

# TRADE, WAR, AND STOLEN CULTURAL PROPERTY

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## ABSTRACT

*Russia's recent invasion of Ukraine poses a serious threat to Ukraine's cultural heritage. With numerous reports that Russian soldiers are looting Ukraine's movable cultural heritage, legal action is required to prevent the successful sale and illegal trafficking of these stolen artifacts. This Note examines the relevant legal tools available to prevent this trade.*

*First, the paper examines relevant international treaties, including the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention and 1954 Hague Convention, and the benefits and potential challenges of using export and import controls to address illicit trade of cultural property. Next, the Note examines the approach to preventing trade in stolen cultural property from Syria and Iraq. However, the Note ultimately finds that the U.N.-based approach taken in those conflicts cannot be applied to Ukraine. While relevant actors have made numerous international commitments to protect cultural property, these commitments are largely non-binding and cannot be used to compel countries to enact domestic laws. Therefore, major nations must pursue unilateral import and export controls to prevent illicit trade in Ukrainian cultural goods.*

*Finally, this Note addresses potential conflicts with World Trade Organization (WTO) obligations. Import and export controls violate the General Agreement on Tariffs and Trade (GATT)'s Article XI prohibition on trade bans or quotas. Prior import and export bans on Syrian and Iraqi cultural property were enacted pursuant to a binding U.N. Security Council Resolution, which qualified these measures for the GATT's Article XXI(c) national security exception. Because binding U.N.-based action is not available to protect Ukrainian cultural property, this Note explores other GATT exceptions that could apply. Ultimately, the Note finds that the GATT's Article XX(f) exception for protecting national treasures provides the strongest legal basis for WTO parties to enact measures banning illicit trade in Ukrainian cultural property without violating their WTO obligations.*

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I. INTRODUCTION

After Russian forces invaded Ukraine in February 2022, international and regional officials called for emergency measures to protect Ukrainian cultural property in the conflict. On March 8, 2022, UNESCO began working with local Ukrainian officials to mark historical sites with the 1954 Hague Convention emblem, assist museums in safeguarding their collections, and monitor damage to cultural sites via satellite.<sup>1</sup> In addition to these traditional approaches to protecting cultural heritage, Ukraine has pursued more innovative methods. In May 2022, Ukraine began a partnership with Uber called Uber Restore, which modified the original Uber application to offer transport services to conservationists attempting to restore or preserve cultural artifacts or remove and secure those artifacts at high risk of looting or destruction.<sup>2</sup> One museum director in Kyiv tried to confuse invading Russian soldiers by changing the sign on the museum and replacing the original artifacts with copies.<sup>3</sup>

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1. See *Endangered Heritage in Ukraine: UNESCO reinforces protective measures*, UNESCO (Mar. 8, 2022), <https://www.unesco.org/en/articles/endangered-heritage-ukraine-unesco-reinforces-protective-measures?hub=701>; see also *UNESCO Actions for Ukraine: Timeline of UNESCO's commitment to protect Ukraine's education and heritage*, UNESCO (July 13, 2023), <https://www.unesco.org/en/ukraine-war/actions-timeline>.

2. See *Ukraine's Ministry of Culture enlists Uber to rescue national treasures*, UBER (Sept. 8, 2022), <https://www.uber.com/newsroom/uber-restore/#:~:text=The%20Ukrainian%20Ministry%20of%20Culture's,version%20of%20the%20Uber%20app>; see also *Uber culture: How the ride-sharing app helped Ukraine save its historic artifacts*, EURONEWS, (Sept. 13, 2022), <https://www.euronews.com/2022/09/13/uber-culture-how-the-ride-sharing-app-helped-ukraine-save-its-historic-artifacts#:~:text=They%20partnered%20with%20the%20department,work%20that%20were%20under%20threat>; Sarah Cascone, *Uber Has Launched Uber Restore, a Special App in Ukraine to Help Transport Art Conservators*, ARTNET NEWS (Sept. 16, 2022), <https://news.artnet.com/art-world/uber-restore-ukraine-2177228>.

