Chapter 2
Law and Ethics Protecting Cultural Objects

2.1 Introduction

This chapter discusses the legal and ethical frameworks intended to protect and regulate rights in cultural objects.[1] Positing that because international threats to cultural objects originate from two different sources, James Nafziger argues there are two distinct legal frameworks intended to protect and preserve right in cultural objects.[2] The first framework deals with destruction and looting during times of war and belligerent occupation. Applicable at any time, the second framework deals with a state's ability to use international cooperation and sanctions to counter the theft and illicit trafficking of its cultural objects.[3] The first section of this chapter discusses the evolution of rules treating cultural objects in the event of armed conflict. Although historically the rules of war decreed 'to the victor go the spoils,' a countervailing argument has carried the day since the second half of nineteenth century.[4] The second section of this chapter discuses the legal framework regarding illicit trafficking of cultural objects, elaborating upon two important international conventions as well as Chinese domestic legislation from the late Qing period. This chapter concludes with an exploration of ethical guidelines regarding cultural

[1]Francesco Francioni and James Gordley state that 'it is safe to say that cultural heritage law is a discrete branch of international law, and at the same time it constitutes an evolving dimension of many areas of international law'. See Francioni & Gordley (2013), at 1.
[2]Nafziger (2008), at 977. As noted by Francioni, the laws protecting cultural heritage—international and domestic, private and public, peacetime and wartime—continues to increase in number, complexity, and inter-relatedness. See Francioni (2012), at 722–726.
[3]See Nafziger, *ibid.*, at 978.
[4]See W. Sandholtz, 'Plunder, Restitution, and International Law', *International Journal of Cultural Property* 17 (2010), pp. 147–176.

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objects promulgated by professional organizations and which have led to the successful restitution or return of some cultural objects. Although not legally binding, such ethical guidelines are valuable guides for any bodies intent upon enacting international laws regarding cultural objects.

2.2 Protection of Cultural Objects During Times of War

Cultural objects have always been looted or destroyed during armed conflict. The only practical constraint upon such destruction and looting, and a reluctance to damage buildings and works of art dedicated to religion, were out of fear the deity might seek revenge.[5] Legal constraints prohibiting destruction or looting of cultural objects during armed conflict were non-existent until the mid-nineteenth century.

2.2.1 From Antiquity to the Eighteenth Century

According to Henry Wheaton, the ancient law of nations provided that all property was subject to capture and confiscation in times of war, including *res sacræ* (things consecrated to gods). In ancient times, both the movable and immovable property of the vanquished passed to the conqueror.[6] This practice was codified by the Roman law of war. '[T]he Romans, with their fine legal minds, understood the ownership of the property of conquered people perfectly and absolutely.'[7] The prescribed forms for written surrender to Rome asked: 'Do you surrender the [named] people, the city, fields, water, boundaries, shrines, utensils, all things divine and human into the dominion of … the Roman people?'[8] An affirmative answer meant the Romans became 'masters of absolutely everything and those who surrender[ed] remain[ed] masters of absolutely nothing' beyond the discretion of the victor.[9] As a result, the ancient world witnessed countless instances of the destruction and plundering of property in times of conflict, such as the burning and sacking of Troy, the burning of Persepolis by Alexander the Great, and the obliteration of Corinth and Carthage.[10] The only other rules even remotely applicable to cultural objects during

[5]Verhoeven (2008), at 376–379; Nafziger (2008), at 978.

[6]Cicero (106–43 BCE) expressed this idea metaphorically: 'Victory made all the sacred things of the Syracusans profane.' H. Wheaton, *Elements of International Law* (2nd ed., annot. by W.B. Lawrence), London: Sampson Low 1864, at 596–597.

[7]*Ibid.*, at 597; Gillespie (2011), at 210.

[8]Gillespie (2011), at 210.

[9]*Ibid.*.

[10]Verhoeven(2008), at 378–379.

ancient times dealt with the division among the victors of the loot taken in times of conflict.[11]

Not until the Renaissance, when people began to think a work of art was unique, could not be recreated, and its loss would thus be permanent, was the plunder and destruction of art increasingly considered barbaric and as evidence of a lack of culture.[12] The Renaissance also birthed the metaphysical vision of such property as 'heritage,' a universal estate common to all peoples.[13] Although these concepts of art gained ground in the elite circles, actual sixteenth century practice usually ran contrary to such noble. The sixteenth century is replete with examples of where cultural objects were looted and destroyed in times of conflict. Despite the elevated status of art in the Renaissance, states and legal authorities did not think the destruction or looting of cultural objects was prohibited by the *jus gentium* (law of nations).[14]

Jakub Przyluski was arguably the first proponent of protecting cultural objects in times of war in the doctrine of the law of nations in 1553.[15] In his famous 'The Rights of War and Peace,' the great international lawyer Hugo Grotius asserts that 'by the Law of Nature those Things may be acquired by a just War, which are either equivalent to that, which tho' due to us, we cannot otherwise get, or which damnifies the Injurer, but within the Bounds of a just Punishment'.[16] Significantly, Grotius distinguishes between just and unjust wars.[17] According to Grotius, things taken in an unjust war must be restored, not only by those who have taken them, but by others into whose hands they may have fallen. Things taken are to be restored to their former lawful owners.[18] Grotius also considered it unnecessary to destroy an enemy's country when the victor has other sources from which to feed his troop and

[11]According to Gillespie, these rules were necessary for two reasons: so equity could be achieved among the victors and each would get their 'just' reward; so troops would continue to fight through a conflict rather than stop fighting to engage in private pillage, thereby affording an enemy the opportunity to regroup, as was a problem in the earliest recorded battles such as Megiddo (1479 BCE) and Kadesh. Gillespie (2011), at 211.

[12]Verhoeven (2008), at 379.

[13]R. O' Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge: Cambridge University Press, 2006, at 5.

[14]Verhoeven (2008), at 379.

[15]Przyluski writes: 'in addition to objects of worship, outstanding works of art and literature should be exempted from the right to take spoils of war'. See Kowalski, *supra* note 18, at 87.

[16]H. Grotius, *The Rights of War and Peace,* (ed. and intr. by R. Tuck), Indianapolis: Liberty Fund 2005, at 1314.

[17]Whether a war is a 'just war' is to be determined with reference to two factors: the war's causes and its conduct. Wars may be justly undertaken in response to 'wrong not yet committed, or to wrongs already done'. The lengthy list of wrongs justifying war includes inflicting punishment, self-defense, the defense of chastity, among others. A justly undertaken war must also be fought rightly for it to be just. Grotius concludes essentially that war is justifiable when, and only when, it serves right. See *Ibid*., at 516.

[18]*Ibid.*, at 1416, 1512.

sustain his war effort.[19] Items which by their nature could not support and prolong the war effort were to be spared even during the heat of battle.[20] As devotional works of art and related items are incapable of increasing the intensity of hostilities or retarding the conclusion of a war, it is a mark of reverence to spare them, which rule should be adhered to particularly by warring nations that worship the same God and observe the same fundamental laws, notwithstanding their having differing opinions regarding their rights.[21]

Another early jurist, Emer de Vattel, took a position similar to Grotius concerning the plundering of art during armed conflicts. Although he postis that '[I]t is lawful to take the property of an unjust enemy in order to weaken or punish him,'[22] Vattel suggests cultural objects should be protected from deliberate destruction because of their significance for humanity. 'For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase the enemy's strength…such as temples, tombs, public buildings, and all works of remarkable beauty'.[23] However, Vattel's prohibition of plundering cultural objects was largely ignored. Pillage was documented among British, Russian, French, and Austrian Forces as they fought their way through Prussia and elsewhere in the Seven Years War.[24]

2.2.2 *The Nineteenth Century*

The Napoleonic Wars saw many works of art brought to France. Originally consisting of art confiscated from clerical and aristocratic collections, under Napoleon's personal direction the Louvre's collections were enriched with art plundered from Italy, Russia, Egypt, Prussia, Italy, Spain and the Netherlands.[25] The supply wagons returning to France from conquered countries were expected to include those countries' art treasures and rare books. Napoleon supplemented these acquisitions by imposing onerous economic penalties upon his defeated enemies under treaties

[19] *Ibid*., at 1464.

[20] *Ibid*., at 1466.

[21] *Ibid.*, at 1467–1468.

[22] See E. de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (ed. and introd. By B. Kapossy & R. Whitmore), Indianapolis: Liberty Fund 2008, §161–162.

[23] *Ibid*., §166.

[24] The doctrine of 'military necessity' was developed in Prussia at this time to permit the destruction of cultural objects in extraordinary circumstances. See Gillespie (2011), at 242; Verhoeven (2008), 379.

[25] Gillespie (2011), at 247; K.F. Gibbon, 'Chronology of Cultural Property Legislation', in: K.F. Gibbon (ed.), *Who Owns the Past? Cultural Policy, Cultural Property, and the Law,* New Brunswick: Rutgers University Press 2005, at 3.

such as the Treaty of Pressburg, the Treaty between France and Prussia, and the Treaty of Vienna and then taking art in partial payment of such penalties.[26] Although some Frenchmen voiced criticism of Napoleon's massive appropriations, others supported them in light of their belief that France was by far the most enlightened and civilized nation and therefore best able to properly appreciate, and own, great art.[27]

In the second half of the nineteenth century, a consensus began to emerge regarding ethical principles governing the protection of non-combatants and non-military targets in war.[28] In his influential *Elements of International Law*, Wheaton posited that 'by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifies devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war'.[29]

Promulgated in 1863, the Lieber Code marked the first time a sovereign nation established formal guidelines for the conduct of its army in the field.[30] A codification of Western military customs, the Lieber Code provides that cultural property, such as classical works of art, libraries, scientific collections, and precious instruments must be secured against all avoidable injury even when contained in besieged or bombarded fortified places (Article 35). Only public property is subject to seizure (Article 31) and cultural property is not public property (Article 34). 'In no case shall they (cultural items) be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured' (para 2, Article 36).

