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# ANALYSING THE LEGAL FRAMEWORK AND GAPS IN ENFORCEMENT AGAINST TRAFFICKING IN CULTURAL PROPERTY

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## ABSTRACT

Illicit trading of cultural properties is a rising global issue that threatens national heritage, fuels organized crime, and deprives communities of their historically possessed artifacts. This cultural property trafficking causes the illegal import and export of cultural artifacts, leaving behind economic, social, cultural, and moral dilemmas for the present and the coming generations. The illicit trafficking causes loss, destruction, and theft of invaluable items that cannot be replaced. While international and national laws exist to combat the practice of illegal trade, there remain high challenges in the enforcement of such laws. This paper analyzes the existing legal frameworks and highlights the weaknesses in the enforcement against trafficking in cultural property.

The paper delves into important international agreements and conventions to understand the rising problem of cultural heritage crimes. Alongside it studies the Indian approach towards the safeguarding of cultural property and the laws enacted by India. The case studies and the real-world examples further elaborate the need for stringent laws in domestic and international legal frameworks. It studies the challenges in properly enforcing these laws and proposes modern-day policies and measures to assist in the protection of cultural artifacts, highlighting the need for an effective and unified approach to prevent the illicit trade of such historically significant artifacts.

**Keywords:** Cultural Heritage, Illicit Trafficking, Legal Frameworks, International agreements, case studies.

## INTRODUCTION

Concerns regarding the protection of cultural property arise due to two main reasons: firstly, the destruction of cultural properties and secondly, illicit trading of cultural properties. These concerns are the result of actions committed by smugglers. For example, Subhas Kapoor, who is a well-known New York antique dealer, was arrested in 2011 for smuggling ancient Indian art in the USA in exchange for more than US \$ 100 million since 2008.<sup>1</sup> Among these, 200 artifacts were returned and officially celebrated between President Barack Obama and the Indian Prime Minister, Narendra Modi.<sup>2</sup> Similar examples of destruction and trafficking of cultural property exist around the globe: the destruction of the Museum in Mosul and detonation of an ancient Palmyra, which was video-recorded and transmitted worldwide only to spread the feeling of disgust; the loss of cultural antiquities due to the Syrian domestic war.<sup>3</sup> And many such examples can be studied. To further understand the rise in such illicit trading, it is important to understand the meaning of “trafficking in cultural property”.

The Cambridge dictionary defines the term ‘trafficking’ as ‘the act of buying or selling goods illegally’. The term ‘cultural property’ means ‘property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.’<sup>4</sup> Cultural property includes both movable and immovable significant cultural objects, including natural and manmade objects, such as paintings and buildings, as well as intangible cultural expressions like music and rituals.<sup>5</sup>

1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict “irrespective of origin or ownership” as:

“(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest;

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<sup>1</sup> S. Calvani, Frequency and Figures of Organized Crime in Art and Antiquities, in: S. Manacorda (ed.), Organised Crime in Art and Antiquities, ISPAC, Milano 2009, p. 29

<sup>2</sup> A. Daye, U.S. Returns \$100 Million of Stolen Artifacts to India, 8 June 2016, <http://edition.cnn.com/2016/06/07/us/stolen-artifacts-returned-india/index.html> [accessed: 20.11.2017].

<sup>3</sup> M. Lostal, Syria’s World Cultural Heritage and Individual Criminal Responsibility, “International Review of Law” 2015, Vol. 3, <http://dx.doi.org/10.5339/irl.2015.3>

<sup>4</sup> What is cultural property? | Cultural goods | Information and Heritage Inspectorate

<sup>5</sup> Luthenhaus, R. (2012). Cultural Property: A Legal Research Guide. Spinelli's Law Library Reference Shelf, 61.

works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as centres containing monuments.”<sup>6</sup>

Cultural property and cultural heritage are both different in meaning and scope.<sup>7</sup> Such property, which is believed to be part of the patrimony of humankind, is considered cultural heritage. This has resulted in cultural property being defined more broadly than cultural heritage.<sup>8</sup> Cultural property includes tangible heritage items such as monuments, artifacts, and works of art that hold cultural, historical, or archaeological significance.

The 1954 Hague Convention, which is the first convention to introduce the term ‘cultural property’, defined it as ‘cultural goods related to architecture, history, art, archaeology, religion, and science.’<sup>9</sup> However, this definition includes natural heritage from its ambit as provided in the drafting notes.

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects has further provided that “cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.”<sup>10</sup>

So when combined, ‘the trafficking in cultural property’ means ‘the act of buying or selling of such property which is designated by each state as being of importance for archaeology, prehistory, history, literature, art or science, which are of great importance to the cultural heritage people and which may include “theft from cultural heritage institutions or private

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<sup>6</sup> Art. 1 of 1954 Hague Convention for the Protection of Cultural Property

<sup>7</sup> Id.

<sup>8</sup> Id at 2.

<sup>9</sup> Pastore, C. G. (2009). Cultural Heritage "Protection of the Concept and Profiles". *Journal of Art Crime*, 2.

<sup>10</sup> Art. 2 of 1995 UNIDROIT Convention On Stolen Or Illegally Exported Cultural Objects

collections”<sup>11</sup>, “looting of archaeological sites”<sup>12</sup>, “displacement of artefacts due to war”<sup>13</sup> and such other acts that leave an impact on the “memory, identity and future of peoples”<sup>14</sup>.

