

ANTIQUITIES, WAR, AND INTERNATIONAL LAW: THE ROLE OF INTERNATIONAL LAW IN PROTECTING LOOTED ANTIQUITIES DURING ARMED CONFLICT

*Katherine Novak**

I. INTRODUCTION

Prior to the post-World War II international agreements which remain in force today, there are few examples of agreements for the protection of cultural property during armed conflicts.¹ Dating back to the Renaissance, scholars have recognized the “universal value of cultural heritage” and the importance of preserving that history for future study and enjoyment, not only for the cultures to which that history belongs, but for all mankind.² These values became particularly poignant following Napoleon Bonaparte’s military campaigns in Italy and Egypt, when the French either destroyed antiquities or looted, and brought them back to Europe, “inspired by the vision of a pan-European artistic and scholarly culture.”³ This demonstrates not only the widespread European interest in preserving the legacies of these ancient civilizations, but also the risks these antiquities are exposed to during armed conflict. It would not be until the American Civil War that values such as preserving and protecting cultural history were codified for military usage.⁴

During the American Civil War the Union Army incorporated certain provisions into the military code requiring that important historic sites be marked with a specific type of flag and that armies take steps to actively avoid the destruction or damage of those sites.⁵ The first multi-

* J.D. Candidate, 2018, Antonin Scalia Law School at George Mason University. I would like to dedicate this note to my parents, Robert and Sandra Novak, for their endless love and support. Without them, I would not be where I am today.

¹ Please note that the treaties and agreements listed prior to The Hague Convention of 1954 are by no means exhaustive. The agreements described are illustrative of the premise that those agreements which were in place prior to World War II were limited in scope, and often ineffectual at protecting cultural property. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, S. TREATY DOCUMENT. NO. 106-1 (1999), 249 U.N.T.S. 215 (entered into force Aug. 7, 1956), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf>.

² CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 11, 12 (2010).

³ *Id.*

⁴ General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code] § II, VI (1863), *reprinted in* INTERNATIONAL COMMITTEE OF THE RED CROSS, *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, *available at* <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/A25AA5871A04919BC12563CD002D65C5/FULLTEXT/IHL-L-Code-EN.pdf>.

⁵ *Id.* at § IV. Articles 35 and 36 of the *Lieber Code* address affirmative actions the army must take to avoid destroying cultural property. Articles 111-118 describe the placement of a certain type of flag to point out the presence of cultural property to advancing armies.

lateral agreements effecting the protection of cultural property were The Hague Conventions of 1899 and 1907.⁶ The Hague Convention of 1907 was in place and ratified by most of the European powers, but did not adequately prevent the destruction of cultural property during the First World War.⁷ Further, following World War I, the United States entered into an agreement with ten other American states, exclusively designed to protect cultural property during armed conflicts.⁸

Prior to and during World War II, the Nazi Party confiscated historic treasures from Jewish families living throughout German-controlled territory.⁹ As the German army retreated at the end of the war, many of these pieces of art were intentionally destroyed or hidden.¹⁰ As the Allied armies advanced, General Dwight D. Eisenhower made concerted efforts to protect Europe's cultural heritage.¹¹ These efforts are best seen through the work of the Monuments, Fine Arts and Archives Teams, better known as the "Monuments Men."¹² Although these teams were largely successful in finding and returning cultural property to the countries of origin, many pieces could not be returned or were completely destroyed.¹³

As a result of these atrocities, one of the first acts of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") was the passage of The Hague Convention of 1954.¹⁴ This Convention, and subsequent treaties and agreements, aspired to create rules for the parties' militaries to avoid harming, and, in some instances, to protect cultural

⁶ Hague Convention II with Respect to the Laws and Customs of War on Land and its annex: Regulation Concerning the Laws and Customs of War on Land, July 29, 1864, 11 Bevans 247; Hague Convention IV, Declaration, Oct. 18, 1907, 1 Bevans 631.

⁷ SHERRY HUTT ET AL., *CULTURAL PROPERTY LAW: A PRACTITIONER'S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES* 191 (1st ed. 2004).

⁸ Friedrich Schipper & Erich Frank, *A Concise Legal History of the Protection of Cultural Property in the Event of Armed Conflict and a Comparative Analysis of the 1935 Roerich Pact and the 1954 Hague Convention in the Context of the Law of War*, 9 *ARCHAEOLOGIES* 13-28, 16, 23 (2013).

⁹ Rebecca E. Hatch, *Litigation Under Common Law for Recovery of Nazi Looted Art*, 141 *AM. JUR. TRIALS* 189 § 1 (2015).

¹⁰ Jim Morrison, *The True Story of the Monuments Men*, *SMITHSONIAN.COM* (Feb. 7, 2014), <https://www.smithsonianmag.com/history/true-story-monuments-men-180949569/>.

¹¹ General Eisenhower said, "It is the responsibility of every commander to protect and respect these [historical monuments and cultural centers] whenever possible." Cited in Chip Colwell-Chanthaphonh & John Piper, *War and Cultural Property: The 1954 Hague Convention and the Status of U.S. Ratification* 10 *INT'L J. CULTURAL PROP.* 217, 224 (2001) (quoting JOHN H. MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 101 (2007)).

¹² National Gallery of Art, *Monuments Officers and the NGA*, NATIONAL GALLERY OF ART, <https://www.nga.gov/about/monuments-officers-national-gallery-art.html> (last visited Jan. 9, 2017); see National Gallery of Art, *The Monuments Men and the National Gallery of Art*, NATIONAL GALLERY OF ART, <https://www.nga.gov/exhibitions/2014/monuments-men.html> (last visited Mar. 10, 2018).

¹³ See generally Hatch, *supra* note 9.

¹⁴ HUTT, *supra* note 7, at 192.

property present during armed conflicts.¹⁵ Broadly speaking, these goals are echoed throughout all of the treaties discussed in this paper.¹⁶ However, not all of these treaties were ratified by the same nations and not all of them provide mechanisms for reclaiming cultural property that was stolen or damaged during these armed conflicts.

In the late 20th century and early 21st century, many armed conflicts, particularly in the Middle East, involve the intentional destruction of cultural property.¹⁷ As of 2015, the Islamic State of Iraq and Syria (“ISIS”) forces in Syria and Iraq intentionally damaged or destroyed several historic sites for “religiously motivated” reasons, “target[ing] well-known ancient sites along with more modern graves and shrines belonging to other Muslim sects, citing idol worship to justify their actions.”¹⁸ Unlike previous armed conflicts, where historical sites and artifacts were often destroyed as a secondary consequence of military campaigns, ISIS has specifically targeted these sites, contrary to international practice and custom.¹⁹

The purpose of this paper is to examine how courts in different nations have applied these treaties and to examine the inconsistencies that arise between parties – particularly the conflicts that exist between previous owners (often the victims of illegal smuggling) and bona-fide purchasers in other countries. Cultural property is often sold through intermediaries who connect smugglers and bona-fide purchasers. First, the background section of this note examines several of the international treaties enacted at the end of World War II. Comparing and contrasting several of these treaties demonstrates some of the overarching themes that the international community has identified as important to the preservation of cultural property during armed conflicts.²⁰ This note then looks at how responses to these themes have changed and evolved over time. Next, this note

¹⁵ *Id.* at 192–97.