The Lieber Code generated a great deal of interest in controlling the actions of the belligerents in European wars and a series of declarations were made and treaties were entered into, notably the 1874 Brussels Declaration and the Oxford Manual.[31] The 1874 Brussels Declaration prohibits any destruction or seizure of the enemy's property that was not imperatively demanded by the necessity of war (Article 13(9)), and provides (in Article 8) that 'The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences

[26]Gibbon, *ibid.*, 3; Gillespie (2011), at 247–248.

[27]Gibbon, *ibid*., 3.

[28]Gibbon, *ibid.*, 3.

[29]Wheaton, *supra* note 29, at 596.

[30]For more information on the Lieber Code, see P. Maguire, *Law and War: An American Story*, New York: Columbia University Press 2001, 21; Merryman (1986), at 833–842; G.M. Hart, 'Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions', *Military Law Review* 203 (2010), pp. 1–77.

[31]The draft of the Brussels Declaration was adopted in a conference by fifteen European states in Brussels on August 27, 1874, but remained unratified because not all the states were willing to accept it as binding. The Oxford Manual was adopted by the Institute of International law in 1880. For more information on the Brussels Declaration and the Oxford Manual, see D. Schindler & J. Toman, *The Laws of Armed Conflicts* (3rd rev. and compl. ed.), Dordrecht: Nijhoff 1988, at 22–34, 36–48.

even when state property, shall be treated as private property. All seizure or destruction of, or wilful damage to institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.' The Oxford Manual incorporates the Brussels Declaration's rules concerning the protection of cultural properties in Articles 32, 34, and 53.

The Brussels Declaration and the Oxford Manual laid the foundation for subsequent international conventions. On the initiative of the Czar Nicholas II of Russia, the First Hague Peace Conference was convened between May 18 and July 29, 1899 and attended by twenty-six delegations.[32] The Conference adopted three conventions. Rules regarding the protection of cultural objects during armed conflict are incorporated in the 1899 Hague Convention (II).[33] Article 23(g) of the 1899 Hague Convention (II) specifically forbids destroying or seizing the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war. All necessary steps should be taken to spare edifices devoted to religion, art, science, charity, and hospitals, provided they are not used also used for military purpose (Article 27). Even when taken by assault, the pillage of a town or place, is prohibited (Article 28). Prohibition of pillage of property in armed conflicts was internationally codified for the first time. Articles 47–56 of the annexed regulations provide rules regarding property in hostile territory. As a general rule, pillage was formally prohibited (Article 47). An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the state, arms depots, means of transport, stores of supplies, and generally movable property of the state which may be used for military operations (Article 53). The occupying states shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works situated in occupied territory and belonging to the hostile state. The occupying state must protect the capital of these territories, and administer it according to the rules of usufruct (Article 55). The property of the communities and religious, charitable, and educational institutions, and those of arts and science, even State property, shall be

[32]For more information on this Conference, see B. Baker, 'Hague Peace Conference (1899 and 1907)', *Max Planck Encyclopedia of Public International Law* November 2009, opil.ouplaw.com/home/EPIL, OUP reference MPEPIL 305.

[33]The other two conventions are Convention (I) for the Pacific Settlement of International Disputes and the Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864. Three declarations were also made: Declarations [IV,1] concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods; Declaration [IV,2] concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases; Declaration [IV,3] concerning the Prohibition of the Use of Bullets which can Easily Expand or Change their Form inside the Human Body such as Bullets with a Hard Covering which does not Completely Cover the Core, or containing Indentations. According to Baker, all parties in attendance signed each of the three conventions, with the exception of Convention (II), which China and Switzerland declined to sign. See *Ibid.*; Liu Pengchao, 'Diplomacy in Modern History: China's First Participation in the International Conference' (in Chinese), *Zhongguo Chengshi JingJi,* (2011), iss. 18, at 327–328.

treated as private property. All seizure of and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited and should be made the subject of proceedings (Article 56). By the end of the second half of the nineteenth century, governments, international organizations, and lawyers had all taken a hand in increasing public awareness of the need to protect cultural properties during times of conflict.

2.2.3 The Two World Wars

The need for protecting cultural objects in times of conflict gained momentum around the turn of the twentieth century. Convened in 1907 and attended by 43 states, the Second Hague Peace Conference attempted to ameliorate the hardships incident to war and substitute non-violent dispute resolution for armed conflict as a means to settle international grievances.[34] Ten of the thirteen conventions adopted were new and the other three revised the three conventions agreed to in 1899. Most significantly for the purposes of this study, the 1899 Hague Convention (II) was the least revised, becoming known as the 1907 Hague Convention (IV).[35] The provisions respecting protection of cultural objects in the event of armed conflict in the 1907 Hague Convention (IV) are identical to those in the 1899 Hague Convention (II). Although the 1899 Hague Convention (II) and the 1907 Hague Convention (IV) were ignored by the belligerents in WWI and many cultural objects were destroyed and looted, these conventions at least provided international rules to protect cultural objects in times of war.[36]

The need for protecting cultural objects in times of war received greater attention following WWI. A report commissioned by the Peace Conference in 1919 recommended declaring confiscation, wanton devastation and destruction of cultural properties as war crimes.[37] In 1933, the Seventh International Conference of American States recommended adoption of the Roerich Pact, which was subsequently drawn up by the Governing Board of the Pan-American Union and signed on April 1935. The Roerich Pact establishes the neutrality of monuments, museums, scientific, artistic, educational, and cultural institutions, and designates a flag by which they could be identified, just as hospitals and medical personnel are identified by the red cross (Articles 1 and 3). '[T]he treasures of culture' were to be

[34]See Baker, *ibid*.; J.B. Scott, 'The Work of the Second Hague Peace Conference,' *The American Journal of International Law* 2 (1908), at 1.

[35]China ratified the 1907 Hague Convention (IV) on May 10, 1917. See Scott, *ibid.*, at 1–2, 12.

[36]For more information regarding such pillage and destruction, see Gillespie (2011), at 252–259.

[37]See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report presented to the preliminary Peace Conference, March 29, 1919', *The American Journal of International Law* 14 (1920), no. 1–2, pp. 114–115.

respected and protected 'in time of war and peace' unless they had been used for 'military purposes' (Article 5).

As a result, at the opening of the Second World War, some efforts were made to protect cultural properties from damage. Hermann Goering instructed his pilots to be careful when attacking French cathedrals, which were 'under all circumstances, to be protected and not attacked, even if it were a question of troop concentration in those places.' '[I]f attacks had to be made, precision bombing Stukas were to be used primarily.'[38] Nonetheless, unprecedented loss and pillage of cultural objects occurred in WWII's Western and Eastern battlefields. The Germans destroyed four hundred twenty-seven museums, among them the wealthy museums of Leningrad, Smolensk, Stalingrad, Novgorod, and Poltava.[39] Asian countries suffered destruction by the Japanese troops. '[I]t appears that the Japanese forces acted with little restraint in the destruction of Chinese cultural heritage whereby libraries and associated cultural treasures were systematically destroyed in, inter alia, Shanghai, Nanjing, Suzhou, and Hangzhou. By the end of the war, out of 4,041 libraries in China, at least 2,500 were destroyed, along with 92 institutions of higher learning'.[40] Alexander Gillespie observes that although all the belligerents prohibited their soldiers from pillaging, soldiers stole properties in all the war's theaters. In addition, some belligerents adopted a systematic, aggressive approach to acquiring their enemies' cultural heritage, most notably the Germans and Soviets.[41] Hitler effected his collection efforts under two pretences. First, there was the art and other spoils which were to be taken in order that they could be 'safeguarded' from the vicissitudes of the war. Alternatively, items were to be acquired by sale, contract or forfeiture. After the War, the total value of the art which had been looted was estimated at between two and two and a half billion US dollars.[42] In 1943, sixteen governments and the French National Committee issued the Inter-Allied Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control (the Declaration of London), with the aim of combating and defeating plundering by the enemy powers. The Declaration stressed that the signatories 'reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been situated in the territories which have come under the occupation or control, direct or indirect of the Governments with which they are at war, or which belong, or have belonged to persons (including juridical persons) resident in such territories'.[43]

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[38]Gillespie (2011), at 259.

[39]The International Military Tribunal, *Tribal of the Major War Criminals before the International Military Tribunal*, Nuremberg: The International Military Tribunal 1947, *Vol.* II, at 66, 42, 54.

[40]Gillespie (2011), at 265–266.

[41]*Ibid.*

[42]*Ibid.,* at 266.

[43]Prott (2009), 4–5.

2.2.4 The Post-War Legal Regime

After WWII, war criminals were prosecuted in the Nuremberg and Tokyo Tribunals. Crimes against peace, war crimes, and crimes against humanity fell within the jurisdiction of both Tribunals.[44] The proceedings of the Nuremberg Tribunal declared 'plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity' war crimes (Article 6). In the Nuremberg trials, American, French and Soviet prosecutors all devoted substantial attention to prosecuting Nazi crimes against cultural property. According to the Nuremberg prosecutors, the plundering and destruction of museums, collections, libraries, and archives was part of the Nazi's plan to enhance Germany's cultural superiority by diminishing, if not annihilating, the cultural heritage of its opponents. The prosecutors also alleged such plundering and destruction violated the 1907 Hague Conventions.[45] Under the heading 'Pillage of Public and Private Property', the judgment cites the 1907 Hague Convention, quoting Article 56 in its entirety. The judgment declares that 'in addition to the seizure of raw materials and manufactured articles, a wholesale seizure was made of art treasures, furniture, textiles, and similar articles in all the invaded countries.' The verdict convicting Rosenberg states: 'Rosenberg is responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe…. He organized and directed the 'Einsatzstab Rosenberg', which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses'(Judgment, Rosenberg).[46]

Although during the formulation of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 some commentators argued the systematic destruction of cultural property should be deemed the actionable offense of 'cultural genocide,' the Convention focused its attention only on people, not objects.[47] Adopted by the UN General Assembly, The Universal Declaration of Human Rights states that 'no-one shall be arbitrarily deprived of his property (Article 17)'.[48] The first special convention for the protection of cultural property in armed conflict, the 1954 Hague Convention[49] was the result of efforts dating back

[44]See the Charter of the International Military Tribunal and the International Military Tribunal for the Far East Charter (IMTFE Charter).