The protection of cultural property becomes significant as it helps in the sustainable development of a particular culture, protects the history of the culture, connects the people to their past through a tangible means, protects their spiritual identity, and preserves the dignity of the victims of armed conflict and communities. Due to industrialization, rapid urbanization, poverty, technological advancements, war, and unlawful excavations, cultural properties are exposed to severe threats. To tackle this, a global agenda has become necessary for a unified action against illicit smuggling and the trade of cultural artifacts. Although respective countries take many steps to safeguard their cultural heritage, all such laws should be uniform to prevent the countries from fighting against each other rather than fighting against the same cause.

## INTERNATIONAL LEGAL FRAMEWORK

Trafficking in cultural property is a transnational issue as thieves and smugglers exploit legal differences between countries to enhance their profits and minimize the risk of apprehension. Stolen or illicitly obtained artifacts are frequently transported to jurisdictions that facilitate concealment from customs, allow for the laundering of questionable titles, and enable sale to private collectors, institutions, or galleries.<sup>15</sup>

### Early developments:

Lieber Code of 1863 is the earliest law that deals with ‘the protection of museums of the fine arts, works of art, libraries, and collections.’ It explicitly states,

“Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”<sup>16</sup>

“If such works of art, libraries, collections, or instruments belonging to a hostile nation or

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<sup>11</sup> Cultural Property - Transnational Alliance to Combat Illicit Trade

<sup>12</sup> Id

<sup>13</sup> Id

<sup>14</sup> TCP brief

<sup>15</sup> The Nicosia Convention: A Global Treaty to Fight Cultural Property Crimes | ASIL

<sup>16</sup> Art. 35 of the Lieber Code

government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they 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.”<sup>17</sup>

As per Article 27 of the Regulations annexed to Hague Convention IV of 1907, protection should be given to ‘buildings dedicated to religion, art, science, or charitable purposes, historic monuments’. Similar protection has been acknowledged in Article 53 of Protocol I and Article 16 of Protocol II (1977) of the 1949 Geneva Conventions that prohibits “acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”

The 1954 Hague Convention, the first convention to define the term “cultural property”, was also created to look into the destruction of cultural heritage during the 2<sup>nd</sup> World War.

### **Growth Of International Legal Instruments:**

In 1945, UNESCO was founded to work on the conservation of culture and assist the member states to implement laws in the protection of cultural heritage and led to the formation of Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) as the first international response against the trafficking of cultural property between 1960s and early 1970s. Italy came up with the first national response by formulating a specialized police force to protect cultural heritage. Furthermore, in 1972, UNESCO also passed the Convention Concerning the Protection of the World Cultural and Natural Heritage that provided the definition of cultural heritage and the responsibility of World Heritage sites and world heritage funds to protect such heritage. Sanctions were also imposed on the member states for violating the principles of the convention in addition to preventive measures as well as restitution procedures through the Second Protocol to the Hague Convention, 1999.<sup>18</sup>

The emergence of the International Court of Justice (ICJ), the principle judicial organ of the

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<sup>17</sup> Art. 36 of the Lieber Code

<sup>18</sup> <https://wacphila.org/uploads/attachments/ckdervf210pgse4qugpre13g7-protecting-and-preserving-cultural-heritage-briefing-paper-2017-final.pdf>

UN, as a powerful platform to safeguard the rights and enforce implementation of responsibilities by states and communities to protect the cultural property has also led to the increased development of legal frameworks. Although it is a platform that has just come into existence, its contribution towards the protection of cultural properties cannot be ignored. For instance, the principle of “prohibition of destruction” and “the obligation to protect during armed conflict” was developed as a part of customary international law; it addresses the grievances of the member states for violation of cultural rights and enforces cooperation to protect the cultural heritage internationally.<sup>19</sup>

Through various cases, the court has highlighted the evolving nature of cultural heritage and the importance of protecting it. In *Liechtenstein v. Germany*<sup>20</sup> and *Cambodia v. Thailand*<sup>21</sup>, the court has looked into the issues of ownership, restitution, and exploitation of cultural objects. The court has looked into the issue of destruction of armed conflict in cases like *Nicaragua v. United States of America*<sup>22</sup> and *Armed Activities on the Territory of the Congo*<sup>23</sup>. ICJ further established the principle of ‘*uti possidetis juris*’, which means "as you possess under law", stating the idea that a newly independent nation inherits the borders that were recognized during colonial rule or previous governance, thereby promoting stability and peace by discouraging territorial disputes based on historical claims. The same principle is applied in claims regarding cultural properties present over disputed territories or borders in the *Temple of Preah Vihear* case.<sup>24</sup>

Although the jurisdiction of ICJ is limited, by delving into key legal instruments and by evolving the principles, it shows its evolving potential in tackling the issue of destruction of cultural heritage and cultural property and promotes effective implementation of rules of the Conventions by the member states.

### **KEY INTERNATIONAL LEGAL FRAMEWORKS:**

#### **Council Of Europe Convention On Offences Relating To Cultural Property (Nicosia**

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<sup>19</sup> The ICJ and the protection of Cultural Heritage: Legal Framework and Case Law - Aishwarya Sandeep-Parenting and Law

<sup>20</sup> 2005

<sup>21</sup> 1962

<sup>22</sup> 1986

<sup>23</sup> *Democratic Republic of the Congo v. Rwanda*, 2006

<sup>24</sup> *Cambodia v. Thailand*, 1962.