¹⁶ According to The Hague Convention of 1954, “cultural property belong[s] to any people whatsoever [and is] the cultural heritage of all mankind.” The 1970 UNESCO preamble states, “the interchange of cultural property among nations...increases the knowledge of the civilization of man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.” JOHN HENRY MERRYMAN, *IMPERIALISM, ART AND RESTITUTION* 106 (John Henry Merryman ed., 2006) (quoting the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, pmbl., Nov. 14, 1970, 823 U.N.T.S. 231). According to a 1976 Recommendation by UNESCO, “cultural property is a powerful means of promoting mutual understanding and appreciation among all nations.” JOHN HENRY MERRYMAN, *IMPERIALISM, ART AND RESTITUTION* 106 (John Henry Merryman ed., 2006) (quoting UNESCO Recommendation Concerning the International Exchange of Cultural Property, pmbl., Nov. 26, 1976, available at http://portal.unesco.org/en/ev.php-URL_ID=13132&URL_DO=DO_TOPIC&URL_SECTION=201.html).

¹⁷ See Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NATIONAL GEOGRAPHIC (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>.

¹⁸ *Id.*

¹⁹ ISIS is not party to any of the later mentioned international treaties; however, their actions have inspired widespread condemnation by the international community.

²⁰ Please note that the treaties examined is by no means an exhaustive list.

examines American customs law and case law to demonstrate how the U.S. has implemented some of these treaties and its response to the illegal import of cultural property taken during armed conflicts. This note then compares the American response with judicial opinions from other Western nations where looted cultural property is often sold. The purpose of these separate examinations is to demonstrate that there is no uniform method for repatriating this stolen property and no single way of applying the important overarching themes identified as crucial to the protection of cultural property.

The solution proposed for these issues is a self-executing treaty that addresses specific methods for identifying and returning looted cultural property, and holding military forces accountable for their conduct. As a response, the best way to eliminate the judicial inconsistencies that result is three-fold: (1) enforcing stricter customs regulations in market nations where cultural property is often sold; (2) establishing harsher criminal sanctions for those who facilitate the sale of illegally appropriated cultural property; and (3) ensuring that those nations which are most at risk for losing cultural heritage during armed conflicts (usually under-developed nations) have access to internet resources and documentation to make the process of reclamation easier.

II. BACKGROUND

In order to examine the inconsistencies in the application of international treaties protecting cultural property during armed conflicts, it is necessary to examine the inconsistencies in the application of international treaties protecting cultural property during armed conflicts to understand the motives behind some of the relevant international treaties. An examination of how these treaties have been interpreted and implemented is possible with an understanding of the basic tenets of international law, which governs cultural property in the context of armed conflict.

The three international agreements examined in this comment are: (1) the 1954 Hague Convention (including both the First and Second Protocols); (2) UNESCO 1970; and (3) UNIDROIT 1995.²¹ However, before examining these treaties, it is important to understand that all of these treaties are non-self executing, meaning that they do not have the effect of enforceable domestic law (at least in regards to the United States) until Congress passes legislation to that effect.²² Although some of the statutes regarding implementation will be addressed in this section, they will be given further analysis in a later section of this note. Additionally, all of these treaties refer broadly to “customary international law” in regards to current practices regarding the repatriation of cultural property as a method

²¹ This is not an extensive list of international agreements. *See supra* note 1.

²² *See* *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008).

of appealing to a broader sense of responsibility that nations began feeling towards cultural property in the aftermath of World War II. However, none of these treaties clarify what exactly is meant by "customary international law" or what that entails.²³ What is clear is that there are two standards which must be met in order for a practice to be deemed "customary international law": "First, [...] consistent State practice in support of the particular rule, and, second, this State practice must be accompanied by a sense of legal obligation or legal entitlement to so act."²⁴ Only then can a practice be deemed "customary" by the international community.

Considering that there was no real international codification of the principles regarding the protection of cultural property until the 1899 and 1907 Hague Conventions, and those were completely ignored during the Second World War, only the 1954 Hague Convention could possibly be considered "customary" in the sense that most nations agree on its guiding principles and to enforce those principles. Although the protection of cultural property seems to be a subject of growing concern amongst nations, there is no uniform method for protecting that property and several nations still do not have legislation (or the means of enforcing that legislation) to provide adequate protection.

A. *The Hague Convention of 1954*

It is generally agreed that the 1954 Hague Convention was created in response to the devastating effect the Nazi regime had on Europe's cultural treasures.²⁵ The 1899 and 1907 Hague Conventions were essentially ignored by the Axis powers as they forcibly collected and destroyed countless objects of historical and artistic significance.²⁶

²³ The idea of customary international law dates back to the Roman Emperor Justinian, whose Institutes were comprised of "[u]nwritten law consisting[ing] of rules approved by usage; for long-continued custom approved by the consent of those who use it imitates a statute." See The Institutes of Justinian, THE ELEMENTS OF ROMAN LAW 45 (bk. I, tit. II, § 9) (4th ed. Lee 1956). In the 17th century, Dutch writer Hugo Grotius, considered the inventor of modern international law, described customary international law as "unbroken custom and the testimony of those who are skilled in it." See Hugo Grotius, HUGO GROTIUS ON THE LAW OF WAR AND PEACE: STUDENT EDITION 32 (Stephen C. Neff, ed., Cambridge University Press 2012). Emer de Vattel, an eighteenth century writer and another founder of the modern understanding of international law, described customary international law as "certain maxims and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law." See Emer de Vattel, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS xv (1797).

²⁴ See generally FORREST, *supra* note 2, 52 (citing Richard Shaw, *The 1989 Salvage Convention and English Law*, LLOYD'S MAR. COM. LAW Q., 202 (1996)).

²⁵ The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 19, 1954, Hein's No. KAV 9-10; see Anthi Helleni Poulos, *The 1954 Hague Convention for the Protection of Cultural Property in the Even of Armed Conflict: An Historic Analysis*, 28 INT' J. LEGAL INFO. 1, 36 (2000) (citing MERRYMAN, *supra* note 16, at 76).

²⁶ See generally FORREST, *supra* note 2, at 75-76.