[45]Quotd from W. Sandholtz, *Prohibiting Plunder: How Norms Change*, Oxford: Oxford University Press 2007, at 176.

[46]*Ibid.*, at, 177.

[47]This Convention was adopted by the UN Assembly on December 9, 1948 as General Assembly Resolution 260. See Vrdoljak (2006), at 164–171.

[48]Universal Declaration of Human Rights, GA Res 217 (III), UN Doc A/810, (1948) at 71.

[49]As of April 17, 2012, one hundred twenty-six countries have ratified or acceded to The Hague Convention of 1954. China acceded to the Convention on January 5, 2000.

to the Lieber Code, the Brussels Declaration, the Oxford Manual, the 1899 and 1907 Hague Conventions, and the Roerich Pact and its adoption 'satisfied a desire that many philosophers had expressed over the course of centuries'.[50]

According to its preamble, the basic principles of the 1954 Hague Convention include 'damage to the cultural property 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' (para 2) and 'this heritage should receive international protection' (para 3). These two principles provide the foundation for the development of all international heritage law.[51]

As summarized by O'Keefe and Prott, the obligations created by the 1954 Hague Convention and its Regulations include:[52]

A duty to safeguard cultural property (Articles 2 and 3), i.e., adequately safeguarding cultural property situated within a state's own territory against all foreseeable effects of an armed conflict;

(a) A duty to respect cultural property (Articles 2 and 4), i.e., not using either cultural property or its immediate surroundings for military purposes or for any purpose which would likely expose it to destruction or damage in the event of armed conflict;
(b) A duty to train the military in the Convention's principles (Article 7); and
(c) Special duties are imposed upon occupying powers (Convention Article 5; Regulations Articles 2 and 19; Protocol (1954) Articles 1 and 4), including assisting local authorities to safeguard and preserve cultural property and, if such authorities are unable to do so, themselves take all measures necessary to insure such property's preservation.

The two Protocols to the 1954 Hague Convention require various actions to be taken by nations desiring to be bound by their terms.[53] Drafted at the time as the 1954 Hague Convention itself,[54] the First Protocol deals with the removal of cultural property from an occupied territory. A Contracting Party must prevent the exportation of cultural property from occupied territory. If objects exported from an occupied territory are found in the territory of a Contracting Party, the Contracting

[50]J. Toman, 'The Road to the 1999 Second Protocol', in: A. van Woudenberg & E. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Leiden: Nijhoff 2010, at 2.

[51]P.J. O'Keefe & L.V. Prott (eds.), *Cultural Heritage Conventions and Other Instruments, A Compendium with Commentaries,* Crickadarn: Institute of Art and Law 2011, at 16.

[52]*Ibid.*, at 16–17.

[53]See para 6 of the First Protocol, Article 41 of the Second Protocol.

[54]The First Protocol became effective on August 7, 1956. As of October 17, 2013, one hundred three states had acceded to the First Protocol. China acceded to the First Protocol on January 5, 2000.

Party must take the objects into custody and return them to the occupied territory upon the close of hostilities.[55] Although some consider the First Protocol a 'revolutionary instrument', others consider it of little practical effect.[56] Patrick J. Bolylan states he has "not seen or received evidence of a single example of States Parties to the Protocol taking action of any kind in order to bring its provisions into practical effect in order to 'freeze' trade in, or other transfers or movements of, cultural property from areas affected by either international or internal armed conflicts".[57] Nevertheless, the recent return of four 16th Century icons from the Netherlands to Cyprus under the First Protocol is noteworthy. Belonging to the Church of Christ Antiphonitis on Cyprus, the icons were removed during the Turkish invasion in 1974 and later discovered in a private collection in the Netherlands. On September 18, 2013, the Netherlands handed the four icons over to Cyprus, the first time the Netherlands returned cultural objects under the First Protocol, and evidently the first time any cultural objects had been returned pursuant to the First Protocol.[58]

Due in large part to a succession of armed conflicts such as the First Gulf War, the conflict in the former Yugoslavia and the war in Afghanistan and their serious harm to cultural heritage, questions arose regarding the efficacy of the 1954 Hague Convention.[59] As a result, the Second Protocol to the Convention was adopted at The Hague on March 26, 1999.[60] A serious effort to update the legal protection of cultural heritage, The Second Protocol includes new provisions such as a definition of military necessity, the introduction of 'enhanced protection' and the creation of a

[55]According to Lijnzaad, initially there was no intention to create a separate instrument covering illegal export of cultural property from occupied territories. However, some countries opposed the inclusion of provisions on restitution of cultural property in the body of the Convention, resulting in the separation of the Convention from the First Protocol. See E. Lijnzaad, 'Sleeping Beauty, the untold story of the (first) Protocol to the 1954 Hague Convention', in: A. van Woudenberg & E. Lijnzaad (ed.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Leiden: Nijhoff 2010, at 148–149.

[56]*Ibid.*, at 149.

[57]P. J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict* (The Hague Convention of 1954), UNESCO Doc CLT-93/WS/12, (1993), at 101.

[58]For more information of the case, see 'Mutual Presentation of Cyprus and the Netherlands on the Return of 4 Icons from the Netherlands to Cyprus under the Protocol of the Hague Convention of 1954', *10 Meeting of the High Contracting Parties to the Hague Convention, UNESCO, Monday 16 December 2013*, viewed March 16, 2015, http://www.unesco.org/culture/laws/1954/NL-Cyprus-4icons_en.

[59]A. Bos, 'Words of Welcome', in: A. Van Woudenberg & E. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Leiden: Nijhoff 2010, at xvi.

[60]The Second Protocol entered into force on March 9, 2004. As of February 11, 2015, 68 states have ratified or acceded to the Second Protocol. China has not been a party member to this protocol.

new monitoring body for the implementation of the Protocol, the intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict.[61] The Second Protocol also provides additional penalties, jurisdiction based on the territorial and active personality theories for all 'serious violations', and universal jurisdiction for violations listed in Article 15 sub-paras (a) to (c). The Second Protocol also establishes individual criminal responsibility for violators.[62] Although the Second Protocol makes great strides in strengthening the rules regarding protection of cultural property during wartime, as Van Woudenberg says, we can only hope that the provisions of criminal liability and jurisdiction do not need to be applied too often.[63] The 1954 Hague Convention and its two Protocols greatly enhanced the rules governing protection of cultural property in the event of armed conflict and their basic principles concerning respect for cultural property have become part of customary international law.[64]

Cultural property also benefits from a certain amount of protection under international criminal law. Crimes against cultural property were treated as crimes against public and private property in the Nuremberg Tribunal and in the Tokyo Tribunal. The ICTY Statute makes a step forward by naming 'seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science' violations of the laws or customs of war (Article 3(d)).[65] The ICTY convicted a number of individuals of crimes against cultural property arising out of the 1991 attacks on educational, cultural, and religious sites in the former Yugoslavia.[66] Considering intentional direct attacks on cultural property as separate indictable offenses follows from the Rome Statute of ICC (Article 8, para 2(b) (ix)).[67]

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[61]Bos, *supra* note 59, at xvi.

[62]For more information about the 'penal elements', see Nafziger (2008), at 987–988.

[63]A. van Woudenberg, 'Elaboration and legal implementation of the 1999 Second Protocol: The Dutch finger on the pulse', in: A. van Woudenberg & E. Lijnzaad (eds), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Leiden: Nijhoff 2010, at 115.

[64]Nafziger (2008), at 1001.

[65]U.N. Doc.S./25704 at 36, annex (1993) and S/25704/Add.1(1993), adopted by Security Council on 25 May 1993, U.N. Doc.S/RES/827(1993).

[66]In 2000, the ICTY convicted General Tihomir Blaskic on charges related to looting and pillage of Bosnian sites. In 2004, Vice Admiral Miodrag Jokic was convicted of targeting Dubrovnik. In 2005, Pavel Strugar, the commander of the Yugoslav People's Army Forces, received an eight-year sentence for ordering attacks on targets in the Dubrovnik region without prohibiting attacks on Dubrovnik's Old Town. See Nafziger (2008), at 990.

[67]The Rome Statute of the International Criminal Court circulated as document A/CONF. 183/9 of 17 July 1998 and corrected by process-verbaux of November 10, 1998, July 12, 1999, November 30, 1999, May 8, 2000, January 17, 2001 and January 16, 2002. The Statute became effective July 1, 2002.

The Nuremberg Tribunal and Tokyo Tribunal and the ICTY Statute and Rome Statute of the ICC have established that wilful destruction and pillage of cultural property are war crimes under the general category of crimes against public and private property or in their own right. Despite international efforts, cultural property remains the target of pillage and destruction. One million books, ten million documents and fourteen thousand archaeological artifacts have been lost in the US-led invasion and subsequent occupation of Iraq.[68] According to Eric A. Posner, treaties have failed because of the lack of sufficient preciseness in existing conventions, insufficient numbers of parties agreeing to the conventions, insufficient enforcement mechanisms, governmental unwillingness and lack of interest in protecting cultural heritage. [69] According to Mattew Bogdanos's investigation into the looting of Iraq's National Museum, people in Iraq believe the US cares for no culture other than its own. The history of looting, as well as the US's failure to protect cultural heritage, reinforces their belief. Because the protection of cultural heritage does not command the same degree of attention or resources as do terrorism or other violent crimes in wartime, relatively few resources were made available for tracking down stolen artifacts.[70] In brief, although protection of cultural objects during wartime is well regulated pursuant to international conventions, in practice, such conventions are largely unenforced.