3. See The Associated Press, *Ukraine accuses Russian troops of looting museums, destroying cultural sites*, CBC NEWS (Oct. 9, 2022), <https://www.cbc.ca/news/world/ukraine-cultural-historical-sites-1.6611690>.

Despite these efforts, since the invasion, there have been reports that Russian forces have looted almost forty museums and stolen thousands of artifacts.<sup>4</sup> As of 2023, over 700 churches have been plundered.<sup>5</sup> These artifacts include priceless cultural property such as a 1,500-year-old golden tiara from the age of Attila the Hun, called the Hun Diadem, and almost 200 coins from Scythian settlers to the region minted over 2,400 years ago.<sup>6</sup> In Kherson, Ukraine, Russian occupying forces dismantled a statue of Prince Grigory Potempkin and stole his mummified remains.<sup>7</sup> In October 2022, these looting activities gained legitimacy when President Vladimir Putin effectively “legalized” looting by declaring martial law in several contested regions of Ukraine, which permitted the “evacuation” of items of social, economic, or cultural significance in these regions.<sup>8</sup> This is an atypical application of martial law because international military codes typically prohibit looting in all forms.<sup>9</sup>

Given the significant loss of movable cultural property in Ukraine, the international community must enact legal mechanisms to prevent the illegal trafficking and sale of these artifacts. In Part I, this Note will review the relevant legal tools available to address this problem, including international treaties and domestic import and export controls. In Part II, the Note will review historical models for addressing this problem, in particular, international responses to preventing illicit trade in

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4. *See id.*

5. Bill Whitaker, *Ukraine accuses Russia of looting museums, destroying churches as part of heritage war*, CBS NEWS (Nov. 12, 2023), <https://www.cbsnews.com/news/ukraine-accuses-russia-museum-looting-church-destruction-60-minutes-transcript/>.

6. *See id.*

7. *See* Anna Chernova & Rob Picheta, *Russia removes bones of 18th-century commander revered by Putin from occupied Ukrainian city*, CNN (Oct. 28, 2022), <https://www.cnn.com/2022/10/28/europe/potemkin-remains-removed-kherson-ukraine-russia-intl/index.html>. Potempkin is seen as a hero of Russian unification of the Crimean Peninsula. *See id.*

8. *See* Taylor Dafoe, *Putin Opened the Door for Mass Looting of Ukrainian Cultural Heritage With His Recent Declaration of Martial Law*, ARTNET NEWS (Nov. 4, 2022), <https://news.artnet.com/art-world/putin-opened-the-door-for-mass-looting-of-ukrainian-cultural-heritage-with-his-recent-declaration-of-martial-law-2204848>.

9. Geneva Convention Relative to The Protection Of Civilian Persons In Time Of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“[p]illage is prohibited”); *see also* the Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 279 (including “plunder of public or private property” in its list of war crimes). Interestingly, the month before Russia imposed martial law, in September 2022, Russia’s Duma amended the criminal code to prohibit looting “during the period of mobilization or martial law,” with a penalty of fifteen years in prison. *See Russia Reportedly Preparing for Mobilization*, KYIV POST (Sept. 20, 2022, 4:15 PM) <https://www.kyivpost.com/post/1165>. This indicates that while the Russian state is interested in pillaging Ukrainian cultural property, it does not sanction Russian forces looting and pillaging for personal gain.

stolen cultural property from Iraq and Syria. In Part III, the Note reviews potential conflicts with WTO law and proposes several solutions to prevent illegal trade and trafficking in looted materials from Ukraine while upholding WTO obligations. Specifically, this Note argues that domestic import bans are the strongest action currently available to third-party countries to protect Ukrainian cultural property; further, domestic import bans can and should be enacted without violating WTO obligations by relying on the exception in Article XX(f) of the GATT for protecting national treasures.

## II. RELEVANT TREATIES & LEGAL MECHANISMS

Both domestic and international law offer legal protection of cultural property. In international law, numerous treaties have focused on protecting cultural property, beginning with the 1954 Hague Convention.<sup>10</sup> In the domestic sphere, many countries have enacted domestic export laws to protect their cultural property, though few have enacted domestic import controls to protect other countries' cultural property.<sup>11</sup> In comparing state obligations that arise under international treaties with potential unilateral action, unilateral import controls provide the strongest immediately available protection for Ukrainian cultural property.

