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## Playing Catch-Up: Laws Protecting Cultural Property in the United States Need an Update

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|      |  |    |
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| I.   | INTRODUCTION .....   | 2  |
| II.  | HISTORICAL ATTEMPTS AT CREATING EFFECTIVE LAWS TO<br>PROTECT CULTURAL PROPERTY .....               | 4  |
|      | A. <i>The Evolution of International Laws Protecting Cultural<br/>Property</i> .....               | 4  |
|      | B. <i>How Responsive Cultural Property Laws Are to<br/>Concomitant Societal Awareness</i> .....    | 11 |
| III. | LAWS PROTECTING CULTURAL PROPERTY IN THE UNITED<br>STATES .....                                    | 13 |
| IV.  | HOW THE UNITED STATES STACKS UP AGAINST OTHER STATES’<br>PROTECTIONS FOR CULTURAL PROPERTY .....   | 18 |
| V.   | SOCIETAL INTEREST IN PROTECTING CULTURAL PROPERTY<br>TODAY AND OPTIONS FOR THE UNITED STATES ..... | 22 |
|      | A. <i>Modern Problems Facing Cultural Property</i> .....   | 22 |
|      | B. <i>Recommended Updates to Protections for Cultural<br/>Property in the United States</i> .....  | 24 |
| VI.  | CONCLUSION .....   | 27 |

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## I. INTRODUCTION

In late 2021, the largest leak of offshore information exposed the secret financial affairs of some of the richest people in the world.<sup>1</sup> Journalists titled the leak the “Pandora Papers.”<sup>2</sup> The papers exposed the types of luxury items that the rich purchase as a tool to hide their wealth, including illicit cultural objects like looted Cambodian antiquities.<sup>3</sup> Art and antiquities are frequently used as modes of financial investment or, in the criminal alternative, money laundering.<sup>4</sup> The Pandora Papers exposed just one piece of the omnipresent looting, trafficking, and racketeering that occur across the world to satisfy the appetite for priceless antiquities. Despite the illegality that often comes with these priceless objects, lawmakers rarely make the protection of cultural property a priority.<sup>5</sup> Often, the protection of cultural property is only taken seriously when cultural objects are directly and publicly tied to illegal acts like money laundering, terrorism financing, or the destruction of high-profile cultural landmarks.<sup>6</sup> The media attention that follows these illegal acts reinvigorates calls for serious efforts to protect cultural property and historic places.<sup>7</sup>

While “cultural property” does not have a universal definition, it is generally accepted to encompass objects of great cultural, historical, or scientific importance.<sup>8</sup> The preservation of these items is important to

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1. *Offshore Leaks Database: Pandora Papers*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://offshoreleaks.icij.org/investigations/pandora-papers> [<https://perma.cc/5738-NWWA>] (last visited Mar. 21, 2023).

2. *Pandora Papers: Biggest Ever Leak of Offshore Data Exposes Financial Secrets of Rich and Powerful*, GUARDIAN (Oct. 3, 2021, 12:30 PM), <https://www.theguardian.com/news/2021/oct/03/pandora-papers-biggest-ever-leak-of-offshore-data-exposes-financial-secrets-of-rich-and-powerful> [<https://perma.cc/6KBL-Q9SU>].

3. *Id.*

4. Matt Egan, *The Art World Has a Money Laundering Problem*, CNN (July 29, 2020 3:52 PM), <https://www.cnn.com/2020/07/29/business/art-money-laundering-sanctions-senate/index.html> [<https://perma.cc/WYW2-8WT3>]; Graham Bowley, *As Money Launderers Buy Dalis, U.S. Looks at Lifting the Veil on Art Sales*, N.Y. TIMES, <https://www.nytimes.com/2021/06/19/arts/design/money-laundering-art-market.html> (Mar. 24, 2022).

5. Nikita Lalwani, *State of the Art: How Cultural Property Became a National-Security Priority*, 130 YALE L.J. F. 78, 79-80 (2020).

6. *Id.*

7. See, e.g., Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, N.Y. TIMES (Mar. 4, 2001), <https://www.nytimes.com/2001/03/04/world/over-world-protests-taliban-are-destroying-ancient-buddhas.html>.

8. There is also debate about whether “cultural property” or “cultural heritage” is the correct terminology for this area. See, e.g., Manlio Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?*, 86 INT’L REV. RED CROSS 367, 367-68 (2004);

societies. Museums and private homes showcase humanity's shared history and demonstrate the importance of cultural preservation. Yet, cultural objects often suffer from the consequences of war, conflict, and greed. Humanity has long agreed that cultural heritage is to be protected in times of conflict;<sup>9</sup> however, it was not until the last century that the world attempted to come to a consensus on the global protection of cultural property.<sup>10</sup>

In the United States, the laws that protect cultural heritage have not kept pace with modern technology and tools that make looting and trafficking easier than ever, despite the continued societal belief in the importance of cultural property.<sup>11</sup> Domestic criminal laws are severely inadequate to deter and punish those who would engage in looting, theft, or sale of cultural property.<sup>12</sup> Today, with the latest revelations coming out of the Pandora Papers, and on the heels of the realization that looted antiquities are used to finance terrorist organizations like ISIS, the importance of safeguarding cultural property is once again at the forefront of societal opinion.<sup>13</sup> This is a moment where it would behoove lawmakers to take advantage of public support to update cultural property law and bring it into the twenty-first century.

This Comment addresses how the United States can harness the current societal momentum to improve national and international protections for cultural property. Part II addresses the evolution of international cultural property law and how it has followed societal movements. Part III details the current laws in the United States for protecting cultural property. Part IV looks at how those laws have not kept pace with the legal protections in other large art markets. Part V outlines the modern problems facing cultural property today and recommends several ways the United States can update its current framework to address these issues. Part VI concludes with a path forward.

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Lyndel V. Prott & Patrick J. O'Keefe, 'Cultural Heritage' or 'Cultural Property'?, 1 INT'L J. CULTURAL PROP. 307, 307 (1992).

9. See discussion *infra* Part II.
10. See discussion *infra* Part II.
11. See discussion *infra* Part III.
12. See discussion *infra* Part III.
13. See discussion *infra* Part V.

## II. HISTORICAL ATTEMPTS AT CREATING EFFECTIVE LAWS TO PROTECT CULTURAL PROPERTY

Legal protection of cultural property is not a new phenomenon.<sup>14</sup> Without domestic and international protections, the most spectacular wonders of the world would not currently exist. Plunder, sacking, raiding, theft, and fraud are just as much a part of human history as the creation of these cultural marvels. Thus, legal protections of cultural property are often implemented in reaction to these crimes to protect our shared heritage.<sup>15</sup> But the world has not yet come to a perfect solution on how to protect cultural property in times of both war and peace. Numerous attempts over the centuries indicate valiant efforts that nevertheless fell short, especially in the United States.<sup>16</sup> This Part first explores the history of international cultural property law. Then it discusses how international cultural property law was both influenced by and is the product of contemporaneous societal movements.

### A. *The Evolution of International Laws Protecting Cultural Property*

Modern cultural property law traces its origins to the Lieber Code.<sup>17</sup> In 1863, President Abraham Lincoln approved a code of conduct created by law professor Franz Lieber that aimed to lessen the human suffering and wanton destruction that occurred during the American Civil War.<sup>18</sup> In the ensuing Lieber Code, Professor Lieber distilled international codes of conduct into one manifesto on the proper conduct of war.<sup>19</sup> This was the first document to state that cultural property is protected during times of war. Article 35 provides that “[c]lassical works of art, libraries, scientific collections, or precious instruments . . . must be secured against all avoidable injury.”<sup>20</sup> However, this protection was not pervasive. The code included the exception of military necessity that allowed a commander in the field to justify the destruction of cultural property if necessary for military purposes.<sup>21</sup>

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14. See discussion *infra* subpart II.A.