2.3 Protection of Cultural Objects Against Illicit Trafficking

The legal regime purporting to protect cultural property other than in times of war includes: (1) the UNESCO Convention and other agreements generally applicable to cultural heritage; (2) regional and bilateral laws and agreements, including European law and bilateral provisions regarding extradition of criminals; and (3) domestic customs control and prosecutions based in part upon foreign and international laws.[71] This section treats international conventions protecting cultural objects from illegal movement or illicit trafficking and Chinese law regarding protection of cultural relics.

[68]See H. Marquez, 'The Plunder of Iraq's Treasures', *Asia Times,* (17-2-2005).

[69]E.A. Posner, 'The International Protection of Cultural Property: Some Skeptical Observations', *Chicago Journal of International Law* 8 (2007), no. 1, at 218–221.

[70]See M. Bogdanos, 'Thieves of Baghdad: Combatting Global Traffic in Stolen Iraqi Antiquities', *Fordham International Law Journal*, 31 (2007), no. 3, pp. 725–740.

[71]Nafziger (2008), at 992.

2.3.1 International Conventions

The 1970 UNESCO Convention and the 1995 UNIDROIT Convention are the most significant international conventions regarding illegal movement of cultural objects.[72]

2.3.1.1 The 1970 UNESCO Convention

According to Askerud and Clement, the 1970 UNESCO Convention was drafted in response to increasing theft and unauthorized export and import of cultural objects in the 1960s.[73] Designed to reinforce the solidarity among its signatories in order to stem the illicit import, export and transfer of ownership (defined as illicit traffic in cultural property), the Convention established a system of import and export control.

The 1970 UNESCO Convention requires party states to adopt certification procedures to control exportation of cultural property (Article 6). Party states must also prevent museums and similar institutions from acquiring illegally exported property from other party states (Article 7(a)); prohibit the importation of stolen cultural property and return such items to their state of origin upon request (Article 7(b)). Unlike theft, which has been prohibited by all legal systems (with the exception of taking booty in times of war), cultural object import and export control is a recent development. Such efforts have been debated and criticized from their inception.[74] Acording to Forrest, the difficulty arises from the need to require sovereign states to enforce exportation laws of other sovereign states. The equality of states and respect for their sovereignty is a fundamental principle of international

[72]The 1970 UNESCO Convention was adopted at the 16th UNESCO General Conference of November 1970 and entered into force on April 24, 1972. The 1995 UNIDROIT Convention was adopted in 1995 and became effective on July 1, 1998. As of August 27, thirty-four states have ratified or acceded to the Convention; China ratified the Convention on May 7, 1997.

[73]In its early years, regarded 'fatally flawed,' the Convention won little support, but with its accession by market countries such as the US, Canada, Australia, France, Japan, the United Kingdom, Switzerland, Germany, Belgium and the Netherlands, the Convention has become the most important multilateral international treaty in this regard. As of April 18, 2014, one hundred twenty-seven states have acceded to or ratified the Convention. China acceded to the Convention on November 28, 1989. See P. Askerud & E. Clement, *Preventing the Illicit Traffic in Cultural Property: a Resource Handbook for the Implementation of the 1970 UNESCO Convention*, Paris: UNESCO 1997, at 16; P.J. O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic,* Leicester: Institute of Art and Law, 2000, at 8.

[74]*Ibid.*; also see C. Forrest, 'Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage', *Melbourne Journal of International Law* 4 (2003), no. 2, at 594; S. Gruber, 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law',*Asia Pacific Journal of Environmental Law* 10 (2007), at 267; K. Siehr, *International Art Trade and the Law* (Recueil des Cours 243), Leiden: Nijhoff Online 1993, DOI: 10.1163/ej.9780792332831.009-41810.1163/ej.9780792332831.009-292, at 162.

law. As a result, states are reluctant to require other states to enforce their public laws, including penal laws, revenue laws and exportation laws.[75]

Pursuant to Article 9, state parties must join in a concerted international effort to identify and implement concrete measures to control the import of cultural property. State parties have interpreted their obligation to counter the import of cultural property both broadly and narrowly. The broad interpretation involves ensuring all cultural property is protected. If cultural property is illegally exported, the state into which it is imported must regard the importation as illegal and ensure the cultural property is returned to its state of origin. This broad interpretation applies to all states whose cultural heritage is illegally exported.[76] The narrow interpretation provides that party states need merely prevent museums and similar institutions over which they have direct control from acquiring cultural property illegally exported from other party states. For example, the US does not consider it illegal for a private individual or an institution it does not directly control to import cultural property illegally exported from a foreign state if it was not stolen from a museum or religious institution of the foreign state.[77]

The import and export controls in the 1970 UNESCO Convention have been criticized by some as jeopardizing legal international trade in cultural property. Some consider it nonsensical to attempt to control export of privately held cultural property because export does not, in and of itself, damage the contextual value of

[75]Forrest, *ibid.*, at 597. Although some countries are reluctant to enforce the export controls of other states, most states attempt to protect their cultural property through export regulations. Attempts to control the movement of cultural objects have been made throughout history. The first modern export ban dates from the chirography of Cardinal Giuseppe Doria Pamphili of October 2, 1802 and the confirming edict Pacca of April 7, 1820. In the late nineteenth and early twentieth centuries, similar efforts were made legislatively in Greece (1834), Italy (1872) and France (1887). According to Siehr, different states have adopted different cultural property export policies: (a) a few states such as the US and the Swiss cantons, have no cultural property export control and make no attempt to protect their cultural property from sale to other countries; (b) several countries such as Italy and some Ibero-American countries prohibit the export of all cultural property without distinguishing between classified/registered items and unclassified/unregistered or between national treasures and pieces of art inadvertently located within their boundaries; (c) many countries take a middle position by restricting export control to classified items or pieces of great importance—for example, most European museums are state owned and their treasures can only be sold by Government permission. See Siehr, *ibid.*, at 162–165, 249.

[76]Forrest, *ibid.*, at 601–602.

[77]*Ibid.* The US legislation implementing the 1970 UNESCO Convention, the Convention on Cultural Property Implementation Act, allows the US to enter into bilateral agreements (Memoranda of Understanding) with a requesting state party. While the bilateral agreement is being negotiated, the U.S. may impose import restrictions if the criteria for an 'emergency' situation are satisfied. Four criteria must be met to impose import restrictions: (a) the cultural property must be in danger; (b) the other state must have taken sufficient actions to protect the cultural property; (c) the import restriction must be beneficial and not overly restrictive; and (d) there is international interest in restricting the importation of the cultural property involved (19 U.S.C. § 2602(a) (1)). Some authors consider the Act little more than an 'agreement to agree'.

the objects or the objects themselves and does not deprive living cultures of objects of ritual or ceremonial importance. [78] Others argue that because the 1970 UNESCO Convention contains such a broad, normative definition of cultural property,[79] it is only useful if state parties specify by law what national cultural property should be protected. The Convention requires signatory states to establish and up-date a list of protected property whose export would constitute an appreciable impoverishment of their national cultural heritage (Article 5).[80] The Convention's allowing signatory states unilaterally to declare their cultural property 'inalienable' and its export therefore 'illicit' has been called the 'blank check' provision by the American lawyer John Henry Merryman.[81]

Like other conventions, the 1970 UNESCO Convention is not retroactive. During negotiations, China had proposed the inclusion of the following article directly relating to restitution and return of cultural objects: 'Any state party which, when the Convention comes into force, is in possession of important cultural property, illicitly acquired, inalienable to, and inseparable from, the history and civilization of another state, shall, in the interest of international good will, endeavor to restore such property to that state.'[82] Some states feared any degree of retroactivity would cast doubt upon ownership of cultural objects within their borders in contravention of the rules of their domestic legal systems, and they made it clear that they would not participate in any Convention which included such a

[78]See Merryman, (2001), at 53–67; R.D. Abramson & S.B. Huttler, 'The Legal Response to the Illicit Movement of Cultural Property', *Law and Policy in International Business* 5 (1973), 972; P. Askerud & E. Clement, *Preventing the Illicit Traffic in Cultural Property: a Resource Handbook for the Implementation of the 1970 UNESCO Convention*, Paris: UNESCO 1997, at 7.

[79]The two major international regimes underlying the free movement of goods, the Treaty of European Communities and the World Trade Organization, both prohibit export controls on 'goods'. The European Court of Justice defines 'goods' as 'products which can be valued in money and which are capable of forming the subject of commercial transaction.' Although both regimes make an exception for restrictions 'imposed for the protection of national treasures possessing artistic, historic, or archaeological importance', neither includes a detailed definition of 'national treasures'. Judge Pierre Pescatore has held that 'exceptions from the rules barring export controls are to be strictly construed.' The term 'treasures' cannot apply to the generality of cultural objects, but only to those having unusual value because of their uniqueness and their importance to a people. See Commission v. Italy (Re Arts Treasures), Case 7 /68[1968] ECR 42; [1969] CMLR1.

[80]According to the Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods, member states of the European Communities retain the right to define their national treasures and to take the necessary measures to protect them within the European Community.

[81]Merryman (1986), at 844–845.

[82]UNESCO Doc. SHC/MD/ 5 Annex II, 10; see L.V. Prott,'Editor's Preliminary Note', in L.V. Prott (ed.), *Witnesess to History: A Compendium of Documents and Writings on the Return of Cultural Objects*, Paris: UNESCO 2009, at 13.

provision. Eventually, the retroactivity provision was rejected on the grounds the Convention was not intended to be retroactive, to the frustration of various states. [83]

2.3.1.2 The 1995 UNITROIT Convention

Because the 1970 UNESCO Convention failed to address the differences among private law systems, one their most glaring weaknesses, in 1984 UNESCO commissioned the UNIDROIT to develop as set of private law rules covering illicit trafficking in cultural objects to complement the 1970 UNESCO Convention. The final text of the 1995 UNIDROIT Convention was adopted after years of study and negotiation.[84] Although the categories of cultural objects covered by the 1970 UNESCO Convention and the 1995 UNIDROIT Convention are identical, the 1995 UNIDROIT Convention does not require cultural objects to be 'designated' as such by a state. As a result private cultural objects are protected by the 1995 UNIDROIT Convention regardless of whether they are designated as such by a state.[85]

The 1995 UNIDROIT Convention provides two distinct regimes for illicitly trafficked cultural objects.[86] The first regime treats stolen cultural objects, establishing the principle that stolen cultural objects must be returned.[87] This regime does not distinguish between public or private property or good or bad faith purchasers, the latter being determinative only in relation to the purchaser's right to compensation (Article 4). Excavated cultural objects are regarded as stolen 'when consistent with the law of the state where the excavation took place' (Article 3(2)).

