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The Illicit Trafficking of Cultural Property: Are the Existing International Legal Framework and Enforcement Mechanisms No More Than Glorified Placeholders for the Real Actors?

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The Illicit Trafficking of Cultural Property: Are the Existing International Legal Framework and Enforcement Mechanisms No More Than Glorified Placeholders for the Real Actors?

Introduction

The illicit trafficking — which includes theft, looting, and illicit trade — of cultural property is a growing concern in the international community. It deprives nations of historical and cultural artifacts that have significant value in the social or cultural evolution and identity of peoples.¹ Not only does it affect the cultural heritage of a nation, but it also has international implications.² For instance, the illicit trafficking of cultural property is a violation of international law, and the perpetrators can be held accountable under international criminal law.³

This paper will be divided into three sections. The first section will define the terms that will be used throughout this paper, as well as give some examples of the different types of trafficking in the context of cultural property. The second section will explore the existing legal framework and highlight their strengths and shortcomings. The third section will follow a similar approach of highlighting the strengths and shortcomings, as applied to the existing enforcement mechanisms. The last section of this paper will discuss three case studies in which the existing legal framework will be applied and discussed. Moreover, the third section will also touch upon the adequacy of the enforcement mechanisms were applied or should have been

¹ Trafficking in Cultural Property, United Nations Office on Drugs and Crime, <https://www.unodc.org/unodc/en/organized-crime/intro/emerging-crimes/trafficking-in-cultural-property.html> (last visited Mar 10, 2023);

Fight Against Illicit Traffic in Cultural Property, UNESCO, <https://en.unesco.org/fightrafficking#:~:text=in%20cultural%20property-,About,to%20the%20financing%20of%20terrorism> (last visited Mar 10, 2023).

² Valerie Hughes & Laurie Wright, International Efforts to Secure the Return of Stolen or Illegally Exported Cultural Objects: Has Unidroit Found a Global Solution?, 32 CANADIAN Y.B. OF INT'L L./Annuaire canadien de droit international, 219-241, 219 (1995).

³ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 35 I.L.M. 1392. [hereinafter “1995 UNIDROIT Convention”]

applied. Although this is primarily a narrative approach in the international laws that governs the illicit trafficking of cultural property, it is my contention that the existing international legal framework and the existing enforcement mechanisms in place are insufficient in monitoring and curtailing the theft, looting, and illicit trade of cultural property. Instead, they are no more than glorified placeholders for the real “teeth” in protecting cultural property — the national level, state-led policies that support and help give legitimacy to the existent international legal framework and enforcement mechanisms.

PART I: Illicit Trafficking of Cultural Property — Definitions & Overview

What is “cultural property?”

“Cultural property” refers to movable or immovable property, regardless of origin or ownership, which is “of great importance to the cultural heritage of every people.”⁴ It can be physical objects such as monuments, paintings, manuscripts, sculptures, books, works of art, or scientific collections.⁵ It can also be paleontological objects such as “rare collections and specimens of fauna, flora, minerals and anatomy.”⁶ It can be places such as a building or a group of buildings, buildings and places of worship, libraries, archives, or archaeological sites.⁷ This property holds important historical and cultural information that can be used to understand the

⁴ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. [hereinafter “1954 Hague Convention”]

⁵ *Id.* Art. 1. Definition of Cultural Property; Ch 1. general provisions regarding protection; Cultural Property, United States Department of State Bureau of Educational and Cultural Affairs, <https://eca.state.gov/cultural-heritage-center/cultural-property> (last visited Apr. 15, 2023).

⁶ UNESCO 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, Art. 1. [hereinafter “1970 UNESCO Convention”]

⁷ 1954 Hague Convention; *supra* note 4; Cultural Property, ICRC: How Does Law Protect in War? https://casebook.icrc.org/a_to_z/glossary/cultural-property (last visited Apr. 15, 2023).

past and present.⁸ It also contributes to the diversity and richness of cultural heritage around the world.⁹

What is “illicit trafficking” in this context?

The “illicit trafficking” of cultural property is an umbrella term that encompasses the theft, looting, and illicit trade of cultural property.¹⁰ The “theft” of cultural property is the unauthorized removal of cultural goods from their owners.¹¹ It can also be the deprivation of the national cultural heritage of a *specific* nation or the deprivation of “common human culture,” disregarding the origin of such property.¹² “Looting” of cultural property is the illegal excavation and “removal of ancient relics from archaeological sites, ... old buildings,”¹³ museums, and graves.¹⁴

Lastly, the “illicit trade” of cultural property is the illegal importing and exporting of such objects regardless of whether they were “stolen from a museum, illegally excavated, or smuggled across the border.”¹⁵ It also includes the illicit transfer of ownership of cultural property, including the displacement of artifacts during war time.¹⁶ The illicit trade of cultural property is also closely related to the theft of and looting of cultural property. This is due to the

⁸ Illicit Trade in Cultural Property, Transnational Alliance to Combat Illicit Trade, <https://www.tracit.org/cultural-property.html> (last visited Mar. 16, 2023).

⁹ Dr. Jeffrey A. Becker, Organizations and agencies that work to protect cultural heritage, Smart History, (Mar. 25, 2018).

¹⁰ Cultural Property, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/The-issues-cultural-property> (last visited May 8, 2023).

¹¹ Cultural Goods Crime, EUROPOL, <https://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/illicit-trafficking-in-cultural-goods-including-antiquities-and-works-of-art> (last visited Apr. 15, 2023).

¹² John Henry Merryman, Two Ways of Thinking About Cultural Property, 80 Am. J. Int’l L. 831, 831-832 (1986).

¹³ Cultural Goods Crime, supra note 11.

¹⁴ United States Department of State, Cultural Heritage Center: Cultural Property, <https://eca.state.gov/cultural-heritage-center/cultural-property> (last visited Apr. 15, 2023).

¹⁵ Fight Against Illicit Traffic in Cultural Property, UNESCO (2023).

¹⁶ Illicit Trade in Cultural Property, Transnational Alliance to Combat Illicit Trade, <https://www.tracit.org/cultural-property.html> (last visited Apr. 25, 2023)

lucrative market for cultural property which is estimated to be a six-billion-dollar¹⁷ industry.¹⁸ As such, the **illicit trade of cultural property** is an almost inevitable result of theft or looting of cultural property.

The Unclear Legal Status of Some Cultural Property

There is also the issue of cultural property which cannot be neatly categorized within the umbrella term of “trafficking” because the property was not obtained through theft, looting, or illicit trade. This is the case for property that have been acquired during colonization or other times of temporary occupation. For instance, it might be the case in which there were proper grounds and authorization when the cultural property was first acquired, but today, the OWNER countries would like the repatriation of such property.

