists" illegally hold a portion of the Salamanca Papers).

<sup>128</sup> *La Generalitat empieza a devolver los 'papeles de Salamanca' a sus propietarios*, EL CORREO DE ANDALUCÍA (Dec. 21, 2011), <http://elcorreoweb.es/historico/la-generalitat-empieza-a-devolver-los-papeles-de-salamanca-a-sus-propietarios-AEEC317236>.

<sup>129</sup> *Id.*

<sup>130</sup> C.E., B.O.E. n. 46, Dec. 29, 1978 (Spain).

<sup>131</sup> *Id.*

3. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and without a property compensation in accordance with the law.<sup>132</sup>

This definition of property rights under Spanish law is an interesting one. While it recognizes the fundamental rights to personal property, it also limits the principle of ownership to those objects which retain a “social function.”<sup>133</sup> Depending on the type of object, this seemingly fluid condition can be a justification for interference with private property rights.<sup>134</sup> Indeed, this justification invariably leads to the assumption that community or collective interest may take precedence over private property ownership, depending on type of object and objective of that function.<sup>135</sup> As a result, the “social function” inherent in the Spanish Constitution plays an inevitable role in the adjudication of cultural property disputes in Spain.

In addition to this inherent constitutional authority, the Spanish government enacted the *Ley del Patrimonio Histórico Español* (Spanish Historical Heritage Law) (“LPHE”) in 1985 to advance specific protective measures for Spain’s valuable cultural heritage.<sup>136</sup> Aligned with the country’s innate interest in protecting its holding of diverse heritage, the LPHE defines Spanish Historical Heritage as “movable and immovable objects of artistic, historical, paleontological, archeological, ethnological, scientific, or technical interest. It also comprises documentary and bibliographic heritage...”<sup>137</sup> This law, like many of its analogous international conventions, aims to protect, promote, and transmit the Spanish cultural heritage to future generations.<sup>138</sup> Documentary and bibliographic heritage, like many of the works comprising of the Salamanca Papers, also holds unique legal status under Spain’s cultural heritage laws.<sup>139</sup> The LPHE broadly qualifies documentary heritage as: “any expression in natural or conventional language and any other type of graphic, sound or image expression given on any type material medium, including computer media.”<sup>140</sup> The sole exception to this definition is “non-original copies of

---

<sup>132</sup> *Id.* at art. 33.

<sup>133</sup> Luis Javier Capote Pérez, *Cultural Heritage and Spanish Private Law*, 2 SANTANDER ART AND CULTURAL L. REV. 237, 239 (2017).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; For a discussion on the evolution of property rights in other areas of the law in Spain see G. Orozco Pardo & E. Pérez Alonso, *La Tutela Civil y Penal del Patrimonio Histórico, Cultural y Artístico* (McGraw-Hill, Madrid ed. 1996).

<sup>136</sup> *Ley del Patrimonio Histórica Española* [Spanish Historical Heritage Law] (“L.P.H.E.”) art. 1(1) (B.O.E., 1980, 155).

<sup>137</sup> *Id.* at art. 1(2).

<sup>138</sup> Specifically, Article 1 of the L.P.H.E. declares that the purposes of the regulation is “the protection, promotion and transmission to future generations of Spanish Historical Heritage.”

<sup>139</sup> L.P.H.E. art. 48(1) (B.O.E., 1985, 155).

<sup>140</sup> *Id.* at art. 49(1).

publications are excluded.”<sup>141</sup> Article 49(5) of the Act also permits the State to “declare that certain documents, though not as old as those mentioned in the above sections, shall form part of the documentary heritage.”<sup>142</sup>

The LPHE also provides certain tax deductions to property considered part of Spain’s cultural, artistic, and historical heritage.<sup>143</sup> Moveable property that is considered of “cultural interest,” is considered especially valuable under the LPHE and, thus, the Act imposes certain limitations on its maintenance and disposal. For example, owners of moveable property are required to record their property in a special inventory.<sup>144</sup> Likewise, owners of such movable property are required to notify state administrative officials before any potential sale or transfer.<sup>145</sup> Article 29(1) of LPHE restricts the export of any “movable property” deemed to belong to the Spanish Historical Heritage.<sup>146</sup> The LPHE emphasizes that such property belongs to the State and such ownership is “inalienable and cannot lapse.”<sup>147</sup> As a result, if a private citizen desires to sell a property deemed of cultural interest, both national and regional administrations have the right of first refusal over other purchasers.<sup>148</sup> While ownership interests remain with the owners, the State seemingly retains a quasi-legal interest in all property considered part of its cultural, artistic, or historical heritage. Thus, by an object’s status as historical, artistic, or cultural heritage, its possessor’s ability to sell or otherwise dispose of the property is significantly limited.<sup>149</sup>

The case of *Santos et al. v. Teodora* illuminates this notion of public and private ownership of cultural property in Spain.<sup>150</sup> This case arises from an ownership dispute of a documental archive of the six heirs of General Juan

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at art. 49(5).

<sup>143</sup> *Id.* at art. 70(1).

<sup>144</sup> L.P.H.E. art. 26(2) (B.O.E., 1985, 155). Under the LPHE, there is a procedure of claiming something as cultural heritage. After undergoing a lengthy determination process, the property is registered in a general registry and will be given an official legal and artistic title. The property’s status as a cultural heritage also provides its possessor with separate responsibilities that it must maintain.

<sup>145</sup> *Id.* at Art. 26(4); see e.g., *Jesus Miguel et al. v. the State of Spain*, S.T.S., May 6, 2002 (R.O.J No. 3154) (Spain) (finding that an Italian painting belongs to the Spanish artistic heritage and, thus, the owner’s freedom to sell was restricted to the national market).

<sup>146</sup> L.P.H.E. art. 29(1) (B.O.E., 1985, 155). For more information on contract nullities in Spain, see Jesus Delgado Echeverría & M.A. Parra Lucán, *Las Nulidades de los Contratos. En la Teoría y en la Práctica*, (Dykinson ed., 2005).

<sup>147</sup> L.P.H.E. art. 29(1) (B.O.E., 1985, 155).

<sup>148</sup> See L.P.H.E. art. 38(1)(3) (B.O.E., 1985, 155). Likewise, if the original owners fail to notify the state or local governments of the sale, these administrations have the right of redemption and to repurchase the properties from the purchaser.

<sup>149</sup> Capote Pérez, *supra* note 133, at 247.

<sup>150</sup> See generally *Santos et al. v. Teodora*, A.P. Soria, Mar. 27, 2009 (R.O.J. No. 56) (Spain).

Yagüe Blanco, one of the chief army officers of the Falange.<sup>151</sup> Teodora, who under the will was charged with filing and archiving the documents, refused to return them to the family home.<sup>152</sup> The five other siblings filed an action seeking the return of the documents to the family archive and an injunction refraining Teodora from any further action without express authorization from the other co-owners.<sup>153</sup> While each claimant utilized private property laws to claim individual ownership, the Appellate Court's conclusion was that the claimants were not co-owners at all, but merely "holders" of the property.<sup>154</sup> Finding that the property was "subject to a special legal regime and a unique legal protection," the Appellate Court determined that the cultural value of the documental archive took precedence over the private interests of the heirs as a result of the historical nature of the archive.<sup>155</sup> To that end, the Appellate Court held that the litigants were "without legitimacy to take action as co-owners."<sup>156</sup>

The court in *Santos et al. v. Teodora* demonstrates Spain's desire for the State to have an impenetrable hold over property considered part of its historical and cultural heritage. Given this unique legal protection afforded to property of this nature, the "social function" of the Salamanca Papers is particularly relevant to its dispute. In the 2013 Constitutional Court case, the State heavily relied on this constitutional requirement, arguing that the transfer of the Salamanca Papers to Catalonia and the dismantling of the archive would result in the "disturbance of the fulfillment of the social function...to the detriment of...today's Spanish citizens and successive generations"<sup>157</sup> Through this argument, the State appears to assume that the disparate location of the objects defeats the social function of the papers and, in turn, their ultimate cultural and historical value. The Constitutional Court disagreed, and found that the maintenance of the "social function" of the archive would not depend on the physical location of the objects.<sup>158</sup> Indeed, the Court explicitly found that digitalized copies of the documents, with the authentic copy going to the *bona fide* owner, would suffice to maintain this social function.<sup>159</sup>

While the Spanish Historical Heritage Law recognizes the rights of private citizens, it also declares that its ultimate purpose is "the protection, promotion, and transmission to future generations of Spanish Historical Heritage."<sup>160</sup> Thus, everyone, including private and public actors, has a

---

<sup>151</sup> Tulio Demicheli, *Una Biografía Rescata el Perfil más Humano del General Yagüe*, ABC, (March 11, 2010), [https://www.abc.es/cultura/libros/abci-biografia-rescata-perfil-mas-humano-general-yague-201003110300-11491175943\\_noticia.html](https://www.abc.es/cultura/libros/abci-biografia-rescata-perfil-mas-humano-general-yague-201003110300-11491175943_noticia.html).