15. See discussion *infra* subpart II.A.

16. See discussion *infra* subpart II.A.

17. FRANZ LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS NO. 100 (Apr. 24, 1863) [hereinafter Lieber Code].

18. Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC’Y INT’LL. PROC. 112, 113-14 (2001).

19. Lieber Code, *supra* note 17.

20. Lieber Code, *supra* note 17, art. 35.

21. Lieber Code, *supra* note 17, art. 14.

Nevertheless, this development was an important first step in establishing legal protections for cultural property. The United States emerged as a leader when it became the first country to recognize the importance of protecting cultural property during wartime.<sup>22</sup> The code became so well regarded that its language ultimately served as the basis for customary international law on warfare beyond just its protections for cultural property.<sup>23</sup>

In fact, protection of and respect for cultural property during times of war is now embedded in customary international law. In 1899, the Hague Peace Conference issued the Convention with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (1899 Hague Convention).<sup>24</sup> The document set forth the laws and customs of war.<sup>25</sup> It was subsequently revised at the 1907 Peace Conference, which promulgated a second convention under the same name (1907 Hague Convention).<sup>26</sup> Today, the provisions in both documents constitute customary international law.<sup>27</sup> Article 56 of the 1899 Hague Convention states that “[a]ll seizure of and destruction, or intentional damage done to [property of the communes, that of religious, charitable, and educational institutions, and those of arts and science], to historical monuments, works of art or science, *is prohibited*, and should be made the subject of proceedings.”<sup>28</sup> The same article appears in the 1907 Hague Convention with minor changes in wording.<sup>29</sup> Several other articles also provide important protections for private property,<sup>30</sup> buildings and towns,<sup>31</sup> and edifices devoted to religion, art, science, and charity.<sup>32</sup> All states are bound to respect these provisions in times of war.

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22. Paust, *supra* note 18.

23. Paust, *supra* note 18, at 113.

24. 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, July 29, 1899, <https://ihl-databases.icrc.org/ihl/INTRO/150> [<https://perma.cc/ZM4D-FCCC>] [hereinafter 1899 Hague Convention].

25. *Id.*

26. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, <https://ihl-databases.icrc.org/ihl/INTRO/195> [<https://perma.cc/UGW8-9W9L>] [hereinafter 1907 Hague Convention].

27. *Id.*; 1899 Hague Convention, *supra* note 24.

28. 1899 Hague Convention, *supra* note 24, art. 56 (emphasis added).

29. 1907 Hague Convention, *supra* note 26, art. 46.

30. 1899 Hague Convention, *supra* note 24, art 23(g).

31. 1899 Hague Convention, *supra* note 24, arts. 25, 28.

32. 1899 Hague Convention, *supra* note 24, art. 27.

Outcry followed World War I due to the war's massive destruction of monuments, historic cities, and cultural objects.<sup>33</sup> The emerging nations called for an international instrument to address the protection of cultural property in times of war.<sup>34</sup> Nations wanted to protect what survived and prevent future destruction.<sup>35</sup> Although no universal document emerged from the inter-war period, the United States and several South American countries signed the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments.<sup>36</sup> Dubbed the "Roerich Pact" in homage to its creator, the treaty reinforced protections for cultural objects in times of war.<sup>37</sup> It would take until 1954 for Europe to adopt similar provisions with the Hague Convention for the Protection of Cultural Property (1954 Hague Convention).<sup>38</sup>

The 1954 Hague Convention was the first international treaty to focus exclusively on cultural property as it related to its protection in armed conflict.<sup>39</sup> The treaty comprehensively addresses the large-scale destruction of cultural heritage occurring during wartime, including the kind of systematic looting that the Nazi regime perpetrated.<sup>40</sup> Now, almost a century later, some of the cultural objects lost during the war have emerged at auctions or appeared on gallery walls.<sup>41</sup> Unfortunately, many remain lost to their rightful owners because of the inability to establish provenance, inconclusive evidence, or statutes of limitations, among other

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33. See, e.g., Paul Clemen & Gerhard Bersu, *Monuments and Preservation of Art in Belgium*, in PROTECTION OF ART DURING WAR 14, 14-15 (Paul Clemen ed., 1919).

34. Dr. Franz W. Jerusalem, *Monuments of Art in War-Time and International Law*, in PROTECTION OF ART DURING WAR, 135, 140-41 (Paul Clemen ed. 1919).

35. *Id.*

36. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Apr. 15, 1935, 167 L.N.T.S. 289.

37. *Id.*

38. Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of the Said Convention, May 14, 1954, 249 U.N.T.S. 215, [hereinafter 1954 Hague Convention].

39. The convention is signed by 133 nations, including the United States. *The Hague Convention*, UNESCO, <https://en.unesco.org/protecting-heritage/convention-and-protocols/states-parties> [<https://perma.cc/2GRT-GJGH>] (last visited Mar. 21, 2023).

40. *Id.* World War II saw the loss of over 200,000 art objects. See generally THE RAPE OF EUROPA (Menemsha Films 2008) and LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994) for a detailed account of the looting and destruction of art in World War II.

41. See, e.g., Patricia Cohen, *The Story Behind 'Woman in Gold': Nazi Art Thieves and One Painting's Return*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html>.

legal and personal hurdles.<sup>42</sup> Still, the 1954 Hague Convention is one of the most important tools for the protection of cultural property in times of war.

There are two protocols to the 1954 Hague Convention. The first protocol is specific to the protection of cultural property during occupation.<sup>43</sup> It prohibits the export and sale of cultural property from an occupied territory and requires the return of cultural property exported or retained to formerly occupied authorities.<sup>44</sup> The second protocol, created in 1999, strengthens and broadens the provisions of the 1954 Hague Convention and the first protocol.<sup>45</sup> It creates a new category of “enhanced protection” for cultural property, in addition to “general protection” and “special protection” granted by the first two documents.<sup>46</sup> The second protocol also includes enforcement provisions. It lists sanctions that are due in the event of a violation of the convention and outlines five serious violations for which individual criminal responsibility applies.<sup>47</sup> It also states under what conditions the military necessity waiver may be used in greater detail than previous documents.<sup>48</sup> Unfortunately, these clarifications and enforcement mechanisms are not as widespread as the provisions found in the 1954 Hague Convention and its first protocol. Only eighty-four countries have signed on to the second protocol, whereas the original convention has 133 state parties.<sup>49</sup>

In 1970, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention), which followed

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42. Jane Kallir, *Holocaust-Era Art Restitution: More Complex Than You Think*, THE ART NEWSPAPER (Feb. 22, 2019), <https://www.theartnewspaper.com/2019/02/22/holocaust-era-art-restitution-more-complex-than-you-think> [<https://perma.cc/TY6N-73TC>].

43. Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358.

44. *Id.* arts. 1-5.

45. 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.

46. *Id.* art. 10. Enhanced protection applies to “cultural heritage of the greatest importance for humanity.” *Id.*

47. *Id.* arts. 15, 21. These five serious violations include the attack or use of cultural property in warfare, the extensive destruction or appropriation of cultural property, or theft, pillage, or vandalism of cultural property. *Id.* art. 15.

48. *Id.* art. 6.

49. *Id.*; 1954 Hague Convention, *supra* note 38.

the 1954 Hague Convention Protocols.<sup>50</sup> This document traces its origins to the aftermath of World War I<sup>51</sup> and incorporates many of the provisions found in the 1954 Hague Convention and its first protocol, but applies to cultural property outside of the theater of war.<sup>52</sup> The League of Nations created a draft international treaty in the 1930s after discussions condemning the surge in looting of archaeological sites and dismantling of monuments.<sup>53</sup> However, the draft treaty failed to move into the next drafting stages. After widespread decolonization post-World War II, a newfound interest emerged in efforts to finalize the UNESCO Convention.<sup>54</sup> Newly independent countries previously subject to colonial rule wished to recover the cultural property that their colonizers stole from them,<sup>55</sup> thus the document gained momentum in the 1960s with a new perspective and global support.