PART II: Legal Framework

The legal framework encompassing the trafficking of cultural property exists at an international, regional, national, or local level. However, this paper will primarily discuss the existing legal authorities at the international and regional levels. The focus will be on international treaties such as the 1954 Hague Convention, the Rome Statute, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention. Specifically, this section will discuss the standards set forth by each treaty, as well as their strengths and shortcomings. Lastly, this section will briefly discuss national level legal authorities such as repatriation, restitution, and patrimony laws.

¹⁷ this figure was published in 2013.

¹⁸ UNESCO, [The Fight against the Illicit Trafficking of Cultural Objects: the 1970 Convention: Past and Future, information kit](https://unesdoc.unesco.org/ark:/48223/pf0000227215_eng), https://unesdoc.unesco.org/ark:/48223/pf0000227215_eng (last visited Mar. 20, 2023)

By going through the strengths and shortcomings of each body of law, it will be evident that despite the protections afforded by these agreements, they are mere words on a piece of paper without state cooperation.

The Big Three

In both the international and regional level, a hodgepodge of agreements, conventions, and treaties exist to protect and prevent the trafficking of cultural property.¹⁹ However, there are three main treaties that are typically referenced in this subject: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”), the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention”), and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“1995 UNIDROIT Convention”).

A. The 1954 Hague Convention

War has been and continues to be major source of the theft, looting, and illicit trade of cultural property.²⁰ For instance, in WWII alone, millions of cultural property were plundered, looted, trafficked were destroyed by the Nazis.²¹ Then, in the early 21st century, there were the

¹⁹ Under the Vienna Convention, “treaties” include agreements and conventions; Glossary, “Treaty”, Council of Europe Portal, <https://www.coe.int/en/web/conventions/glossary> (last accessed Mar. 26, 2023). Moreover, according to the United Nations: “**Legally, there is no difference between a treaty, a convention or a covenant.** All are international legal instruments which, in international law, legally bind those States that choose to accept the obligations contained in them by becoming a party in accordance with the final clauses of these instruments.” (emphasis added); Glossary of technical terms related to the treaty bodies, “Treaty, convention, covenant or instrument”, United Nations, <https://www.ohchr.org/en/treaty-bodies/glossary-technical-terms-related-treaty-bodies> (last visited May 12, 2023).

²⁰ Edward M. Cottrell, Comment: Keeping the Barbarians outside the Gate: Toward a Comprehensive International Agreement Protecting Cultural Property, 9 CHI. J. INT’L L. 627-659, 631 (Winter 2009).

²¹ Looted Cultural Property, Ministère de la Culture, <https://www.culture.gouv.fr/en/Know-us/Organisation-du-ministere/The-General-Secretariat/Mission-of-search-and-restitution-of-plundered-cultural-property-between-1933-and-1945/Looted-cultural-property>, (last visited May 9, 2023).

theft of Roman artifacts in Libya by Gaddafi loyalists after the demise of Muammar Gaddafi's regime and the looting of the Iraq National Museum in Baghdad which housed the "world's greatest collection of Babylonian, Sumerian, and Assyrian antiquities" during the second Iraq war.²² More recently, there was the ransacking of Ukraine's historical property from the Kherson Regional History Museum.²³ As such, it is no surprise that the international community has recognized the prevalence of this issue and has sought to redress it with the creation of the 1954 Hague Convention.

The 1954 Hague Convention seeks to protect, to safeguard, and to respect cultural property.²⁴ The Convention defines cultural property as property that is important to *everyone*, regardless of their origin or ownership.²⁵ The Convention requires States Parties to take measures to protect cultural property during armed conflict and to prevent its theft, vandalism, pillaging, or illicit trafficking because "any damage to cultural property, irrespective of the people it belongs to, is a damage to the cultural heritage of all humanity, because every people contributes to the world's culture."²⁶

The Convention has a wide breadth, it also protects monuments, works of art, and even scientific collections.²⁷ It is also applicable in both international and civil armed conflict.²⁸ Additionally, even though its primary purpose is to protect cultural property "in the event of

²² Christian Lowe, Libya displays Roman treasures looted by Gaddafi troops, Reuters, <https://www.reuters.com/article/uk-libya-artefacts/libya-displays-roman-treasures-looted-by-gaddafi-troops-idUSLNE7AR02A20111128> (Nov. 28, 2011); Matthew D. Thurlow, Note: Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law, 8 YALE HUM. RTS. & DEV. L.J. 153-187, 153 (2005)

²³ Tetiana Kurmanova, Ukraine: War Crimes Against Cultural Heritage, IWRP, <https://iwpr.net/hpblfw0t> (Jan. 3, 2023)

²⁴ 1954 Hague Convention, *supra* note 4, Ch. 1, Art. 2-4.

²⁵ 1954 Hague Convention, *supra* note 4, Art. 1.

²⁶ 1954 Hague Convention, *supra* note 4, Art.1; Preamble.

²⁷ 1954 Hague Convention, *supra* note 4, Art. 1.

²⁸ 1954 Hague Convention, *supra* note 4, Art. 19.

armed conflict,” it is also applicable during peacetime.²⁹ During peacetime, the convention seeks Parties to safeguard and respect cultural property within their territories by taking appropriate measures to in dealing with cultural property.³⁰ However, two stark limitations to the 1954 Hague Convention is that (1) it self-limiting because it is only applicable to the signatory states of the Convention, and (2) despite the protections it provides to cultural property, the Convention itself would be ineffective without the cooperation and the willingness of states to comply with its provisions.³¹ Since there’s no international court or body that would prosecute violations of the Convention, the responsibility for implementing its provisions rest primarily on the contracting parties (i.e. states).³²

B. The 1970 UNESCO Convention

If the 1954 Hague Convention is the most prevalent source of law cited during armed conflict, the 1970 UNESCO Convention is its complement as the most prevalent source of law that is cited during times of peace.³³ The primary purpose of the 1970 UNESCO Convention is to prohibit the theft, pillage, or illicit trafficking of cultural property and thus requires State Parties to take measures to prevent its illicit trade.³⁴ It contains import restriction provisions to curtail the movement of certain types of cultural property from certain countries.³⁵ For instance, it has a provision that prevents museums from acquiring illegally obtained artifacts.³⁶

²⁹ 1954 Hague Convention, *supra* note 4, Art. 3.

³⁰ 1954 Hague Convention, *supra* note 4, Art. 3; Art. 4.