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[83]Dissatisfaction was expressed at the Conference of Heads of State or Government of Non-aligned Countries at its Fourth Conference in Algiers in 1973. States found propsective controls of little utility because significant culturally significant objects were already in other countries. *Ibid*. at 12–13.

[84]L.V. Prott, 'UNESCO and Unidroit A Partnership against Trafficking in Cultural Objects', *Uniform Law Review* 1 (1996), at 59–61.

[85]*Ibid.*, at 61–62.

[86]See UNITROIT Secretariat, 'UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report', *Uniform Law Review* 2001, no. 3, at 502.

[87]The Convention counterbalances the principle of restitution of stolen cultural objects by the bona fide possessor's right to compensation for her loss of her cultural object. Compensation is subject to two prerequisites: the possessor 'neither knew nor ought reasonably to have known that the object was stolen' and the possessor 'can prove that it exercised due diligence when acquiring the object'. The notion of 'good faith' is interpreted variously in different legal systems. The Convention requires the court or competent authority to take into consideration 'all the circumstance of the acquisition' (Article 4(7)), paying particular attention to certain criteria defined largely by reference to Article 7(2)(3) of the draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables. Although compensation is to be 'fair and reasonable,' the Convention goes no further in establishing the amount of compensation, relying instead on the discretion of the courts. See *Ibid.* at 514–520.

Claims may be brought by private parties or states dispossessed of cultural objects as a consequence of theft. Thus, while the 1970 UNESCO Convention only provides that the return should be made 'through diplomatic offices,' under the 1995 UNIDROIT Convention a private owner may avail himself of the normal legal channels available in the country where the object is located in order to obtain a court order requiring the return of a stolen object. States may act in the place of a private person who cannot or does not wish to bring a claim.[88] Claims for restitution must be brought within three years from the time the claimant knew the location of the cultural object and the identity of its possessor, but special treatment is given to certain 'identified' objects.[89] The absolute statute of limitations is fifty years from the time of the theft, and states party to the Convention may declare that claims are subject to an absolute time bar of seventy-five years or such longer period as they may provide by law.[90]

The second regime treats illegally exported cultural objects.[91] Illegally exported cultural objects include not only items exported without a permit according to the law of the requesting state, but also include cultural objects temporarily exported under permit but not returned in accordance with the terms of the permit (Article 5 (3)). Although a private owner can initiate proceedings to reclaim stolen cultural objects, only states party to the Convention are entitled to order the return of an illegally exported cultural object. Because such claims are brought on the basis of a breach of public law protecting cultural heritage ((Article 5(1)), it is the state that has an interest in initiating proceedings. The state may act on its own initiative or at the request of a private owner. If the object was first stolen and then unlawfully removed to another state, a claim for restitution may be brought by the dispossessed owner.[92] Significantly, only when the illegal export of a cultural object impairs the interests protected by the Convention, or when a cultural object is determined to be of great cultural importance to the requesting state, may the court or other

[88] *Ibid.*, at 506.

[89] 'Identified' cultural objects are items forming an integral part of a particular monument or archaeological site, or items belonging to a public collection. A 'public collection' consists of a group of inventoried or otherwise identified cultural objects owned by: (a) a state party to the Convention, (b) a regional or local authority of a state party to the Convention, (c) a religious institution in a state party to the Convention, or (d) an institution that is established for an essentially cultural, educational or scientific purpose in a state party to the Convention and is recognized in that state as serving the public interest (Article 3 (4), (7)).

[90] Nine states party to the Convention had made such a declaration and introduced a longer limitation by December 1, 2011. China declares the absolute period of seventy-five years.

[91] In the absence of specific international commitments, the removal of a cultural object from a state in breach of the state's rules is not regarded by many states as an unlawful act and does not, in itself, constitute a legal obstacle to the object's acquisition. This attitude was condemned by the International Law Institute in Wiesbaden in 1975 and the 1989 Swiss Law on Private International Law was instrumental in 'softening' the inapplicability of the foreign public law. See UNITROIT Secretariat, *supra* note 86, at 524.

[92] *Ibid.*, at 526.

competent authority order its return.[93] The limitation period for the return of illegally exported objects is the same with that for restitution of stolen cultural objects, except there is no exceptional limitation system for certain 'identified' objects.

Like the 1970 UNESCO Convention, the 1995 UNITROIT Convention is not retroactive. When signing the Convention in 1996, 'China reserve[d] the right to recover the cultural relics illegally confiscated in the history'.[94] Although the 1995 UNITROIT Convention is considered the most recent and sophisticated multinational treaty on restitution because it achieves a delicate compromise between importing and exporting countries and between civil and common law jurisdictions, the Convention's sophistication does not guarantee its popularity among states. It's ratification by so few states and its rare application signal the Convention's practical failure.[95]

2.3.2 *Chinese Legislation Protecting Cultural Relics*

As of the end of 2013, pursuant to the 1970 UNESCO Convention, China has entered into Memorandum of Understanding (MOU) with nineteen states prohibiting the illicit transfer, import, and export of cultural property.[96] The SACH lists over five hundred legal and administrative instruments intended to protect cultural objects in China.[97] Significantly, legislative efforts to protect cultural relics in China date from well before the PRC's foundation.

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[93]Interests include: (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community (Article 5(3)).

[94]See Peng, L. (2012), at 73.

[95]According to Forrest, the unsatisfactory degree of ratification can be attributed to the constituent and political composition of many states. While states whose constituents seek to acquire cultural heritage are obligated to promote free trade in cultural heritage, source states seek protection of national cultural heritage by preventing any such trade whatsoever. See Forrest, *supra* note 74, at 601.

[96]Peru, India, Italy, the Philippines, Greece, Chile, Cyprus, Venezuela, the US, Australia, Turkey, Ethiopia, Egypt, Mongolia, Mexico, Colombia, Nigeria, and Switzerland. Concluded in 2009 and garnering the majority of public interest, the MOU with the US imposes import restrictions on categories of archaeological material from the Palaeolithic Period through the Tang dynasty, and monumental sculpture and wall art at least two hundred fifty years old.

[97]Adopted in 1982 and amended in 2002, the Law of PRC on Protection of Cultural Relics is the most important. The instruments include one law, five administrative regulations by the State Council, eight department regulations, six national standardizations, thirty-three industry standardizations, one hundred fifty regulatory documents, eighty provincial regulations, twenty regional regulations, one hundred sixty regional normative documents, one military regulation, accession to four international conventions, fifteen bilateral agreements. For more details, see 'There are over five hundred existing legal instruments to protect cultural relics in China', China

Faced with a series of challenges at the end of the nineteenth century, the late Qing government attempted to modernize China. Modernizing the legal system included providing legal protection for cultural heritage. In charge of the protection of historical sites and antiquities at that time, the Ministry of Interior issued the Promotional Measures on Conservation of Antiquities in 1906, requiring the regional governments to investigate all heritage sites within their administrative areas and report their findings to the Ministry.[98] The Statute on Regional Autonomy of Cities, Town and Villages promulgated in 1908 designated protection of heritage sites one of the 'autonomous affairs' (Article 5).[99] Drafted in 1909 by the Ministry of Interior and submitted to the to the Qing Court for approval, the Promotional Statute on Conservation of Antiquities defined antiquities as, among other things, stiles, stone pillars with Buddhist inscription, stone resonators, stone statues and inscriptions, ancient paintings, inscriptions on cliffs, paintings and works of calligraphy, from the Zhou and Qin dynasties to 1909 and required the provincial governments to prepare and submit to the Ministry a list of antiquities. The statute prohibited and harshly punished traffic in antiquities. Each province was required to establish museums to collect and protect cultural relics. Unfortunately the statute was never effectively implemented due to the political upheavals of the late Qing dynasty.[100]

Following the demise of the Qing dynasty, the Beiyang Government continued governmental attempts to regulate the preservation of antiquities by issuing the Grand President's Decree Restricting the Export of Antiquities in June 1914, requiring all exports of antiquities to be examined and approved by the Ministry of Interior and the Tax Bureau. Although the decree required the Tax Bureau to formulate guidelines regarding the export of antiquities to be implemented by all customs services in China, such guidelines were never formulated; instead, heavy export duties were simply imposed.[101] Promulgated in 1916, the five articles of the Provisional Regulation on the Conservation of Antiquities delineate five categories of antiquities: tombs of royals and their predecessors, places of interest, works of art, precious plants and other kinds of relics which were to be inventoried and conserved. Movable antiquities owned or discovered by individuals were to be

(Footnote 97 continued)

News, December 11, 2012, viewed April 2, 2013, http://www.chinanews.com/cul/2012/12-11/4400271.shtml.

[98]See Peng, L. (2012), at 77; Guan Xiaohong, 'The Ministry of Education in the Late Qing Dynasty and Modern Cultural Institutions' (in Chinese), *Journal of Sun Yatsen University (Social Science Edition)* 40 (2000), no. 2, at 81.

[99]Zhang Song, 'Legal History of Protecting Cultural Heritage in China' (in Chinese), *China Ancient City* (2009), no. 3, at 27.

[100]See Peng, L. (2012), at 77–78.