<sup>152</sup> *Santos et al. v. Teodora*, at 2.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 4.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> S.T.C., Mar. 14, 2013 (T.C. No. 3803, p. 152) (Spain).

<sup>158</sup> *Id.* at 157.

<sup>159</sup> *Id.*

<sup>160</sup> L.P.H.E., art. 1 (B.O.E. 1985, 15) (Spain).

constitutional duty to protect and promote Spanish cultural and historical heritage.<sup>161</sup> In relation to the Salamanca Papers, the proponents of their retention in Salamanca seemingly believe that their inherent value as universally “Spanish” is better served in one location together, as part of the collective memory of all of the Spanish people.<sup>162</sup> The underlying significance of Spanish cultural heritage over private ownership interest, as articulated in the Spanish Constitution and the Spanish Historical Heritage Law, informs this basis for opposition. Undoubtedly, the notion that these papers serve a “social function” for Spaniards becomes muddled when considered in conjunction with their function for citizens of regional autonomies, which retain their own distinctive cultural and historical patrimonies. Accordingly, the “social function” of the Salamanca Papers plays an indispensable role in the continual struggle between this national and regional controversy.

*B. “España nos roba”<sup>163</sup> The Region-State Dichotomy in Spain*

The current discord between the *Generalitat* of Catalonia and the Spanish State is a result of thousands of years of political, territorial, and economic struggles between the two governments.<sup>164</sup> Catalonia, like many of Spain’s autonomous regions, maintains a long and rich history, dialect, and culture, independent from its Spanish identity.<sup>165</sup> Since the end of the “War of Catalan Separation” to present day, Catalonia has struggled, and has ultimately failed, to realize its goal for independence.<sup>166</sup> Catalonia became part of the Spanish Empire in 1714, after Barcelona’s surrender to the Castilians more than three hundred years ago.<sup>167</sup> During the nineteenth and twentieth centuries, Catalonia entered a period referred to as “*Renaixencia*,” (Renaissance) which saw significant industrial and economic development within the region, as well as the rise of Catalan nationalism.<sup>168</sup> However, after Franco’s victory in 1939, Catalonia’s autonomy was eliminated,

<sup>161</sup> C.E., art. 46, (B.O.E. 1978) (Spain).

<sup>162</sup> This is evident by the fact that the proponents of the Salamanca Papers’ retention in Salamanca continuously argue that the papers must be together in order to preserve the history and identity of the Spanish people. See Manuel Artero Rueda, *De Paseata con Policarpo Sánchez por Los Infames Entresijos del Expolio al Archivo de Salamanca*, LA PASEATA (Jan. 13, 2017), <https://lapaseata.net/2017/01/31/policarpo-expolio-archivo-salamanca/>.

<sup>163</sup> Translated to “Spain robs us,” this was a motto used by proponents of the Salamanca Papers’ transfer to Catalonia. See Jesús García Calero, *El Archivo de Salamanca Vuelve a la «Normalidad» de Entregar Más Papeles a la Generalitat*, ABC, (Oct. 22, 2018), [https://www.abc.es/cultura/abci-archivo-salamanca-vuelve-normalidad-entregar-mas-papeles-generalitat-201810190217\\_noticia.html](https://www.abc.es/cultura/abci-archivo-salamanca-vuelve-normalidad-entregar-mas-papeles-generalitat-201810190217_noticia.html).

<sup>164</sup> See Dr. Josep Ma Reniu, *Could Catalonia Become Independent?*, 42 INT’L J. LEGAL INFO. 67 (2014).

<sup>165</sup> See ALBERT BALCELLS, *CATALAN NATIONALISM PAST AND PRESENT*, (Geoffrey J. Walker ed. 1996) for an in-depth overview of Catalonia’s journey towards independence.

<sup>166</sup> See Ma Reniu, *supra* note 164, at 68.

<sup>167</sup> Marta García Barcia, *Catalonia, the New European State?*, 20 ILSA J. INTL & COMP. L. 399, 414 (2013-2014).

<sup>168</sup> *Id.* at 400.

resulting in the repression of the Catalan language, cultural expression, and identity.<sup>169</sup> With the death of Franco and the codification of the Spanish Constitution in 1978, Catalonia's pursuit for political autonomy reemerged with fervor.<sup>170</sup>

The unification of the country and the restoration of rights for autonomous communities coincided with Spain's transition to democracy.<sup>171</sup> Spain's Constitution of 1978 reiterates the "indissoluble unity of the Spanish nation," and simultaneously "recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all."<sup>172</sup> The Spanish Constitution provides a distinctive framework for self-governance for autonomous regions, by enumerating that "[m]atters not expressly assigned to the State by this Constitution may fall under the jurisdiction of the self-governing communities by virtue of their Statutes of Autonomy."<sup>173</sup> However, the Spanish Constitution clarifies that national law takes precedence over those of autonomous communities; specifically, "matters not claimed by Statutes of Autonomy shall fall with the State, whose laws shall prevail, in case of conflict, over those of the Self-governing Communities regarding all matters in which exclusive jurisdiction has not been conferred upon the latter."<sup>174</sup> Unlike the United States, where any powers not delegated to the federal government are left to the states, the Spanish Constitution identifies explicit matters for which autonomous communities may self-govern.<sup>175</sup> While each autonomous community may enlarge their self-governance through amendments to regional statutes of autonomy, ultimately any amendments to its governing statute must be approved by the Spanish Parliament.<sup>176</sup>

The self-governance enumerated in the Spanish Constitution extends to Spain's cultural and historical heritage. The individual autonomous communities also have their own *leyes de patrimonio historico* (cultural heritage laws), which further aim to protect and promote the cultural heritage and identity of the individual region.<sup>177</sup> In particular, Catalonia's *Ley 9/1993* (Law 9/1993) gives the *Generalitat* the power "to designate cultural assets of national interest, the highest protection category, which corresponds to that of assets of cultural interest defined by said Law on

---

<sup>169</sup> See *id.* at 401.

<sup>170</sup> Christopher K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 DUKE J. COMP. & INT'L L. 51, 56 (2013).

<sup>171</sup> *Id.* at 57.

<sup>172</sup> C.E., art. 2 (B.O.E. 1978) (Spain).

<sup>173</sup> *Id.* at art. 149(3).

<sup>174</sup> *Id.*

<sup>175</sup> Carmen Gonzalez, *The Catalan National Identity And Catalonia's Bid For Independence*, 32 CONN. J. INT'L L. 115, 123 (2016).

<sup>176</sup> *Id.*

<sup>177</sup> For access to each of the autonomous regions' cultural heritage laws, see LEGISLACIÓN CONSOLIDADA, <https://www.boe.es/buscar/act.php?id=BOE-A-1993-26497&p=20120323&tn=1>.

Spanish Historic Heritage.”<sup>178</sup> Of particular importance, “[t]he Catalan Ministry of Culture shall ensure the return to Catalonia of assets with values proper to Catalan cultural heritage that are outside its territory.”<sup>179</sup> Both national and Catalan law are seemingly in agreement that the protection and promotion of cultural heritage is a critical goal, fundamental to regional and national identities. However, the control, protection, and preservation over cultural heritage belonging to both the National Government and the autonomous region certainly conflict.

This region-state dichotomy in Spain is particularly relevant to the dispute over the Salamanca Papers. Undoubtedly, the political ramifications over either solution for the Salamanca Papers cannot be ignored, as this dispute remains a struggle over Spain’s identity as a nation. The historical narrative of the suppression of the Catalan people informs their desire for restitution of the Salamanca Papers.<sup>180</sup> The failure of the State to return all objects thus serves as a symbolic affront to its identity and culture. Conversely, those supporting the Spanish government believe the return of the papers to Catalonia “would break up the history of Spain and [be] a short step to breaking up Spain itself.”<sup>181</sup> As Carolyn Boyd, a distinguished scholar on Spanish history described, “the intensity of the struggle registers the degree to which history and historical memory are perceived to hold the key to collective identity and political justice.”<sup>182</sup>

The intertwining narrative between the “social function” of cultural heritage and national identity percolates to the legal basis for ownership over the Salamanca Papers. On appeal to the Spanish Constitutional Court, the Appellant argued that *Ley 21/2005* is unconstitutional because the law was contrary to article 149.1.28 of the Spanish Constitution, which designates the State with exclusive “competence” over the archives of state ownership.<sup>183</sup> The Appellant argues that the uniqueness of certain institutions, such as the *Museo del Prado*, the National Library, the National Historical Archive, and the General Archive of the Spanish Civil War, are so unique and fundamental to Spain’s identity and heritage, that any law mutilating or distorting such collections would be unconstitutional.<sup>184</sup> In ruling against the Appellant, the Constitutional Court opined that there was “no doubt” that Catalonia’s retention of the objects would sufficiently protect the public interests of the

---

<sup>178</sup> *Ley 9/1993, de 30 de Septiembre, del Patrimonio Cultural Catalán* [Law 9/1993, of September 30, on Catalan Cultural Heritage] (“L.P.C.C.”) pml. (B.O.E. 1993) (Spain). As in the LPHE, there is a particular designation process of property to be considered historical heritage or of the national interest.