³¹ 1954 Hague Convention, *supra* note 4, Art. 18; Eric Posner, “The International Protection of Cultural Property: Some Skeptical Observations,” 8 *CHI. J. OF INT’L L.* 213, 219 (2007).

³² Zoë Howe, *Can the 1954 Hague Convention Apply to Non-State Actors?: A Study of Iraq and Libya*, 47 *TEX. INT’L L. J.* 403, 413 (2012)

³³ Vincent Négri, *The 1970 Convention: Cultural diversity before the letter of the law*, UNESCO, <https://en.unesco.org/courier/2020-4/1970-convention-cultural-diversity-letter-law> (last visited Mar. 26, 2023); Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 *NOTRE DAME L. REV.* 1835, 1839 (2009).

³⁴ 1970 UNESCO Convention, *supra* note 6.

³⁵ 1970 UNESCO Convention, *supra* note 6, Art. 7;12;13.

³⁶ 1970 UNESCO Convention, *supra* note 6, Art. 7(a), (b)(ii).

However, the UNESCO Convention is largely unsuccessful because it is non-self-executing, giving states a wide berth on the amount of effort they utilize in enforcing its provisions.³⁷ Another limitation, and source of large criticism, for the 1970 UNESCO Convention is that it does not have retroactive provision which greatly limits its scope and applicability.³⁸ Lastly, the Convention only addresses cultural property that were illicitly exported — it doesn't address the issue of cultural property that has been legally exported but may have been acquired through questionable means. As a result, despite being a complement to the 1954 Hague Convention, the 1970 UNESCO Convention's importance was short-lived because it was further supplemented by the 1995 UNIDROIT Convention.

C. The 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention primarily deals with the illicit trade of stolen cultural property.³⁹ Specifically, it seeks to curtail the illicit trade in cultural objects and to establish a legal framework in order to facilitate the restitution and return of stolen and illicitly traded cultural property between the contracting parties.⁴⁰ This restitution principle is regarded as one of the major strengths of the convention because it provides a legal basis for the repatriation of cultural objects in their state of origin.⁴¹

³⁷ Alexandra Lone Levine, Note The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention, 36 BROOKLYN J. INT'L L. 751, 758 (2011); 1970 UNESCO Convention, supra note 6, Art. 7(a);

Katarzyna Januszkiewicz, Note: Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia, 41 BROOKLYN J. INT'L L. 329, 337 (2015).

³⁸ Katarzyna Januszkiewicz, Note: Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia, 41 BROOKLYN J. INT'L L. 329, 344 (2015); Kasey Theresa Mahoney, Note: "Why Did Constantinople Get the Works" That's Nobody's Business but the Turks." A New Approach to Cultural Property Claims and Geographic Renaming Under the 1970 UNESCO Convention, 44 BROOKLYN J. INT'L L. 762-794, 764 (2019).

³⁹ 1995 UNIDROIT Convention, supra note 3, Preamble.

⁴⁰ Id.

⁴¹ Tullio Scovazzi, Repatriation and Restitution of Cultural Property: Relevant Rules of International Law, in ENCYCLOPEDIA OF GLOBAL ARCHEOLOGY 6318, 6318-6324 (Claire Smith ed., 2014).

However, a significant limitation for the convention is its limited ratification, with only fifty-five states ratifying the convention.⁴² It only has fifty-five signatory states, a limited number of signatory states. Additionally, the convention, on its own, does not have retroactive application, thus cultural objects that were stolen or illicitly traded prior to the adoption or ratification of the convention will not be protected by this legal mechanism.⁴³

As mentioned earlier, the 1995 UNIDROIT Convention established a legal framework for the restitution and repatriation of stolen and illicitly traded cultural property. However, this legal framework needs the cooperation of states.

ICC Rome Statute

In looking at the trafficking of cultural property, the “big three” alone would be insufficient to see the bigger picture. Since most owners of stolen, looted, or illicitly traded would categorize these actions as crimes, this discussion would be incomplete without talking about the criminal prosecution of these acts and the legal framework enabling such prosecution.

The Rome Statute, signed in 1998 and entered into force on July 1, 2002, primarily established the International Criminal Court (ICC), which will be further discussed below.⁴⁴ However, in addition to creating the ICC, the Rome Statute has specific provisions relating to cultural property. Under Article 8(2)(b)(ix) of the Rome Statute, the destruction of cultural property can constitute a war crime.⁴⁵ Under Article 8, war crimes include the “extensive destruction and appropriation of property.”⁴⁶ Specifically, under Articles 8(2)(b)(ix) and

⁴² as of this publication; States Parties, UNIDROIT, <https://www.unidroit.org/instruments/cultural-property/1995-convention/status/> (last visited May 11, 2023).

⁴³ Lyndel Prott, The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Ten Years On, UNIF. L. REV. 215, 219 (2009).

⁴⁴ Rome Statute of the International Criminal Court, Art.1 opened for signature July 17, 1998, 2187 UNTS 90, Art. 1 [hereinafter, “Rome Statute”]

⁴⁵ Rome Statute, supra, note 44, Art. 8.

⁴⁶ Id.

8(2)(e)(iv), “[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” would qualify as war crimes.⁴⁷ There is also language in Article 8(2)(e)(v), which includes the looting, theft, plunder, and vandalism of cultural property as a war crime.⁴⁸ Further, the Office of the Prosecutor for the ICC has illustrated that due to the broad language included in the articles, the destruction and appropriation of objects and/or property can be held accountable under either the protection of cultural property or cultural heritage.⁴⁹

Repatriation & Restitution Laws

As the treaties above showcase, regardless of the strengths of the legal framework governing the protection of cultural property, they largely depend on state participation. Thus, the existence of these agreements above, no matter how numerous, would be moot if the states are unwilling to ratify the treaties and enforce the provisions of these treaties within their own respective nations.

In addition to using ratification to ensure the agreements above are honored within their borders, the member states of the agreements discussed above also supplement by enacting repatriation and restitution laws at the national level.

During the colonization period, countless cultural property was trafficked. For instance, during the British’s colonization period, cultural property such as the Benin Bronzes and the Moai ‘Hoa Hakananai’a’ statue were trafficked by British soldiers.⁵⁰ In these cases, repatriation

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ The Office of the Prosecutor, Policy on Cultural Heritage, Comment 41, International Criminal Court (June 2021) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf> (last accessed Mar. 20, 2023).