### A. *International Law & International Treaties*

A robust body of international law and treaties aims to protect cultural property, especially during armed conflict. The most relevant treaties for protecting Ukraine's cultural property include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) and its two protocols, and the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention). Of the available treaties, the 1970 UNESCO Convention provides the strongest basis for immediate action regarding Ukrainian cultural property. However, international treaties fall short of mandating sufficient safeguards. Ultimately, international stakeholders must act independently to implement border controls that protect Ukraine's cultural heritage.

Protection of cultural property during armed conflict is a principle of customary international law.<sup>12</sup> The 1954 Hague Convention codifies

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10. See *infra* Section II.A.

11. See *infra* Section II.B.

12. Polina L. Mahnad, *Protecting cultural property in Syria: New opportunities for States to enhance compliance with international law?*, 99 INT'L REV. RED CROSS 1037, 1039–40 (2017).

and develops this custom by enumerating specific scenarios in armed conflict in which cultural property deserves heightened protection and by imposing obligations on parties to enact protective measures in times of peace.<sup>13</sup> Several provisions of the Hague Convention relate to the conflict in Ukraine, including Article 4.3, which requires parties to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”<sup>14</sup> Additionally, “[t]hey shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.”<sup>15</sup> Article 28 of the Convention permits the contracting parties to bring criminal action against any individual who has violated the Convention.<sup>16</sup>

Russia, the United States, Ukraine, and the United Kingdom are parties to the 1954 Hague Convention.<sup>17</sup> Although the plain language is ambiguous, Article 4.3 is understood to impose obligations on state parties in a conflict to restrain their military from theft or pillaging rather than imposing obligations on third-party countries to intervene to protect cultural property at risk in another territory.<sup>18</sup>

By extension, the same interpretation applies to the prohibition on “requisitioning” cultural property in the territory of another contracting party.<sup>19</sup> Therefore, Article 4.3 only gives rise to obligations on the part of Ukraine and Russia. Russia is clearly in violation of its obligations under Article 4.3 by permitting, and even “legalizing,” the looting of Ukraine’s cultural property by its military forces. Under Article 28 of the treaty, any contracting party can bring legal action to enforce obligations, not

13. *See id.* at 1040.

14. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 4.3, May 14, 1954, S. Treaty Doc. 106-1, 249 U.N.T.S. 216 [hereinafter 1954 Hague Convention].

15. *Id.*

16. *See id.* art. 28.

17. For the list of the countries that have signed the 1954 Hague Convention, see *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention*, UNESCO, <https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention#item-4>.

18. *See* Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245, 308–11 (2006); *see also* Patty Gerstenblith, *Beyond the 1954 Hague Convention*, in CULTURAL AWARENESS IN THE MILITARY: DEVELOPMENTS AND IMPLICATIONS FOR FUTURE HUMANITARIAN COOPERATION 83, 85 (Robert Albro & Bill Ivey eds., 2014).

19. 1954 Hague Convention, *supra* note 14, art. 4.3 (“[The parties] shall refrain from *requisitioning* movable cultural property situated in the territory of another High Contracting Party.”) (emphasis added).

only the violated party.<sup>20</sup> Therefore, any country could bring criminal action against the Russian forces for looting cultural property. This criminal action takes the form of disciplinary or penal sanctions under the enforcing country's domestic criminal jurisdiction, so there must be appropriate domestic legislation to impose and enforce sanctions.<sup>21</sup> However, identifying the individuals responsible for the looting and destruction in Ukraine and bringing legal action is likely years away and thus is not a feasible approach to protect Ukrainian cultural property today.

Two additional protocols supplemented the 1954 Hague Convention. The First Protocol, passed in 1954, states that “[e]ach High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property[.]”<sup>22</sup> Additionally, “[e]ach High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of [this treaty.]”<sup>23</sup> Thus, parties to the First Protocol “undertake” to prevent the exportation of cultural property from occupied territories and “undertake” to return any cultural property illegally exported. Although the term “undertake” is not as binding as “shall,” if the occupying party fails to prevent this exportation, they “shall” indemnify the occupied state.<sup>24</sup> Russia and Ukraine are signatories to the First Protocol.<sup>25</sup> Thus, under this Protocol, Russia must either return the property or indemnify Ukraine for cultural property stolen during its occupation. However, Russia's return of the looted property is unlikely.