<sup>179</sup> *Id.* at art. 1(4).

<sup>180</sup> See Kathryn Crameri, *History Written by the Losers: History, Memory, Myth and Independence in Twenty-First Century Catalonia*, 11 HISPANIC ISSUES ON LINE, 35, 36 (2012).

<sup>181</sup> Balcells, *supra* note 30, at 5.

<sup>182</sup> Carolyn Boyd, *The Politics of History and Memory in Democratic Spain*, 617 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 133, 137 (2008).

<sup>183</sup> S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 154) (Spain).

<sup>184</sup> *Id.* at 153.

State and the autonomous communities for the conservation and enjoyment of the Salamanca Papers.<sup>185</sup>

The Court, in finding for the constitutionality of the law, specifically addressed the relationship between the cultural heritage laws of the State and the autonomous regions.<sup>186</sup> Both regional and state cultural heritage laws support the Court's findings. Catalonia's *Ley 9/1993*, like the LPHE, explicitly imposes obligations on private movable property owners that conserve and protect the property.<sup>187</sup> Similarly, the LPHE calls upon each autonomous community to be responsible for the protection of Spain's historical heritage.<sup>188</sup> Under both the Spanish Constitution and the regional and state cultural heritage laws, the power to protect and maintain cultural property is an inalienable duty of the State and autonomous communities.<sup>189</sup> While it is clear that the aim of LPHE is for the Spanish State and autonomous communities to work symbiotically for the protection of cultural heritage, the issue of the Salamanca Papers has become entangled by politics.

Since Spain's transition to democracy, the autonomy of Catalonia and its identity as a sovereign government has been a topic of great political discourse, which has continued to escalate until present-day. The Salamanca Papers serve as a paradigmatic example of the tension between national and regional identity in Spain, specifically as it relates to Catalonia. The legal framework of the autonomous communities plays a particularly important role in the Salamanca Papers conflict, as the Spanish Constitution recognizes and guarantees the competence of these communities to exercise only those powers delegated to them.<sup>190</sup> *Ley 21/2005* recognizes the inherent importance of the Salamanca Papers as "the rebirth of the right of...institutions to recover their historical memory and restitution of their institutional archive...[and] the documents and effects seized in that tragic period of the history of Spain."<sup>191</sup> As Catalonia slowly gravitates towards independence, the question of legal ownership or the right of possession over the Salamanca Papers would clearly change this legal and political framework. While this state-region dichotomy continues to permeate the debate, it is clear that successful restitution to rightful owners can only be realized by a neutral negotiated solution, beyond state-regional politics.

---

<sup>185</sup> *Id.* at 161.

<sup>186</sup> *See id.* at 158.

<sup>187</sup> L.P.C.C. art. 1(1) (B.O.E. 1993) (Spain). For example, L.P.C.C. Article 21 imposes a duty of conservation for all assets considered Catalan cultural heritage.

<sup>188</sup> L.P.H.E. art. 6 (B.O.E. 1985, 155) (Spain).

<sup>189</sup> *See id.* at pmb1.

<sup>190</sup> C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain).

<sup>191</sup> L.O., art. 1 (R.O.E 2005, 276) (Spain).

C. “*Devuelve lo que no es tuyo*”<sup>192</sup>: *Catalonia’s Right to the Entirety of the Salamanca Papers.*

Currently, the issue of the Salamanca Papers has yet to be resolved in Spain. Should Catalonia be able to hold on to those papers that do not belong to them? Could their retention of the papers be a form of reparation for the suppression that Catalonia suffered during the war? Before the promulgation of the Spanish Constitution in 1978, Spain codified the Amnesty Law of 1977, which essentially served to decriminalize acts of political violence committed during the Civil War and Franco’s forty-year dictatorship.<sup>193</sup> Political elites at the time of the drafting of the new constitution desired to attain a “collective amnesia” of the events that transpired during the Spanish Civil War, resting on a *de facto* “*pacto del olvido*,” or “pact of forgetting,” to avoid responsibility for the wrongdoings of the dictatorship.<sup>194</sup> However, the opening of the Civil War section of the National Historical Archive in Salamanca, which made public the existence of the Salamanca Papers, resurrected the collective memory of the atrocities that occurred during the Spanish Civil War.<sup>195</sup> While various laws have been put into place to restore the legal rights of citizens and autonomous communities who were unjustly repressed during the Franco regime, the failure to resolve the Salamanca Papers controversy serves as constant reminder of the friction between Spain and its autonomous communities.<sup>196</sup>

One of the problems lies in the fact that the *Generalitat* claims that it has already returned ninety-five percent of the papers to their original owners.<sup>197</sup> In response to this claim, the SAA argues that such return was done in an “inappropriate way,” as the “returned documents...[have] not been returned to their legitimate owners.”<sup>198</sup> By way of example, the SAA asserts that many of the documents may belong to owners or heirs in Asturias, Valencia, Madrid, and Murcia.<sup>199</sup> According to the SAA, some of the 400,000 documents were unduly returned to improper parties throughout

---

<sup>192</sup> Translated to “return what is not yours,” this serves as the slogan for the Save the Archive Association, which believes Catalonia should not have the right to keep those objects that were not taken from the Catalan region.

<sup>193</sup> L.O. art 1 (B.O.E. 1977, 248) (Spain).

<sup>194</sup> Boyd, *supra* note 182, at 135.

<sup>195</sup> *Id.* at 136.

<sup>196</sup> Among the legislation to be effectuated included recognition of the welfare rights for those previously in the Republican army, restitution or compensation to political parties of goods seized in application of the *Ley de Responsabilidades*, and the restitution of document and effects seized after Franco’s victory during the Spanish Civil War. T.S.J., Nov. 24, 2017 (R.O.J., No. 12334, p. 4) (Spain).

<sup>197</sup> José Ángel Montañés, *Ofensiva para pedir los ‘papeles de Salamanca’ pendientes*, EL PAÍS (July 26, 2018),

[https://elpais.com/ccaa/2018/07/26/catalunya/1532633092\\_214499.html](https://elpais.com/ccaa/2018/07/26/catalunya/1532633092_214499.html).

<sup>198</sup> José Ángel Montañés, *40 personas piden en Barcelona el retorno a Salamanca de los ‘papeles’*, EL PAÍS (Apr. 22, 2016),

[https://elpais.com/ccaa/2016/04/22/catalunya/1461355748\\_488894.html](https://elpais.com/ccaa/2016/04/22/catalunya/1461355748_488894.html).

<sup>199</sup> *Id.*

Catalonia.<sup>200</sup> While it has been made clear by both the Constitutional Court in 2013 and the *Tribunal Supremo* in 2019 that *Ley 21/2005*, which gives competence to Catalonia to possess the Salamanca Papers, is in fact constitutional, neither the courts nor the law address the critical issue of what to do with those assets that were not seized from Catalonia.<sup>201</sup>

Both courts affirm that “the transfer to the *Generalitat* of the documents seized in their territory during the [C]ivil [W]ar [,] to be the one in charge of returning them to their legitimate owners[,] cannot be labeled unreasonable or devoid of any justification.”<sup>202</sup> While the constitutionality of *Ley 21/2005* is definite, Catalonia’s retention of those assets that were not taken from Catalan territory by DERD is an issue that still must be determined. *Ley 21/2005* specifically enumerates that those documents and effects, that were taken by DERD during the Spanish Civil War, must be returned to Catalonia.<sup>203</sup> Under this law, the requests for restitution shall be “processed and resolved by the procedure established by the *Generalitat of Catalonia* in the exercise of its powers.”<sup>204</sup> The law additionally accounts for other autonomous communities, specifying that:

The restitution of documents, documentary funds and effects to civilians or private entities may be carried out by the Communities Autonomous upon request, in accordance with the procedure established by the Government and in accordance with the requirements set forth in article 5.<sup>205</sup>

This language is somewhat unclear. Do the autonomous communities have to seek restitution from the State or from the *Generalitat* of Catalonia?