⁵⁰ US returns Benin bronzes stolen by British colonial forces, Al Jazeera (Oct. 12, 2002), <https://www.aljazeera.com/news/2022/10/12/us-returns-african-bronzes-stolen-by-british-colonial-forces>;

& restitution laws are the legal frameworks that would be the most effective in facilitating the return of these cultural property. “Repatriation” refers to the process of returning cultural property to its country of origin or rightful owner, particularly when it has been illegally taken or traded.⁵¹ The term “restitution” is typically interchangeable with “repatriation,” however it has two implicit connotations: (1) the return of cultural property in the general sense; or (2) the restitution of trafficked cultural property.⁵²

One example of a repatriation and restitution legal framework is the resolution adopted by the United Nations General Assembly (UNGA) in 1995. The unanimous resolution called “Return or restitution of cultural property to the countries of origin” gives countries of origin the right to request the return of its cultural property.⁵³ It essentially recognizes that the country of origin of cultural property has the right to request the return of its cultural property.⁵⁴ Used in conjunction with the 1995 UNIDROIT Convention, this resolution acts a segue from the international treaty to member states in how to enforce the former by providing guidelines to the latter.

Cultural Patrimony Laws

Another national level legal framework for protecting cultural property are patrimony laws. Under the patrimony laws, the government becomes the owner of cultural property or artifacts found within a specific territory within national soil.⁵⁵ Thus, once that cultural property

‘Stolen friend’: Rapa Nui seek return of moai statue, BBC News (Nov. 18, 2018) <https://www.bbc.com/news/world-latin-america-46222276>.

⁵¹ “Return & Restitution” Intergovernmental Committee, UNESCO, <https://en.unesco.org/fighttrafficking/icprep> (last visited May 12, 2023).

⁵² Tullio Scovazzi, *supra* note 41, at 6318.

⁵³ UN General Assembly unanimously adopts resolution on “Return or restitution of cultural property to the countries of origin”, UNIDROIT (Dec. 10, 2021) <https://www.unidroit.org/un-general-assembly-unanimously-adopts-resolution-on-return-or-restitution-of-cultural-property-to-the-countries-of-origin/>

⁵⁴ Id.

⁵⁵ William R. Ognibene, Lost to the Ages: International Patrimony and the Problem Faced by Foreign States in Establishing Ownership of Looted Antiquities, 84 BROOK. L. REV. 605, 606 (2019).

is removed from national soil, they become stolen property.⁵⁶ Patrimony laws and its strengths can also depend on whether the nation state is a “market” or a “source.”⁵⁷ A “source” nation station is one that has a rich cultural history and therefore an abundance of cultural property while a “market” nation is one that collects cultural property either “for personal, commercial, or academic use.”⁵⁸ For instance, source nations might want stronger patrimony laws to protect their cultural heritage, but market nations might be more willing to have less stringent standards in order to possess the cultural property of source nations.⁵⁹

Customary International Law

The last type of legal framework that this section will discuss is customary international law. This a complex category because it rests upon customs.⁶⁰ For instance, centuries ago, up until the seventeenth century, it was acceptable to plunder foreign cultural property.⁶¹ These cultural property become spoils of war and could be used as a way to improve morale or to serve as trophies of conquest.⁶² Today, as a result of evolving social or cultural norms, these acts would be categorized as barbaric practices.⁶³

There are many existing bodies of law that make up the legal framework for protecting cultural property. Moreover, these legal frameworks can serve as guidelines for nation states to adopt national practices that would protect cultural property, prevent its trafficking, and even prosecute those who traffic in cultural property. However, what is evident despite the different

⁵⁶ Leah Weiss, The Role of Museums In Sustaining the Illicit Trade in Cultural Property, 25 CARDOZO ARTS & ENT. LJ 837, 843 (2007).

⁵⁷ Ognibene, supra note 67, at 615.

⁵⁸ Id. at 616.

⁵⁹ Id.

⁶⁰ Francesco Francioni, Customs, General Principles, and the Intentional Destruction of Cultural Property, in CULTURAL HERITAGE AND MASS ATROCITIES 411, 411-412 (James Cuno & Thomas G. Weiss ed., 2022).

⁶¹ David Gilks, Attitudes to the Displacement of Cultural Property in the Wars of the French Revolution and Napoleon, 56 The Historical Journal 113-143, 115 (2013).

⁶² Id. at 124.

⁶³ Id.

types of legal frameworks discussed above, is that these bodies of law will be ineffective without the support and thereafter ratification of nation states. Additionally, the legal framework is only half of the picture. In order to properly protect cultural property, there must be enforcement mechanisms to ensure that these bodies of law are upheld, which will be discussed in the next section.

Part II: Enforcement Mechanisms

This section will discuss the range of actors such as states, state-sanctioned organizations, international organizations, and individuals that serve as the enforcement mechanisms by applying the existing legal framework to the trafficking of cultural property. Specifically, this section will primarily discuss the ICC, Interpol, and the United Nations. Moreover, these actors will be scrutinized as to their effectiveness and their limitations in policing the trafficking of cultural property. Lastly, other minor actors will also be discussed in less detail to showcase how they can be also server as enforcement mechanisms. In scrutinizing these actors, it will again be evident that in order to become a proper enforcement mechanism, these actors are still dependent on state support and cooperation.

The International Criminal Court (ICC)

As mentioned earlier, the Rome Statute established the ICC.⁶⁴ The ICC is a major outlet of international law that can pursue criminal prosecution for the theft, looting, and illicit trafficking of cultural property.⁶⁵ However, one procedural limitation to the effectiveness of the ICC is its limited jurisdiction.⁶⁶ First, there's the subject-matter limitation in which ICC may only exercise its jurisdiction if genocide, crimes against humanity, acts of aggression, or war

⁶⁴ Rome Statute, *supra* note 44, Art. 1

⁶⁵ Kate Fitz Gibbon, *International Criminal Court: Cultural Heritage & Genocide*, <https://culturalpropertynews.org/international-criminal-court-cultural-heritage-genocide/> (Aug. 1, 2021).

⁶⁶ *Id.*

crimes were committed.⁶⁷ Second, there's the issue of *who* can be subjected to the ICC's jurisdiction. There are limited circumstances that would subject an individual or entity to ICC jurisdiction. Assuming the subject-matter requirement has been met, the crime against cultural property must also be either:

a crime committed by a signatory State Party; or
a crime that occurred in State Party's territory; or
a State that accepted the ICC's jurisdiction; or
a crime that was referred to the ICC's Office of the Prosecutor; or
a crime that was referred by the United Nations Security Council (UNSC).⁶⁸

As such, there are essentially two elements that must be met in order to utilize the ICC in criminally prosecuting the trafficking of cultural property: (1) the crime must fit within the confines of the "war crime" definition set forth in Article 8; and (2) it must be subject to the ICC's jurisdiction.⁶⁹ Thus, with these limited instances where the ICC can step in, there is a gap in the protections provided by the ICC regarding cultural property.