As stated in the First Protocol, Russia, as a signatory, only “undertakes” to return cultural property located in Russia after the conflict.<sup>26</sup> Reports of looting in Ukraine indicate a mixture of state-organized theft in the martial law territories and informal looting by Russian

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20. *Id.* art. 28.

21. *See id.*

22. *See* First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict art. I.1, May 14, 1954, S. Treaty Doc. 106-1, 249 U.N.T.S. 358 [hereinafter First Protocol].

23. *See id.* art. I.3.

24. *See id.* art. I.4.

25. For the list of the countries that have signed the First Protocol, see *Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <https://www.unesco.org/en/legal-affairs/protocol-convention-protection-cultural-property-event-armed-conflict?hub=66535#item-4>.

26. *See* First Protocol, *supra* note 22, art. I.3.

soldiers.<sup>27</sup> For property subject to state-organized looting, Russia will likely continue to possess the property and, therefore, could possibly return it at the end of the conflict. However, given that Russia is stealing this property to erase Ukrainian culture,<sup>28</sup> indemnity is more likely. For property looted informally by Russian soldiers, the property is expected to be stored for a period of years and then sold. This property is unlikely to be in Russia at the end of the conflict, and if it were, the Russian state would not easily be able to locate it. Therefore, there is little hope of Russia recovering and returning property looted informally. However, because this kind of looted property was illegally exported during the war, Russia will have to indemnify Ukraine for its loss. Indemnity is helpful; however, monetary reparations can never replace these artifacts and their significance in Ukrainian cultural heritage. Therefore, while the First Protocol helps provide monetary damages to Ukraine, it should not be a primary legal mechanism to protect Ukrainian cultural property.

The Second Protocol to the 1954 Hague Convention was passed in 1999.<sup>29</sup> The Second Protocol strengthens the First Protocol by requiring that an occupying state “shall” prevent the export of cultural property from the occupied territory.<sup>30</sup> This is a stronger obligation than in the First Protocol, where the parties only committed to “undertake” to prevent the exportation of cultural property.<sup>31</sup> Additionally, third-party countries to the Protocol must establish violations of this treaty as criminal offenses under domestic law so that those trying to export or import stolen cultural property under enhanced protection are subject to criminal actions.<sup>32</sup> Article 31 also opens the door for more direct intervention by third-party countries. The Article states that “[i]n situations of serious violations of this Protocol, the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations[.]”<sup>33</sup>

The Second Protocol could theoretically serve as a legal basis for obliging third-party countries to penalize Russian actions. However, Russia is not a signatory to the Second Protocol and, therefore, is not criminally liable for failing to uphold its additional protections.

27. See The Associated Press, *supra* note 3.

28. See Whitaker, *supra* note 5.

29. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172 [hereinafter Second Protocol].

30. *Id.* art. 9.

31. See First Protocol, *supra* note 22, art. I.3.

32. See Second Protocol, *supra* note 29, art. 15.2.

33. *Id.* art. 31.

Furthermore, the Second Protocol only applies to cultural property that qualifies for enhanced protection under Article 10.<sup>34</sup> In 2019, Ukraine had no cultural property listed for enhanced protection.<sup>35</sup> The Committee for the Protection of Cultural Property, established under the Second Protocol to carry out the agreement, invited Ukraine to request the inscription of cultural heritage properties under enhanced protection in March 2022.<sup>36</sup> In September 2023, the Committee granted enhanced protection to twenty cultural sites; however, the grant only included immovable property, such as churches or landmarks, rather than movable property subject to illicit trade.<sup>37</sup> Because the Second Protocol does not bind Russia, and Ukraine does not qualify to receive its additional protections, the Second Protocol is not relevant to the matter at hand.