Estimates regarding the amount of cultural heritage lost as a result of World War II number in the hundreds of thousands, many of which have yet to be identified or recovered.²⁷ At the first meeting of UNESCO in April 1954, all forty-five nations present signed the Hague Convention, recognizing the importance of preventing another situation in which cultural heritage “belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”²⁸

One of the most important features of the 1954 Hague Convention, distinguishing it from previous attempts to protect cultural heritage during armed conflicts, is its definition of “cultural property”:

moveable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archeological sites; groups of buildings, which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.²⁹

Note that this definition specifically alludes to “moveable” property, an important category of cultural heritage not mentioned in previous international agreements.³⁰ The advantage of enumerating such specific parameters for the identification of cultural property is that belligerent nations on either side of a conflict are made constructively and actually aware of those items not to be damaged or destroyed. According to Anthi Helleni Poulos, there are at least four primary innovations introduced by the 1954 Hague Convention, three of which are relevant to international law: “equal application to occupation forces, applicability to the various parameters of armed conflict (by including civil wars and wars of liberation), and responsibilities of states in peacetime.”³¹ These terms differ from previous international understanding of cultural heritage, which were limited to vague terms such as “booty,” “pillage,” or “spoils.”³² Although the list of enumerated items provided for in The Hague Convention is not exhaustive, it attempts to ensure that those types of property which were specifically targeted by the Nazi army would be protected.

²⁷ ROBERT M. EDSSEL, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY* 400 (2009).

²⁸ Hague Convention, *supra* note 25.

²⁹ Hague Convention, *supra* note 25, at Art. I(a).

³⁰ See Friedrich T. Shipper & Erich Frank, *A Concise Legal History of the Protection of Cultural History in the Even of Armed Conflict and a Comparative Analysis of the 1935 Roerich Pact and the 1954 Hague Convention in the Context of the Law of War*, *ARCHEOLOGIES* 13, 18 (Apr. 2013).

³¹ Poulos, *supra* note 25, at 39.

³² *Id.* at 3.

In addition to the greatly expanded definitions of cultural property, the Hague Convention provides guidelines for military forces to follow.³³ Article 5 begins with the proposition that any occupying force or military engaged in active operations take “necessary” measures “[to] support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.”³⁴ And even then, a belligerent or occupying military is required to protect cultural property “as far as possible,” suggesting that even in the most dire circumstances of a military operation, cultural heritage is to be given the highest priority protection.³⁵

Finally, Article 7 of the Convention stipulates that the militaries of contracting parties are to be educated regarding the protection of cultural property, including recognition of the designated flag indicating the presence of cultural property and special forces equipped to protect that property.³⁶

The remainder of the Convention establishes general guidelines for implementing these measures.³⁷ For example, military personnel identified as working to protect cultural property, regardless of which side they are fighting for, are to be left to complete their missions without interference; areas designated as cultural heritage or as containing moveable cultural property are to be marked with a special flag of the Convention;³⁸ and the transport of cultural heritage is permitted when military conflict threatens that property.³⁹

The First Protocol of the Hague Convention provides some general guidelines for the return of cultural property in the event that it is removed from its nation of origin.⁴⁰ Any cultural property taken from its place of origin must be returned at the end of the hostilities, and failure to do so triggers an indemnity payment to the proper owners of the property.⁴¹ The First Protocol makes it clear that even if cultural property is retained by a belligerent nation at the end of hostilities, that property “shall never be retained as war reparations.”⁴²

The Second Protocol reaffirms the goals and guidelines set out in the original Convention and First Protocol, but seeks to clarify the protections to be put in place by all participating military forces.⁴³ For example, Chapter 2 Art. 6 restates the idea from the original Convention

³³ FORREST, *supra* note 2, at 76.

³⁴ Hague Convention, *supra* note 25, at KAV 11.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See generally id.*

³⁸ *Id.*

³⁹ *Id.* at 14-15.

⁴⁰ *Id.* at 39.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 45.

that steps are to be taken to prevent the destruction or damage of cultural property during military operations, but it qualifies that statement with exceptions that distinguish cultural property that has itself become a military target or in the case of no other alternative.⁴⁴ Note that none of the above Articles or examples addresses the ways in which nations are to implement this Agreement; the Agreement only establishes that the signing parties acknowledge that the world's cultural heritage requires protection. Implementation is left to individual states. The Convention only establishes a minimum level of protection for cultural property upon which the signing parties agree to.

B. UNESCO 1970

In 1970, UNESCO established a convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.⁴⁵ The U.S. ratified and implemented UNESCO 1970 through the Cultural Property Implementation Act (CPIA), despite its failure to ratify the 1954 Hague Convention.⁴⁶ Even though the CPIA was not passed until thirteen years after UNESCO was ratified, it demonstrates the U.S.'s commitment to implementing the Convention's measures.⁴⁷ Like the prior Hague Convention, UNESCO 1970 emphasizes the importance of allowing party nations to implement legislation to prohibit the export of cultural property following armed conflict.⁴⁸ However, it is more specific than the Hague Convention as to the types of protected cultural property. Rather than the broad grant of protection issued under the Hague Convention, UNESCO 1970 specifies:

- (1) rare flora, fauna, minerals, and fossils;
- (2) property relating to history, history of science, military, and leaders;
- (3) products of archeological excavations;
- (4) elements of monuments and archeological sites;
- (5) antiquities over 100 years old, e.g., coins and engraved seals;
- (6) objects of ethnological interest;
- (7) property of artistic interest, paintings, drawings, designs by hand, and statues;
- (8) rare manuscripts;
- (9) postage and revenue stamps;
- (10) archives, including sound, photo, and cinema recordings; and
- (11) articles of furniture over 100 years old, and musical instruments.⁴⁹

⁴⁴ *Id.* at 47-48.

⁴⁵ 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.

⁴⁶ See generally HUTT, *supra* note 7, at 193.

⁴⁷ BARBARA T. HOFFMAN, *International Art Transactions and the Resolution of Art and Cultural Property Disputes: A United States Perspective*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 159, 160 (Barbara T. Hoffman ed., 2006).

⁴⁸ United Nations Educational, Scientific and Cultural Organization, *Text of the Convention*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/> (last visited Mar. 17, 2018).

⁴⁹ HUTT, *supra* note 7, at 194-95.

Compared to Article 1 of the 1954 Hague Convention, UNESCO 1970 places much greater importance on the types of cultural property which exist.⁵⁰ It is not limited to moveable versus non-moveable historic or artistic pieces.⁵¹

Because of all the similarities between the 1954 Hague Convention and UNESCO 1970, the U.S. is a signatory to both agreements. Neither agreement specifies how the agreed upon measures are to be implemented in any given country. Thus, signatories are given a wide degree of latitude in the implementation of the agreements.