The International Crime Police Organization (INTERPOL)

INTERPOL is another entity that is actively regulating the trafficking of cultural property. However, INTERPOL itself does not possess its own officers or enforcement personnel.⁷⁰ Instead, it simply provides a global platform for law enforcement agencies to work together and therefore requires cooperation from its member countries in order to have jurisdiction in its operations.⁷¹ For instance, if INTERPOL wants to issue an arrest warrant for an individual or group or entity due to the theft of cultural property, it must issue a Red Notice. Even if the member country cooperates with the issuance of the Red Notice, it does not give

⁶⁷ How the Court Works, ICC, <https://www.icc-cpi.int/about/how-the-court-works> (last visited Apr. 15, 2023).

⁶⁸ Id.

⁶⁹ World court decision sets 'new precedent' for cultural heritage protection, Cornell University, College of Arts & Sciences, (Dec. 8, 2021) <https://as.cornell.edu/news/world-court-decision-sets-new-precedent-cultural-heritage-protection>.

⁷⁰ INTERPOL, About Notices, <https://www.interpol.int/en/How-we-work/Notices/About-Notices> (last visited Mar. 15, 2023).

⁷¹ Id.

INTERPOL the authority to compel the member country to make the arrest.⁷² As such, it might be more proper to categorize INTERPOL as a state-sanctioned actor.

However, despite needing the support of states in order to function, INTERPOL has been an effective mechanism for identifying and tracking cultural goods, especially with its creation of the Stolen Works of Art Database (SWAD) and ID Art mobile application (ID-Art).⁷³ SWAD catalogs information about stolen cultural property and artworks through descriptions and pictures of the missing objects of art and it is INTERPOL's main tool "in tackl[ing] the traffic[king] of cultural property".⁷⁴ ID-Art further enhances SWAD by making the information within SWAD more accessible to the public.⁷⁵ In conjunction, SWAD and ID-Art allows a range of individuals from law enforcement officers to the general public access to INTERPOL's database which identifies over 52,000 cultural objects from over 134 countries and also allows these individuals to take initiative — for instance, by reporting cultural sites that could be at risk.⁷⁶

But there is one limitation to these systems. In order to be effective, INTERPOL needs the cooperation of member states because the certified police information that will be cataloged in these systems must be provided by the member states.⁷⁷ Consequently, this requires member states to allocate and provide resources to their local enforcement agents in order to acquire and

⁷² INTERPOL, About Red Notices, <https://www.interpol.int/en/How-we-work/Notices/About-Red-Notices> (last visited Mar. 15, 2023).

⁷³ Cultural property crimes thrive throughout pandemic says new INTERPOL survey, INTERPOL, (Oct. 18, 2021) <https://www.interpol.int/en/News-and-Events/News/2021/Cultural-property-crime-thrives-throughout-pandemic-says-new-INTERPOL-survey>.

⁷⁴ Stolen Works of Art Database, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database#:~:text=The%20Stolen%20Works%20of%20Art,and%20missing%20objects%20of%20art> (last visited May 11, 2023).

⁷⁵ ID-Art mobile app, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/ID-Art-mobile-app> (last visited May 11, 2023).

⁷⁶ Id.

⁷⁷ About Red Notices, *supra* note 72.

thereafter submit that information to INTERPOL. As such, the practical reality is that INTERPOL is merely an instigating supportive actor to the member states as these member states are responsible themselves for creating the specified local units that could provide data for INTERPOL's database.⁷⁸

The United Nations (UN) & UNESCO

Another enforcement mechanism for curtailing the trafficking of cultural property is the UN. The UN has established an open-ended intergovernmental expert group that focuses on the trafficking of cultural property.⁷⁹ However, since this committee focuses more on collaboration and research, it does not possess much enforcement ability.⁸⁰

In 1945, the UN also created a specialized agency called the United Nations Educational, Scientific and Cultural Organization (UNESCO) and tasked it to “contribute to peace and security by promoting international cooperation in the fields of education, science, culture, and communication.”⁸¹ UNESCO is responsible for designating and preserving World Heritage Sites and promoting cultural heritage protection.⁸² UNESCO is responsible for designating and preserving World Heritage Sites and promoting cultural heritage protection.⁸³ For instance, in 1978, UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation

⁷⁸ How we fight cultural heritage crime, INTERPOL, <https://www.interpol.int/en/Crimes/Cultural-heritage-crime/How-we-fight-cultural-heritage-crime> (last visited May 12, 2023).

⁷⁹ United Nations: Office on Drugs and Crime, Open-ended intergovernmental expert group on protection against trafficking in cultural property, <https://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-expert-groups.html> (last visited Mar. 8, 2023).

⁸⁰ Id.

⁸¹ UNESCO Constitution, UNESCO, <https://www.unesco.org/en/brief> (last visited May 10, 2023).

⁸² UNESCO Constitution, UNESCO, <https://www.unesco.org/en/brief> (last visited May 10, 2023).

⁸³ World Heritage, UNESCO, <https://whc.unesco.org/en/about/> (last visited May 12, 2023).

(ICPRCP) to address the “return & restitution” of cultural property.⁸⁴ The ICPRCP committee was responsible discussing the implications of cultural property that were obtained not only as a result of illicit trafficking, but also as a result of foreign or colonial occupation.

However, UNESCO, by itself, has limited enforcement authority because it also relies on member states to implement its conventions and guidelines — such as the 1970 UNESCO Convention. As such, UNESCO is also likened to be more of a brochure or an educational source that promotes awareness of the problem and develops international norms and standards rather than a recognized enforcement mechanism since it also lacks enforcement authority.

Other Enforcement Actors

In addition to the more mainstream enforcement mechanisms, other intergovernmental organizations also help by using consolidated data and expertise to produce evidence-based research to track the global trade of looted cultural property.⁸⁵ For example: The International Center for the Study of the Preservation and Restoration of Cultural Property (ICCROM) seeks to promote the conservation of cultural property by providing assistance to member states.⁸⁶ However, since it focuses more on risk management, disaster response, and management of cultural property, it is another mechanism that cannot serve as a strict enforcement mechanism but rather mere “support”.⁸⁷

As this section showcased, the myriad of enforcement mechanisms relies on the support of either member states or the general international community. Since these actors are primarily

⁸⁴ UNESCO, "Return & Restitution" Intergovernmental Committee, <https://en.unesco.org/fighttrafficking/icprep> (last visited Mar. 27, 2023).

⁸⁵ Trafficking Culture, <https://traffickingculture.org/> (last visited Mar. 19, 2023).