Consequently, if the documents and other effects are all transferred to Catalonia, then how could the other autonomous communities seek restitution from Catalonia? The problem is that neither the LPHE nor Catalonia’s Cultural Heritage Law specifically provides Catalonia with this competency. While Article 6 of LPHE gives autonomous communities the power to enforce the cultural heritage laws found therein, there is no provision or measure in LPHE requiring restitution of previously seized materials.<sup>206</sup> Furthermore, Catalonia’s *Ley 9/1993* only assumes “major responsibilities for the protection of local cultural heritage within the sphere of its powers.”<sup>207</sup> Like the National Government, the *Generalitat* has the

<sup>200</sup> Jesús García Calero, *El Archivo de Salamanca vuelve a la «normalidad» de entregar más papeles a la Generalitat*, ABC (Oct. 22, 2018), [https://www.abc.es/cultura/abci-archivo-salamanca-vuelve-normalidad-entregar-mas-papeles-generalitat-201810190217\\_noticia.html](https://www.abc.es/cultura/abci-archivo-salamanca-vuelve-normalidad-entregar-mas-papeles-generalitat-201810190217_noticia.html).

<sup>201</sup> See S.T.S., June 11, 2019 (R.O.J., 1885, p. 10) (Spain); S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 162) (Spain).

<sup>202</sup> S.T.S., June 11, 2019 (R.O.J. 1885, p. 10) (Spain); See also S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 162) (Spain).

<sup>203</sup> L.O., R.O.E. art. 2 (B.O.E. 2005, 21) (Spain).

<sup>204</sup> *Id.* at art. 5(2).

<sup>205</sup> *Id.* at art. 6.

<sup>206</sup> L.P.H.E. art. 6 (B.O.E. 1985, 155) (Spain).

<sup>207</sup> L.P.C.C. pmb. (B.O.E. 1993) (Spain).

power to designate cultural assets of national interest and to maintain and conserve assets of cultural interest as defined by the LPHE.<sup>208</sup> However, Catalonia's Cultural Heritage Law provides no such mechanism for restitution or repatriation of illegally seized or plundered assets.<sup>209</sup>

As Catalonia retains the rights to effectuate the provisions under LPHE, it retains the competency to maintain, conserve, and protect those assets considered in the cultural interest, including the Salamanca Papers.<sup>210</sup> While Catalonia has a statutory basis to possess the Salamanca Papers, as articulated in the June 2019 *Tribunal Supremo* decision, the law does not provide for the unconditional transfer of these assets to the *Generalitat*.<sup>211</sup> The temporal limitations of Catalonia's retention of the papers have long passed under *Ley 21/2005*, which provided that claimants must come forward one year after the law's enactment in 2005.<sup>212</sup> It is unclear as to how long Catalonia will be able to retain objects that were not taken from its territory. However, both the Constitutional Court and the *Tribunal Supremo* are seemingly in agreement that Catalonia's current possession is reasonable.<sup>213</sup> *Ley 21/2005* was promulgated for the purpose of allowing Catalonia to effectuate the legitimate goal of its codification – restitution to lawful owners.<sup>214</sup> The Constitutional Court in 2013 affirmed that because the *Generalitat* has the competences in matters of cultural and historical heritage, it is therefore not possible to find that Catalonia's "restitution of documents is unreasonable," regardless of where the objects were taken.<sup>215</sup>

As contended above, under Spanish law, the State retains quasi-ownership interests in all of its property considered cultural, artistic, or historical heritage. Theoretically, Catalonia retains a similar interest in cultural heritage considered specifically Catalan. Assets considered part of Spain's cultural and historical heritage consist as part of the culture of the whole country, and therefore the two levels of government should work together to realize a solution. Despite the limitations on objects of cultural interest, rightful owners of these materials are entitled to enjoyment and restitution of their property.<sup>216</sup> Such ambiguity in the law is perhaps the reason this conflict has persisted for over forty years.

---

<sup>208</sup> *Id.*

<sup>209</sup> *See id.*

<sup>210</sup> *See* L.P.H.E. pmb. (B.O.E. 1985) (Spain).

<sup>211</sup> *See* S.T.S., June 11, 2019 (R.O.J., No. 1885, p. 9) (Spain).

<sup>212</sup> L.O. art. 5 (R.O.E. 2005, 276) (Spain).

<sup>213</sup> *See* S.T.S., June 11, 2019 (R.O.J., 1885, p. 9) (Spain); S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 161-62) (Spain).

<sup>214</sup> S.T.S., June 11, 2019 (R.O.J., No. 1885, p. 9) (Spain).

<sup>215</sup> S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 160) (Spain).

<sup>216</sup> *See Código Civil* [Civil Code] art. 348 (1889) (Spain) (defining the private property concept of ownership as "the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws. The owner shall have an action against the holder and the possessor of the property to claim it").

V. THE INTERNATIONAL LEGAL FRAMEWORK OF PROPERTY CONFISCATION DURING THE SPANISH CIVIL WAR

A. *The Salamanca Papers as Spoils of War or Lawful War Booty?*

Throughout history, it has been customary for the victors of war to claim an ownership right over the spoils, including objects of national and regional cultural and historical significance.<sup>217</sup> Indeed, “history was frequently written in booty rather than in books, and the upward surge of nations can still be traced through the remains of wartime plunder.”<sup>218</sup> However, for more than a century, the international community has recognized that cultural property is immune from seizure during times of armed conflict.<sup>219</sup> The earliest document which was considered an implicit recognition of this international concept arose during the U.S. Civil War through a group of instructions for the government’s armies.<sup>220</sup> The so-called “Lieber Code” enumerated protections for cultural property from wanton destruction and private misappropriation.<sup>221</sup> Subsequent instruments, such as the 1874 International Declaration Concerning the Laws and Customs of War (the “Brussels Declaration”)<sup>222</sup> and the 1880 Oxford Laws of War on Land<sup>223</sup> reiterated the essential premise that the seizure, confiscation, and pillaging of property is unlawfully forbidden under international law.

The acceptance of these instruments and the principles they represent did not become codified into international law until the Hague Conventions of 1899, which specified, “[a]ll seizure of and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.”<sup>224</sup> The Hague Convention of 1907 reiterated these principles; however, Spain was not a signatory to this agreement.<sup>225</sup> The strength and enforceability of the prohibition against seizures during wartime was tested

---

<sup>217</sup> Stephan Wilske, *International Law and the Spoils Of War: To the Victor the Right of Spoils? The Claims for Repatriation of Art Removed From Germany by The Soviet Army During or as a Result of World War II*, 3 UCLA J. INT’L L. & FOR. AFF., 223, 242 (1998).

<sup>218</sup> Wojciech W. Kowalski, *Historical background of the concept of restitution of works of art as a legal institution*, 288 RECUEIL DES COURS 24, 54 (2001).

<sup>219</sup> Wayne Sandholtz, *Plunder, Restitution, and International Law*, 17 INT’L J. CULT. PROP. 147, 163 (2010).

<sup>220</sup> Francis Lieber, U.S. War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) [hereinafter “Lieber Code”].

<sup>221</sup> *Id.* at art. 35, 46.

<sup>222</sup> Project of an International Declaration Concerning the Laws and Customs of War, Brussels, (Aug. 27, 1874) [hereinafter “Brussels Declaration”].

<sup>223</sup> The Laws of War on Land, Oxford, (Sept.9, 1880).

<sup>224</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, (July 29, 1899). [hereinafter “1899 Hague Convention”].

<sup>225</sup> 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) [hereinafter “1907 Hague Convention”].

during World War I and the prohibition against plunder was largely not respected.<sup>226</sup> Nonetheless, the prosecution of these actions of plunder did not emerge until after World War II during the International Military Tribunal in Nuremberg.<sup>227</sup>

While the pillaging and plunder of property was, and still is, violative of international law, the seizure of lawful “booty of war” remains permissible. Article 45 of the Lieber Code provides: “[a]ll captures and booty belong, according to the modern law of war, primarily to the government of the captor.”<sup>228</sup> The Hague Convention of 1907 similarly permits an occupying army to “take possession of...generally all movable property belonging to the State which may be used for military operations.”<sup>229</sup> “War booty” is defined as “property necessary and indispensable for the conduct of war, such as food, means of transportation, and means of communication, and is lawfully taken.”<sup>230</sup>

Franco’s systematic confiscation of property during the Spanish Civil War is seen by both proponents and opponents of the Spanish’s governments retention of the property as *botín de guerra* (war booty).<sup>231</sup> While both sides generally agree with the classification of the property, the contrasting sides conflict as to how this classification supports their respective positions. Proponents of the retention of the documents in Catalonia have called the confiscation of the Salamanca papers as *botín de guerra* and, as a result, have stated the documents belong in Catalonia.<sup>232</sup> On the other hand, proponents of the papers staying in Salamanca have argued that because the papers constitute *botín de guerra*, and since they were taken in a time of war, the Spanish government should retain ownership over the

<sup>226</sup> Kowalski, *supra* note 218, at 65.