C. UNIDROIT 1995

Signed and entered in 1995, United Nations International Institute for the Unification of Private Law (UNIDROIT) created the Convention on the International Return of Stolen or Illegally Exported Objects to further the objectives laid out by UNESCO in 1970.⁵² UNESCO 1970 failed to substantively address issues regarding the repatriation of illegally stolen or sold cultural property.⁵³ Although UNIDROIT 1995 has only been ratified by 18 nations, it provides guidance as to what the international organization deems appropriate as to “issues of ownership, limitation periods, the position of the *bona-fide* purchaser and the payment of compensation in some cases.”⁵⁴ Therefore, unlike its predecessors, UNIDROIT 1995 takes on more of the characteristics of a self-executing treaty because it establishes the conditions for protecting cultural property,

[a]s it provides a mechanism for direct access to the court of a State Party by private individuals (or States) it is essentially a private law instrument. That is, once a State becomes a party to the Convention and implements its provisions nationally, private individuals will be directly affected through the ability to take action and have action taken against them.⁵⁵

These mechanisms were not adopted by the vast majority of nations, but are still recognized as a minimum standard to measure processes for repatriation of cultural property.⁵⁶ However, as suggested by the only eighteen member nations who have ratified this treaty, UNIDROIT is

⁵⁰ See United Nations, *supra* note 48.

⁵¹ *Id.*

⁵² International Institute For The Unification of Private Law, *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, International Institute for the Unification of Private Law, UNIDRIOT (June 24, 1995), available at <https://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf>.

⁵³ See FORREST, *supra* note 2, at 196.

⁵⁴ *Id.*

⁵⁵ *Id.* at 197.

⁵⁶ *Id.*

somewhat unpopular because it has more similarities to a self-executing treaty and would require signing parties to conform to certain regulations.⁵⁷

In addition to its self-executing qualities, UNIDROIT is more generally concerned with requiring signatories to repatriate stolen cultural property to its country of origin.⁵⁸ It is generally under-developed nations or indigenous communities which suffer the most from the illegal export of cultural property.⁵⁹ This is recognized in the preamble to the UNIDROIT 1970:

[State parties were] deeply concerned by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural property of national, tribal, indigenous or other communities, and also to the property of all peoples, and in particular by the pillage of archeological sites and the resulting loss of irreplaceable archeological, historical and scientific information.⁶⁰

This disparity in the impact from illegal export of cultural property leads to conflicts between under-developed or developing nations, which most often lose their cultural property and heritage during armed conflict, and developed nations, which are often importers of cultural property (both legally and illegally). Not only are there legal questions about implementing the laws of one state in the courts of another, but importing nations are understandably reluctant to pass laws outlawing the import stolen or looted cultural property.⁶¹

As a result of this conflict, UNIDROIT has been criticized as inhibiting museums and collectors in developed nations from acquiring cultural heritage, while at the same time, making it difficult for under-developed and recently war-torn regions to make claims requesting the return of cultural property.⁶² Although UNIDROIT provides a judicial remedy for nations seeking to reclaim stolen cultural property following an armed conflict, the fact that the nation making the claim to the cultural property has to pay for its return places an extremely high financial burden on under-developed nations.⁶³ Under-developed nations are also

⁵⁷HUTT, *supra* note 7, at 194-195.

⁵⁸ See 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

⁵⁹ See generally MANUS BRINKMAN, *Reflexions on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 64 (Barbara T. Hoffman ed., 2006).

⁶⁰ FORREST, *supra* note 2, at 198 (citing the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects).

⁶¹ *Id.* at 208. This point will be further examined in the following section, where American courts are often forced to interpret foreign laws in regards to US *bona-fide* purchasers.

⁶² *Id.* at 219.

⁶³ Adrian Parkhouse, *The Illicit Trade in Cultural Objects: Recent Developments in the United Kingdom*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 178, 179 (Barbara T. Hoffman ed., 2006).

disproportionately affected as they are most often the ones making claims for the return of cultural property.⁶⁴

D. American Understandings of International Treaties

Although Congress has not ratified all of these treaties, many of their ideas and principles have been enacted through legislation.⁶⁵ An understanding of that legislation is necessary to an examination of how American courts have interpreted international law in this area as well as how the courts deal with interpreting issues of the laws of foreign nations.

First, there is the National Stolen Property Act, which was not originally intended to address the illegal import of cultural property, but has since proved beneficial in prosecuting parties for illegal importation.⁶⁶ Second, there is the Cultural Property Implementation Act, which was enacted to implement the UNESCO 1970 treaty.⁶⁷ Finally, there are several American customs regulations which play a role in determining at which point antiquities looting becomes a crime in the U.S. and the degree to which offenders may be punished. In regards to case law, there is some inconsistency as to the implementation of these particular acts, but the actual inconsistencies which are relevant to this note involve the additional examinations of foreign legislation and unequal application of treaty principles across international borders.

1. The National Stolen Property Act

Enacted in 1948, The National Stolen Property Act (NSPA) provides, “[w]hoever transports, transmits or transfers in interstate or foreign commerce, any goods etc. of value of \$5000 or more, knowing the same to have been stolen, converted or taken by fraud...[s]hall be fined...or imprisoned.”⁶⁸ Although not originally intended to aid the federal government in seizing and returning stolen cultural property being imported into the U.S.,⁶⁹ the NSPA has given the U.S. government the authority to seize stolen cultural property after it has already gone through the U.S.

⁶⁴ *Id.*

⁶⁵ See *infra* pp. 14-17.

⁶⁶ See Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting, 18 U.S.C. § 2314 (1948); HOFFMAN, *supra*, note 47, at 165 (Hoffman provides an excellent summary of the legislation and case law directing the seizure of cultural property in the United States based on the National Stolen Property Act of 1948, 18 U.S.C. §§ 2314-15).

⁶⁷ *Convention on Cultural Property Implementation Act (CPIA) of 1983; Fact Sheet*, Archaeological Institute of America (April 1, 2010) <https://www.archaeological.org/news/sitepreservation/75>; Cultural Property Implementation Act, 19 USC §§ 2601-13 (1983).

⁶⁸ 18 U.S.C. § 2314.