**Convention of 2017):**

This convention came into force on 1<sup>st</sup> April 2022 and is the most recent convention on cultural property. The convention is also known as the “Blood Antiquities Convention”<sup>25</sup> due to “the terrible destructions of the ancient city of Palmyra in Syria and the ruins of Nimrud in Iraq have highlighted the concern for ‘blood antiquities’” – said Secretary General Thorbjørn Jagland, introducing the Nicosia Convention in spring 2017. The convention was made to fight the first illegal trade in the art market and to combat it through a joint action at Pan European level.

The convention complements other existing international instruments on trafficking in cultural property, like the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict<sup>26</sup> and additional protocols<sup>27</sup>, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>28</sup>, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects<sup>29</sup>.

The treaty is open for signature to any country that is willing to work against the same cause and to protect the common heritage through a criminal law perspective, which is the most unique feature of the treaty to date. It is enshrined under the treaty that even the states not a party to the Council of Europe (CoE) may join the convention.<sup>30</sup> The convention further aims to protect cultural property by criminalizing the action of illegal sale of such properties<sup>31</sup>, it identifies the sanction proportionate to the crime done<sup>32</sup> and also allows the parties to provide non-criminal sanctions as per the conduct<sup>33</sup>. It also facilitates cooperation between different nations to help them consult and exchange information regarding cultural property exposed to an offense<sup>34</sup>.

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<sup>25</sup> “Blood Antiquities”: New Council of Europe Initiative to Combat Illicit Trafficking in Cultural Property, 2 March 2016, <https://rm.coe.int/1680721000>

<sup>26</sup> May 14, 1954, 249 U.N.T.S. 240.

<sup>27</sup> Protocol for the Protection of Cultural Property in the Event of Armed Conflict (May 14, 1954), 249 U.N.T.S. 358; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Mar. 26, 1999), 2253 U.N.T.S. 21.

<sup>28</sup> Nov. 14, 1970, 823 U.N.T.S. 231.

<sup>29</sup> June 24, 1995, 34 I.L.M. 1322.

<sup>30</sup> Art. 28

<sup>31</sup> Arts. 3 to 11

<sup>32</sup> Art. 14

<sup>33</sup> Art.30

<sup>34</sup> Arts. 19-21

The convention has provided a wide scope to the meaning of cultural property, which is widely accepted on the global level. It defines both movable and immovable cultural property under Article 2 of the convention. The text defines movable property in relation to cultural heritage, particularly as it pertains to the 1970 UNESCO Convention aimed at curbing illicit trade in cultural artifacts, and refers to cultural artifacts of archaeological, historical, artistic, or scientific significance that are subject to protection against illicit trade. This includes items such as rare specimens, historical properties, archaeological artifacts, antiques over 100 years old, ethnological objects, and original artworks. The classification emphasizes the importance of preserving these items for both religious and secular purposes, highlighting their contributions to history and culture. On the other hand, Immovable property includes monuments, buildings, sites, or other structures (on land or underwater) deemed significant for archaeology, history, art, or science. These may be designated by any Party to the Convention based on religious or secular criteria, and they are protected under the guidelines of the 1972 UNESCO Convention on World Cultural and Natural Heritage.

Chapter II of the convention provides the substantive provisions covering a variety of offences relating to the stealing of cultural goods and their illegal transportation. It imposes an obligation on the state parties to apply their respective domestic law provisions in the course of criminal proceedings and impose criminal sanctions for certain acts like theft<sup>35</sup>, unlawful excavation<sup>36</sup>, illicit trafficking<sup>37</sup>, illegal acquisition<sup>38</sup> and placing on the market<sup>39</sup>, destruction or damage of cultural property<sup>40</sup> and the intentional falsification of documents<sup>41</sup>. Every such member state needs to set “minimum rules” in their domestic law to enable their courts to establish jurisdiction over the mentioned offences when committed in their territory.<sup>42</sup> Furthermore, the convention recognizes not just individual liability but also corporate liability for the criminal offences, stating that the member states are required to establish the liability of a legal entity "when committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within that legal person."<sup>43</sup>

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<sup>35</sup> Art.3

<sup>36</sup> Art.4

<sup>37</sup> Art. 5, 6

<sup>38</sup> Art. 7

<sup>39</sup> Art. 8

<sup>40</sup> Art. 10

<sup>41</sup> Art. 9

<sup>42</sup> Art. 12

<sup>43</sup> Art. 13

The convention, thus, recognizes the persisting challenges and the inter-connection between the crimes with regard to cultural property. The preamble of this convention also supports actions preventing profitable forms of organized crime within the broader framework of the fight against terrorism and organized crime. Although only six states have ratified the convention at present, it was drafted through the successful international collaboration of organizations like, EU, UNIDROIT, UNESCO, and the United Nations Office for Drug Control and Crime Prevention (UNODC), confirming the global nature of the offence and unified action against it.

### **The 1995 UNIDROIT Convention On Stolen Or Illegally Exported Cultural Objects:**

After the Nicosia Convention, the second most recent and important convention is the The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects aims to improve and preserve cultural heritage in the interest of all.<sup>44</sup> It further aims to promote cultural cooperation through legal trading and interstate agreements for cultural exchange.<sup>45</sup> The convention was signed by twenty-two countries at the time of its completion and provides for the restitution of all the illegally exported cultural property, however, the convention applies prospectively.