[101]Ma Shuhua, *Protection of Cultural Relics during the Period of Republic of China*, (in Chinese) [Dissertation], Jinan: Shangdong Normal University 2000, at 7–8.

purchased and conserved by public institutions in case the objects could be purchased by foreigners and exported abroad (Articles 3 and 5).[102]

On September 13, 1928, the Chinese Ministry of Interior promulgated Regulations Governing the Preservation of Scenic Resorts, Ancient Remains and Relics. Established in the same year, the Central Commission for the Preservation of Antiquities played an important role in the preservation of antiquities at that time.[103] The Commission sent telegrams to cities all over China requiring municipal authorities to stop all excavations by foreign explorers.[104] On June 2, 1930, the Nationalist Government promulgated the Law on the Preservation of Antiquities governing the preservation, ownership, excavation, circulation and export of antiquities.[105] Regulations implementing the law were promulgated throughout the 1930s.[106]

2.3.2.1 Rules for Archaeological Excavation

The 1930 Law on the Preservation of Antiquities led to more effective control of excavations. The law declared national ownership of all antiquities buried underground or exposed on the ground and required persons discovering any antiquities

[102]The President of the Republic of China issued a presidential decree on the restriction of export control of antiquities in 1914. See Ma, S., *ibid.* at 7–8; Peng, L.(2012), at 78.

[103]Established in April 1928 as the successor to the Chinese Association of Academic Organizations, the Association was intended to stop explorations by Swedish explorer, Sven Hedin. Following extensive negotiations, the Association and the exploration team signed a detailed cooperation agreement defending China's interest. See Luo Guihuan, 'As regards the Founding and Significance of the Central Committee for the Preservation of Antiquities in the Early 20th Century', (in Chinese), *The Chinese Journal for the History of Science and Technology* 27 (2006), no. 2, at 137–139.

[104]Chinese authorities intercepted eighty-seven cartons of antiquities collected by the American expedition team led by Roy Chapman Andres from the Gobi Desert and Mongolia. The items included many fossilized dinosaur eggs and ancient animal specimens. On October 20, 1928, representatives from China and the US reached an agreement pursuant to which all historical cultural relics were to remain in China; fossils of vertebrate animals were to be sent to the Museum of Natural History in New York for research, two complete sets of which were to be returned to China following the research; fossils of invertebrate animals were to be researched in China, and one specimen would be sent to New York; and the other items were divided equally between the two parties. See Luo, G., *ibid.*, at 139–140; Ma, S., *supra* note 101, at 27–28.

[105]The categories of antiquities provided include those related to archaeology, science or history, paleontology and other cultures (Article 1). See Hsiang-yu Huang, 'Background Analysis of the Birth of Legalization of Antiques Preservation (1911–1930)' (in Chinese), Journal of the National History Academy, December 2012,; Ma, S., *ibid*. at 22–26.

[106]The regulations include: Implementation of the Antiquities Preservation Law, Rules on Excavation of Antiquities, Rules on Export Permit for Antiquities, Rules on Excavation of Antiquities by Foreign Academic Institutes and Individuals, Provisional Scope and Species of Antiquities, Rules on Encouragement and Reward Respecting Antiquities and Measures of Conservation of Antiquities in Unusual Times. See Ma, S., *ibid.*, at 22–26.

to report the discovery to the government in return for a reward. Failure to report a discovery resulted in the discoverer being punished as a thief (Article 7). Excavations of antiquities required permits from both the Ministries of Education and Interior and excavations done without permits were deemed theft (Article 8). In addition, excavations were to be supervised by supervisors appointed by the Central Commission for the Preservation of Antiquities (Article 11).[107]

When Stein entered China for his fourth expedition in 1930, on behalf of the Central Commission for the Preservation of Antiquities, nineteen Chinese professors, heads of colleges and directors of research institutes asked Stein's sponsors at Harvard University, the Archaeological Survey of India, and the British Museum to consider 'whether in the interest of science and international good feeling they should continue their support promised to Sir Aurel Stein'.[108] The experts claimed: Stein intended to take archaeological objects from Xinjiang and had obtained his permit under false pretenses; the wholesale smuggling of the Dunhuang manuscripts was effectively 'commercial vandalism'; and other countries had enacted laws prohibiting the unauthorized excavation and the export of archaeological treasures. They said the Chinese government had promulgated just such a law in 1930, and they believed they had the 'sympathy of all true students of scientific archaeology all over the world' in opposing any attempt by Stein or other foreigners to excavate under false pretenses and smuggle historical objects out of China.[109] Unlike his previous expeditions, Stein's activities during the fourth expedition were kept under strict surveillance by the Chinese government. The Chinese Ministry of Interior sent an extra urgent telegram to Jin Shuren, the provincial director of Xinjiang, on September 21, 1930, prohibiting Stein from conducting archaeological excavations in Xinjiang and ordered Jin Shuren to observe Stein's activities closely.[110] Jin Shuren sent decrees to municipalities in Xinjiang to implement the order from the central government.[111] When Stein and his followers engaged in archaeological excavations, the Chinese Ministry of Interior ordered the Ministry of

[107]The Law of PRC on Protection of Cultural Relics declares that all cultural relics remaining underground, in China's waters, or in collections of state-owned intuitions are owned by the state, as are all sites of ancient ruins, ancient tombs, temples, other monuments, ancient architecture and stone carvings designated for protection by the state (Article 5). State-owned cultural relics may not be donated, rented or sold to other organizations or individuals (Article 44). In order to protect cultural relics within China, the law imposes harsh criminal sanctions (including the death penalty until 2011) upon the theft, robbery or smuggling of cultural relics. For more regarding the PRC's law on cultural relics in English, see S. Gruber, 'Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law', *Asia Pacific Journal of Environmental Law* 10 (2007), no. 3–4, pp. 272–276; J.D. Murphy, 'An Annotated Chronological Index of People's Republic of China Statutory and Other Materials Relating to Cultural Property', *International Journal of Cultural Property* 3 (1994), no. 1, pp. 159–167.

[108]Quoted from A. Walker, *Aurel Stein: Pioneer of the Silk Road,* London: Murray 1995, at 287.

[109]*Ibid.*

[110]Xu Xinjiang, Tong Lu, and others (ed.), *Modern Historical Materials about Foreign Explorers in Xinjiang*, (in Chinese), Urumqi: Xinjiang Meishu Sheying Chubanshe 2001, at 134–135.

[111]*Ibid.*, at 134–153.

Foreign Affairs to revoke Stein's visa and deport Stein.[112] Stein was deported on May 18, 1931. On his departure, all the antiquities found upon a search of his luggage were detained by the Chinese authorities.[113]

The Rules on Excavation of Antiquities and the Rules on Excavation of Antiquities by Foreign Academic Institutes and Individuals provided more detailed procedures and conditions for excavations in China. Pursuant to the rules, only academic institutes under the direct control of the central or provincial governments were allowed to conduct excavations. If an excavation required facilities or support from foreign academic institutes or individuals, the Chinese academic institute was required to report such requirement to the Central Commission for the Preservation of Antiquities. Without the approval of the Central Commission, foreign academic institutes or individuals were prohibited from participating in the excavation. Marking the beginning of the standardization of archaeological excavations in China, the first excavation permit was issued for the archaeological excavation at the ruins of Yin-xu by the Ministries of Education and Interior in 1935.[114] These efforts halted the previously rampant excavations in China by foreign explorers. There was one excavation in northwest China by foreign explorers in the 1920s, and no such excavations in the 1930s.[115]

2.3.2.2 Antiquities Export Control

Following the Beiyang Government's attempt to reduce the export of antiquities pursuant to the Presidential Decree in 1914, more regulations regarding export of antiquities were promulgated, including the 1916 Provisional Regulation on the Conservation of Antiquities, the 1924 Act on Protecting Ancient Books, Antiquities, and Historical Sites, the 1930 Law on the Preservation of Antiquities and the 1935 Rules on Export Permits for Antiquities.[116] Not everyone welcomed antiquities export control. Various individuals even requested the Tax Bureau to issue them tax exemptions for the export of antiquities, but the Tax Bureau refused on the ground that such tax exemptions violated the 1916 Promotional Regulation on Conversation of Antiquities.[117] The Tax Bureau did request the Ministry of Interior to specify the

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[112] *Ibid.*, at 143.

[113] According to archival documents, all of Stein's acquisitions were temporarily kept in the British Consulate in Kashi before being handed over to the Chinese authorities after negotiations. Stein took photographs of the objects, which photographs are now in the British Library. *Ibid.*, at 27.

[114] See Li Ji, 'The First License of Archeological Excavation issued by Republic of China' (in Chinese), in: National Museum of History (ed.), *Bao Zunpeng Xiansheng Jinian Wenji,* Taipei: National Museum of History 1971, at 69–70.

[115] From 1850 to 1920, each decade respectively recoded five, twelve, twenty-eight, twenty-two, twenty-two, forty-five and sixteen excavations in northwest China. For more information, see Huang, H., *supra* note 105, at 9–18.

[116] Quoted from Ma, S., supra note 101, at 8.

[117] *Ibid.*

exportable and non-exportable antiquities. In response, the Ministry of Interior stressed that because antiquities embodied China's culture there was no reason to promote the export of antiquities, concluding that in principle, all export of antiquities should be prohibited. As to the categorization of antiquities, the Ministry of Interior distinguished antiquities from general goods rather than distinguishing exportable antiquities from the non-exportable antiquities.[118] In 1927, the Beiyang Government issued another Decree of the Grand President on the prohibition of the export of antiquities.[119] When the 1930 Law on the Preservation of Antiquities was promulgated, it was established that 'the circulation of antiquities shall be limited within China.' Antiquities could only be exported for research purposes, which were to be jointly approved by the Ministries of Education and Interior. Exported antiquities were to be returned to China within two years (Article 13). The 1935 Rules on Export Permits for Antiquities provided the detailed procedures for obtaining export permits.

Under the existing law of the PRC, all cultural relics extant as of or prior to 1911 are not subject to exportation, except for exhibition or upon approval by the State Council.[120]

2.4 Soft Laws Protecting Cultural Objects

In addition to the two legal frameworks discussed above, in recent decades some ethical strictures concerning the circulation, restitution and return of cultural objects have been developed. The development of such ethical strictures is often described as "soft law-making."[121] According to Lorenzo Casini, because 'traditional international law instruments do not seem to ensure an adequate level of protection for cultural heritage,' 'securing such protection requires procedures, norms, and

[118] *Ibid.*

[119] See *ibid.*, at 8–13.