⁶⁹ Hoffman, *supra* note 47, at 165 (describing how the NSPA was originally enacted to help the federal government recover stolen vehicles).

customs process.⁷⁰ The NSPA was not enacted for the purpose of implementing one of the multilateral treaties regarding the protection of cultural property during armed conflicts, but rather has had the effect of supporting efforts to return that property to the rightful owners.⁷¹

It is argued that the NSPA is effective at helping the government return stolen cultural property because it “respects not only the common law property rights of another nation, but it also recognizes a national ownership of the patrimony of another country.”⁷² A general export control law is insufficient for the government to return stolen property; that instead “[t]he NSPA accepts the law of other nations as an indicia of ownership that form the basis of the concept of theft of items removed from a country in violation of its patrimony laws.”⁷³

2. The Cultural Property Implementation Act

Unlike the NSPA, which was enacted independent of any international agreements or obligations, and only subsequently applied to cultural property repatriation, the Cultural Property Implementation Act (CPIA) was enacted in 1983 to implement UNESCO 1970 in the U.S.⁷⁴ It represents “attempts to balance the competing goals of archeologists, anthropologists, academics, art collectors and museums, and relevant government agencies.”⁷⁵ CPIA provides:

[w]hoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law is subject to forfeiture of the property.⁷⁶

Note that unlike the NSPA, CPIA refers merely to forfeiture of the property, not to any form of criminal punishment.⁷⁷

It is argued that the CPIA actually limits the authority customs officers have under the NSPA because they are prohibited from seizing any object going through customs that some foreign party claims is stolen.⁷⁸ The purpose of this is to protect the legitimate interests of groups within the

⁷⁰ See HOFFMAN, *supra* note 47, at 165; *see also* 18 U.S.C. § 2314.

⁷¹ *See* 18 U.S.C. § 2314; HOFFMAN, *supra* note 47, at 165.

⁷² HUTT, *supra*, note 7, at 197.

⁷³ *Id.*

⁷⁴ HOFFMAN, *supra* note 47, at 160.

⁷⁵ *Id.*

⁷⁶ HUTT, *supra* note 7, at 198-99 (citing 18 U.S.C. § 545).

⁷⁷ *Id.* at 199.

⁷⁸ HOFFMAN, *supra* note 47, at 160.

U.S. attempting to acquire these objects, and it protects the American market for these objects.⁷⁹

3. U.S. Customs Law

There are several statutes governing American customs law in regards to the importation of cultural property.⁸⁰ For the most part, these statutes allow for the seizure of property believed to be stolen; however, some provide for civil or criminal liability. Instead of the government having to prove that the object in question was stolen property, “the burden is...on the owner, to show that, in fact, the property was not stolen.”⁸¹ Further,

[c]laimants satisfy this burden by proving that the predicate crime never occurred, or that the property lacks sufficient nexus to the predicate crime to warrant forfeiture under the applicable statute. In addition claimants often assert the innocent owner defense, arguing that because they have a legitimate interest in the property and did not participate in the predicate offense, the property should not be forfeited to the U.S. government.⁸²

Unfortunately for potential owners, most courts have not accepted this argument unless that defense is explicitly provided for in the relevant statute.⁸³ Therefore it is necessary to examine some of the existing federal statutes governing the importation of cultural property.

First, 18 U.S.C. §545 “prohibits the importing of merchandise ‘contrary to law’ and allows the government to forfeit merchandise that has been determined as imported contrary to law.”⁸⁴ Next, 18 U.S.C. §542 “prohibits the import of merchandise by means of a [materially] false statement and allows for seizure of the object.”⁸⁵ Finally, there is 19 U.S.C. §1595(a), which “permits the seizure or forfeiture of objects known to be stolen at the time of import.”⁸⁶ Although not exhaustive, these statutes demonstrate how potentially difficult it is for bona fide purchasers to disprove the U.S. government’s investigation into the transport of stolen goods. Once the government forfeits items believed to be stolen, the burden shifts to the purchaser to prove the government incorrect.⁸⁷

⁷⁹ *Id.*

⁸⁰ Although not specifically mentioned with some of the statutes in this section, both the National Stolen Property Act and the Cultural Property Implementation Act both affect U.S. Customs law. *See generally* 18 U.S.C. § 2314; 19 U.S.C. §§ 2601-13.

⁸¹ HOFFMAN, *supra* note 47, at 163.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 164 (citing 18 U.S.C. § 542 (1994); *see also* United States v. An Antique Platter of Gold, 184 F.3d 131, 135 (2d Cir. 1999)).

⁸⁶ *Id.* (citing 19 U.S.C. § 1595(a) (1999)).

⁸⁷ *Id.* at 163.

III. PROBLEM

While many nations have signed and ratified (per their own international agreements about the protection of cultural property during armed conflict, not every nation has agreed to abide by the guidelines.⁸⁸ Additionally, several of the agreements, as well as academic commentaries about the agreements, refer to general “customary international law,” a term never well defined.⁸⁹ Thus inconsistency exists as to the implementation of these agreements, not only within the courts of the U.S., but also within the courts of other sovereign parties. Treaties in the U.S. are presumably non-self executing, meaning that they do not become enforceable domestic law within the U.S. until Congress passes legislation to that effect. And even then, courts interpret these statutes to mean different things. Finally, these American interpretations of international agreements must be compared with several foreign decisions, particularly in Western nations where cultural property is more likely to be illegally sold.

Given the extent of the inconsistencies within purely domestic application of these principles in American courts, those courts are often then required to interpret the laws of those nations requesting the return of cultural property. Unfortunately, as is often the case during armed conflicts, the nations losing cultural heritage often do not have the resources to sustain a claim, or even a government stable enough to make a claim.

A. *International Struggles to Implement Treaties and Agreements*

Beginning in 2001, the Taliban instituted a deliberate policy of targeting cultural heritage that in any way contradicted their interpretation of Islamic teachings.⁹⁰ Shortly after the announcement of this policy, the Taliban destroyed two ancient Buddha statues in Bamiyan near Kabul in modern Afghanistan, two of the Afghan culture’s most prized possessions.⁹¹ Unfortunately, Afghanistan was not party to most international treaties specifically addressing the destruction of cultural property during armed conflict.⁹² However, “the absence of specific treaty obligations...does not relieve the Taliban regime from international responsibility deriving from the destruction of the Buddhas of Bamiyan, under general norms of customary international law.”⁹³ First, it is a well-established principle of international law that the protection of cultural heritage during armed

⁸⁸ For instance, the United States is not a party to the Second Protocol of the Hague Convention.

⁸⁹ See *supra* Part II.

⁹⁰ FRANCESCO FRANCONI & FEDERICO LENZERINI, *The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 28, 31 (Barbara T. Hoffman ed., 2006).

⁹¹ *Id.*

⁹² *Id.* at 34.