⁸⁶ What is ICCROM, ICCROM, <https://www.iccrom.org/about/what-iccrom> (last visited May 5, 2023)

⁸⁷ Id.

intergovernmental ventures, they need authorization from the nation states in order to exercise any sort of authority that would be required of them in order to be functional mechanisms.

Part III: The Adequacy Test — Application via Case Studies

After looking at the existing legal framework and the existing enforcement mechanisms, this section will look through three different case studies and evaluate whether the discussed treaties and actors are sufficient in protecting and preventing the trafficking of cultural property.

Case I: Theft During Times of War: The Looting of the Baghdad Museum

This section will analyze the legal framework and the enforcement mechanisms that would be applicable in a situation that encompasses the trafficking of cultural property during armed conflict. This section will also discuss some patrimony laws that could be helpful in retrieving the lost cultural property that were unsuccessfully retrieved.

During the Iraq War in 2003, the Baghdad Museum was looted and thousands of artifacts were stolen.⁸⁸ Many of these artifacts were later recovered, but some are still missing.⁸⁹ So how can the international community address this issue with the existing legal framework and enforcement mechanisms? First, since the looting occurred during civil unrest, an argument can be made that the 1954 Hague Convention is applicable. Additionally, under Article 8 of the Rome Statute, the looting of the Baghdad Museum would be a clear violation of international law because it fits the definition of a “war crime” of the statute because the looting can be an attack towards cultural property.⁹⁰ Inevitably, the looting was condemned by the international

⁸⁸ Craig Barker, Fifteen years after looting, thousands of artefacts are still missing from Iraq’s national museum, The Conversation (Apr. 9, 2018) <https://theconversation.com/fifteen-years-after-looting-thousands-of-artefacts-are-still-missing-from-iraqs-national-museum-93949>.

⁸⁹ Id.

⁹⁰ Rome Statute, supra note 44, Art. 8

community, however condemnation alone is not enough.⁹¹ Instead, international cooperation was necessary to recover the stolen artifacts and continues to be necessary to have the possibility of recovering the remaining artefacts that are still missing.⁹²

This is where the enforcement mechanisms hold tremendous importance. For instance, by utilizing INTERPOL's Stolen Works of Art Database and its accompanying ID-Art application, there can be a centralized network where both government officials and the general public can consolidate information regarding the missing cultural property. These technologies are especially important here because it is hard to "identify all of the stolen artifacts to be returned."⁹³ Additionally, the repatriation and restitution laws of member states can play a role in the stolen cultural property's retrieval because they can impose national-level enforcement to ensure that if such cultural property were to be found within their borders, that specific nation's government can legally acquire the property and return it to Baghdad.

Case II: Unclear Legal Status: The Parthenon Sculptures ("The Elgin Marbles")

The second case study will look at a situation in which the cultural property is not trafficked cultural property under the definitions set forth above, but instead has an unclear legal status due to the manner it was acquired.

The Parthenon Sculptures, also known as the Elgin Marbles, are a collection of sculptures that were removed from the Acropolis in Athens in the early 1800s.⁹⁴ Most of the sculptures

⁹¹Craig Baker, Fifteen years after looting, thousands of artefacts are still missing from Iraq's national museum, The Conversation (Apr. 9, 2018) <https://theconversation.com/fifteen-years-after-looting-thousands-of-artefacts-are-still-missing-from-iraqs-national-museum-93949>.

⁹² UNESCO, UNESCO calls for worldwide emergency steps to recover Iraq's looted heritage, (Apr. 17, 2003) <https://news.un.org/en/story/2003/04/65112>.

⁹³ Brianna Rauenzahn, Jamison Chung, and Aaron Kaufman, The Regulations of Stolen Cultural Artifacts, The Regulatory Review (Apr. 17, 2021) <https://www.theregreview.org/2021/04/17/saturday-seminar-regulation-stolen-cultural-artifacts/>.

⁹⁴ The British Museum, The Parthenon Sculptures, <https://www.britishmuseum.org/about-us/british-museum-story/contested-objects-collection/parthenon-sculptures> (last visited Mar. 13, 2023).

originated from the Parthenon itself, however some parts of the collection originated from other buildings on the Acropolis such as the Erechtheion, the Temple of Athena Nike and the Propylaia.⁹⁵ The sculptures were acquired by a British ambassador, Lord Elgin, who obtained a permit (*firman*) in the early 1800s from Greek authorities and promptly transported various sculptures from Athens to Britain. Although Lord Elgin's actions were deemed legal by a committee back in 1816, Greece asserts that the sculptures were taken without permission, and thus should be returned to their country of origin.

The Parthenon Sculptures demonstrates an instance in which the legality of an acquisition of cultural property becomes disputed. Consequently, the legal ownership of the sculptures becomes the problem. In this instance, the British Museum asserts that Lord Elgin had legally acquired the sculptures because he was expressly given permission⁹⁶ by the administrators from the Ottoman Empire who governed Athens at the time.⁹⁷ However, in 1983, Greece formally submitted a request for the permanent return of the cultural property.⁹⁸

Additionally, under British law, the museum cannot remove items from its collection unless “the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students.”⁹⁹ According to the British Museum's Policy for De-accession of Objects from the Collection, the term “unfit to be retained” means the item is “no longer useful or relevant to the Museum's purpose.”¹⁰⁰ With such vague language, it is

⁹⁵ Id.

⁹⁶ It is contested that the permission was simply for conducting an excavation at the Parthenon, and not the removal of any objects. See Alex Marshall, As Europe Returns Artifacts, Britain Stays Silent, The New York Times, <https://www.nytimes.com/2021/12/20/arts/design/parthenon-marbles-restitution.html> (Dec. 20, 2021).

⁹⁷ Alex Marshall, After 220 Years, the Fate of the Parthenon Marbles Rests in Secret Talks, The New York Times, (Jan. 18, 2023).

⁹⁸ Id.

⁹⁹ BRITISH MUSEUM ACT 1963, UK Public General Acts, c..24 §5, <https://www.legislation.gov.uk/ukpga/1963/24/section/5> (last accessed Mar. 15, 2023).