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) was designed to combat the illicit trafficking of cultural property and provides some legal protection for Ukraine's looted goods. Under Article 11, "[t]he export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit."<sup>38</sup> The Convention provides a greater basis for third-party country action than the above-discussed agreements. In Article 7, parties "undertake" to prevent museums or other institutions within their territories from acquiring cultural property that was illegally exported from another contracting party, to prohibit the importation of cultural property stolen from a museum or other religious or secular monuments, and to take steps to recover and return such

34. *Id.* art. 10.

35. UNESCO, INTERNATIONAL LIST OF CULTURAL PROPERTY UNDER ENHANCED PROTECTION, [https://en.unesco.org/sites/default/files/Enhanced-Protection-List-2019\\_Eng\\_04.pdf](https://en.unesco.org/sites/default/files/Enhanced-Protection-List-2019_Eng_04.pdf) (last visited Dec. 16, 2022).

36. UNESCO, *The Committee for the Protection of Cultural Property in the Event of Armed Conflict held an emergency meeting dedicated to Ukraine*, <https://www.unesco.org/en/articles/committee-protection-cultural-property-event-armed-conflict-held-emergency-meeting-dedicated-ukraine> (last visited Dec. 16, 2022).

37. See *Cultural Property under Enhanced Protection Ukraine*, UNESCO (Sept. 7, 2023), <https://www.unesco.org/en/culture/cultural-property-under-enhanced-protection>; see also *Ukraine: 20 Cultural Properties Receive Enhanced Protection by UNESCO's Second Protocol to the 1954 Hague Convention*, UNESCO (Sept. 7, 2023), <https://www.unesco.org/en/articles/ukraine-20-cultural-properties-receive-enhanced-protection-unescos-second-protocol-1954-hague>.

38. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 11, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].



cultural property.<sup>39</sup> In Article 9, parties “undertake” to implement export or import controls when another contracting party’s cultural patrimony is in jeopardy of being pillaged.<sup>40</sup> Finally, under Article 8, parties “undertake” to impose sanctions or administrative penalties on individuals who violate Article 6(b), banning the illegal exportation of cultural property, and Article 7(b), banning the importation of cultural property stolen from a museum or other similar institution.<sup>41</sup>

Ukraine and Russia are parties to the 1970 UNESCO Convention; therefore, Russia is violating its obligations under Article 11 to refrain from exporting cultural property from a territory it occupies. Interestingly, violations of Article 11 are not subject to sanctions under Article 8.<sup>42</sup> However, Russia also violates Article 7(b) by importing cultural property stolen from a museum or other institution, which is subject to Article 8 sanctions.<sup>43</sup> Therefore, every other contracting party has committed to “undertake” to impose sanctions on Russia. Additionally, every other contracting party has committed to prevent the importation or purchase by domestic institutions of much of Ukraine’s lost cultural property, in addition to taking steps to recover and return it.<sup>44</sup> If they fail to “undertake” to execute these commitments under Article 7(b), these third-party countries can face sanctions or other administrative penalties under Article 8. The United States, the United Kingdom, and many EU countries are parties to this Agreement<sup>45</sup> and, therefore, have committed to such import bans.

Though Article 7(b) could be used as a tool to promote third-country action, under Article 7(b) parties only commit to “undertake” to implement an import ban. Additionally, countries that fail to enact import bans are unlikely to face sanctions. Therefore, the 1970 UNESCO Convention falls short of delivering binding obligations on contracting parties. Still, it does provide a stronger basis for encouraging third countries to take action to prevent trade in stolen Ukrainian property and to sanction Russia for its transgressions. Finally, both the 1995 UNIDROIT Convention and the Nicosia Convention on Offences relating to Cultural Property contain binding obligations on

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39. *See id.* art. 7.

40. *See id.* art. 9.

41. *See id.* arts. 8, 6(b), 7(b).

42. *See id.* art. 8.

43. *See id.* arts. 8, 7(b).

44. *See id.* art. 7.

45. *See Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention*, *supra* note 16.

third countries.<sup>46</sup> However, the relevant states in this conflict are not parties or have not ratified these agreements, so they are not relevant to this discussion.