The convention allows for the claims to be brought against restitution in the court of the country where the offence occurred.<sup>46</sup> Furthermore, the court of one country can request the court of another country to order the return of the illegally exported materials.<sup>47</sup> However, it must be kept in mind, the convention will be applicable only if the offence was committed after the enforcement of the convention and does not apply retrospectively, so any cultural objects taken away prior to the enforcement of this convention will not into the jurisdiction of the courts.<sup>48</sup> This, however, does not mean that the convention seeks to legitimise the illegal transactions done before the convention was in force, and thus, it does not limit the rights of the countries or any person to claim the remedies available outside this convention.<sup>49</sup> Judicial remedies have been provided by the courts in the U.S. to foreign nationals who seek to recover the stolen

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<sup>44</sup> The\_Unidroit\_Convention\_on\_Stolen\_or\_Ill.pdf

<sup>45</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, [hereinafter UNIDROIT Convention].

<sup>46</sup> Art. 8(1)

<sup>47</sup> Art. 5(1)

<sup>48</sup> Art. 10 (2)

<sup>49</sup> Art. 10 (3)

property but not the illegally exported ones<sup>50</sup>.

The courts have followed the principle of *Nemo Dat*, which states that “one who purchases property from a thief, no matter how innocently, acquires no title in the property”, thus, only the true owner possesses the title. The New York court stated that the "principle has been basic in the law that a thief conveys no title as against the true owner." The court commented that the law "stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors." <sup>51</sup>

The convention defines the term ‘cultural property’<sup>52</sup> as provided under Article I of the 1970 Convention. It has further set out the limitation period of three years to bring a claim for the restoration of the cultural property without requiring the claimants to exercise due diligence<sup>53</sup>. However, not all claims are bound by this limitation period. The convention exempts any cultural property that is an integral part of an identified monument or any archeological sites and if the object belongs to the public collection<sup>54</sup>. Furthermore, the nation states are given the power to establish their time limit of seventy-five years or more<sup>55</sup>.

One of the key aspects of the convention is that it has set out the compensation to be payable to the possessor of the stolen object only if he neither knew nor could have reasonably known that the object was stolen and had exercised due diligence when the object was acquired.<sup>56</sup> To determine the due diligence, the courts need to look into the character of the possessor, the price paid, and whether the possessor tried to approach the registrar of the cultural objects or tried to obtain any other information.<sup>57</sup> To determine if the possessor knew that the object was stolen, the absence of the export certificate of the requesting nation needs to be considered.<sup>58</sup>

The Court of Appeals for the Seventh Circuit has observed<sup>59</sup> that a formal search should be conducted by the possessor of the stolen object from the International Foundation for Art Research (IFAR) and a full background check of the seller and his claim of title. In case of

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<sup>50</sup> *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts*, 917 F.2d 278, 280, (7th Cir. 1990)

<sup>51</sup> *Menzel v. List*, 267 N.Y.S.2d 804, 819 (N.Y. Sup. Ct. 1966).

<sup>52</sup> Art. 2

<sup>53</sup> Art. 3

<sup>54</sup> Art. 3(4)

<sup>55</sup> Art. 3(5)

<sup>56</sup> Art. 4(1)

<sup>57</sup> Art. 4 (4)

<sup>58</sup> Art. 6 (2)

<sup>59</sup> *Greek-Orthodox Church v. Goldberg*, 917 F.2d 278, 294 (7th Cir. 1990).

failure to conduct the search, the courts may find the possessor guilty of the possession of the artefact and, hence, not an innocent purchaser under the convention.

‘The Court of Appeals for the Fifth Circuit upheld a conviction under the National Stolen Property Act of individuals who sold pre-Columbian artifacts in Texas. The court determined that there was clear Mexican ownership of the artifacts.’<sup>60</sup>

Thus, the UNIDROIT convention has been effective in providing a legal framework to promote the protection of cultural property from illegal trading and promotes cooperation and communication and information regarding cultural heritage. Parties to this convention have recognized the importance of protecting cultural heritage and cultural exchange to promote an understanding between the people to aid in their well-being and progress of civilization.<sup>61</sup> While the Convention provides a legal avenue for restitution, the complexity of international law and differing national laws can complicate enforcement. Cases can be lengthy and subject to legal ambiguities, making it difficult to achieve timely returns. Continued advocacy, greater participation by countries, and improved legal frameworks at national levels are essential for maximizing the Convention's impact.

**The Convention On The Means Of Prohibiting And Preventing The Illicit Import, Export And Transfer Of Ownership Of Cultural Property, 1970 [hereinafter 1970 UNESCO Convention]:**

The preamble to this convention declares that ‘cultural property is one of the basic elements of civilization and national culture, and its interchange is needed to increase the knowledge of civilization, enrich the cultural life of all peoples and inspire mutual respect and appreciation among nations.’<sup>62</sup> This convention is the second most important convention after the Hague Convention of 1954, adopted by the General Assembly of UNESCO in 1970, and essentially looks into the private conduct of the individuals and nation-states during peacetime. This convention was the result of various illegal imports of the artefacts from the original country conducted during the 1960s and thefts of museums in the countries of the South, and the objects were offered in the North that were fraudulently imported.<sup>63</sup> This global concern was put

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<sup>60</sup> United States v. Mc Clain

<sup>61</sup> UNIDROIT Convention

<sup>62</sup> 1970 UNESCO Convention, Preamble.