<sup>227</sup> Alfred Rosenberg was the first individual to be found guilty of “crimes against humanity” specifically for his organization and direction of the “Einsatzstab Rosenberg,” which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. *International Military Tribunal (Nuremberg) Judgment and Sentences*, 41 AM. J. INT’L. L. 172, 287-288 (1947).

<sup>228</sup> Lieber Code, *supra* note 198, at art. 45.

<sup>229</sup> 1907 Hague Convention, *supra* note 225, at art. 53.

<sup>230</sup> *Menzel v. List*, 49 Misc. 2d, 300, 307 (Sup. Ct. N.Y. Co. 1966); *see also* 1907 Hague Convention, *supra* note 225, at annex (stating “An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally all movable property belonging to the State which may be used for military operations”).

<sup>231</sup> *See e.g.*, Josep Cruaynes I Tor, *El Papeles de Salamanca. L’espoliació del patrimoni documental de Catalunya (1938-1939)*, 19 REVISA LLIGALL, 35, 63 (2002); Pío Moa, *Los Papeles de Salamanca, Libertad Digital*, (June 24, 2004), <https://www.libertaddigital.com/opinion/pio-moa/los-papeles-de-salamanca-19349>.

<sup>232</sup> Miguel Lorenci, *Los papeles del Archivo de Salamanca son botín de guerra*, DIARIO DE LEÓN, July 12, 2004, <https://www.diariodeleon.es/articulo/cultura/los-papeles-archivo-salamanca-son-botin-guerra/20041207000000749884.html>.

property in the Salamanca Archive to serve as “a reminder of intolerance, the racism or political totalitarianism.”<sup>233</sup>

Whether the Salamanca Papers are considered “plunder” or “war booty” is indeed a noteworthy quandary. As detailed above, part of the Salamanca Archive is comprised of documents taken by Franco’s troops to be used as evidence to imprison their political adversaries and anyone seen as an “*enemigo*” of Franco’s regime.<sup>234</sup> Additionally, some of the documents, which are now destroyed, were also sold and used to fund the Falange’s war-time efforts.<sup>235</sup> A similar argument could be made that the confiscation of propaganda could prevent troops from joining the opposing troops. To that end, it is not a completely illogical argument that the Salamanca Papers may have been used for military operations. However, the argument that the Salamanca Papers are considered lawful war booty is attenuated.

Like Hitler’s government in World War II, Franco’s definition of war booty was certainly very broad.<sup>236</sup> Unlike food or water, the Salamanca Papers were not integral to advance the Falange’s ultimate war time goal – to take over the national Spanish government. As stated above, the moniker the “Salamanca Papers” is a misnomer, as much of the property is also comprised of works of art, propaganda posters, books, and other cultural artifacts.<sup>237</sup> Like the confiscation of property during World War II, the systematic plunder of the Salamanca Papers served a deeper dogmatic purpose, unrelated to wartime activities. While Franco’s troops used some of the papers confiscated for informational purposes towards their military advancement,<sup>238</sup> the primary purpose of setting up OIPA and DERD was to prove the existence of “Marxist activities in Spain and in particular...of Masonic societies, League of the Rights of Man, Friends of Russia, International Red Aid, etc.”<sup>239</sup> During the offensive in Santander, Franco sent orders to the army generals to save:

[a]ll kinds of documentation of Official Centers (military and civil), political and social, which must provide very interesting information in the first place, for the immediate development of operations, in another aspect for the discovery of responsibilities for the solvent movement that

---

<sup>233</sup> Carloes Cue, *El conflicto de los 'papeles de Salamanca' llega al Senado*, EL PAÍS (Feb. 11, 2005), [https://elpais.com/diario/2005/02/11/cultura/1108076409\\_850215.html](https://elpais.com/diario/2005/02/11/cultura/1108076409_850215.html).

<sup>234</sup> Anderson, *supra* note 24, at 174.

<sup>235</sup> THE DIGNITY COMM’N, *supra* note 32, at 11.

<sup>236</sup> See *Menzel v. List*, 49 Misc. 2d 200 n. 2 (Sup. Ct. N.Y. Co. 1966) (discussing Hitler’s broad definition of booty and citing to list of the goods decreed by Nazis to qualify as booty).

<sup>237</sup> THE DIGNITY COMM’N, *supra* note 32, at 16.

<sup>238</sup> See Romero, *supra* note 33, at 134-135.

<sup>239</sup> *Id.* at 133.

put the Nation at the edge of its ruin and always as a precise material to facilitate the judgment of history.<sup>240</sup>

Franco's broad orders serve as evidence that the seized documentations served multiple purposes. His language seems to suggest that the "development of operations" is secondary to the ultimate goal to "facilitate the judgment of history."<sup>241</sup> Indeed, the Salamanca Papers were more useful after the Civil War, in order to effectuate the creation of the police archive and to prosecute political adversaries.<sup>242</sup> While these objects served a dual purpose, the subordinate use for wartime operations indicates that the Salamanca Papers likely cannot be considered lawful booty.<sup>243</sup>

The classification of the Salamanca Papers as pillage or plunder is similarly not abundantly clear. "Pillage or plunder" is defined as "the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful."<sup>244</sup> The applicability of this definition to the Spanish Civil War confiscations is difficult for two reasons. First, while some of the property confiscated by Franco's regime was owned by private citizens, much of the property was from public organizations and autonomous governments.<sup>245</sup> Second, the property in question was not taken by a foreign government or occupying force. Rather, the property was taken by insurgent forces within Spain – i.e. Spanish citizens.<sup>246</sup> Furthermore, the insurgent forces in this case were not signatories to either the 1899 or 1907 Hague Conventions. As such, can property be considered "pillaged or plundered" when it was taken by a *de facto* government, which thereafter became the legitimate and recognized for over forty years?<sup>247</sup>

According to the International Criminal Tribunal for the former Yugoslavia ("ICTY"), pillage may occur "when private or public property is appropriated intentionally and unlawfully."<sup>248</sup> However, the Rome Statute of the International Criminal Court substantially limits the elements of the crime of "pillage," requiring:

(1) [t]he perpetrator appropriated certain property; (2) [t]he perpetrator intended to deprive the owner of the property

<sup>240</sup> *Id.* at 135.

<sup>241</sup> *Id.*

<sup>242</sup> Anderson, *supra* note 24, at 176.

<sup>243</sup> However, it should be noted that a case-by-case analysis would need to be effectuated due to the disparate nature of the entirety of the Salamanca Paper collection.

<sup>244</sup> *Menzel v. List*, 49 Misc. 2d 200, 307 (Sup. Ct. N.Y. Co. 1966).

<sup>245</sup> THE DIGNITY COMM'N, *supra* note 32, at 16.

<sup>246</sup> Indeed, OIPA was "part and parcel of Franco's personal secretariat." See Anderson, *supra* note 24 at 175-176.

<sup>247</sup> The recognition of the Nationalists as "belligerents" subjects them to the 1899 Hague Convention and requires compliance with international law. Whether the Nationalist should be considered "belligerents" is discussed *infra*. For more information on the recognition of belligerency during the Spanish Civil War, See Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish Civil War*. 31 A.J.I.L. 398, 413 (1937).

<sup>248</sup> *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, p. 26, ¶84 (Dec. 17, 2004).

and to appropriate it for *private or personal use* (3); [t]he appropriation was without the consent of the owner; (4) [t]he conduct took place in the context of and was associated with an international armed conflict [and] (5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>249</sup>

Franco's regime systematically appropriated the property through the confiscation of objects of historical, cultural, and artistic significance from both private citizens and public institutions.<sup>250</sup> These takings were unequivocally without the consent of their owners.<sup>251</sup> The appropriation took place during armed conflict of arguably international character, as multiple countries, including Germany, Russia, and Mexico, battled on both sides of the civil conflict.<sup>252</sup> However, the international community's reluctance to recognize the conflict as a "state of war," which would entail full belligerent rights and obligations, might preclude the classification of the Spanish Civil War as an "international armed conflict."<sup>253</sup> The perpetrators were undoubtedly aware of the circumstances surrounding the armed conflict, as their direct ability to carry out these confiscations was a result of the Falange's advancement during the Civil War. The only element of the crime of "pillaging" that may be inapplicable is the requirement that the appropriation was "for *private or personal use*."<sup>254</sup> While it can be argued that the perpetrators of these confiscations committed these acts due to their own personal disdain for Leftist politics, the subsequent public use of the objects to create an archive and to prosecute individuals in state courts negates this argument.