Thus, the relevant international treaties provide limited legal mechanisms for protecting Ukrainian cultural heritage. Under the 1954 Hague Convention, individuals who steal or loot cultural property are subject to criminal liability.<sup>47</sup> Given the ongoing nature of the offenses and uncertainty around individual responsibility, criminal action is likely many years away if it will ever be feasible. Under the First Protocol to the 1954 Convention, Russia has committed to return or indemnify Ukraine for stolen cultural property.<sup>48</sup> Because Russia seeks to erase Ukraine's cultural identity in this conflict, the return of the property seems unlikely.<sup>49</sup> Additionally, given the widescale loss of Ukrainian cultural patrimony, indemnity seems insufficient. Various treaties provide a basis for third-party country action, such as import and export controls, to protect Ukrainian cultural property. However, none of the key stakeholders have signed treaties under which that obligation is binding. Therefore, under the current regime of international treaties,

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46. Whereas the 1970 UNESCO Convention relies on parties recognizing and enforcing another country's export laws, the 1995 UNIDROIT Convention provides stronger protection by enabling countries whose cultural property has been stolen and illegally exported to request its return and obliges other contracting parties to return it. *See* UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects arts. 1, 3, 5, June 24, 1995, 34 I.L.M. 1322 [hereinafter 1995 UNIDROIT Convention]. The 1995 UNIDROIT Convention's binding language provides a more powerful legal tool to compel restitution of lost cultural property; however, Ukraine, the United States, and the United Kingdom are not parties to the agreement. Russia is a signatory but has not ratified the Convention. Therefore, it has no legal relevance to the present conflict. Similar to the 1995 UNIDROIT Convention, the Nicosia Convention on Offences relating to Cultural Property contains more binding language than other international agreements. Specifically, Article 5 requires parties to prohibit the importation of cultural property that has been illegally excavated, exported, or stolen from another state. Council of Europe, Convention on Offences Relating to Cultural Property art. 5, May 19, 2017, C.E.T.S. No. 221. Any individual who attempts to import such goods while knowing that they were illegally excavated, exported or stolen is subject to criminal liability. *Id.* Because the Nicosia Convention is a product of the Council of Europe, many European countries are parties to the Convention with several non-European countries also joining. Both Ukraine and Russia have signed the agreement; however, they have not ratified the Nicosia Convention or entered it into force. The United States is not a party. In total, the Nicosia Convention has only entered into force in six countries. Because the Nicosia Convention has entered into force in so few jurisdictions, it is not helpful for solving the problem at hand. However, it is interesting to demonstrate that the law is moving toward stronger protections of cultural property. Council of Europe Convention on Offences Relating to Cultural Property (Nicosia, 19 May 2017), 23 *Unif. L. Rev.* 656, 656–91 (2018).

47. *See* Hague Convention, *supra* note 14, art. 28.

48. *See* First Protocol, *supra* note 22, art. I.3.

49. *See* Whitaker, *supra* note 5.

any action taken by third-party countries will be unilateral and voluntary.

### B. *Import & Export Controls*

As originally set out in the 1970 UNESCO Convention, import and export controls remain the primary legal tool for third-party countries to protect another country's cultural property.<sup>50</sup> These controls can take different forms. Relevant export controls include bans on the exportation of a nation's cultural property, including laws that claim state ownership over all illegally exported materials, or licensing requirements for exportation.<sup>51</sup> Similarly, import controls include banning the importation of illegally exported or stolen cultural property and requiring the importer to show proof of legal exportation.<sup>52</sup> Typically, these provisions will include exceptions for temporary loans to museums or safe harbor for cultural property during conflict.<sup>53</sup> Importantly, goods illegally exported under the laws of one jurisdiction can be *legally* imported into another jurisdiction if the importing jurisdiction has not enacted laws to recognize foreign export laws or prohibit the import of such goods.<sup>54</sup>

Ukraine has enacted export restrictions on cultural objects.<sup>55</sup> These restrictions include a general ban on exporting cultural property inscribed on certain national registries,<sup>56</sup> sourced from museum collections, or objects of "museum value" belonging to the state.<sup>57</sup> Given the ongoing

50. See 1970 UNESCO Convention, *supra* note 38, art. 9.

51. See James Nafziger & Robert Paterson, *International Trade in Cultural Material*, in HANDBOOK ON THE LAW OF CULTURAL HERITAGE AND INTERNATIONAL TRADE 19, 42 (James Nafziger & Robert Paterson eds., 2014).