Critically, the UNESCO Convention addresses the illicit import and export of cultural property.<sup>56</sup> It is still the leading document today for preventing the international trafficking of cultural property during peacetime, filling the gap in cultural property law left by the 1954 Hague Convention and its protocols, which only apply in times of war.<sup>57</sup> The United States was one of the first nations with a substantial art market to ratify the convention, although today there are 141 state parties to it.<sup>58</sup> The UNESCO Convention has led to the passage of national legislation to protect cultural property in many countries.<sup>59</sup> It has influenced the development of other conventions and international workshops and has also had a persuasive effect on public attitudes about trafficking of cultural

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

51. The League of Nations created a draft international treaty in the 1930s. *A Pioneering Convention*, UNESCO, <https://en.unesco.org/news/pioneering-convention> [https://perma.cc/PZ43-EW4Q] (Apr. 21, 2022).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. UNESCO Convention, *supra* note 50.

57. 1954 Hague Convention, *supra* note 38; see Lyndel V. Prott, Convention for the Fight Against the Illicit Trafficking of Cultural Property, *Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 Years After Its Adoption*, CLT/2011/CONF.207/7, at 3-4 (Mar. 2011).

58. UNESCO Convention, *supra* note 50.

59. Prott, *supra* note 57, at 3.

property.<sup>60</sup> For example, it is now common practice at museums and other cultural institutions to use 1970 as the key date for provenance inquiries.<sup>61</sup>

While the 1970 UNESCO Convention has resulted in significant progress toward the protection of cultural property, it also has several weaknesses.<sup>62</sup> It did not create any clear rules, benchmarks, standards, or consequences that would render it fully effective in the fight against illicit trafficking.<sup>63</sup> The document does not instruct ratifying countries on how to implement a system to protect cultural property that would comply with the treaty.<sup>64</sup> It does not include an enforcement mechanism, nor does it state what sanctions or individual liability may apply when its provisions are violated.<sup>65</sup> Instead, it merely provides a theoretical framework.

One limitation to the 1970 UNESCO Convention arises from its syntactical shortcomings. For example, Article 2(2) instructs that “States Parties *undertake* to oppose” the illicit import, export, and transfer of cultural property.<sup>66</sup> Article 5 uses similar language in instructing States Parties to “*undertake*, as appropriate for each country, to set up within their territories one or more national services . . . for the protection of the cultural heritage.”<sup>67</sup> The consistent use of the term “undertake” as opposed to “shall” suggests the articles of the convention may be easily satisfied by a simple attempt or show of an attempt to enact them.

Another limit on the effectiveness of the convention is the time limitations on claims. Because the document itself does not include a time limitation, several state parties have used either 1970 or their date of ratification as the date from which claims may be brought.<sup>68</sup> In this way, the convention does not allow for retrospectivity. Objects taken before 1970 or the state’s date of ratification must be returned under other legal theories, if any exist.<sup>69</sup> Thus, while the treaty establishes important norms regarding the cultural property trade, several weaknesses have been identified in the forty years since its ratification.<sup>70</sup>

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60. Prot, *supra* note 57, at 3.

61. Prot, *supra* note 57, at 3.

62. UNESCO Convention, *supra* note 50.

63. UNESCO Convention, *supra* note 50.

64. UNESCO Convention, *supra* note 50.

65. UNESCO Convention, *supra* note 50.

66. UNESCO Convention, *supra* note 50, art. 2(2) (emphasis added).

67. UNESCO Convention, *supra* note 50, art. 5 (emphasis added).

68. Prot, *supra* note 57, at 4-5.

69. Prot, *supra* note 57, at 4-5.

70. For a comprehensive critique of the UNESCO Convention, see generally PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY (2d ed. 2007).

Although the 1970 UNESCO Convention took place more than fifty years ago, only one international document has subsequently emerged on the topic of cultural property and it failed to gain widespread support. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) attempted to replace and update the provisions of the 1970 UNESCO Convention.<sup>71</sup> It did not allow for reservations, requiring states to implement the treaty in its entirety.<sup>72</sup> However, the UNIDROIT Convention has not received much support from states. Notably, of the fifty-four contracting parties, the only major art market country to adopt the convention is China.<sup>73</sup> The United States and the United Kingdom, the world's largest and third largest art markets (which, together, comprise almost two-thirds of the global market), are not signatories.<sup>74</sup> The treaty has potential to create effective legislation around the world to protect cultural property and provides for the restitution and return of illegally acquired cultural property. But without widespread support and the buy-in of major art markets, the document cannot achieve its goals.

International attempts to create protections for cultural property in the last few centuries have been noble, but lack the kind of enforcement provisions or global participation required to make them effective. The United States began as a leader in the movement with the advent of the Lieber Code and importantly is the largest art market signed on to the 1970 UNESCO Convention, but it has since fallen behind. As the UNIDROIT Convention demonstrates, the international community is attempting to modernize protections for cultural property.<sup>75</sup> But, that

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

72. Alexandra Love Levine, *The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention*, 36 BROOK. J. INT'L L. 751, 753 (2011).

73. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, UNIDROIT, <https://www.unidroit.org/wp-content/uploads/2022/08/Tableau-August-2022.pdf> [<https://perma.cc/VRF8-DU7K>] (last visited Mar. 21, 2023). In 2021, the United States was the largest art market in the world, generating almost half of the global market value. See *Distribution of the Global Art Market Value in 2021, by Country*, STATISTA (Mar. 2022), <https://www.statista.com/statistics/885531/global-art-market-share-by-country> [<https://perma.cc/6NWZ-L4HR>]. China and the United Kingdom came in a distant second and third, respectively, each generating about twenty percent of the global art market value. *Id.*

74. STATISTA, *supra* note 73.

75. Other relevant conventions on cultural property not discussed in this Comment include the Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1872, 1037 U.N.T.S. 151; Convention on the Protection of the Underwater Cultural Heritage (with Annex), Nov. 2, 2001, 2562 U.N.T.S. 3; and Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3.

modernization has been slow. Without the support of the United States, whose early support and ratification of the 1970 UNESCO Convention likely influenced that document's widespread adoption, it is unlikely that the more exacting UNIDROIT Convention will supplant the former as the preeminent international cultural property law treatise.

*B. How Responsive Cultural Property Laws Are to Concomitant Societal Awareness*

Laws protecting cultural property are often drafted in response to current events.<sup>76</sup> The Lieber Code, for example, had the goal of reducing the devastation and destruction occurring to the North and South during the Civil War.<sup>77</sup> To this end, Article 29 of the Lieber Code states that “[t]he ultimate object of all modern war is a renewed state of peace.”<sup>78</sup> Thus, the law of war as first codified in this document had an eye toward future reconciliation between the opposing parties. Through this code, Professor Lieber connects the protection of cultural property to the ultimate resolution of hostilities and restoration of peace.<sup>79</sup> Tying cultural property protection to the integrity of the Union was a critical recognition of the important societal role cultural property plays.<sup>80</sup> Even then, society recognized the value in preserving culture, especially in times of war, where it is most vulnerable to theft and destruction. The Lieber Code documented this valuation, thereby codifying the zeitgeist of the time.

Similar societal awareness and desire to protect cultural property led to the advent of the 1954 Hague and 1970 UNESCO Conventions. After the World Wars, the world grappled with the profound destruction and looting of cultural objects and sites that occurred across Europe and Asia.<sup>81</sup> It was widely apparent that war imposed a tragic cost on cultural property. Monuments, ancient cities, private collections, and religious sites suffered catastrophic damage.<sup>82</sup> The 1954 Hague Convention and its protocols responded to many of the concerns that emerged after the wars and attempted to prevent such tragedies from happening again.<sup>83</sup> These international documents responded to the outcry that occurred after the

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76. See discussion *infra* subpart II.B.