[120] For more details, see Examining Standards for Export of Cultural Relics issued in 2007. This documents also lists sixteen categories of cultural objects which are prohibited from being exported: fossilized objects, materials related to architecture; works of paintings and calligraphy before 1911 and some items between 1911 and 1949, rubbings before 1949, statues, and others.

[121] Although the concept of soft law has existed for years, scholars have not reached a consensus on why states use soft law or whether 'soft law' is a coherent analytic category. See A.T. Guzman & T.L. Meyer, 'International Soft Law', *Journal of Legal Analysis* 2 (2010), no. 1, at 171; Lorenzo Casini, "Italian Hours': The Globalization of Cultural Property Law', *International Journal of Constitutional Law* 9 (2011), no. 2, at 369; M. Barelli, 'The Role of Soft Law in the International Legal System: the Case of the United Nations Declaration on the Rights of Indigenous People', *International and Comparative Law Quarterly* 8 (2009), no. 4, at 960; K. Siehr, *International Art Trade and the Law* (Recueil des Cours 243), Leiden: Nijhoff Online 1993), DOI: 10.1163/ej.9780792332831.009-41810.1163/ej.9780792332831.009-292, at 251.

standards [to be] produced by international organizations' such as UNESCO and ICOM.[122] For Casini, a comprehensive global regulatory regime to complement the law of cultural property has yet to be achieved.[123] Alessandro Chechi agrees, stating: 'Cultural heritage has a variety of emotional and symbolic meanings that can be described, but not fully captured, in legal terms…. Indeed, the various interests associated with cultural assets could be better accommodated through a shift from adversarial processes and the strict application of positive law towards a model that puts greater emphasis on information exchange, consultation, consensus-building, and sharing.'[124] Because I agree that a positive legal regime protecting cultural heritage has yet to be achieved and that soft law-making likely reflects the trends in law-making regarding cultural objects, I next treat two aspects of soft law-making respecting cultural objects: ethical guidelines combating illicit trafficking in cultural objects and the ethics of repatriating cultural objects.

2.4.1 *Ethical Guidelines Regarding Illicit Trafficking in Cultural Objects*

Following the adoption of the 1970 UNESCO Convention, museums, art dealers and art historians embraced ethical guidelines regarding their acquisition, trading and publication practices. Despite their not being legally binding, some such ethical codes have been quite effective.[125] In the archaeological community, institutions like the World Archaeological Congress and Archaeological Institute of America have adopted ethical guidelines aimed at fighting against the illicit trafficking in cultural objects.[126] Museum associations have made similar attempts to combat illicit trafficking in cultural objects. The most well-known ethical guidelines are found in the ICOM Code of Ethics for Museums. The code bars member museums from acquiring cultural objects without full provenance even if positive law does

[122]Casini, *ibid*., at 369.

[123]*Ibid.*

[124]A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford: Oxford University Press 2014, at 4.

[125]Because they are not legally binding, although they may influence the elaboration of a legal rule or even articulate a principle identical to the content of a specific legal instrument, ethical guidelines do not generally create legal sanctions per se, unless a legal instrument expressly stipulates consequences.

[126]Adopted in 1990, The World Archaeological Congress's First Code of Ethics sets forth the obligation of archeology and heritage management professionals to recognize of the importance of indigenous cultural heritage (sites, places, objects, artifacts, human remains, etc.) to indigenous peoples and that such cultural heritage rightfully belongs to the indigenous people. Also approved in 1990, The Archaeological Institute of America's Code of Ethics requires its members to refuse to trade in undocumented antiquities and refrain from activities that enhance the commercial values of objects. Members are also required to inform the appropriate authorities of threats to or plunder of archaeological sites and the illegal import or export of archaeological material.

not forbid their acquisition.[127] Similar ethical guidelines are found in other museum associations such as the Department for Culture, Media and Sport's Illicit Trade Advisory Panel in the UK, and the Association of Art Museum Directors in the US, Canada and Mexico.[128] Ethical guidelines for art dealers also prohibit their members from trading in objects of dubious provenance. For instance, the Code of Practice for the Control of International Trading in Works of Art prohibits members from to importing, exporting or transfering ownership of stolen or illegally exported objects or objects acquired dishonestly or illegally from excavation sites or monuments.[129] Similarly, the International Code of Ethics for Dealers provides: 'Professional traders in cultural property will not import, export, or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported'.[130]

The Principle of Due Diligence

Used throughout the ethical codes discussed above, in cases involving recovery of stolen or looted cultural property, "due diligence" is required in two situations: (1) a buyer's investigation of suspicious circumstances; and (2) a victim's search for his stolen property.[131]

In the first situation, due diligence relates to a buyer's obligation to verify the provenance of an object, that is, a buyer must make a legitimate effort to ascertain

[127]Created in 1946 by and for museum professionals, ICOM is a network of almost thirty thousand members of the global museum community. Adopted in 1984 and revised in 2004, the ICOM Code of Ethics seeks to provide a 'global minimum standard' upon which more specific or rigorous requirements may be built.

[128]In 2004 The Department for Culture, Media and Sport's Illicit Trade Advisory Panel issued ethical guidelines to assist museums, libraries and archives when considering the acquisition of cultural property originating outside the UK. Pursuant to the guidelines, museums should acquire and borrow an item only if its provenance is legally and ethically sound. Museums, libraries and archives should reject an item if, after undertaking due diligence, there is any suspicion about the item or its surrounding circumstances. In 2004 the Association of Art Museum Directors promulgated guidelines advising members not to acquire objects without clear proof the object was outside the US prior to 1970 or that it was legally exported from another country after 1970. See Department for Culture, Media and Sport (DCMS), *Combating Illicit Trade: Due Diligence Guidelines for Museums, Libraries and Archives on Collecting and Borrowing Cultural Material,* London: DCMS 2005.

[129]The terms of this Code were translated into French and adopted by the Confédération Internationale des Négociants en Oeuvres d'Art (CINOA) at Florence on September 25, 1987, and amended in Stockholm in 1998 and in New York in 2005. Established in 1935 for dealers, CINOA represents five thousand dealers from thirty-two leading national and international member associations in twenty-two countries.

[130]The International Code of Ethics for Dealers in Cultural Property was prepared by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation and endorsed by the UNESCO General Conference in 1999.

[131]See L.F. Pinkerton, 'Due Diligence in Fine Art Transactions', *Case Western Reserve Journal of International Law* 22 (1990), no. 1, at 1.

the veracity and accuracy of all information supplied, and uncover additional data about the history of the object, to fully explain the object's history of ownership. The goal of performing an investigation with due diligence is to fill in any gaps in the object's published provenance and to ascertain whether the object's current owner holds the proper title.[132] A guideline issued in the UK provides that due diligence involves: (1) examining the item; (2) considering the type of item and likely place of origin; (3) taking expert advice regarding the item and its provenance; (4) determining whether the item was lawfully exported to the UK; and (5) evaluating the account of the item's ownership given by its vendor or donor.[133] Although exercising and demonstrating due diligence in investigating the provenance of cultural objects has become a necessary element of acquiring a valid title to cultural objects, not all cultural objects are registered or otherwise subject to a public recording system. Not all cultural objects have complete, unbroken records of ownership, and most cultural objects have gaps in their provenance. Some commentators have criticized the due diligence requirements of ethical guidelines, arguing that museums should be able to acquire unprovenanced objects unless there is clear and convincing evidence such objects were looted or are of questionable status as to legal title.[134] Cuno argues that a museum should be able to acquire an antiquity without having all the ownership and provenance history as long as certain procedures are followed.[135]

In the second situation, due diligence involves a victim's obligation to search for stolen objects and an owner's obligation to verify the provenance of owned cultural objects (owners are not necessarily individual collectors, they include individuals who have inherited perhaps only one particularly significant cultural item, a gallery, a corporation, a church, a museum, a historic house, or even a cemetery).[136] First of all, a victim must report a theft to law-enforcement and other agencies. Such reporting is essential to facilitating buyers' exercising their due diligence by their researching a proposed acquisition in available databases and registries of stolen and missing items.[137] Victims are also obligated to make a diligent search for its stolen objects although even a diligent search may not save a victim's claim from the effects of the passage of time.[138]

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[132]*Ibid.*; M.J. Masurovsky, 'Why is Contextual Analysis needed In The Resolution of Cultural Heritage Litigation Cases?', *CLE Program, The Center for Jewish History*, October 11, 2013.

[133]DCMS, *supra* note 128, at 8–10.

[134]L.M. Kaye, 'Provenance Research: Litigation and the Responsibility of Museums', in J.A.R. Nafziger & A.M. Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce,* Leiden: Nijhoff 2009, at 405.

[135]J.B. Cuno, 'Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: U.S. Art Museums and Cultural Property', *Connecticut Journal of International Law* 16 (2001), no. 2, at 189–196.

[136]A. Kisluk, 'Forum: Stolen Art and 'Due Diligence'', *Curator: The Museum Journal* 41 (1998), no. 3, at 162.

[137]*Ibid.*, at 164.

[138]Pinkerton, *supra* note 131, at 10.

2.4.2 *Ethics of Restitution of Cultural Objects*

The last few decades have witnessed increasing scholarly debate and public concern regarding claims for restitution and return of cultural objects, most notably restitution of Nazi looted art and claims by formerly colonized or occupied countries. Proving the legitimacy of the desire for restitution and return of cultural objects, a number of resolutions and principles have been adopted to address these concerns.