<sup>63</sup> Background and Adoption - 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property - LibGuides at UNESCO Library

forward in the Geneva Convention by the nations to address the cause of the impoverishment of cultural heritage. The parties to the convention declared international cooperation to be the most efficient method toward safeguarding the cultural properties and stood to oppose all illicit import, export, and transfer of ownership of cultural property, with whatever means at their disposal.<sup>64</sup>

The Convention establishes a thorough framework for safeguarding cultural property and outlines the responsibilities of participating states to combat illicit trade — particularly by "removing their causes, putting a stop to current practices, and by helping to make the necessary reparations."<sup>65</sup> For an effective criminal justice strategy against the trafficking of cultural property in transit countries, it identifies three essential pillars, namely: 'preventive measures (focused on import-export regulations), law enforcement and prosecution (focusing on legislation, investigations, and legal actions), and international collaboration in the seizure, confiscation, and recovery of cultural assets.'<sup>66</sup>

A fundamental provision of the Convention requires State Parties to implement measures against the illicit trade of cultural property within their territories. This includes creating national inventories, enforcing export controls, and necessitating export certificates for cultural items leaving their country of origin. Furthermore, the Convention mandates that State Parties prohibit the importation of cultural property that has been unlawfully exported from another signatory state, as well as taking steps to return such property to its rightful owners.<sup>67</sup>

Moreover, the Convention encourages State Parties to establish legal and administrative frameworks that enhance the protection of cultural property while facilitating the recovery and restitution of stolen artifacts. Its provisions highlight the importance of international cooperation and the exchange of information between states to thwart the illegal trafficking of cultural objects. The Convention, thereby, promotes the establishment of bilateral or multilateral agreements to address specific issues concerning the protection of cultural heritage.<sup>68</sup>

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<sup>64</sup> Supra note 53.

<sup>65</sup> Id.

<sup>66</sup> Provisions and Mechanisms - 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property - LibGuides at UNESCO Library

<sup>67</sup> Id.

<sup>68</sup> Id.

## **The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954):**

It is the first international convention to protect cultural property during Armed Conflict which provides that ‘damage to the cultural property of any people whatsoever damages the cultural heritage of all mankind.’<sup>69</sup> The convention applies not just in international and non-international conflicts<sup>70</sup> but also during peacetime<sup>71</sup>. The convention regards cultural property as a component of a human culture, common to all peoples, and was created as a response to the destruction caused to the cultural artefacts during World War II, ratified by 127-member countries. The convention covers both tangible and intangible cultural property under its ambit, including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books, and other objects of artistic, historical, or archaeological interest, as well as scientific collections of all kinds, regardless of their origin or ownership.

The convention created several obligations to protect the cultural property and to respect it.<sup>72</sup> It further obligates to train the military.<sup>73</sup> One of the key features of the 1954 Convention is the special series of duties on occupying powers<sup>74</sup>. It is provided under the convention that the occupying powers must take all possible measures to protect cultural property within the occupied territory and also prevent the export of cultural property from the occupied territory. For instance, under the 1954 convention, the U.S. military was prohibited from acquiring the cultural artefacts when they invaded Iraq. However, the cultural properties are left most vulnerable during the armed conflicts and hence requires a comprehensive robust framework.

The convention also states that cultural property may bear a distinctive emblem so as to facilitate its recognition<sup>75</sup>. This emblem is called the blue shield emblem, which later laid to the foundation of International Committee of the Blue Shield in 1996, often referred to as the ‘cultural equivalent of the Red Cross’.

However the convention lacks proper enforcement mechanisms and there are no penalties for non-compliance. Many countries lack the resources or infrastructure to effectively protect

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<sup>69</sup> Hague Convention, Preamble.

<sup>70</sup> Art. 16

<sup>71</sup> Art. 17

<sup>72</sup> Art. 2, 4

<sup>73</sup> Art. 7

<sup>74</sup> Article 5, Regulation arts. 2 and 19, and Protocol (1954) Art. 1 and 4

<sup>75</sup> Art. 6

cultural properties, diminishing the convention's overall effectiveness. The convention was further supplemented by the 1999 Additional Protocol to address the difficulties of the convention, yet it is unclear if the Convention addresses the obligation of states and individuals at the time of armed conflicts<sup>76</sup> as it is also provided that the convention<sup>77</sup> would not apply to non-state actors violating the convention and looting antiquities.<sup>78</sup>

### **Other Legal Instruments**

UNESCO has established several conventions in time to protect cultural property from being stolen and sold illegally.<sup>79</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in 2005, is one of the conventions formed by UNESCO that has 143 members, including the European Union, and complements the Universal Declaration on Cultural Diversity of 2001. The 2005 convention aims to promote cultural expression through education and public awareness and protects it in special circumstances. The convention gives preferences to the developing countries and sets out the guidelines for the exchange, analysis, and dissemination of information, and the use of international funds to protect the cultural diversity. While the 2001 convention provides guidelines for 'identity, diversity, and pluralism', 'cultural diversity and human rights', 'cultural diversity and creativity', and 'cultural diversity and international solidarity'. It further aims to preserve cultural diversity by preventing its segregation.

Other convention established by UNESCO is the Convention for the Safeguarding of the Intangible Cultural Heritage. This was adopted in 2003 and aims to protect the practices with regard to cultural heritage, their expression, knowledge, and representation. It only recognizes the intangible form of cultural heritage, like oral traditions, performing arts, social practices, rituals, festive events, knowledge, and practice about nature and the universe, and traditional craftsmanship.

Another convention adopted in 2009 is the Convention on the Protection of the Underwater Cultural Heritage (CPUCH). This convention protects the cultural heritage underwater and prevents its exploitation commercially. Broader exploration is allowed to cooperating countries

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<sup>76</sup> Schorlemer, Sabine Von. *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce*. Martinus Nijhoff Publishers, 2008. Page 144

<sup>77</sup> Art. 4 (3)

<sup>78</sup> Id.