77. Paust, *supra* note 18.

78. Lieber Code, *supra* note 17, art. 29.

79. See discussion *supra* subpart II.A.

80. See discussion *supra* subpart II.A.

81. See discussion *supra* subpart II.A.

82. See discussion *supra* subpart II.A.

83. See discussion *supra* subpart II.A.

world saw just how much cultural property was in peril.<sup>84</sup> The world recognized the importance of these objects and places to modern civilization and the utility in safeguarding them for future generations.<sup>85</sup> Made acutely aware of the gap in international law prior to these conflicts, the international community responded with counteracting measures via these treaties.

A critical modern response to the problems facing cultural property today is the incorporation of crimes against cultural heritage under the Rome Statute of the International Criminal Court (ICC). The Rome Statute established the ICC in 2002, a relatively new international institution.<sup>86</sup> This international judicial body deals with violations of jus cogens, including genocide and crimes against humanity.<sup>87</sup> Included in the Rome Statute, which established the jurisdiction of the court, are several provisions that expressly or implicitly cover cultural property.<sup>88</sup> The first conviction by the ICC of crimes against cultural heritage was of Mr. Ahmad al-Faqi al Mahdi for his destruction of historic mausoleums and mosques in Mali.<sup>89</sup> The case focused exclusively on crimes against cultural heritage and provided the first opportunity for the ICC prosecutor to bring charges relating to cultural property.<sup>90</sup>

In 2021, the Office of the Prosecutor published an official policy on cultural heritage explaining how the various charges available under the Rome Statute apply to crimes against cultural property.<sup>91</sup> The prosecutor found that, beyond the express mentions of cultural heritage, there are several provisions from which protections for cultural property can arise.<sup>92</sup> The Office of the Prosecutor found it important to outline the various ways cultural heritage is protected under the Rome Statute, in part because of the historical connection between atrocities and attacks on heritage, and also because of recent attacks in Syria, Mali, and Iraq.<sup>93</sup> The policy recognized that attacks on cultural heritage are both a historical and

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84. See discussion *supra* subpart II.A.

85. See discussion *supra* subpart II.A.

86. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, <https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf> [<https://perma.cc/8G4T-V6X5>] [hereinafter Rome Statute].

87. *Id.*

88. *Id.* art. 8(2).

89. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgement and Sentence (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF) [<https://perma.cc/8TAK-6PZC>].

90. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., POLICY ON CULTURAL HERITAGE 5 (June 2021).

91. *Id.*

92. *Id.* at 7.

93. *Id.* at 4.

modern practice in warfare, which was highlighted once again by the destruction of religious sites and cities in the Middle East and North Africa.

These changes in national and international law demonstrate that laws protecting cultural property are often reactionary. It is during times of conflict when we are made acutely aware of the value and fragility of cultural property. During these moments of realization, humanity often steps in to counteract and protect.

### III. LAWS PROTECTING CULTURAL PROPERTY IN THE UNITED STATES

Apart from the international protections afforded to cultural property, the United States has several pieces of domestic legislation that can be useful in punishing and preventing crimes against cultural property.<sup>94</sup> Congress has recognized that there is a “profound national interest” in preventing the trafficking of cultural property and protecting the nation’s cultural heritage.<sup>95</sup> Three acts provide specific protections for cultural property: the Archaeological Resources Protection Act (ARPA), the Convention on Cultural Property Implementation Act (CPIA), and the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>96</sup> Beyond these explicit statutory protections, several statutes aid in prosecuting crimes against cultural property even though they are not explicitly designated for such use.<sup>97</sup> The various statutes under these categories provide for civil and criminal liability. Together, they form the statutory framework for protecting cultural property in the United States.

ARPA attempts to correct the lack of clarity found in its precursor, the Antiquities Act,<sup>98</sup> and adds an express prohibition of the trafficking of archaeological resources.<sup>99</sup> The statute defines the term “archaeological resource” as “any material remains of past human life or activities which are of archaeological interest” and are “at least 100 years of age.”<sup>100</sup> Any such items found on public or Native American lands cannot be removed

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94. See discussion *infra* Part III.

95. S. REP. NO. 97-564, at 23 (1982).

96. 16 U.S.C. §§ 470aa-470kk; 19 U.S.C. §§ 2601-2613; 25 U.S.C. §§ 3001-3013.

97. 18 U.S.C. §§ 541-542, 545, 554, 1341-1343, 2314-2315.

98. 54 U.S.C. § 320301(a) (1906). Parts of the act were held to be unconstitutionally vague, leaving prosecutors unsure of the feasibility of bringing charges under the statute. See *United States v. Diaz*, 499 F.2d 113, 114-15 (9th Cir. 1974) (vacating a conviction under the Antiquities Act holding the penalty provision unconstitutionally vague); see also Stephanie Ann Ades, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U. L. REV. 599, 604-06 (1995) (discussing the Antiquities Act and the ARPA).

99. 16 U.S.C. § 470ee.

100. *Id.* § 470bb(1).

or damaged without a permit, nor can they be sold or purchased in interstate commerce.<sup>101</sup>

Violations of ARPA can trigger both civil and criminal penalties.<sup>102</sup> Any person found in violation of a permit issued under the statute may be assessed a civil penalty by the federal land manager concerned.<sup>103</sup> Violations of the main provisions of the statute can incur a fine of up to \$20,000 for a first offense where the value of the resource exceeds \$500, or up to \$100,000 for a subsequent violation.<sup>104</sup> In lieu of a fine, violators could face up to two years in prison for a first offense or up to five years for a subsequent offense.<sup>105</sup> Under ARPA, the first step in effective prosecution is finding out where the object originated and when it was taken, which can be a challenging inquiry.<sup>106</sup> Further, to be protected by ARPA, an object must be over 100 years old and found on public or native land.<sup>107</sup> These limitations could hinder convictions under this statute.<sup>108</sup>

After ARPA, the United States passed the CPIA in 1983.<sup>109</sup> The CPIA is the implementing legislation for the 1970 UNESCO Convention.<sup>110</sup> This step was critical for the United States as the largest market country for the transport and sale of cultural property because, without it, support for the 1970 UNESCO Convention would be futile. The CPIA prohibits the import of stolen cultural property removed from its origin after that origin state became party to the 1970 UNESCO Convention or after the United States became a party—whichever is later.<sup>111</sup> Thus, the law on its face only protects cultural property removed from its origin within the last fifty years, at most.<sup>112</sup> Critically, this limitation removes the possibility of using the CPIA to hold thieves accountable for actions during World War II, where art and cultural property theft and destruction were rampant. This is a massive oversight in legislation that could have provided a viable cause of action for families

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101. *Id.* § 470ee.

102. *Id.* §§ 470ff, 470(ee)(d).

103. *Id.* § 470ff.

104. *Id.* § 470ee(d).

105. *Id.*

106. *Id.* § 470bb(1).

107. *Id.*; *id.* § 470aa(b).

108. 16 U.S.C. § 470bb(1); *id.* § 470aa(b).

109. 19 U.S.C. §§ 2601-2613.

110. *Id.* Implementing legislation is the final step in incorporating many treaties into U.S. law and in some cases is necessary for a treaty obligation to have bite within U.S. jurisdiction.

111. *Id.* § 2607.

112. *Id.*

of victims of looting in World War II. Instead, they are left to other property and contract law devices.