⁹³ *Id.*

conflict is a high priority for all nations.⁹⁴ Second, that there is a general “prohibition of acts of violence against cultural heritage in the event of armed conflicts.”⁹⁵

Although it may appear from these statements that members of the Taliban could be held liable for the destruction of the Bamiyan Buddhas, it is unlikely due to the lack of enforcement measures within the treaties regulating this area. Not only is there the obstacle that Afghanistan was not party to several of these agreements when the destruction occurred, but several acts of the Taliban took place within Afghanistan with the support of the State, and thus fall outside the realm of international law.⁹⁶

In the aftermath of the destruction caused by the Taliban, the world is now facing the devastating effect ISIS has had on the historic sites of the Middle East and the international community is forced to find out how to implement existing agreements as to the repatriation of cultural property.⁹⁷ According to Article 8 of the Rome Statute of the International Criminal Court, adopted in 1998, “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” are categorized as “war crimes.”⁹⁸ Additionally, the U.S. “recognizes cultural cleansing as a risk factor for impending crimes against humanity, genocide, and war crimes.”⁹⁹ Not only has ISIS taken to destroying such important sites, but also it actively encourages looting and illegal sales as a method of funding its activities.¹⁰⁰ As the war against ISIS continues, the international community is responding by attempting to protect and restore cultural heritage as territory is reclaimed. For instance, UNESCO leaders are continuing to meet with Syrian leaders regarding the shared priority of protecting what heritage remains from further violence.¹⁰¹ Additionally, Russian President Vladimir Putin has pledged “material support for preservation and reconstruction

⁹⁴ *Id.*

⁹⁵ *Id.* at 35.

⁹⁶ *Id.* at 36-37 (noting that there is the additional problem that the Taliban is not a state actor, and that it remains to be seen whether such an organization can be held liable for its actions in an international court, which is a discussion for another note).

⁹⁷ Euan McKirdy, *Which Ancient Treasures Did ISIS Destroy in Palmyra?* CNN (last updated Mar. 28, 2016, 10:34 AM), <http://www.cnn.com/2016/03/28/middleeast/isis-palmyra-treasures-destroyed/>.

⁹⁸ Rome Statute of the International Criminal Court, art. 8 § (2)(b)(ix), *adopted on July 17, 1998*, U.N. Doc. A/CONF.183.9 (entered into force July 1, 2002).

⁹⁹ Jamie B. Perry, *Cultural Carnage: Considering the Destruction of Antiquities through the Lens of International Laws Governing War Crimes*, 64 U.S. ATT'YS BULL. 57, 60 (2016) (citing *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, UN (2014), available at http://www.un.org/en/genocideprevention/documents/publications-and-resources/Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf).

¹⁰⁰ Perhaps the most shocking ISIS's destruction is of the Syrian city of Palmyra, once an oasis along the famed Silk Road and part of the Roman Empire. Curry, *supra* note 17.

¹⁰¹ McKirdy, *supra* note 97.

work in Palmyra.”¹⁰² While the widespread condemnation of the international community against these acts of violence is encouraging, it highlights one of the key failings of this system of international law: all the international treaties in place to protect cultural property, there is no way to enforce those measures against non-member states, even when there is a violation of customary international law.

Another instance where the international community has attempted to implement these principles is in the International Criminal Tribunal for the former Yugoslavia (ICTY). Established in 1993 to address the war crimes and crimes against humanity,¹⁰³ the ICTY claims to have “laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically that leaders suspected of mass crimes will face justice.”¹⁰⁴ While the Tribunal submits that it possesses the authority to bring those guilty of such crimes into court, the reality is that most of these criminals are never actually prosecuted.

For example, in the case of *Prosecutor v. Dario Kordic and Mario Cerkez*, the convictions of two Serbian politicians for genocide and the intentional destruction of property were upheld, but in a Press Release issued by the United Nations, the Appellate Court noted the problems that arise in most instances of prosecution because:

[c]hambers of the International Tribunal can only hear a case regarding a person against whom an Indictment has been filed and confirmed and who is present in the The Hague... a case against an alleged serious offender may not be heard before this International Tribunal... [because] the Prosecution had not enough evidence and/or that there was insufficient co-operation between the International Tribunal and a State.¹⁰⁵

This is only one example of the difference between the expectation and the reality of international prosecution for war crimes and crimes against cultural property. Because there are no enforcement measures for these international treaties, very little can be done about bringing these criminals to justice. Comparing the apparent effectiveness of the ICTY with the lack of prosecution following the 2003 looting of the Iraqi Museum in Baghdad and ISIS’ destruction of cultural property throughout the Middle East, it becomes obvious that the availability of judicial remedies relies on where the theft or damage occurs.

¹⁰² *Id.*

¹⁰³ In this case, I am referring to the destruction of cultural property during these conflicts, which, as demonstrated earlier in this article, is often listed in international treaties amongst other types of war crimes.

¹⁰⁴ *About the ICTY*, U.N. INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Mar. 23, 2018).

¹⁰⁵ Press Release, Int’l Crim. Tribunal for the Former Yugoslavia, Appeals Chamber Judgment in the Case the Prosecutor v. Dario Kordic and Mario Cerkez, ICTY Press Release CT/P/I.S./926e (Dec. 17, 2004).

Contrast the situation in the Middle East and the goals of the ICTY with the case of the Elgin Marbles, originally part of the Parthenon in Athens, Greece, but now resident in the British Museum in London, England.¹⁰⁶ The Elgin Marbles were removed from Greece in 1812 while the Parthenon was part of an Ottoman military fort, and subsequently sold to the British government and put on permanent display at the British Museum in 1817, where they remain today. Greece renewed its efforts for the repatriation of the Marbles in 2004, when Athens hosted the Olympic Games.¹⁰⁷ According to John Tierney, international interest in this case derives from the preamble to the 1954 Hague Convention, which states “that cultural property is ‘the cultural heritage of all mankind.’”¹⁰⁸ Tierney suggests that Greece may actually have standing to sue the United Kingdom in an American Court under the Foreign Sovereign Immunities Act of 1976.¹⁰⁹ Under that statute, an American court might have the authority to examine the legal question at issue when the property in question was “taken in violation of international law...and that agency...is engaged in a commercial activity in the United States.”¹¹⁰ Compare Greece’s claim with England’s claims, that the people of the world, to whom the Elgin Marbles actually belong under the theory that history belongs to everyone, have better access to the Marbles at the British Museum than in Athens.¹¹¹ Additionally, there are concerns about preservation and conservation capabilities in Greece.¹¹² Thus there is no clear-cut solution to this dilemma and no indication that it will be resolved in the near future.

The comparison between instances where there is no legal remedy for the destruction of cultural property (i.e., the Middle East) to diplomatic and adjudicated cases (i.e., ICTY and the Elgin Marbles) illustrates that there is no uniform method of applying international treaties to cases of looted cultural property. The lack of uniformity makes treaty interpretation particularly difficult and leads to a lack of continuity when it comes to the

¹⁰⁶ While the case of the Elgin Marbles does not fall strictly within the scope of this paper (i.e., looting during armed conflict in violation of international treaties), it provides a useful case study because it addresses some of the potential legal remedies for nations seeking the return of their cultural property as well as the arguments as to why that would be detrimental to the property’s preservation.

¹⁰⁷ MERRYMAN, *supra* note 16, at 99.