<sup>79</sup> [ssrn\\_id4416781\\_code2801143.pdf](#)

across their exclusive economic zone to implement this convention. The significant aspect of the convention is that it applies to all traces of human existence having a cultural, historical, or archaeological character that have been underwater for at least 100 years.

UNESCO has further laid to development of various rules and ethical instruments to combat trafficking in cultural property. In 1984, The Rules of Procedure for Mediation and Conciliation was formulated, which aids the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation. This framework of dispute resolution enhances the procedure of restitution of cultural property.

Furthermore, guidelines are set out for the state legislatures to establish and recognize state ownership of undiscovered cultural objects under the Model Provisions on State Ownership of Undiscovered Cultural Objects.

Additionally, to identify the source and seizure of cultural objects sold online, actions and recommendations are taken by UNESCO, INTERPOL, and ICOM. Every cultural property is given an object ID that allows for efficient documentation by collaborating with organizations around the world to combat the illicit art trade. To identify and trace cultural properties, the UNESCO-WCO Model Expert Certificate was prepared jointly by UNESCO and the World Customs Organization. As a result of the growing illicit trade of cultural objects in professional activities, The International Code of Ethics for Dealers in Cultural Property was adopted, and The International Council of Museums also adopted to set out principles and a Code of Ethics for the better management of the cultural property.

The first regulation concerning the mobility of cultural goods dates back to 1990, with Regulation EEC No. 3911/92 addressing the export of cultural goods and Directive 93/7/EEC dealing with the return of cultural objects that have been unlawfully removed from the territory of a Member State. The Network of European Museum Organization (NEMO) further provides a database of existing regulations and best practices for the movement of cultural goods.

In December 2014, the General Assembly adopted the International Guidelines for Crime Prevention and Criminal Justice Responses to Trafficking in Cultural Property. While non-binding, these Guidelines provide a valuable tool for Member States to enhance their policies, legislation, and cooperation in addressing trafficking in cultural heritage and related offenses.<sup>80</sup>

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<sup>80</sup> Organized Crime Module 3 Key Issues: Cultural Property Trafficking

Thus, these legal instruments are the key result of the joint endeavour of various nation-states and organizations to combat the ongoing practice of buying and selling of cultural properties illegally for some monetary gain, depriving the culture and the country of its rich historical artefacts.

### **Indian Legal Framework And Approach Towards Protecting The Cultural Properties**

Throughout history, the theft and plunder of cultural artifacts by conquerors, especially during the colonial period, has been rampant. The East India Company, for instance, took numerous treasures from India under the pretext of safeguarding them. Even after India's independence, valuable items continued to be smuggled out, such as the Vrishanana Yogini statue from Uttar Pradesh, returned from France in 2013, and a bronze statue of Shiva and Ardhanarishvara, returned by Australia in 2014. All of these artifacts were stolen from India and sold, but due to the efforts of the Indian Government, they were brought back to India. Another example is that of the famous Kohinoor diamond that was acquired by the British from the throne of a Mughal king and became a part British Royal Family.<sup>81</sup>

Many such examples exist in the current period, not just in India but globally as well. A total of 251 invaluable antiquities of Indian origin have been retrieved from different countries as of April 2023.<sup>82</sup> Still, some have not found their way back to India, like erotic sculptures from Khajuraho, almost 1300 miniature paintings taken away from Jaipur's City Palace Museum, 125 pieces of antique jewellery, and 32 rare gold coins that went missing after a theft at the National Museum, New Delhi.<sup>83</sup>

Although the illicit trading of cultural properties has been long practiced, it deprives a country of its rich cultural symbols. Now, with the help of international instruments, these countries get the chance to safeguard their cultural rights and properties. Sometimes, the countries get into an agreement with the country having these stolen cultural artifacts; for instance, there was a U.S.- India Cultural Agreement. "This cultural property agreement is about two things. First and foremost, it's about justice – returning to India and Indians what is rightfully theirs. Secondly, it's about connecting India with the world. Every American and every global citizen deserves to know, see, and experience the culture that we celebrate here today. To know Indian

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<sup>81</sup> Looted, Recovered, and Awaited: Stories of India's Stolen Antiques | INDIAN CULTURE

<sup>82</sup> Repatriated artifacts helping India reclaim its lost elements of history & heritage

<sup>83</sup> India's ancient treasures: Lost and found, but still inaccessible - The Statesman

culture is to know human culture.” Ambassador Garcetti, U.S. Ambassador to India, stated.

The agreement will not just strengthen the relations between the countries but also allow them to combat the practice of illicit trading and restore lost memories. With this agreement, India joins the ranks of 29 existing U.S. bilateral cultural property agreement partners. The State Department negotiated the U.S.-India Cultural Property Agreement under the U.S. law implementing Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property. The agreement restricted the import of certain items from 1.7 million years ago through 1947.<sup>84</sup> The US offered to return to India any object or material on the Designate List forfeited to the Government of the US.<sup>85</sup> The agreement also aligns with the Cultural Property Implementation Act (CPIA) of 1983, which authorizes the U.S. government to enter into bilateral agreements to protect cultural heritage.<sup>86</sup>

The agreement emerged from extensive bilateral discussions spanning a year, initiated during the G20 meetings. Under India’s G20 Presidency, the protection of cultural heritage was given a special place. The Kashi Culture Pathway and the New Delhi Leaders’ Declaration (NDLD) of 2023 also was a response to combat illicit trafficking through a series of commitments identified by G20 Culture Ministers<sup>87</sup>:

- Promote return and restitution of cultural property as a matter of social justice while strengthening efforts to combat illicit trafficking, particularly by enhancing regulations on online trade.
- The role of local communities and living heritage should be recognized in fostering social and inclusive development.
- The cultural and creative industries should be promoted to enhance the inclusive development and promotion of employment in the economy.