The CPIA establishes a method of imposing import restrictions via bilateral agreements.<sup>113</sup> An individual party to the UNESCO Convention wishing to establish import restrictions on its cultural property brought into the United States must request such protection from the federal government following an application procedure outlined in the statute.<sup>114</sup> The United States uses these bilateral agreements, which often come with other guarantees of cultural exchange, in lieu of automatic application of import restrictions to all states parties.<sup>115</sup> The only automatic protection afforded to other states parties is to property previously accounted for in museums or private collections.<sup>116</sup> All other unaccounted for or not-yet-unearthed objects are only protected once the state obtains import controls through a bilateral agreement.<sup>117</sup> Furthermore, these bilateral agreements only pertain to archaeological and ethnological materials, rather than all types of cultural property as defined under the broader definition in the UNESCO Convention.<sup>118</sup>

A significant number of cultural objects are categorically excluded from this statute, either because no bilateral agreement exists between the United States and the origin country, or because the object does not fit into the categories of archaeological and ethnological material permitted by the agreement.<sup>119</sup> Section 2611 also provides for several exemptions from the act based on how long the object has been in the United States and how reasonable it is that the purchaser or origin state should have known the object was stolen.<sup>120</sup> On top of these limitations, the only remedy available under the CPIA is civil forfeiture.<sup>121</sup> The act does not provide for any criminal liability to hold violators accountable.<sup>122</sup> Objects forfeited

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113. *Id.* § 2602.

114. *Id.*

115. Maria Papageorge Kouroupas, *U.S. Efforts to Protect Cultural Property: Implementation of the 1970 UNESCO Convention*, 28 *AFRICAN ARTS* 32, 33-35 (1995).

116. *Id.* at 33.

117. *Id.*

118. Archaeological materials must be at least 250 years old, of cultural significance, and discovered by normal excavation or digging. 19 U.S.C. § 2601(2)(C)(i)(II). Ethnological materials must come from “tribal or nonindustrial society” and be especially important to those people. *Id.* §2601(2)(C)(ii)(I). The UNESCO Convention’s definition of cultural property covers a wide range of cultural objects and provides no minimum age for most. *See UNESCO Convention, supra* note 50, art. 1.

119. *See* 19 U.S.C. §§ 2602-2604.

120. *Id.* § 2611.

121. *Id.* § 2609

122. *Id.*

under the CPIA are returned either to the state party from which they originated or to a claimant who can establish valid title to the object.<sup>123</sup>

Following the CPIA, Congress passed NAGPRA in 1990.<sup>124</sup> This statute provides for the repatriation and disposition of Native American human remains and cultural objects.<sup>125</sup> It requires all federal agencies and institutions that receive federal funds to catalog human remains and cultural objects, and to return them to either their descendants or closest tribal relations.<sup>126</sup> Enforcement provisions under the statute provide for civil penalties and make the trafficking of Native American human remains and cultural property a criminal offense.<sup>127</sup> While NAGPRA was enacted to right past wrongs against Native American remains and cultural items, the act is not without faults. Repatriation has not been timely, and the scientific study exception has been effective at withholding human remains from their descendants or tribes.<sup>128</sup>

In addition to ARPA, the CPIA, and NAGPRA, various statutes address the removal, sale, and transport of illicit goods. These can provide helpful legal protections to cultural property. First, the National Stolen Property Act (NSPA) can be applied when the object is valued at over \$5,000 and is transported across state lines.<sup>129</sup> Charges under NSPA can culminate in a fine or imprisonment of up to ten years.<sup>130</sup> Second, federal prosecutors can bring charges for theft of major artwork from a museum.<sup>131</sup> This statute is limited in application to objects of cultural heritage that are either worth at least \$100,000 or are over 100 years old and worth more than \$5,000.<sup>132</sup> However, the statute does provide for a fine or imprisonment to be imposed on offenders.<sup>133</sup>

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123. *Id.*

124. 25 U.S.C. §§ 3001-3013.

125. *Id.* § 3002.

126. *Id.*

127. 18 U.S.C. § 1170. This statute is limited to remains or cultural items found on Federal or tribal lands. 25 U.S.C. § 3002.

128. 25 U.S.C. § 3005(b). The Kennewick Man case is a popular example. Kate Fitz Gibbon, *A Primer: NAGPRA, ARPA, and the Antiquities Act*, CULTURAL PROP. NEWS (Dec. 19, 2018), [https://culturalpropertynews.org/a-primer-nagpra-arpa-and-the-antiquities-act/#\\_edn25](https://culturalpropertynews.org/a-primer-nagpra-arpa-and-the-antiquities-act/#_edn25) [<https://perma.cc/TXR9-W8Q2>]. It took over twenty years for the 9,000 year old skeleton to be repatriated to its closest living descendants. *Id.* The remains were caught in years of litigation by scientists demanding further study. *Id.* An early ruling held that a direct link between the remains and modern tribes could not be established. *Id.* Years later, when DNA analysis had advanced, the skeleton was found to be related to the Colville tribe. *Id.*

129. 18 U.S.C. §§ 2314, 2315.

130. *Id.*

131. *Id.* § 668.

132. *Id.* § 668(a)(2).

133. *Id.* § 668.

Lastly, criminal charges for crimes against cultural property could be brought for forgery,<sup>134</sup> customs violations,<sup>135</sup> robbery, or extortion.<sup>136</sup> Although these statutes do not expressly provide for crimes involving any type of cultural property, they provide the opportunity to hold offenders criminally liable when their actions would otherwise only involve forfeiture under the more tailored CPIA.

This legal framework for protecting cultural property within the United States contains several noticeable gaps. ARPA only covers objects that are over one hundred years old found on public or native land.<sup>137</sup> The CPIA only applies to objects removed from their origin after 1970 and does not provide for any criminal enforcement mechanism.<sup>138</sup> Furthermore, it requires other countries to enter into a bilateral agreement with the United States to receive protections for their cultural property.<sup>139</sup> In practice, repatriation under NAGPRA has been slow.<sup>140</sup> What is more, there are a few statutes beyond the three major acts that may also apply to prosecuting the trafficking of cultural property, but they are not specifically tailored to the issues cultural property faces.<sup>141</sup>

Yet, the United States has historically acknowledged the importance of protecting cultural property.<sup>142</sup> It began the modern movement of protections by approving the Lieber Code during the Civil War.<sup>143</sup> It has signed on to several of the leading international treaties.<sup>144</sup> But legal protections have not kept pace with evolving times and societal awareness of the problems facing cultural property. The legal framework that currently exists is largely impotent and does not deter would-be traffickers and destroyers of cultural property.<sup>145</sup> As the largest art market in the

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134. *Id.* § 1343; *id.* § 1341.

135. *Id.* § 541 (Entry Via False Classification); *id.* § 542 (Entry Via False Statements); *id.* § 554 (Unlawful Export); *id.* § 545 (Unlawful Import).

136. Consider also *id.* § 1951 (Hobbs Act), *id.* § 1001 (False Statements), *id.* § 1501-21 (Obstruction of Justice), or *id.* § 1621-23 (Perjury). See David L. Hall, *Cultural Property Prosecutions*, 64 U.S. ATT'YS BULL. 17, 18 (2016).

137. 16 U.S.C. §§ 470aa-470bb.

138. 19 U.S.C. §§ 2601-2613.

139. *Id.* § 2602.

140. See Fitz Gibbon, *supra* note 128.

141. Laws protecting cultural property at the state level do exist, but they vary. State law is an important tool for the protection of cultural property but is beyond the scope of this Comment which focuses primarily on wide-reaching national and international laws protecting cultural property.

142. See discussion *supra* Part III.

143. See discussion *supra* Part II.

144. See discussion *supra* Part II.

145. See discussion *infra* Part IV.

world, it is incumbent upon the United States to update its legal protections, refocus its efforts and resources toward discouraging crimes against cultural property, and emerge as a leader once again.

#### IV. HOW THE UNITED STATES STACKS UP AGAINST OTHER STATES' PROTECTIONS FOR CULTURAL PROPERTY

International and domestic cultural property laws result from the desire by the global community and lawmakers to protect cultural property. These reflect the greater societal desires to protect our shared culture for future generations. From the Lieber Code to the CPIA, regulations on cultural property and what can or cannot be done to it began with societal movements.<sup>146</sup> The power of social awareness and outrage can be profoundly influential and often leads to improvements in the law. It did just that at specific points in U.S. history. With recognition of struggles often comes measures to counteract those struggles. Today, cultural property is in danger again and there is a recognition that existing law is inadequate, but no new measures are being implemented. The United States has disappointingly fallen behind the rest of the world. There are few recent measures that suggest the United States takes this protection of cultural property seriously. What measures do exist are late and ineffectual.<sup>147</sup> Meanwhile, the rest of the world has advanced tremendously in how it protects cultural property in the modern age.