The Salamanca Papers' status as "plunder" is stronger than their status as lawful "war booty." When defining "war crimes," the Nuremberg Charter included the "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military

---

<sup>249</sup> Rome Statute of the International Criminal Court, Elements of Crimes, Article 8(2)(b)(xvi) (2011). While the criminality of pillaging under this section is applicable to individual liability, its classification is important to distinguishing whether the property was taken in violation of international law.

<sup>250</sup> *Appropriated*, Black's Law Dictionary (6th ed. 1990). Although "appropriated" is not defined in the Rome Statute, Black Law's dictionary defines it as "exercis[ing] dominion over an object to the extent, and for the purpose, of making it subserve one's own proper use or pleasure."

<sup>251</sup> See THE DIGNITY COMM'N, *supra* note 32.

<sup>252</sup> For a discussion of the nature of foreign involvement in the Spanish civil war, see Antony Beever, *The Civil War Becomes International* in THE BATTLE FOR SPAIN: THE SPANISH CIVIL WAR, 1936-1939, 129-186 (Penguin ed. 2006).

<sup>253</sup> See O'Rourke, *supra* note 247, at 413.

<sup>254</sup> For a discussion of the inclusion of the element of "private and personal use" as inconsistent with the laws of armed conflict and the accepted definition of pillage in international criminal law See James G. Stewart, *Defining Pillage: Elements of the Offense*, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES, OPEN SOCIETY JUSTICE INITIATIVE PUBLICATION, 19-23 (2010).

necessity.”<sup>255</sup> Additionally, after World War II, the Nuremberg International Military Tribunal charged the defendants with the specific war crime of the plunder of both public and private property because they “ruthlessly exploited the people and the material resources of the countries they occupied, in order to strengthen the Nazi war machine, to depopulate and impoverish the rest of Europe, to enrich themselves and their adherents, and to promote German economic supremacy over Europe.”<sup>256</sup> The confiscation of public and private property by Franco’s insurgent forces was for the ultimate goal of prosecuting crimes committed during the war by Republican militia and armed forces, which resulted in the individuals’ identification, punishment, and death.<sup>257</sup> While the Falange attempted to legitimize these confiscations through proactive laws such as *El Ley de Politicas Responsabilidades*, such wanton despoliation of both public and private property for the sake of political persecution and to enrich the Falange’s stronghold over Spain would certainly qualify as “plunder.”

The Falange’s status as a non-foreign occupying force adds a layer of complexity to the classification of the Salamanca Papers as plunder. When Spain signed the 1899 Hague Convention on July 29, 1899 and ratified it on September 4, 1900, the government of Spain was bound by the provisions found therein.<sup>258</sup> However, whether Franco and the Nationalists were bound by the provisions of the 1899 Hague Convention depends on if the Falange forces were considered “belligerents.”<sup>259</sup> Under Article 1, to be considered “belligerents,” the following conditions must occur: (1) the forces must be commanded by a person responsible for his subordinates; (2) the forces must have a fixed emblem recognizable at a distance; (3) the forces must carry arms openly; and (4) the forces must conduct their operations in accordance with the laws and customs of war.<sup>260</sup> When applying this definition to the Spanish Civil War, three of the four elements were fulfilled. The Nationalist forces were commanded by General Franco and they openly carried arms as they invaded the various regions all over Spain.<sup>261</sup> The Falange also affixed

---

<sup>255</sup> See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b), 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter “Nuremberg Charter”].

<sup>256</sup> See International Military Tribunal, the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics v. Hermann Wilhelm Goring et. al. (Indictment), 1 Trial of the Major War Criminals Before the International Military Tribunal 27, 55-56 (1947).

<sup>257</sup> Blesa and Castillo, *supra* note 12, at 230.

<sup>258</sup> *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899*, INT’L COMM. RED CROSS [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=150](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=150).

<sup>259</sup> 1899 Hague Convention, *supra* note 224, at art. 1.

<sup>260</sup> *Id.*

<sup>261</sup> ALEJANDRO DE QUESADA, *THE SPANISH CIVIL WAR 1936–39 (1): NATIONALIST FORCES*, 46 (Osprey Publishing 2014).

to their uniforms their emblem of the yoke and arrows.<sup>262</sup> However, the last prong is likely not met as Francisco Franco's failure to adhere to the traditional laws and customs of war, as well as his troops' undertaking of various unprosecuted war crimes, is well documented.<sup>263</sup> Notwithstanding the international nature of the Spanish Civil War, the failure of the international community to recognize the insurgent Nationalists as "belligerents" demonstrates a desire to relegate it to a purely domestic conflict.

If the 1954 Hague Convention were retroactive and applicable to activity occurring during the Spanish Civil War, the Falange's status as an occupier would be clearer.<sup>264</sup> Article 4 of the 1954 Hague Convention mandates that states shall refrain from "requisitioning movable cultural property situated in the territory of another High Contracting Party."<sup>265</sup> While this definition seems to limit the prohibitions under the convention to those occupying another territory in an international context, Article 19(1) states "[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property."<sup>266</sup> According to Patty Gerstenblith,<sup>267</sup> the use of "party" with a lowercase "p" in Article 19(1), without delineating the word "State," "State Party" or "High Contracting Party," means that the provision "applies to all the parties to a non-international conflict."<sup>268</sup> Thus, even if the Falange was not a part to the 1954 Hague Convention, it would have been required to "to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of...cultural property."<sup>269</sup>

Additionally, the Second Protocol of the 1954 Hague Convention, adopted in 1999, expanded the application of cultural heritage provisions of the 1954 Hague Convention to apply to non-international armed conflicts, specifically by stating that all of its provisions "shall apply in the event of an armed conflict not of an international character, occurring within the territory

---

<sup>262</sup> *Id.*; see *Yoke and Arrows*, IMPERIAL WAR MUSEUM, <https://www.iwm.org.uk/collections/item/object/29146>.

<sup>263</sup> See Human Rights Council. 27th Session. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. Mission to Spain. U.N. Doc. A/HRC/27/56/Add.1 (July 22, 2014) available at <https://www.refworld.org/docid/543fc0fc4.html>.

<sup>264</sup> Neither the 1954 Hague Convention nor its protocols have any language permitting retroactivity of the instruments.

<sup>265</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, art. 4.3 [hereinafter "1954 Hague Convention"].

<sup>266</sup> *Id.* at art. 19(1).

<sup>267</sup> Patty Gerstenblith is a distinguished research professor of law at DePaul University and director of its Center for Art, Museum & Cultural Heritage Law.

<sup>268</sup> Patty Gerstenblith, *The Destruction Of Cultural Heritage: A Crime Against Property Or A Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336 (2016).

<sup>269</sup> 1954 Hague Convention, *supra* note 266, at art. 4.3.

of one of the Parties.”<sup>270</sup> Spain ratified the Second Protocol on July 6, 2001.<sup>271</sup> While Article 22 limits the applicability of this provision by stating that “riots, isolated and sporadic acts of violence and other acts of a similar nature” do not fall under the Second Protocol, such a characterization is presumably inconsistent with the nature of the three-year armed conflict, which ravaged Spain during the Civil War.<sup>272</sup> Thus, even though the Falange was a non-state actor in a conflict of arguably domestic nature, the pillaging and plunder of the Salamanca Papers would be a violation of the 1954 Hague Convention.<sup>273</sup>

The classification of the Salamanca Papers as plunder is necessary to determine a resolution for their disposal. If the papers are designated as war booty, then perhaps the Spanish government would have a legitimate claim to their ownership and retention under international law.<sup>274</sup> If applying contemporary standards of international law, it is clear that the papers should be considered plunder. It is likely for this reason that Spain’s Constitutional Court declared that the “plunder is indisputable.”<sup>275</sup> Deeming the Salamanca Papers to be considered plunder, the next question that must be answered is whether Spain is obligated to return the property to its original owners or their heirs eighty years after the Civil War.

#### *B. Spain’s International Obligation to Restitute Plunder from the Spanish Civil War*

The obligation to return plundered cultural property after armed conflict is a result of a series of international treaties, to which Spain is a signatory member of many. While the government of Spain maintains that it has the ultimate constitutional authority to dispose of the Salamanca Papers, this section equivocates that it has an indisputable obligation to return the property to the rightful owners, or their heirs, under international law. The jurisprudential obligation of restitution dates back to Ancient Rome in accordance with the legal maxim “*restitutio in integrum*,” which generally permitted the restoration of rights to property, that were later found to have been taken illegally.<sup>276</sup> Between the 17<sup>th</sup> and 18<sup>th</sup> centuries, attitudes towards the antiquated practice of spoils of war began to gradually change,

<sup>270</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212, art. 22 [hereinafter “Hague Convention Second Protocol”].