¹⁰⁸ *Id.* at 100; see John Tierney, *Ideas and Trends: Did Lord Elgin Do Something Right?* N.Y. TIMES (Apr. 20, 2003), <https://www.nytimes.com/2003/04/20/weekinreview/ideas-trends-did-lord-elgin-do-something-right.html> (arguing that there is merit to taking a “Lord Elgin” approach in war zones in the Middle East. It has the benefit of putting professional archeologists in charge of museums and dig sites, it helps eliminate the black market in such goods, and it gets cultural property out of war zones, thus upholding the principle that cultural property is valuable and worth preserving).

¹⁰⁹ MERRYMAN, *supra* note 16, at 101 (referencing *Austria v. Altmann*, 541 U.S. 677 (2004), where the case came up on an act of replevin, but was ultimately settled privately after the case was remanded to the federal district court in Los Angeles, California).

¹¹⁰ General Exceptions to the Jurisdictional Immunity of a Foreign State, 28 U.S.C. § 1605(a)(3) (2016).

¹¹¹ MERRYMAN, *supra* note 16, at 106.

¹¹² *Id.* at 106-07.

recovery of cultural property or reparations for its destruction during armed conflicts.

B. American Case Law

As a result of the various methods by which nations interpret and implement all treaties protecting cultural property, courts are left with the daunting task of sifting through all of that information and applying both foreign and domestic law to a number of cases. As with the previous sections, this list of cases is by no means exhaustive, but illustrative of the ways different courts apply these principles.¹¹³

The seminal case for interpreting the NSPA¹¹⁴ is *United States v. McClain*, where a jury convicted the defendants of “conspiring to transport, receive, and sell assorted stolen pre-Columbian artifacts in interstate commerce, in violation of 18 U.S.C. §§2314, 2315, and 371.”¹¹⁵

In interpreting the NSPA in *McClain*, the Fifth Circuit relied on an interpretation of whether “the pre-Columbian antiquities in question, exported from Mexico in contravention of that country’s law, were knowingly “stolen” within the meaning of the [NSPA].”¹¹⁶ The Mexican government claimed that all pre-Columbian artifacts were the property of the Mexican government and were therefore “stolen” within the meaning of the NSPA as soon as they were removed from their archeological sites.¹¹⁷ However, the court rejected the view that this had always been the state of Mexican law, and the Fifth Circuit instead ruled that the relevant statute was not enacted until 1934, and stated, “all immovable archeological monuments belong to the nation.¹¹⁸ Objects which are found (in or on) immovable archeological monuments are considered as immovable property, and they therefore belong to the [n]ation.”¹¹⁹

In sum, the court held that the term “stolen” as read in the NSPA has a broad, wide range of meaning and, thus the court could award the artifacts to the Mexican government, even if the government never physically possessed the artifacts (or indeed knew they existed) before they were stolen.¹²⁰ Perhaps another broad take-away from this case is the principle (seen throughout all of the case law surrounding this topic), that foreign courts are very likely to recognize state ownership over a piece of

¹¹³ See *supra* note 1.

¹¹⁴ See *supra* Section II.D.1.

¹¹⁵ *United States v. McClain*, 545 F.2d 988, 992 (5th Cir. 1977).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 997-99.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 998.

¹²⁰ *Id.* at 992; HOFFMAN, *supra* note 47, at 165.

cultural property when that foreign state has very clear legislation explaining that intent.¹²¹

Inconsistencies in such cases arise because there is no clear way for courts to define when foreign legislation meets the vague standard of “very clear,” and courts seem to simply meet that standard to achieve a “fair result” when a foreign state has an explicit interest a piece of cultural property. Unless, as examined in *Peru v. Johnson*, the foreign legislation in question is just so much of a stretch that the Court cannot plausibly return cultural property.¹²² Thus all of the cases examined within this section show different reasons for why each of the courts did or did not find the foreign legislation adequate for a judgment directing the return of the cultural property in question.

In *United States v. Hollinshead*, the Ninth Circuit was also faced with the challenge of interpreting the NSPA in regards to a foreign nation’s domestic law.¹²³ In that case, archeological pieces discovered at the Machaquila archeological site in Guatemala were smuggled by the defendants into the U.S.¹²⁴ However, the defendants only acquired the pieces after they had been smuggled into Belize.¹²⁵ The defendants were only arrested when they tried to sell the pieces to the Brooklyn Museum and a curator contacted the archeologist in charge of the site in Guatemala.¹²⁶ The defendants argued that they had no specific knowledge of Guatemala’s laws prohibiting the theft and smuggling of cultural property, but the Ninth Circuit ruled that constructive knowledge that theft is likely illegal in Guatemala was sufficient to affirm the defendants’ convictions.¹²⁷

Compare that case to *United States v. Pre-Columbian Artifacts*, where the Northern District Court of Illinois interpreted the NSPA in light of a Guatemalan law which provided, “[f]or the purposes of this motion...the law of Guatemala...that upon export without authorization, the artifacts are confiscated in favor of the Republic of Guatemala, and become the property of Guatemala.”¹²⁸ Interestingly enough, the court then refused to examine the accuracy of Guatemala’s claims, stating, “no attempt will presently be made to parse the specific language of the Guatemalan legislation...it is also assumed that the artifacts were illegally exported from Guatemala.”¹²⁹ In terms of the NSPA, the court merely found that in order for property to fall within the broad definition of “stolen,” it must first

¹²¹ *McClain*, 545 F.2d at 992; see also FORREST, *supra* note 2, at 152.

¹²² See generally *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal 1989); see *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 546 (N.D. Ill. 1993).

¹²³ *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Pre-Columbian Artifacts*, 845 F. Supp. at 546.

¹²⁹ *Id.*

belong to someone else.¹³⁰ Thus the NSPA and Guatemalan law were reconciled by “assum[ing]” the truth of the Guatemalan legislation.¹³¹

While *Hollinshead* was a criminal case, *Peru v. Johnson* dealt with a civil matter, where Peru was unable to establish ownership over eighty-nine pre-Columbian artifacts which had been seized by the U.S. Customs Service.¹³² The Central District Court of California held that because Peru’s laws regarding the export of pre-Columbian artifacts were so imprecise and subject to such frequent change that they were not able to sufficiently prove where in Peru the object were discovered.¹³³ The Court in fact suggested that the artifacts could have been discovered in several South American nations.¹³⁴ Thus, this case is anomalous among the NSPA cases in that the foreign nation claiming ownership did not present sufficient evidence to support a claim; however, the court did not establish a clear test for determining when there is not clear enough legislation to support a claim.¹³⁵

In *United States v. Schultz*, a New York art dealer was charged with conspiring to receive and possess stolen property under the NSPA.¹³⁶ Following a general statement of good faith in a foreign nation’s laws¹³⁷ the District Court in New York laid out criteria for determining whether to enforce foreign legislation in the United States:

[W]hether the law declared the state’s ownership in clear and unambiguous language; whether the law explicitly or implicitly recognized the right to private ownership; whether the nation actually sought to exercise its ownership rights such that, in practice, the statute acted as an export restriction; whether private citizens who possessed objects could transfer them by gift, bequest, or intestate succession; and whether a designated government department had to make a determination of the object’s artistic, archeological or historical value in deciding the government’s ownership interest.¹³⁸

In *Schultz*, the court ruled that Egyptian law, which states that all antiquities “‘are considered to be public property’ essentially means that all antiquities are property of the state.”¹³⁹ However, the court ultimately held

¹³⁰ *Id.* at 547.