Italy provides an example of a country taking measures to aid in the protection of items of cultural significance. In 1969, it founded the Department for the Protection of Cultural Heritage within the Carabinieri.<sup>148</sup> This created the first police force in the world that specialized in cultural property crimes.<sup>149</sup> The department now houses over 200 investigators dedicated solely to art crimes.<sup>150</sup> In the United States, no comparable art crime force exists. While Italy is a country overflowing with cultural objects, this is nevertheless problematic for the United States as the largest art market in the world. The Federal Bureau of Investigation (FBI) has a dedicated art crime team, which consists of

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146. See discussion *supra* Part II.

147. See discussion *supra* Part III.

148. Sylvia Poggioli, *For Italy's Art Police, An Ongoing Fight Against Pillage of Priceless Works*, NPR (Jan. 11, 2017, 12:37 PM), <https://www.npr.org/sections/parallels/2017/01/11/508031006/for-italys-art-police-an-ongoing-fight-against-pillage-of-priceless-works> [<https://perma.cc/D2EF-87F5>].

149. *Id.*

150. *Id.*

only about twenty special agents.<sup>151</sup> The FBI established the team in 2004 after the looting of the Baghdad Museum when it recognized the need for agents with special training in the field of stolen and looted art.<sup>152</sup> However, compared to that of the Carabinieri, the FBI's art crime squad is utterly outnumbered.<sup>153</sup> The amount of resources Italy dedicates to the protection of cultural property through staffing the squad alone is well above that of the United States. The difference in the art markets of both countries as well as their sizes and wealth only further highlights this excessive imbalance.

Other large art markets continue to make progress toward protection of national and international cultural heritage. For example, China has legislative protection favoring national artifacts and prioritizing restitution.<sup>154</sup> The Chinese government established the National Treasure Project aimed at recovering Chinese artifacts from abroad.<sup>155</sup> Chinese policy today is to repatriate as many lost and stolen artifacts as possible, particularly given the exponential growth of the Asian art market in China in recent years.<sup>156</sup> After 1949, several laws relating to the protection of cultural property went into effect.<sup>157</sup> In 1982, China enacted the "Law of the People's Republic of China on the Protection of Cultural Relics."<sup>158</sup> In 1987, the government "promulgated a notice on the Suppression of Illicit Excavation and Smuggling of Cultural Objects."<sup>159</sup> In general, these laws are more concerned with the export of Chinese cultural objects than with the import of cultural property with dubious provenance.<sup>160</sup>

Japan is similarly concerned with the protection of its own cultural exports. The country maintains inventories of its own cultural objects.<sup>161</sup>

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151. Peter Szekely, *FBI's 'Art Cops': In Hot Pursuit of Renoirs, Rembrandts and Ruby Slippers*, REUTERS (Apr. 10, 2019, 5:12 AM), <https://www.reuters.com/article/us-crime-art-fbi-feature/fbis-art-cops-in-hot-pursuit-of-renoirs-rembrandts-and-ruby-slippers-idUSKCN1RM14F> [<https://perma.cc/XY29-GNQF>].

152. *FBI Art Theft Program*, FBI, <https://www.fbi.gov/video-repository/newss-fbi-art-theft-program/view> [<https://perma.cc/XXP9-THAL>] (last visited Mar. 21, 2023).

153. Poggioli, *supra* note 148.

154. KEUN-GWAN LEE, AN OVERVIEW OF THE IMPLEMENTATION OF THE 1970 CONVENTION IN ASIA 8-10 (June 2012).

155. *Id.* at 10.

156. *Id.* at 8-10.

157. *Id.* at 13.

158. *Id.* (internal quotations omitted). The law was extensively updated in 2002. *Id.*

159. *Id.* at 8.

160. *Id.* at 8-10.

161. Patty Gerstenblith, *Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations*, in *THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY* 70, 85 (Jane Anderson & Haidy Geismar eds., 2017).

Those not on the list are allowed to be traded freely.<sup>162</sup> This practice is reflected in Japan's implementation of the 1970 UNESCO Convention. Japan only implemented Article 7(b), which prohibits the import of "specified foreign cultural property," meaning it must have been stolen from an institution that kept records of the property.<sup>163</sup> This means that looted and undocumented archaeological and ethnographic objects stolen directly from the ground or from sites that do not keep such inventories are not protected.<sup>164</sup> Thus, Japan's application of international cultural property law leans heavily toward protecting its own cultural property as it sees fit, although not so much toward the import of trafficked goods.

The United States has not enacted comparable protections for its own cultural property. While ARPA regulates excavations and digging on federal and Native lands, its application is limited to only certain types of cultural property. Cultural property originating in the United States does not in practice receive any more thorough protections than that originating elsewhere. Egypt has a law providing that all artifacts found within the country are designated "regulated cultural property" and all artifacts discovered in archaeological digs are automatically state-owned property.<sup>165</sup> Any private ownership or trade in antiquities can lead to severe sanctions under Egyptian law, including prison terms with hard labor.<sup>166</sup>

Some countries provide broad protections for cultural property that apply indiscriminately. For example, Australia is one of the only states party to the 1970 UNESCO Convention to apply import controls to all illegally exported cultural objects.<sup>167</sup> There, import controls apply to all countries uniformly, regardless of whether the exporting state has also signed on to the convention.<sup>168</sup> The only triggering event required is that the export of the object violated a "law of that country relating to cultural property."<sup>169</sup> Furthermore, Australia does not factor in the date of export of an illicit cultural object, as long as its attempted import into Australia happened after the date of the implementing legislation.<sup>170</sup>

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162. *Id.*

163. *Id.* (internal quotations omitted).

164. *Id.* at 85-86.

165. Folarin Shyllon, *Legislative and Administrative Implementation of 1970 UNESCO Convention by African States: The Failure to Grasp the Nettle*, 21 INT'L J. CULTURAL PROP. 23, 26 (2014) (emphasis omitted).

166. *Id.*

167. Gerstenblith, *supra* note 161, at 79.

168. Gerstenblith, *supra* note 161, at 79.

169. Gerstenblith, *supra* note 161, at 79.

170. Gerstenblith, *supra* note 161, at 79.

This kind of sweeping protection is not universal, and some countries have more limited 1970 UNESCO Convention implementing legislation. For example, Switzerland is the only other country besides the United States to require states party to the convention to enter into bilateral agreements to implement the terms of the treaty between the two nations.<sup>171</sup> However, unlike the United States, Switzerland implements Article 3 rather than Article 9 of the convention.<sup>172</sup> Practically, this difference means that the categories of covered property under the bilateral agreements are expanded beyond archaeological and ethnological materials to all types of cultural property.<sup>173</sup> Furthermore, the Swiss bilateral agreements can be perpetual, whereas the U.S. agreements must be reconsidered every five years and can be revoked.<sup>174</sup> Moreover, Switzerland imposes criminal penalties for the illicit import of cultural property.<sup>175</sup> Certain offenses can receive up to two years imprisonment or a fine up to 200,000 Swiss Francs.<sup>176</sup> Those “active in the art trade and auctioning business” are also held to a higher standard of diligence.<sup>177</sup> Thus, although the Swiss implementation of the 1970 UNESCO Convention is similarly limited by its requirement of bilateral agreements, the patchwork of cultural property protections available within the legal system provides additional incentives to safeguard Swiss and international heritage.

While the rest of the world has moved from fragmented protections offered to cultural property to a more robust and responsive framework, the United States has fallen behind. What measures do exist within the United States are often ineffective and require creative charging on behalf of prosecutors to deliver meaningful justice. Historically, the world has been receptive to societal awareness of the dangers facing cultural property. Protective laws are similarly reactionary. However, the United States has faltered at a time where the world is rapidly changing, and its current protections afforded to cultural property are overwhelmingly inadequate.