<sup>271</sup> *State Parties*, UNESCO, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/states-parties/>.

<sup>272</sup> Hague Convention Second Protocol, *supra* note 271, at art. 22(2).

<sup>273</sup> See e.g., Zoe Howe, *Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya*, 47 TEX. INT’L L.J. 403 (2012).

<sup>274</sup> See e.g., *Pauly v United States*, 152 Ct Cl 838, 843 (1961) (finding that horses captured by U.S. forces during World War II during an overrun of German forces were considered “war booty”).

<sup>275</sup> S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 152) (Spain).

<sup>276</sup> Kowalski, *supra* note 218, at 24.

specifically with the codification of the Treaty of Westphalia in 1648, which provided limited return of property to the estates of the Holy Roman Empire.<sup>277</sup> Following the Napoleonic Wars, which resulted in unprecedented plunder of art treasures, the Conference of Vienna instituted this Roman concept "*restitutio in integrum*," thereby cancelling this inherent right to spoils as a lawful means to acquire property.<sup>278</sup>

After the Lieber Code and subsequent declarations, the 1899 and 1907 Hague Conventions adopted provisions protecting signatory states from seizure of property, but not necessarily rendering restitution as obligatory.<sup>279</sup> The end of World War I and the signing of the Treaty of Versailles in 1919 saw the establishment of restitution as an obligation under international law.<sup>280</sup> In particular, Article 238 compelled Germany to "make restitution in cash of taken away, seized or sequestered, and also restitution of animals of every nature and securities taken away, seized, sequestered, in the case in which it proves possible to identify them in territory belonging to Germany or her Allies."<sup>281</sup> Article 245 went even further and extended Germany's requirement of restitution to include plunder taken during the war between France and Prussia from 1870 to 1871.<sup>282</sup> The Treaty of Versailles endorsed the principle that restitution was the sole remedy for violation of the international law against plundered cultural property, even after the passing of a long period of time.<sup>283</sup>

Despite the recognition and codification of international laws prohibiting the seizure of property and the subsequent requirements to retribute any seized property, Franco's totalitarian regime, for the most part, failed to return the property confiscated during the Spanish Civil War. In the meantime, further obligations to retribute cultural property arose after World War II in response to the large-scale plundering carried out by the Nazis. For example, after the end of World War II, the allied powers produced the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control," also commonly known as

---

<sup>277</sup> Wilske, *supra* note 217, at 244; In 1648, the Treaty of Westphalia ended the Thirty Years War by "acknowledging the sovereign authority of various European princes. This event marked the advent of traditional international law, based on principles of territoriality and state autonomy." Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-05 (1997) (quoting Arthur Nussbaum, *A Concise History of the Law of Nations*, 24 (1947)).

<sup>278</sup> Wilske, *supra* note 217, at 246.

<sup>279</sup> See 1899 Hague Convention, *supra* note 224; See also 1907 Hague Convention, *supra* note 225.

<sup>280</sup> Treaty of Versailles, June 28, 1919, 1919 For. Rel. (Paris Peace Conference, XIII) 55, 740, 743; Senate document 51, 66th Congress, 1st Sess. (1920).

<sup>281</sup> *Id.* at art. 238.

<sup>282</sup> *Id.* at art. 245.

<sup>283</sup> Zhang Yue, *Customary International Law and the Rule Against Taking Cultural Property as Spoils of War*, 17 CHINESE J. INT'L L., 943, 980 (2018).

the “London Declaration.”<sup>284</sup> The London Declaration reserved the right of the Allies to invalidate any “transfers of, or dealings with, property, rights and interests of any description whatsoever,” including those that may have appeared to have been “legal in form.”<sup>285</sup> In order to improve the international rules of the protection of cultural property during armed conflict, a committee of international experts set out to draft a new convention.<sup>286</sup> The issue of restitution was relegated to the Hague Convention of 1954’s First Protocol, which requires each contracting party to undertake to “return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory.”<sup>287</sup> Spain signed the First Protocol on May 14, 1954.<sup>288</sup> While the 1954 Hague Convention does not delineate obligations to return plundered art, “it can be asserted that the obligation to return illicitly taken cultural objects is inherent in the obligation to respect cultural property and in the prohibition on seizing and pillaging of cultural property.”<sup>289</sup>

In 1991, the UN Security Council under Resolution 686 (1991), required Iraq to “return all Kuwait property seized by Iraq, [and] the return to be completed in the shortest possible period.”<sup>290</sup> In 2003, the UN Security Council requested States to “facilitate the safe return to Iraqi institutions of Iraqi cultural property...illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq.”<sup>291</sup> More recently in the case of Syria, the UN Security Council asked States to “take appropriate steps to prevent the trade in Iraqi and Syrian cultural property, thereby allowing for their eventual safe return to the Iraqi and Syrian people.”<sup>292</sup> These cases exemplify this widespread state practice to return objects unlawfully taken during armed conflict.

The mid-1990s saw a reemergence in the interest in the return of cultural property confiscated by the Nazis.<sup>293</sup> During this period of renewed interest, the international community drafted multiple documents to solve the ongoing issues involving Nazi-era restitutions, including: the 1998

<sup>284</sup> Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control; Establishment of Inter-Allied Sub-Committee on Acts of Dispossession, 1 Foreign Relations, 439, 444 (1943).

<sup>285</sup> *Id.*

<sup>286</sup> Wojciech W. Kowalski, *Restitution of works of art looted in times of war*, 288 RECUEIL DES COURS 154, 188 (2001).

<sup>287</sup> Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954), art. I (3) (1956) [hereinafter “Hague Convention First Protocol”].

<sup>288</sup> *Id.*

<sup>289</sup> Marc-André Renold, *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, (2016) [https://www.lootedart.com/web\\_images/pdf2016/IPOL\\_STU\(2016\)556947\\_EN.pdf](https://www.lootedart.com/web_images/pdf2016/IPOL_STU(2016)556947_EN.pdf).

<sup>290</sup> S.C. Res. 686, para. 2(d) (Mar. 2, 1991).

<sup>291</sup> S.C. Res. 1483, para. 7 (May 22, 2003).

<sup>292</sup> S.C. Res. 2199, para. 17 (Feb. 12, 2015).

<sup>293</sup> This was a result of a variety of factors including the declassification of World War II documents and the publication of numerous books on the looting which occurred during the war.

Washington Conference Principles on Nazi Confiscated Art (“Washington Conference Principles”)<sup>294</sup>, the 1999 Council of Europe Resolution 1205 on Looted Jewish Cultural Property (“Council of Europe Resolution 1205”),<sup>295</sup> the 2009 Terezin Declaration of Holocaust Era Assets and Related Issues (“Terezin Declaration”),<sup>296</sup> and the 2009 Draft UNESCO Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War (“Draft UNESCO Declaration”).<sup>297</sup> While these are all non-binding international instruments, they generally affirm the same premise – there is an international moral and legal obligation to encourage domestic measures to restitute property plundered during World War II. Again, Spain participated in the creation of these soft law principles.

The obligatory notion to return stolen objects is also practiced in museums around the world. For example, in 2018, the British Museum restituted eight 4,000-year-old clay cones looted from Iraq after the fall of Saddam Hussein in 2003.<sup>298</sup> In 2019, The Metropolitan Museum of Art, the United States’ largest art museum, restituted the “Gold Coffin of Nedjemankh,” after a determination that it was a stolen antiquity.<sup>299</sup> In regards to objects found in American museums that were confiscated during World War II, the American Alliance of Museums’ asks to the museum “to

---

<sup>294</sup> U.S. DEP’T OF STATE, WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS (1998). [hereinafter “Washington Principles”]. In 1998, the U.S. Department of State and the U.S. Holocaust Memorial Museum co-hosted the Washington Conference on Holocaust-Era Assets, which was attended by representatives of forty-four countries, including Spain. The conference adopted and endorsed the Washington Conference Principles on Nazi Confiscated Art, which generally called for the finding, identification, and restitution of cultural property plundered during World War II.

<sup>295</sup> Eur. Consult. Ass., *Resolution 1205 on Looted Jewish Cultural Property*, 1<sup>st</sup> Sess., DOC. NO. 8563 ((2000)). In 1999, the Council of Europe codified Resolution 1205 on Looted Jewish Cultural Property, which encouraged the restitution of Nazi-looted property for countries found within the European Union.

<sup>296</sup> Terezin Declaration of Holocaust Era Assets and Related Issues, June 30, 2009, <https://2009-2017.state.gov/p/eur/rls/or/126162.htm>. In 2009, the Czech Republic sponsored a second conference to survey the developments in restitution of Nazi-looted assets as a result of the 1998 Washington Conference.