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<sup>84</sup> India and United States of America sign the first ever ‘Cultural Property Agreement’, PIB, July 26, 2024. <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2037604> ↑

<sup>85</sup> U.S. and India Sign Cultural Property Agreement - U.S. Embassy & Consulates in India

<sup>86</sup> *Id.*

<sup>87</sup> G20 New Delhi Leaders’ Declaration reaffirms culture as a transformative powerhouse for sustainable development | UNESCO

- Digital transformation should be integrated with the policies of safeguarding cultural heritage.

Similarly, there have been agreements established between the US and nations such as Algeria, Cambodia, China, Egypt, El Salvador, Greece, Guatemala, Honduras, and Italy.<sup>88</sup> This shows a significant shift not just in the global development strategy but goes beyond the diplomatic relations, recognizing culture as an independent objective in the post-2030 development framework.

Furthermore, the global partner under India's G20 Presidency recognized the importance of cultural properties and their restoration and formed a declaration stating:

“We call for the full recognition and protection of culture with its intrinsic value as a transformative driver and an enabler for the achievement of the SDGs and advance the inclusion of culture as a standalone goal in future discussions on a possible post-2030 development agenda.”<sup>89</sup>

Under the Indian Constitution, various provisions deal with the right to protect cultural property. The provisions are contained in both Part III and Part IV of the Constitution. Part III guarantees the following:

- ‘any section of citizens’ with a distinct language, script or culture the right to conserve it.<sup>90</sup>
- guarantees protection against discrimination on the basis of religion, race, caste, or language.<sup>91</sup>
- permits cultural and language minorities to establish and administer their educational institutions and therefore protects the right of minority groups to promote their cultures and languages.<sup>92</sup>
- prohibits the government from denying state funds or aid to minority educational

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<sup>88</sup> Id.

<sup>89</sup> G20 New Delhi Leaders' Declaration

<sup>90</sup> Article 29(1)

<sup>91</sup> Article 29(2)

<sup>92</sup> Art. 30

institutions.<sup>93</sup>

Part IV of the Constitution has imposed the following:

- A positive obligation is imposed on the state to ensure that all workers are able to fully enjoy social and cultural opportunities.<sup>94</sup>
- Imposes obligation on the state to guard against spoilage, disfigurement, destruction, removal, disposal or export of any monument or place or object of artistic or historical interest, which is of national importance under Parliamentary law.<sup>95</sup>
- imposes a duty on citizens of India to value and preserve the composite culture and heritage of the nation.<sup>96</sup>

Other than these provisions, legislations that protect the cultural heritage in India include, Indian Treasure Trove Act of 1876, which aims to protect and preserve archaeological and historically important treasures found accidentally and oversees their appropriate disposal; the Ancient Monuments and Archaeological Sites and Remains Act, 1958<sup>97</sup> that calls for the “preservation of ancient and historic monuments and archaeological sites as well as remains of national importance, regulating archeological excavations and protecting sculptures, carvings and other objects of the kind” under which the Archaeological Survey of India operates and restricts construction within a 100-meter radius of protected monuments. Other provisions include Ancient Monuments and Archeological Sites and Remains (Amendment and Validation) Act of 2010 that governs the monuments and sites and the Antiquities and Art Treasures Act of 1972 governs movable cultural properties.

Some examples of state laws include, West Bengal Heritage Commission Act 2001; Uttar Pradesh’s 1956 Ancient and Historical Monuments and Archaeological Sites and Remains Protection Act; Tamil Nadu Ancient Monuments and Archaeological Sites and Remains Act, 1966; Salar Jung Museum Act, 1961; Victoria Memorial Act, 1903; Rajasthan Monuments, Archaeological Sites and Antiquities Act, 1961; Orissa Ancient Monuments and Preservation Act, 1956; Hampi World Heritage Area Management Authority Act, 2002; Jammu and

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<sup>93</sup> Art. 30(2)

<sup>94</sup> Art. 43

<sup>95</sup> Art. 49

<sup>96</sup> Art. 51A(f)

<sup>97</sup> The Ancient Monuments and Archaeological Sites and Remains Act, No. 24 of 1958, Acts of Parliament (India)

Kashmir Heritage Conservation and Preservation Act, 2010; etc.

Union Minister for Culture and Tourism Shri Gajendra Singh Shekhawat on 3<sup>rd</sup> Feb 2025 stated that “Government has retrieved 655 antiquities from foreign countries from the year 1976 to 2024, of which 642 antiquities have been retrieved since 2014.”<sup>98</sup> Furthermore, the government is actively working to fight against the illicit trafficking by enhancing security measures at monuments, sites, and museums through the deployment of Private Security Guards and the Central Industrial Security Force. In cases of theft, FIRs are filed and 'Look Out Notices' issued to assist in recovering stolen items and preventing their export. Additionally, to raise public awareness, the government has organized exhibitions such as “Re(ad)dress: Return of Treasures” and “Journey beyond the Borders: Return of Treasures” and participated in a UNESCO workshop focused on combating antiquities trafficking.<sup>99</sup>