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171. Gerstenblith, *supra* note 161, at 82.

172. Gerstenblith, *supra* note 161, at 82.

173. Gerstenblith, *supra* note 161, at 82.

174. Gerstenblith, *supra* note 161, at 82. For example, the United States had a bilateral agreement with Canada from 1997 to 2002. Gerstenblith, *supra* note 161, at 76.

175. Gerstenblith, *supra* note 161, at 82-83.

176. Gerstenblith, *supra* note 161, at 82-83.

177. Gerstenblith, *supra* note 161, at 83 (internal quotations omitted).

V. SOCIETAL INTEREST IN PROTECTING CULTURAL PROPERTY  
TODAY AND OPTIONS FOR THE UNITED STATES

U.S. regulations for cultural property have not kept pace with that of the international legal framework nor with that of other countries. Catching up will require addressing the realities of modern trafficking. The advent of the Internet, with platforms like eBay, has made it easier than ever to traffic stolen property across continents. The growth in trade and in freeports also make it easier for art smugglers and launderers to keep their movements secret from governments. The growth in this illicit market incentivizes the looting and destruction of cultural sites, particularly in places experiencing conflicts where resources are diverted away from protecting cultural property. Furthermore, global conflict is on the rise and civil unrest is rampant. Holding accountable the growing number of non-state actors involved in conflicts and smuggling is difficult under international law. This Part considers the modern problems facing those who seek to protect cultural property today, including those who seek to disrupt the connections between trafficking, terrorism, and money laundering. Then, it suggests a path forward for the United States.

A. *Modern Problems Facing Cultural Property*

The realities of the modern world illuminate the need for criminal laws to keep pace with the rising societal awareness of the importance and fragility of cultural property. Conflicts in the last twenty years have led thieves and destroyers to take advantage of modern technology like the Internet and social media. A United Nations Security Council report detailed the ways terrorist organizations receive financing and called out Facebook as “a tool for the illicit trafficking of cultural property” that benefits ISIS.<sup>178</sup> Several reports since have detailed the ways in which terrorist organizations use Facebook, as well as other social media and Internet platforms like WhatsApp and Snapchat, to trade looted antiquities on the black market.<sup>179</sup> Once the smuggled artifacts leave their place of origin, many will sit for decades in warehouses at freeports in Europe and

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178. Twenty-Fifth Rep. of the Analytical Support and Sanctions Monitoring Team Submitted Pursuant to Resol. 2368 (2017) Concerning ISIL (Da’esh), Al-Qaida and Associated Individuals and Entities, ¶¶ 81-84, U.N. Doc. S/2020/53 (Jan. 20, 2020).

179. See AMR AL-AZM & KATIE A. PAUL, FACEBOOK’S BLACK MARKET IN ANTIQUITIES 2 (June 2019), <http://atharproject.org/report2019/>; Ben Taub, *The Real Value of the ISIS Antiquities Trade*, NEW YORKER (Dec. 4, 2015), <https://www.newyorker.com/news/news-desk/the-real-value-of-the-isis-antiquities-trade>.

Asia.<sup>180</sup> Their provenance will be fabricated using modern techniques and they will be advertised as Mesopotamian or Byzantine in origin instead of Syrian or Iraqi.<sup>181</sup> This can make it incredibly difficult for even the most informed buyer to be certain that their purchase is not indirectly financing mass looting or terrorism.

The realization that the systematic looting and sale of antiquities was funding terrorist organizations like ISIS catalyzed one of the most recent calls to strengthen U.S. cultural property law.<sup>182</sup> After the scathing U.N. report, the U.S. Department of State began to see protection of cultural property as a national security interest.<sup>183</sup> Reports from areas under ISIS control detailed how locals are incentivized to dig for artifacts and sell them on the black market, upon which ISIS exacted a twenty-percent tax to fund its operations.<sup>184</sup> Estimates of the income from this process range from tens of millions to \$100 million.<sup>185</sup> Some say the looting is of a comparable scale to that of the Nazis during World War II and that Syrian and Iraqi artifacts may resurface decades from now just as looted World War II art continues to resurface today.<sup>186</sup>

Several other events within the last twenty years have drawn the public eye to the importance of instituting new and improved protections for cultural property. In 2001, the Taliban's destruction of the Bamiyan Buddhas drew international outrage.<sup>187</sup> In 2003, there was outcry when the world learned of the looting of the Baghdad Museum.<sup>188</sup> More recently, the Hobby Lobby Museum of the Bible saga has drawn attention to just how easy it is for stolen artifacts to end up in a museum in the

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180. Benoit Faucon et al., *The Men Who Trade ISIS Loot*, WALL ST. J., <https://www.wsj.com/articles/the-men-who-trade-isis-loot-1502017200> (Aug. 6, 2017 7:28 PM).

181. Jenna Scatena, *Facebook's Looted-Artifact Problem*, ATLANTIC (July 31, 2020), <https://www.theatlantic.com/technology/archive/2020/07/archaeologists-defied-isis-then-they-took-facebook/614674/>.

182. See Lalwani, *supra* note 5, at 94 for a related discussion on how the high-profile looting of cultural property in the Middle East in recent years convinced Congress and the State Department to take the issue seriously.

183. Lalwani, *supra* note 5, at 94.

184. Fiona R. Greenland, *Inside ISIS' Looted Antiquities Trade*, THE CONVERSATION (May 30, 2016, 9:04 PM), <https://theconversation.com/inside-isis-looted-antiquities-trade-59287> [<https://perma.cc/5QNR-7HX5>]; Faucon et al., *supra* note 180; Taub, *supra* note 179.

185. Greenland, *supra* note 184; Faucon et al., *supra* note 180; Taub, *supra* note 179.

186. Faucon et al., *supra* note 180.

187. Bearak, *supra* note 7; Barbara Crossette, *Taliban Explains Buddha Demolition*, N.Y. TIMES (Mar. 19, 2001), <https://www.nytimes.com/2001/03/19/world/taliban-explains-buddha-demolition.html>.

188. Alan Riding, *Aftereffects: Missing Antiquities; Loss Estimates Are Cut on Iraqi Artifacts*, N.Y. TIMES (May 1, 2003), <https://www.nytimes.com/2003/05/01/world/aftereffects-missing-antiquities-loss-estimates-are-cut-on-iraqi-artifacts.html>.

United States.<sup>189</sup> The company has repatriated tens of thousands of antiquities after discovering faked provenances.<sup>190</sup> Even Christie's auction house found itself caught in the scandal after selling the Hobby Lobby family the Gilgamesh Dream Tablet.<sup>191</sup> It was later revealed that the item was imported illegally from Iraq under a fabricated provenance.<sup>192</sup>

Furthermore, the Pandora Papers revealed how cultural property is tied to the financial misdeeds of the world's elite.<sup>193</sup> The exposé disclosed how a renowned scholar allegedly smuggled priceless antiquities from Cambodia to supply major auction houses, museums, and private collections.<sup>194</sup> In this modern context of money laundering and trafficking perpetrated by not just terrorist organizations, but also allegedly by reputable scholars, cultural property is caught in the crosshairs. As the largest market for cultural property in the world, it is incumbent upon the United States to take steps responsive to these modern challenges.