52. See, e.g., *Questions and Answers on the Illegal Import of Cultural Goods Used to Finance Terrorism*, EUROPEAN UNION, [https://ec.europa.eu/commission/presscorner/detail/mt/MEMO\\_17\\_1954](https://ec.europa.eu/commission/presscorner/detail/mt/MEMO_17_1954); Cultural Property Export Control List art. XX, 1977 (Can.), [https://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,\\_c.\\_448/index.html](https://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._448/index.html).

53. See 19 U.S.C. § 2603.

54. Without domestic legislation to enforce foreign export laws, enforcement is ad hoc and typically the result of diplomatic efforts. However, courts in most countries have not supported the recognition and enforcement of foreign export laws over cultural materials, though there is some evidence that this is changing. See Nafziger & Paterson, *supra* note 51, at 41–43.

55. Committee on Market Access, *Ukraine: Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions (G/L/59/REV.1)*, WTO Doc. G/MA/QR/N/UKR/5 (Oct. 30, 2020) [hereinafter *Ukraine Notification*].

56. Law on Export, Import and Return of Cultural Values art. 14, Sept. 21, 1999, No. 1068-XIV (Ukr.) [hereinafter *Ukraine Law on Cultural Values*].

57. Law on Museums and Museum Affairs art. 22, June 29, 1005, No. 249/95-BP (Ukr.). The restrictions permit some cultural objects to be temporarily exported for purposes such as

conflict, Ukraine currently lacks the ability to enforce its export controls domestically. However, export bans are an important prerequisite to securing foreign enforcement under some countries' import ban regimes.<sup>58</sup> Ultimately, protecting Ukrainian cultural property relies on third-party countries enacting or enforcing import regimes recognizing Ukraine's export laws or otherwise banning trade in Ukrainian cultural property.<sup>59</sup>

As discussed above, the 1970 UNESCO Convention creates a non-binding obligation on parties to prohibit their museums or institutions from purchasing illegally exported cultural property, to ban the importation of stolen cultural property, and to institute additional import or export controls when another party's cultural patrimony is at risk of being pillaged. After the 1970 UNESCO Convention, most parties enacted legal regimes to regulate exports of their cultural property; however, few have enacted import laws to recognize and enforce foreign export regimes to protect *other* countries' cultural property.<sup>60</sup> Among those that have enacted import regimes are the United States, Switzerland, Canada, Germany,<sup>61</sup> and the EU.<sup>62</sup>

The import regimes enacted in Germany, Canada, and the EU ban the importation of illegally exported goods.<sup>63</sup> The United States and

exhibitions or restorations; however, if the goods are not returned in the specified window, the goods are illegally exported. Ukraine Law on Cultural Values, *supra* note 56, art. 23.

58. Canada and the European Union ban trade in illegally exported cultural property. *See infra* note 61. The United States' law bans trade in stolen cultural property and will only enforce another country's export bans after concluding a bilateral treaty or invoking emergency measures. *See Nafziger & Paterson, supra* note 51, at 43. Because Ukraine's export laws do not automatically grant state ownership over illegally exported cultural property, illegally exported material from Ukraine is not legally considered stolen. *See* Ukraine Law on Cultural Values, *supra* note 56. Without a bilateral treaty with the US, Ukraine is reliant on the U.S. invoking emergency provisions to enforce Ukrainian export laws.

59. Ukraine's export laws do not automatically grant state ownership over illegally exported cultural property. *See* Ukraine Law on Cultural Values, *supra* note 56.

60. *See* Robert Peters, *Nationalism Versus Internationalism: New Perspectives Beyond State Sovereignty and Territoriality in the Protection of Cultural Heritage*, in *INTERSECTIONS IN INTERNATIONAL CULTURAL HERITAGE LAW* 364, 377 (Anne-Marie Carstens & Elizabeth Varner eds., 2020).