Indian case studies include the Return of the Nalanda Buddha Statue, which was stolen in the 1960s from the Bihar museum and later found in the London’s trade fair, which was then retrieved in 2018.<sup>100</sup> The Indian government has also retrieved a Vishnu-Lakshmi sandstone sculpture, one of three stolen from India<sup>101</sup> in 2024 with the help of a bilateral agreement with the U.S. Department of Homeland Security. Similarly, the Bronze-idols belonging to the Chola period and a sixth-century Shiva statue were retrieved from several Australian Museums after the investigative and collaborative efforts between Indian authorities and Australian institutions.<sup>102</sup>

However, all these are few examples of the successful stories of the lost cultural property that made to the home country after several decades. Thousands of cultural artefacts still remain in the possession of foreign countries and are yet to be traced and retrieved. Since many challenges exist in proving the origin of artefacts, repatriation cases often lead to protracted legal battles in foreign jurisdictions, requiring significant financial and diplomatic resources.<sup>103</sup> India can continue to set examples by restoring the lost artifacts through various investigations and agreements between the countries and improve the enforcement of the legal mechanism

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<sup>98</sup> Press Release: Press Information Bureau

<sup>99</sup> Id.

<sup>100</sup> London Police return stolen 12th century Buddha statue to India on I-Day - Times of India

<sup>101</sup> U.S. returns idols stolen from India - The Hindu

<sup>102</sup> Australia to return 14 artworks, most bought from jailed smuggler Subhash Kapoor, to India – ThePrint – Select

<sup>103</sup> Illicit Trafficking of Cultural Goods: An Indian Perspective on the Loss of a Heritage | Harvard International Law Journal

along with effective collaboration with international states.

## **FINDING THE GAPS AND PROPOSING THE RECOMMENDATIONS**

Many international conventions and agreements, along with domestic laws, have developed that safeguard both tangible and intangible properties from loss and destruction through a uniform code of conduct and principles. However, the main concern remains in the enforcement of these laws. Some critics argue that bureaucracy has damaged world heritage sites, reducing them to mere marketing tools for boosting tourism revenue among Member States. This tourism can expose the sites to threats by terrorists and other anti-social elements. Despite some protective measures being implemented, considerable work remains to be done to safeguard these cultural heritage sites.

Since cultural property trafficking is transnational, it involves multiple jurisdictions, making it impossible to investigate the source of properties that are sold in other states. National protections for cultural heritage are insufficient, necessitating regional or global action. A lack of resources and public interest puts archaeological sites and artifacts, spanning over 2,000 years of history, at risk of rapid and irreversible destruction.<sup>104</sup>

The most common gap that exists in the effective protection of cultural property against trafficking is the improper enforcement of legal frameworks outlined under various conventions and domestic laws due to weak legal mechanisms and corrupt officials that hinder the process of protection and earn enormous profits out of it.

Secondly, to implement the agreements between countries, meticulous documentation of the artefacts and their verification becomes an important part of the process. However, due to a lack of information on the lost artefacts and an anonymous source, the possessor of the object claims to be the owner for some monetary gain.

The lack of exact data on the value or number of antiquities lost from a country or any approx. revenue collected from illicit trading is scarce, leaving room for the development of other forms of organised crimes and their funding through such markets. It was estimated by the European Union that the “total financial value of the illegal antiquities and art trade is larger than any other area of international crime except arms trafficking and narcotics and has been estimated

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<sup>104</sup> SRIUN\_Protecting\_Cultural\_Heritage\_2016.09.12\_LR.pdf

at €2.5 - €5 billion yearly”.<sup>105</sup> This hidden nature of the crime, in addition to the chain system, further complicates the problem.

The major problem is the lack of strict sanctions against the offender committing or indulging in such trafficking. Criminal law mostly follows the principle of proportionality, which maintains that punishment of the crime should be proportional to the gravity of the crime committed. However, as the size of the market remains disputed, it is difficult to estimate the value of the crime, and such loss of cultural heritage can never be compensated either.

To strengthen the protection of artefacts, the following recommendations can be taken into consideration:

- Steps should be taken to collaborate with the specialised investigative agencies, police force, and research institutions to plan a unified approach to the global issue.
- Rapid communication through digital tools can further hinder the stolen objects from entering into the trade markets.
- Countries should look forward to inclusive decision-making tools to effectively tackle the problem of trafficking.
- Proper documentation should be made available, and countries should keep amending their domestic laws and allow the export and import of such artifacts having proper documents.
- Uniform laws should be adopted at the international level to provide better jurisdiction over the crimes.
- Corrupt officials should be first investigated and removed for a better implementation of the laws in the future.

Other than these recommendations, personal projects can be formulated, like the Indian Pride Project<sup>106</sup>, which utilizes digital activism and crowdsourcing to raise awareness about stolen Indian antiquities in all countries. These recommendations, though not rigid, can still lead to

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<sup>105</sup> Questions and Answers on the illegal import of cultural goods used to finance terrorism

<sup>106</sup> India Pride Project - Bringing Stolen Artefacts Back to India

better and effective enforcement of the laws that can shape future agreements and retrieve lost properties.

## **CONCLUSION**

The global battle against the illicit trafficking of cultural properties has been given due recognition with time. This recognition of the crime and its transnational scope has led the countries to form conventions and agreements, not only internationally but nationally as well. Many challenges are involved in the enforcement of these laws. Restoration of the objects can never be the best possible way to prevent the crime in the future. A strict punishment must be awarded to the criminals to create fear in the minds of smugglers. The paper has looked into various conventions and legislations in India and internationally as well. The challenges in the enforcement must be studied carefully to bring out the most effective solution.