*B. Recommended Updates to Protections for Cultural Property in the United States*

The legal framework in the United States is inadequate to address the realities of modern trafficking. Yet, the desire for more protections is evident. There are three areas in which the United States could immediately improve. First, the creation of a Department of Culture. Second, the implementation of criminal penalties for violations of laws

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189. While many of the stolen antiquities turned out to be fakes, the scandal nevertheless highlights the ease with which cultural artifacts can be looted and then sold around the world. Kelly Crow, *Hobby Lobby President to Return 11,500 Antiquities to Iraq and Egypt*, WALL ST. J. (Mar. 27, 2020, 12:57 PM), <https://www.wsj.com/articles/hobby-lobby-president-to-return-11-500-antiquities-to-iraq-and-egypt-11585324494>; Anja Shortland & Daniel Klerman, *Hobby Lobby's Owner Returned Thousands of Artifacts to Iraq. How Did He Get Them in the First Place?*, WASH. POST (Aug. 10, 2021 7:45 AM), <https://www.washingtonpost.com/politics/2021/08/10/hobby-lobbys-owner-returned-17000-ancient-artifacts-iraq-how-did-he-get-them-first-place/>; Paul LeBlanc, *Hobby Lobby Ordered to Forfeit Ancient Artifact Bought for \$1.6 Million in 2014*, CNN (July 27, 2021, 8:55 PM), <https://www.cnn.com/2021/07/27/politics/epic-of-gilgamesh-hobby-lobby/index.html> [<https://perma.cc/R548-NAES>].

190. Shortland & Klerman, *supra* note 189.

191. LeBlanc, *supra* note 189.

192. Eileen Kinsella, *The Founders of Hobby Lobby Are Suing Christie's for Selling Them an Ancient Artifact That Pretty Much Everyone Now Agrees Was Stolen*, ARTNET (May 20, 2020), <https://news.artnet.com/art-world/hobby-lobby-christies-lawsuit-1865667> [<https://perma.cc/R3Q6-6YLC>].

193. *Pandora Papers*, *supra* note 2; INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, *supra* note 1.

194. Tess Davis, *Douglas Latchford: The Man Who Pillaged Cambodia*, DIPLOMAT (Aug. 21, 2020), <https://thediplomat.com/2020/08/douglas-latchford-the-man-who-pillaged-cambodia/> [<https://perma.cc/S5SM-DDKM>].

protecting cultural property. Third, the extension of the CPIA to include all types of cultural property from all countries. Implementing these targeted suggestions would put the United States in a better position to protect cultural property not only domestically, but also internationally.

First, the United States needs a Department of Culture.<sup>195</sup> Over fifty countries have Ministers of Culture that promote the art and culture of their country and society.<sup>196</sup> Major art market countries like the United Kingdom and China have such positions at the highest points of government.<sup>197</sup> The United States is a clear outlier. The United States houses cultural oversight within the Bureau of Education and Cultural Affairs in the State Department. Other departments also touch on art and culture, including the Smithsonian Institution, the National Endowment for the Arts, and the National Endowment for the Humanities. Yet, there exists no centralized authority for culture within the United States. It is one of the few countries not to have such a position in modern times.

The utility of such a position is profound. It could consolidate the various programs that exist across several departments within the federal government into one cohesive program to advance and protect American culture. As in other countries, the benefits would be interdisciplinary, from antiquities to opera. It would streamline policy as it relates to cultural property and demonstrate to the rest of the world that the largest market country is taking art and culture seriously. For the department to maximize its impact on laws protecting cultural property, it must also have an enforcement arm. This department should go above and beyond the small FBI art crime squad, work across departments, and incorporate federal prosecutors dedicated solely to this area of law. Currently, most customs and law enforcement officers in the field do not have the training or knowledge to identify trafficked cultural property.<sup>198</sup> A centralized department dedicated solely to the enforcement of laws protecting cultural property would ensure that those in the field have the requisite knowledge. This can be accomplished by creating a specific training program for law enforcement or promulgating rules and trainings across departments. Housing all of this within a Department of Culture would centralize the

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195. It has also been suggested that tying cultural property to national security opens budgets and resources from the State Department, but more can be done. *See* Lalwani, *supra* note 5, at 100.

196. Megan Garber, *Should the U.S. Have a Secretary of Culture?*, ATLANTIC (July 1, 2013), <https://www.theatlantic.com/entertainment/archive/2013/07/should-the-us-have-a-secretary-of-culture/277409/>.

197. *Id.*; LEE, *supra* note 154, at 10.

198. *See* discussion *supra* Part IV.

issues pertaining to cultural property and allow the federal government to be more reactive to the modern realities of the trafficking of cultural property.

Second, there is a need for the United States to create robust criminal penalties for violations of cultural property law, both domestically and internationally. As the largest art market in the world, the United States must ensure that there are adequate protections for the art and culture that flows through its marketplace.<sup>199</sup> Properly tailored criminal laws can have a profound behavioral impact on the cultural property industry. Serious liability for violations of cultural property law could provide a much needed deterrent to crimes against that property in the United States. With so many cultural objects moving around and through the United States, ineffectual trafficking laws are not sufficient. While Egypt's cultural property laws provide an example of a perhaps overly robust criminal deterrent, it is nevertheless an influential example of how nationalization of cultural property and serious consequences for trafficking lead to a greater respect for and fewer criminal actions against cultural property.<sup>200</sup> Furthermore, U.S. policy toward its own cultural heritage is lacking when compared to other large art markets like those of China and Japan.<sup>201</sup> Its own cultural property is just as vulnerable to trafficking and just as deserving of legal protections. Creating a more robust criminal framework is an important step toward protecting all types of cultural property moving through and within the United States.

Third, the United States should broaden the domestic implementation of the 1970 UNESCO Convention. When the implementing legislation passed in 1983, it severely limited the efficacy of the 1970 UNESCO Convention. It narrowed the definition of the types of cultural property protected, it required bilateral agreements in lieu of a blanket recognition, and it limited those agreements to five years. These restrictions make it difficult for the CPIA to function as the drafters intended. Switzerland's use of the broader definition and Australia's blanket application should be seriously considered.<sup>202</sup> Otherwise, the early adoption of the treaty and central role in the creation of the document by the United States is performative and futile. Arguably, the treaty has received so many signatories because the United States threw its weight behind the document. Yet, the domestic implementation of the treaty forces those signatories to enter into an additional agreement with the

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199. See STATISTA, *supra* note 73.

200. See discussion *supra* Part IV.

201. See discussion *supra* Part IV.

202. See discussion *supra* Part IV.

United States to receive the protections the treaty ought to automatically provide. Broadening the CPIA to include all types of cultural property from all countries would allow the United States to complete its implementation of the convention and establish more effective measures that combat illicit trafficking.

Furthermore, updates to the CPIA should include a stronger enforcement mechanism. Currently, the only remedy under the act is civil forfeiture. While restitution of cultural property is a desired outcome of cultural property law, criminal liability is also necessary as a deterrent. Otherwise, the implementing legislation is largely toothless and impractical for protecting the considerable amount of cultural property that exists within and flows through the United States.

Traffickers' and thieves' use of modern technology exposes holes in the antiquated legal framework that currently purports to protect cultural property in the United States. Existing legal protections do not reflect these new challenges. While the world has continued to respect the need for stewardship of our shared cultural heritage, the United States has fallen critically behind. By implementing these targeted improvements, the United States could better position itself to combat the trafficking of cultural property and protect our shared cultural heritage for generations to come.

## VI. CONCLUSION

It is time for the United States to not only catch up, but to become a leader in providing robust legal protections for cultural property. The current legal framework in the United States for holding looters, thieves, dealers, and the like accountable is inadequate and requires updating. The rising tide of societal awareness of the problem of illicit trafficking and destruction of cultural property can be used to propel the creation of new legislative protections for cultural property. The destruction of cultural sites during war, the looting of museums, and revelations of the art market's participation in money laundering have created public outcry at the devastation to and misuse of our shared cultural patrimony. Robust, modern laws are necessary to deter this behavior and to show nefarious actors that the largest art market in the world is not open for business to looted antiquities. The tricks and tools of modern trafficking are changing rapidly, and laws in the United States need to keep pace with that growth or else its legal system will remain ill-equipped to deal with the problem. The societal momentum caused by front page news about looting and destruction of cultural property can be used to pressure Congress to take

this issue seriously and to finally update the antiquated framework currently in place. The United States has not been at the forefront of cultural property law since the Lieber Code. Now is the time to retake the lead.