¹⁰⁰ De-accession of objects from the collection, British Museum Policy, https://www.britishmuseum.org/sites/default/files/2019-10/De-accession_Policy_Nov2018.pdf.

highly unlikely that the sculptures will ever be deemed “unfit” for the museum’s purpose(s) and thus returned to Greece. Additionally, British legislators have shown no inclination to amend the 1963 provision.¹⁰¹ Instead, it is likely that the British museum will propose to draft an agreement to lend the collection to Greece rather than permanently returning them.¹⁰²

As such, although Lord Elgin’s actions were deemed legal by a (British) committee back in 1816, Greece’s assertion that the sculptures were taken without permission, and thus should be returned to their country raises the issue of who has legal ownership to the Parthenon Sculptures and what remedies can be pursued by these owners once they have been determined. The analysis of this issue begins with establishing the legal framework. Since the legal status of the sculptures are contested, it is unlikely that the 1954 Hague Convention and the 1970 UNESCO Conventions will be applicable due to their lack of retroactive provisions. Although Greece submitted its request for the return of the sculptures in the 1980s, well after when both conventions were created, since the acquisition itself occurred in the early 1800s, it is outside the scope of the convention. Lastly, an argument can be made under the 1995 UNIDROIT Convention that Greece is entitled to the repatriation of the sculptures. But, if this argument is made, an issue will be raised as to what enforcement mechanisms can facilitate the application of the convention, which will be discussed below.

Regarding the applicability of the existing enforcement mechanisms, it is unlikely that INTERPOL would be constructive in this situation. First of all, INTERPOL’s database would be moot in this case because the location of the Parthenon Sculptures within the British Museum is

¹⁰¹ Elizabeth Piper; Sharon Singleton, UK PM Sunak rules out law change for return of Parthenon, Reuters marbles <https://www.reuters.com/world/uk/uk-pm-sunak-rules-out-law-change-return-parthenon-marbles-2023-03-13/> (Mar. 13, 2023).

¹⁰² Gareth Harris, British Museum proposes new ‘Parthenon partnership’ with Greece in bid to end deadlock over Marbles, The Art Newspaper (Aug. 1, 2022) <https://www.theartnewspaper.com/2022/08/01/british-museum-proposes-new-parthenon-partnership-with-greece-in-bid-to-end-deadlock-over-marbles>.

established. Perhaps an argument can be made that the ICC could be a source of recourse for Greece, but the case must meet the requirements mentioned above to be subject to the ICC's jurisdiction: (1) meet the subject-matter requirement, and the (2) jurisdiction requirement. Here, both Greece and the United Kingdom are signatories to the Rome Statute, meeting the jurisdiction requirement. However, it is unlikely that the issue will meet the subject-matter requirement because the acquisition of the Parthenon Sculptures will unlikely meet the definition of a "war crime" under Article 8. As such, Greece should turn to other mechanisms.

Another avenue that Greece could pursue is through the UN. Since the UN General Assembly has unanimously adopted the "Return or restitution of cultural property to the countries of origin" resolution, an argument could be made that the UN might enforce the repatriation of the sculptures.¹⁰³ Since the UN can impose sanctions as an enforcement mechanism, Greece could pursue this route.¹⁰⁴ However, since the United Kingdom is one of the permanent members of the Security Council, it will likely veto a resolution that would propose a sanction to itself failing to repatriate the sculptures.

Today, the restitution battle for the possession of the Parthenon Sculptures remains.¹⁰⁵ Since November 2021, the prime minister of Greece (Kyriakos Mitsotakis) and the chairman of the British Museum (George Osborne) have held numerous meetings to negotiate and settle the matter. A possible solution that was proposed was for British parliament to change the legislation to lessen the burden on the British Museum's decision on whether or not to return the marbles.¹⁰⁶

¹⁰³ UN General Assembly unanimously adopts resolution on "Return or restitution of cultural property to the countries of origin", UNIDROIT (Dec. 10, 2021) <https://www.unidroit.org/un-general-assembly-unanimously-adopts-resolution-on-return-or-restitution-of-cultural-property-to-the-countries-of-origin/>.

¹⁰⁴ Sanctions, United Nations Security Council <https://www.un.org/securitycouncil/sanctions/information> (last visited May 12, 2023).

¹⁰⁵ Marshall, After 220 Years, the Fate of the Parthenon Marbles Rests in Secret Talks, New York Times (Jan. 18, 2023) <https://www.nytimes.com/2023/01/17/arts/design/parthenon-sculptures-elgin-marbles-negotiations.html>.

¹⁰⁶ Parthenon Sculptures (Return to Greece) Bill, Private Members' Bill (Presentation Bill), 2016-17, U.K., 2016-2017.

However, the British Prime Minister's decision to rule out the possibility of amending the relevant legislation makes it unlikely that the Parthenon Sculptures will be permanently returned to Greece.¹⁰⁷

The case of the Parthenon Sculptures highlights a recurring issue with repatriation of cultural property that were acquire through some authorized means in the past, even if that authorization may be questioned today. It is clear that in these cases, there will conflicts of interest between the originating nation state and the possessing nation state. This issue also showcases an instance where the intersection of national and international law can help or burden the repatriation and restitution of cultural property.

The Parthenon Sculptures illustrate the shortcomings of the existing framework and the enforcement mechanisms when they conflict with local laws that try to hinder repatriation and restitution. Here, it becomes evident that in balancing interests between a nation state and international efforts to protect and repatriate cultural property, the state's own interest will likely prevail since it can exercise its authority within its border to maintain its possession.

CASE III: A Resolved Case: Mali & UNESCO — The Timbuktu Mausoleums

This section will analyze a resolved case regarding cultural property. Here, it is clear what legal framework and enforcement mechanisms were utilized. Thus, after an overview of the issue, the section will analyze the situation based on the legal framework and enforcement mechanisms set forth above. Thereafter, the legal framework and enforcement mechanisms that were in fact applied will be discussed. Lastly, this section will judge the effectiveness of the framework and mechanisms utilized to see whether they were an adequate relief for the situation.

¹⁰⁷ Piper, Singleton, supra note 100.

Timbuktu is a World Heritage site under UNESCO for being an intellectual and spiritual capital of Islam in Africa.¹⁰⁸ Its three mosques and sixteen mausoleums are considered important buildings that helped spread Islam in Africa and served as “outstanding witnesses” to the urbanization of Timbuktu from the 14th century to 21st century.¹⁰⁹ In 2012, after a coup d’état, destruction of the Timbuktu Mausoleums occurred in which ten mausoleums and mosques were intentionally destroyed by extremists.¹¹⁰ This incident also included the destruction of over 4000 manuscripts and monuments.¹¹¹ The case came under ICC jurisdiction after a court from Bamako, the capital city of Mali, referred the case to the ICC’s Office of the Prosecutor.¹¹² Mali met the requirements of being subject to the ICC’s jurisdiction because (1) it was a signatory party to the Rome Statute, and (2) the issue fit the definition of a “war crime” under Article 8.¹¹³ After being subject to the ICC’s jurisdiction, a criminal prosecution ensued against the members of a radical group, which eventually led to the conviction of the group’s leader, Ahmad Al Faqi Al Mahdi.¹¹⁴ He was found guilty as a co-perpetrator for the war crime of intentionally directing attacks against religious and historic buildings in Timbuktu and was sentenced to nine years imprisonment.¹¹⁵

¹⁰⁸ Timbuktu, UNESCO World Heritage Convention, <https://whc.unesco.org/en/list/119/#:~:text=Home%20of%20the%20prestigious%20Koranic,Yahia%2C%20recall%20Timbuktu's%20golden%20age> (last visited May 10, 2023).