<sup>297</sup> Director-General of UNESCO, General Conference, Draft of the Declaration of Principle Relation to Cultural Objects Displaced in Connection with the Second World War, Doc. 35C/24, 3-4 (July 31, 2009), <http://unesdoc.unesco.org/images/0018/001834/183433e.pdf> (last visited Aug 7, 2019). UNESCO attempted to adopt binding principles of restitution of plundered art. However, the draft declaration never received a consensus and thus was not adopted.

<sup>298</sup> Palko Karasz, *British Museum to Return Looted Antiquities to Iraq*, NEW YORK TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/arts/iraq-looted-objects-british-museum.html>.

<sup>299</sup> *Ancient gold coffin returned to Egypt from New York as looted antiquity*, USA TODAY (Sept. 25, 2019), <https://www.usatoday.com/story/life/2019/09/25/ancient-gold-coffin-returned-egypt-new-york-looted-antiquity/2444916001/>.

seek to resolve the matter with the claimant in an equitable, appropriate and mutually agreeable manner.”<sup>300</sup>

While the focus has primarily been on World War II-era cases, the norm and customary obligation to facilitate “just and fair solutions” for those who are victims of plundered property can readily apply to other cases. In the case of the Salamanca Papers, the Spanish government’s continued refusal to transfer the remaining assets to Catalonia and demands for the return of the other transferred documents is directly contrary to both hard and soft principles of international law toward restitution of plundered objects. Regardless of the domestic nature of the Spanish Civil War, Spain, as a signatory of the 1954 Hague Convention and its First Protocol, is bound by the obligations to not only protect cultural property, but to return objects forcefully requisitioned after its armed conflict.<sup>301</sup> After World War II, Spain has continued to sign on to policies denouncing the plunder of cultural property by Nazis and subsequently calling for their return.<sup>302</sup> Regardless of whether these instruments are legally binding or not, it is generally expected for signatory states to abide by to make reasonable efforts to follow their express provisions. Spain’s desire to hold the entirety of the loot confiscated during the Spanish Civil War for the purpose of a historical archive is not justified under international law. The Spanish government continual efforts to thwart restitution to rightful owners is inconsistent with the international obligations for which it bound itself.

## VI. REALIZING A SOLUTION: THE DE-POLITIZATION OF RESTITUTION OF THE SALAMANCA PAPERS

The preamble of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property provides that “cultural property constitutes one of the basic elements of civilization and national culture.”<sup>303</sup> The Salamanca Papers are seen both by the Spanish and Catalan people as a symbol of their respective identities and cultures. As a result, neither government is compromising in the approach to achieving an ultimate resolution to this

---

<sup>300</sup> *Unlawful Appropriation of Objects During the Nazi Era*, AMERICAN ALLIANCE OF MUSEUMS <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/>.

<sup>301</sup> See Hague Convention First Protocol, *supra* note 288.

<sup>302</sup> However, note that, according to Stuart E. Eizenstat, an adviser to the State Department Spain has “taken no steps” to fulfill its principles of restituting Nazi-looted art. See William D. Cohan, *Five Countries Slow to Address Nazi-Looted Art, U.S. Expert Says*, NEW YORK TIMES (Nov. 26 2018), <https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html>.

<sup>303</sup> *Id.*; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231, pmb1. [hereinafter “1970 UNESCO Convention”]. The 1970 UNESCO Convention sought to address international issues pertaining to the increase of thefts in museums and archeological sites, which were thereafter sold in the market.

dispute. Despite the strong customary international law towards restitution, there is currently no international forum for Catalonia to bring a claim against the Spanish government. It is thus axiomatic that, in order to achieve a final solution to the disposal of the Salamanca Papers, both sides must transcend state-regional politics to achieve a "just and fair" solution for rightful owners and heirs.

The current legal framework in Spain for the identification and restitution of claimants of any object of the Salamanca Papers does not effectively adhere to international law nor does it adequately redress the victims of the Spanish Civil War. While *Ley 21/2005* promulgates procedures for the restitution of the objects to legitimate owners, the exercise of these rights were only for a year following the enactment of the law, on November 17, 2005.<sup>304</sup> Moreover, the request must be made through the *Generalitat* of Catalonia, notwithstanding that the source of some of these objects may be from other autonomous communities.<sup>305</sup> *Ley 21/2005* also fails to distinguish between public and private institutions. Clearly, the law, while a step in the right direction, does not adequately protect individual claimants.

As a practical matter, the solution to this dispute is to enact domestic policy in Spain outlining specific measures and procedures for lawful claimants to come forward. *Ley 21/2005* is outdated and must be replaced by a contemporary piece of legislation, which addresses not only those issues from Catalonia, but also those from other autonomous communities, public and private institutions, and private citizens. First, Spain should restructure the legal framework of the new *Ley 21/2005* to create mechanisms for the identification of Civil War-era looted cultural property. As articulated in the Washington Principles with respect to Nazi-looted art, this law must make "every effort...[to] publicize art that is found to have been confiscated...in order to locate its pre-War owners or their heirs."<sup>306</sup> In order to actualize this goal, there should be a detailed registry, which delineates identifiable information, including the date of confiscation, the province or autonomous community of confiscation, the current location, the current possessors, a detailed description of the property, and the last known owner of the property. This registry should be made available online, in multiple languages, in order to allow for ex-patriates who immigrated to other countries during the Civil War to potentially identify their stolen objects.

This new law should also expand the temporal requirements to allow for claimants to come forward after a reasonable amount of time. The sheer volume of objects from the archive to categorically identify and document would be an immense undertaking, requiring a collaboration by the Spanish government and the other autonomous communities. Creation of this registry

---

<sup>304</sup> L.O. art. 5 (R.O.E. 2005, 276) (Spain).

<sup>305</sup> *Id.*

<sup>306</sup> Washington Principles, *supra* note 295.

would also require a team of multidisciplinary experts, trained in art, history, provenance, law, and regional idiosyncrasies. Accordingly, in order to account for the period of time required to accumulate the sheer volume of information necessary to create such a registry, the statute of limitations for this law should extend beyond the publication of the registry, for a period of no less than five years.

Additionally, this law should extend not only to those assets found in the Historical Archive and in Catalonia, but to all Civil War-confiscated objects found throughout the country that may be subject to ownership disputes in the future. The law should also create a neutral judicial body to oversee and resolve claims of Civil War-era property. This judicial body should have exclusive jurisdiction over these issues and be the only one with competency to make a determination based on clear and convincing evidence of ownership. After a decision is made by the judicial body, the determination shall be binding on all parties. However, the law should clarify that those claimants who come forward and are ultimately determined to be the true owner of the assets must comply with limitations enumerated in the Spanish Historical Heritage Act and the Spanish Constitution. The law should also provide a "right of first refusal" provision, permitting the National Government to provide cash restitution for the stolen property.

In the event that no rightful owners come forward, then the law should delineate whether the state or the autonomous community where the property was confiscated should retain ownership over the objects. In the interest of fairness and recompense for the injustices occurring during the war, the autonomous community should necessarily retain ownership over any unclaimed property. However, a fair balance of the equities and the "social function" of the property would ultimately need to be considered before enumerated in the law. Perhaps in such an instance, a case-by-case determination by the neutral judicial body would be necessary. As outlined at length above, the core of the dispute over the Salamanca Papers is essentially over the culture and identity of Spain and Catalonia. Any domestic policy should focus on the individual owners themselves, as opposed to concentrating on regional or national ownership. This law should encourage provenance research to identify rightful owners and should foster a fair and equitable procedure beyond national-regional politics.

## VII. CONCLUSION

Notwithstanding Spain's goal to retain "collective amnesia" over the atrocities of the Spanish Civil War and Franco's repressive dictatorship that followed, the dispute over the Salamanca Papers offers an axiomatic example of the lasting tensions between the Spanish government and Catalonia that continue to pervade the political atmosphere in Spain. Given that eighty years have passed since the conclusion of the war, the assets plundered during this period must be dealt with efficiently and with a focus on providing

restitution to the victims and heirs of Franco's regime. Driven by fervent ideals of patriotism and culturalism, both Catalan separatist leaders and far-right nationalist parties in Spain are categorically resolute in finding a solution to this contentious dispute. The inability of both governments to come to a mutual compromise reveals institutional weaknesses in Spain's legal framework regarding the restitution of plundered cultural property. In order for Spain to comply with its international hard and soft law obligations to restitute plundered property, Spain must draft new policies which reconcile the rights of lawful owners with the "social function" inherent in each asset considered part of its cultural and historical patrimony. In the end, one thing will always ring true, "if a man [or woman] has something once, always something of it remains."<sup>307</sup>

---

<sup>307</sup> ERNEST HEMINGWAY, *FOR WHOM THE BELL TOLLS*, 171 (Simon and Schuster ed. 1968).