2.4.2.1 Restitution of Nazi Looted Art

The campaign to return Nazi looted art began in the early 1990s with the publication of an abundance of scholarly and journalistic research, resulting in increasing popular awareness of both the extent and the brutality of the Nazis' art spoliation.[139] On December 3, 1998, the international community convened the Washington Conference on Holocaust-Era Assets where the participating nations developed non-binding principles to assist in resolving issues relating to Nazi looted art. Now known as the Washington Principles, they provide minimum conditions and starting points for a restitution policy to achieve 'a just and fair solution.' Unfortunately, the Washington Principles fail to specify what solutions qualify as 'just and fair.'[140]

On November 4, 1999, The Parliamentary Assembly of the Council of Europe adopted Resolution 1205 on Looted Jewish Cultural Property, asserting that restoring such cultural property to its original institutions, communities, nations or individual owners or their heirs is a significant aspect of returning Jewish culture to its rightful place in Europe. The Resolution called for 'the organization of a European conference, further to that held in Washington on the Holocaust-era assets, with special reference to the return of cultural property and the relevant legislative reform'.[141] In response to the Resolution, in October 2000, Lithuania hosted a conference. Adopted at the conclusion of the conference's plenary session, the Vilnius Forum was a significant first step in calling on all participating States 'to take all reasonable measures' to implement Resolution 1205.[142] Three major

[139]Tensions during the Cold War years left little room for introspection into, or discussion about, Germany's wartime past. The collapse of communism and the disintegration of the Eastern Bloc played an important part in opening up the historical information on trophy art, providing key evidence for a great deal of the current title disputes. B. Demarsin, 'Let's Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law', *Brooklyn Journal International Law* 37 (2011), no. 1, at 122–123.

[140]*Ibid.* at 138; T.I. Oost, *In an Effort to do Justice? Restitution Policies and the Washington Principles,* Amsterdam: University of Amsterdam 2012, at 3, 17.

[141]See P.J. O'Keefe, 'A Comparison of the Washington and Vilnius Principles and Resolution 1205', in: L.V. Prott (ed.), *Witnesses to History: A Compendium of Documents and Writings on the Return of Cultural Objects*, Paris: UNESCO 2009, at 158–159.

[142]*Ibid.,* at 158.

themes ran through the forum: access to information; modalities of restitution, particularly regarding property with no heirs; and restitution implementation procedures.[143] To the extent valuable information was exchanged and advances were made in providing information services, the Vilnius Forum was a success.[144]

In June 2009, the Czech Republic hosted the Prague Conference on Holocaust Era Assets. Focusing on immovables, Nazi-looted art, Holocaust education and remembrance, archival access, and the recovery of Judaica, the Prague Conference closed with the Terezin Declaration's endorsement by the forty-six participating governments.[145] The Terezin Declaration reaffirms the Washington Principles and urges all stakeholders to ensure that their legal systems or alternative processes facilitate just and fair solutions. At the national level, some countries like Austria, the Czech Republic, France, The Netherlands, Russia and the U.K. have adopted explicit policies on restitution of Nazi-looted cultural assets. Most countries have demonstrated a willingness to make a legitimate effort at restitution.[146]

Efforts toward the restitution of Nazi-looted art are significant in two ways; they recognize the need to provide "transitional justice" to the victims of WWII[147] and, as stated in Resolution 1205, they enable the restoration of Jewish culture to its proper place in Europe and its culture.

2.4.2.2 General Assembly and UNESCO Resolutions

During the second half of the twentieth century, various UN organizations have focused their attention on cultural heritage issues.[148] The UN General Assembly

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[143] *Ibid.*, at 159.

[144] *Ibid.*, at 158–162.

[145] For the declaration, see *Holocaust Era Assets conference,* June 30, 2009, viewed October 25, 2012, http://www.holocausteraassets.eu/program/conference-proceedings/declarations/.

[146] For more information regarding the national practices on the restitution of Nazi looted art, see Oost *supra* note 140.

[147] The UN defines 'transitional justice' as 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'. See UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, para 8.

[148] The Preamble to its charter states that one of the UN's objects is to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.' Encouraging and fostering the development of international law to regulate international relations has been a major objective of the United Nations since its inception. According to Rosalyn Higgins, the process by which the content of norms is clarified or developed within UN organs include: (a) decisions which UN organs take concerning their own jurisdiction and competence, (b) resolutions declaratory of existing law, (c) resolutions confirmatory of existing law, (d) claims within an area of law generally agreed upon, (e) resolutions recommending the adoption of new rules of law, (f) decisions applying specific rules to particular situations, and (g) rules internal to the organizations. See R. Higgins, 'The Development of International Law by the Political Organs of the United Nations', *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)* 59 (1965), at 117–123.

and UNESCO have become the primary forums for countries of origin to demand the return of their cultural objects.[149] During the 1960s, states recently released from colonial rule lodged increasingly strong demands at the UN for the recovery of their cultural objects. From and after the 1970s, the UN General Assembly has adopted a series of resolutions addressing restitution or return of cultural property. Sponsored in 1973 by twelve African states (A/RES/3187(XXVIII)), 'Restitution of works of art to countries victims of expropriation' deplores 'the wholesale removal, virtually without payment, of objets d' art from one country to another, frequently as a result of colonial or foreign occupation', and affirms that the prompt restitution to a country of its cultural property without charge is calculated to strengthen international cooperation inasmuch it constitutes 'just reparation for damage done.'

As a specialized agency of the UN, UNESCO leads international efforts to safeguard tangible and intangible cultural heritage. UNESCO has contributed to the development and clarification of norms regarding cultural heritage law by drafting and promoting international multilateral conventions.[150] In 1978, the UNESCO Director-General made a Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It, stating that cultural heritage is one of the most noble incarnations of a people's genius, bearing witness to the history of a culture and nation whose spirit they perpetuate and renew. According to the Plea, restitution of the cultural heritage will help people to greater self-knowledge as well as enable others to understand them better. The Plea calls for the return of cultural heritage to people who have created it.[151] The Plea is regarded as providing ethical basis for the return of cultural objects to their countries or origin. Also in 1978, UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural

[149]Although its efforts have not always been clearly recognized or universally embraced, since the late 1940 s the UN General Assembly has attempted to modernize international law. The General Assembly's obligation to treat legal matters and participate in the formulation of international law can be found in Articles 10, 11, and 13 of its Charter. In addition to appointing ad hoc special committees, the General Assembly has utilized the Six (Legal) Committees of the General Assembly and the International Law Commission to encourage the betterment of international law. See C.C. Joyner, 'U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation', *California Western International Law Journa*l 11, (1981), no. 3, 448–450.

[150]UNESCO has drafted and promoted the 1954 Hague Convention, the 1970 UNESCO Convention, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the 2001 Convention for the Protection of the Underwater Cultural Heritage, the 2003 Convention for the Safeguarding of Intangible Cultural Heritage, and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

[151]The Plea also acknowledges that people seeking return of cultural heritage "know, of course, that art is for the world and are aware of the fact that this art, which tells the story of their past and shows what they really are, does not speak to them alone. They are happy that men and women elsewhere can study and admire the work of their ancestors. They also realize that certain works of art have for too long played too intimate a part in the history of the country to which they were taken for the symbols linking them with that country to be denied, and for the roots they have put down to be severed.' See A.M. M'Bow, 'A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created it,' *UNESCO* 7 June 1978.

Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) to facilitate the resolution of restitution claims for objects removed prior to the implementation of the 1970 UNESCO Convention.[152] UNESCO's most important arm in the area of return and restitution of property to its country of origin, in its advisory role the ICPRCP provides a framework for discussion and negotiation although its recommendations concerning inter-State disputes are not legally binding. The ICPRCP's enabling statute provides that a return request can 'be made for any cultural property which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people' (Article 3 (2)). As does the 1970 UNESCO Convention, the ICPRCP privileges the state. Only states that are UNESCO members or associate members may assert a claim or sit on the ICPRCP.[153] The ICPRCP has helped settle a number of claims. The dispute over the Parthenon Marbles between Greece and UK is pending before the ICPRCP. The parties have been unable to agree whether the marbles were illicitly exported by Lord Elgin.[154] According to Prott, the establishment of the ICPRCP and the Director-General's appeal are important 'because both, on the surface, apply equally to cultural heritage items taken during hostilities and those taken during colonial times. Whatever the legality of the original taking, the emphasis here rests on allowing each country an appropriate representation of its own national cultural heritage—a desire with which, it must be said, many museum curators have sympathy'.[155]

2.5 Chapter Conclusion

The broad acceptance of the 1954 Hague Convention and the 1970 UNESCO Convention signals the global community's awareness of the need for protection of cultural heritage. Although the notion that 'to the victors go the spoils' was previously recognized throughout human history, it has been universally established that destruction and confiscation of cultural objects are illegal in the event of armed

[152]The twenty-two Committee members are elected from among the UNESCO Member States at elections held every two years during the General Conference.

[153]Vrdoljak (2006), at 214.

[154]The Committee successfully concluded the six following cases through mediation or bilateral agreement where international conventions were deemed inapplicable: Germany and Turkey regarding the Bogazkoy Sphinx; Barbier-Mueller Museum and the United Republic of Tanzania regarding a Makonde Mask, the U.S. and Thailand regarding Phra Narai; the German Democratic Republic and Turkey regarding seven thousand Bogazkoy cuneiform tablets; the Cincinnati Art Museum and Jordan regarding parts of the sandstone panel of Tyche; and Italy and Ecuador regarding twelve thousand pre-Columbian objects. The dispute between the U.K. and Greece regarding the Parthenon Marbles, and the dispute between Iran and Belgium regarding archaeological objects from the Necropolis of Khurvin are pending before the Committee. Most of the successful resolutions followed the 1970 UNESCO Convention.

[155]Prott, *supra* note 82, at 15.

conflict, and looted cultural objects should be returned to their rightful owners. Although combating illicit traffic in cultural objects has been identified by the international community as a worthy objective, due to differences between domestic legal regimes, especially as they relate to illegally exported cultural objects, disagreement remains regarding the definition of 'illicit traffic.' In addition to international conventions, even though they are of no legally binding effect, soft-law instruments are playing a vital role in the protection of cultural objects. The ethical guidelines adopted by professional associations to deal with cultural objects, the practices surrounding restitution of Nazi-looted art, and the resolutions adopted by UN organs are of normative value in practice insofar as they reflect developing trends in international law.

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