¹⁰⁹ Id.

¹¹⁰ “Mali: ICC trial over destruction of cultural property in Timbuktu shows need for broader accountability”, Amnesty International, (Aug. 22, 2016), available at <https://www.amnesty.org/en/latest/press-release/2016/08/mali-icc-trial-over-destruction-of-cultural-property-in-timbuktu-shows-need-for-broader-accountability/#:~:text=The%20situation%20in%20Mali%20was,the%202012%20conflict%20in%20Mali>.

¹¹¹ Reconstruction of the destroyed mausoleums of Timbuktu (Mali), UNESCO, <https://whc.unesco.org/en/canopy/timbuktu/> (last visited May 12, 2023).

¹¹² Mali, Coalition for the International Criminal Court, <https://www.coalitionfortheicc.org/country/mali> (last visited May 12, 2023).

¹¹³ Id.

¹¹⁴ Mali and UNESCO receive symbolic reparation on behalf of international community for destruction of Timbuktu’s mausoleums, UNESCO News (Mar. 30, 2021), <https://whc.unesco.org/en/news/2268>.

¹¹⁵ Al Mahdi Case, The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, International Criminal Court, <https://www.icc-cpi.int/mali/al-mahdi#:~:text=Ahmad%20Al%20Faqi%20Al%20Mahdi,-Alleged%20member%20of&text=Charges%3A%20Found%20guilty%20as%20a,in%20June%20and%20July%202012> (last visited May 12, 2023).

In applying the frameworks discussed above, this incident occurred during civil unrest, i.e. a civil armed conflict, thus the 1954 Hague Convention could be applicable. Additionally, since Mali is a State Party to the convention, then it is clear that the convention would have applied. Additionally, the 1970 UNESCO Convention would also have been applicable due to its language preventing the “pillaging” of cultural property. Here, some monuments and over 4000 manuscripts were destroyed, thus implicating the “pillaging” provision of the 1970 UNESCO Convention. Regarding the 1995 UNIDROIT Convention, it is unlikely to be applicable because the incident is primarily about the intentional destruction of cultural property and there doesn’t seem to be any mention of stolen or illegally transported cultural property.

Next, it will also be unlikely that the tools that INTERPOL has developed would have a significant role on the issue due to the absence of stolen or trafficked cultural property. Instead, the three primary actors who would be play a significant role in this issue are the ICC and the UN — especially the UN’s specialized agency, UNESCO. Since these actors were in fact involved in the Timbuktu case and played a role in the resolved case, the analysis for them will proceed below.

Since Timbuktu is a designated World Heritage Site, it is unavoidable that UNESCO would be involved in the case. Moreover, since the attacks occurred during a surge of violence in Northern Mali, the UN had priorly deployed the United Nations Multidimensional Integrated Stabilization Mission (MINUSMA) in the area to maintain the peace.¹¹⁶ However, the main actor of this case is the ICC. After the ICC reviewed the referral from the Mali government, it did not immediately proceed in conducting the investigation. Instead, the Office of the Prosecutor issued a statement advising those “[t]hose who are destroying religious buildings in Timbuktu[,] should do so in full

¹¹⁶ Supporting political process and helping stabilize Mali, United Nations Peacekeeping, (April 2013) <https://peacekeeping.un.org/en/mission/minusma>.

knowledge that they will be held accountable.”¹¹⁷ Once the investigation took place, the results unfolded as mentioned above.

The section will discuss whether the legal framework and enforcement mechanisms that were in fact applied to the Timbuktu Mausoleums were effective. It can be argued that in some ways, the framework and mechanisms were effective. However, in other ways, they were not effective at all. For instance, if the analysis primarily focuses on prosecution and criminalization, then the Mali case is a success. In fact, many advocates for the protection of cultural property herald the Mali case as a victory for setting new precedent that the ICC can implement in future similar cases to protect cultural heritage.¹¹⁸ Yet, if the analysis primarily focuses on protecting cultural property, for instance as sought by the conventions mentioned above, then the Mali case was clearly a failure because none of the legal frameworks were sufficient nor prevented the destruction of cultural property. In fact, even the remedies provided, a symbolic one dollar, as a result of ICC prosecution could be argued to be minimal compared to the immense loss and impact of the destruction of the mausoleums to Mali’s heritage.¹¹⁹

Thus, although the Mali case is a landmark in protecting cultural property and establishes precedent that can be applied to future cases, it also highlights the shortcomings of the existing legal framework because they cannot by themselves protect cultural property. Despite the best language within the conventions, the destruction of cultural property occurred.

Conclusion

¹¹⁷ ICC, Prosecutor’s Statement on Mali, July 1, 2012, available at <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/B8B506C8-E2DE-4FF5-A843-B0687C28AA6C/284735/OTPBriefing20June3July2012.pdf> (last visited May 12, 2023)

¹¹⁸ Catherine Fiancon-Bokonga, A historic resolution to protect cultural heritage, (Oct. 17, 2017), <https://www.unesco.org/en/articles/historic-resolution-protect-cultural-heritage-0>.

¹¹⁹ Mali and UNESCO receive symbolic reparation on behalf of international community for destruction of Timbuktu’s mausoleums, UNESCO (Mar. 30, 2021), <https://www.unesco.org/en/articles/mali-and-unesco-receive-symbolic-reparation-behalf-international-community-destruction-timbuktus>.

As this paper has discussed, the theft, looting, and illicit trade of cultural property is a prevalent international issue. Although there are legal frameworks and enforcement mechanisms in place, they are insufficient on their own to properly protect cultural property and curtail its illicit trafficking. Today, there is a large body of law that perpetuates to protect cultural property, but even after almost seventy years since the inception of the 1954 Hague Convention, the same limitation for the legal framework exists. The fact that agreements made are only enforceable with ratification and support from individual member states, makes the protection of cultural property an endeavor that is filled with significant shortcomings. Thus, until there is a more effective source of authority to enforce such legal frameworks and specialized enforcement mechanisms that are not dependent on voluntary state participation, the situation will stay the same: having legal frameworks and enforcement mechanisms that are merely glorified placeholders to the real authorities — individual states.