¹³¹ *Id.* at 546.

¹³² *Johnson*, 720 F. Supp. at 812.; HOFFMAN, *supra* note 47, at 166.

¹³³ HOFFMAN, *supra* note 47, at 166 (citing *Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal 1989)).

¹³⁴ *Id.*

¹³⁵ *Contra* *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974); *Pre-Columbian Artifacts*, 845 F. Supp. at 546; *McClain*, 545 F.2d at 992.

¹³⁶ *United States v. Schultz*, 178 F. Supp. 2d 445, 446 (S.D.N.Y. 2002).

¹³⁷ *Pre-Columbian Artifacts*, 845 F. Supp. at 546.

¹³⁸ HOFFMAN, *supra* note 47, at 167 (citing Schultz’s brief, prior to the ruling in *United States v. Schultz*, 178 F. Supp. 2d 445, 446 (S.D.N.Y. 2002)).

¹³⁹ *Schultz*, 178 F. Supp. 2d at 446 (citing Law No. 117 of 1983 (Law on the Protection of Antiquities), *al Jaridah al-Rasmiyah*, vol.32 bis, 11 Aug. 1983, art. 6 (Egypt)).

that the importation of smuggled artifacts is not in itself contrary to U.S. Customs law. The government now faced a high standard of proof in demonstrating that the defendant had actual knowledge that the Egyptian artifacts were stolen.¹⁴⁰ It is argued that *Schultz* demonstrates the United States' commitment to return stolen cultural property, however as a result of this ruling, there is potentially a higher burden of proof on foreign states wishing to reclaim stolen cultural property and also on bona fide purchasers seeking to protect an investment.¹⁴¹

As to judicial implementation of the CPIA, *United States v. An Antique Platter of Gold, Known as a Gold Phiale Mesomphalos, c. 400 B.C.* is a leading case. In that case, the U.S. government sought civil forfeiture for an Italian Phiale, which the Italian government had tracked to Switzerland and then to a New York art dealer.¹⁴² Like the cases mentioned above, this case involved the application of a foreign law which declared a certain category of artifacts to be state property, regardless of whether they had already been discovered or not.¹⁴³

IV. SOLUTION

The above analysis makes clear that stronger international treaties which speak specifically to the remedies for states that commit violations of established customary international law would greatly aid in preventing the destruction of cultural artifacts. Since the 1954 Hague Convention, most international treaties on this subject state that the international community is opposed to this violence against cultural property and that signing parties agree to take affirmative steps to prevent their militaries from committing such atrocities during armed conflicts. However, given that the effect of such violence has a largely international effect, none of the examined treaties provide any potential remedies for those nations that violate these principles, especially against those nations which are not signing parties. Thus, an international treaty which provides a standard for nations to air grievances against each other, whether that be through arbitration or an international court would solve this issue.¹⁴⁴

¹⁴⁰ *Id.*

¹⁴¹ HOFFMAN, *supra* note 47, at 166.

¹⁴² *United States v. An Antique Platter of Gold*, 184 F.3d 131, 133 (2d Cir. 1999); *see also* FORREST, *supra* note 2, at 152.

¹⁴³ *See* FORREST, *supra* note 2, at 152.

¹⁴⁴ While some form of international treaty or agreement would be the best way of ensuring international participation in such a scheme, there are several inherent problems with that solution. As this Note examines, international treaties and agreements are notoriously difficult to implement and enforce. Additionally, there is the concern that by entering into such treaties and agreements, nations are "giving up" some degree of their inherent sovereignty. In the United States, most treaties signed by the Executive are never ratified by the Senate. And an even smaller amount are legislated into domestic law. However, I would still maintain that some form of international consensus is necessary, particularly when cultural property is destroyed during armed conflict between states.

In response to the varying inconsistencies which sometimes inhibit the return and protection of cultural property, there should be a three-fold policy solution: (1) enforcing stricter customs regulations in market nations where valuable pieces of cultural property are often sold; (2) establishing harsher criminal sanctions for those who facilitate the sale of illegally appropriated cultural property; and (3) ensuring that those nations which are most at risk for losing their cultural heritage during armed conflicts (usually under-developed nations) have access to Internet resources and documentation to make the process of reclamation easier.¹⁴⁵

Developed nations such as the United States, the United Kingdom, and France do have customs regulations and criminal sanctions in place in an effort to prevent the growth of the black market for cultural property. However, as demonstrated by the case study of the Elgin Marbles, there is little certainty as to which nations laws might apply in any given case. Therefore, this note proposes that, in future international treaties and agreements, specific regulations and sanctions should be proposed and adopted to afford greater continuity between cases.¹⁴⁶ Making such regulations and sanctions widely accepted has the further effect of improving the reclamation process for under-developed nations, or indeed, any nation that finds itself the victim of such a crime, because it standardizes the way in which such cases are adjudicated – laying out what standards of proof a nation must meet in order to reclaim its property and what remedies it has available. In a word, the solution to this problem is specificity. Specificity with regards to the types of crimes that will be prosecuted, judicial remedies, and regulations supposedly preventing this activity.

V. CONCLUSION

Although many nations have agreed upon the principles laid out by the international community condemning acts of theft and destruction of cultural property, there is as yet no agreed upon standard process for nations seeking to reclaim stolen cultural property or recompense when such property is destroyed. The primary benefit of standardizing the judicial remedies for the recovery of stolen and smuggled cultural property is that nations or individuals filing actions in the U.S. (or indeed, in any country that also regularizes this process) have an understanding of the process for

¹⁴⁵ MANUS BRINKMAN, *Reflexions on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures*, ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 65-66 (Barbara T. Hoffman ed., 2006).

¹⁴⁶ This sort of proposal is perhaps best effectuated in an international system such as that established by the European Union, where decisions by certain courts and bodies automatically take legislative effect within member states, sometimes overriding domestic law. The effect of that action though, is that the same laws are applicable throughout Europe. Uniform criminal and civil penalties, for instance, could provide strong incentives for compliance.

making a claim. The goal of setting out a specific, standardized system of rules for all nations is that all nations which find themselves the victims of armed conflicts have an easily-understood remedy for reclaiming their cultural heritage.