61. Germany enacted an import regime that banned the importation of illegally exported goods in 2016; however, because Germany was part of the European Union and thus participated in a single customs border, this law was criticized as hard to implement and ineffectual. *See id.* at 382. The European Union passed a similar regulation in 2019, which largely cures those criticisms. *Id.* at 384-87.

62. *See id.* at 377-78, 385.

63. Germany and Canada's regulations impose criminal sanctions for individuals who violate the ban; the EU legislation leaves specific penalties to the Member States. *See id.* at 381; *see also* CAN. BORDER SERVICES AGENCY, MEMORANDUM D19-4-1, EXPORT AND IMPORT OF CULTURAL PROPERTY, ¶ 16 (Jan. 23, 2023) [hereinafter CBSA MEMORANDUM]; *see also* Regulation 2019/880, of the European Parliament and of the Council of 17 April 2019 on the Introduction and the

Switzerland enacted regimes that require a separate bilateral treaty to enforce a country's export controls.<sup>64</sup> Neither country has concluded an agreement with Ukraine.<sup>65</sup> Under U.S. law, the United States can implement import controls without a bilateral treaty in emergency situations to protect the cultural property of another party to the 1970 UNESCO Convention; however, the party must request this U.S. action and supply evidence that an emergency condition exists.<sup>66</sup> Ukraine is a party to the Convention but has not requested that the United States enforce its export ban or provide evidence of an emergency condition. Therefore, the United States cannot act under its current laws. The United Kingdom exited the EU before enacting the EU import regime and has not enacted a similar regime post-Brexit.<sup>67</sup> Therefore, illegally exported Ukrainian cultural property is currently only banned from entering the Canadian and EU markets. Though Canada and the EU are major marketplaces, these import bans alone will not serve as a sufficient deterrent to the transport and sale of Russian-looted Ukrainian cultural property.<sup>68</sup>

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Import of Cultural Goods, 2019 O.J. (L 151) 1, 3 art. 11 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0880&from=EN> [hereinafter Regulation 2019/880].

64. See Peters, *supra* note 60, at 378. Canada's law only applies to "reciprocating" countries, but this includes all countries that are party to the 1970 UNESCO Convention, including Ukraine. See CBSA MEMORANDUM, *supra* note 63, ¶ 16.

65. See *Bilateral Agreements*, SWITZ.: FED. OFF. OF CULTURE, <https://www.bak.admin.ch/bak/en/home/cultural-heritage/transfer-of-cultural-property/bilateral-agreements.html> (last visited Dec. 16, 2022); see also *Current Agreements and Import Restrictions*, U.S. DEP'T OF STATE, BUREAU OF EDUC. & CULTURAL AFFS., <https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions> (last visited Oct. 31, 2023).

66. "[I]f the President determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party, the President may apply the import restrictions set forth in section 2606 of this title with respect to such material." 19 U.S.C. § 2603 (b). Where an emergency condition includes property that is "identifiable as coming from any site recognized to be of high cultural significance if such site is in jeopardy from pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of crisis proportions[.]" *Id.* § 2603(a)(2). However, "[t]he President may not implement this section with respect to the archaeological or ethnological materials of any State Party unless the State Party has made a request . . . to the United States and has supplied information which supports a determination that an emergency condition exists." *Id.* § 2603(c)(1).

67. See Peters, *supra* note 60, at 386. According to Peters, this discrepancy between EU and UK laws might leave the United Kingdom susceptible to becoming a hub for trafficking in cultural objects. See *id.*

68. The EU regulation has also been subject to scrutiny as prone to evasion. Specifically, a provision allows the importer to "declare" the item has been illegally exported, rather than providing proof, when the origin of the good cannot be reliably determined and has been located in the last, exporting country (not the country of origin) for more than five years. Effectively, Ukrainian cultural property that is not easily identified as Ukrainian in origin could be held in

III. UKRAINE IN THE CONTEXT OF IRAQ AND SYRIA

The conflicts in both Iraq and Syria posed a similar threat to their cultural heritage as Russia's invasion currently poses to Ukraine. The political unrest in Iraq and Syria resulted in significant looting in both countries, and the international community was concerned that the sale of looted goods during conflict could fund terrorist activities in the region.<sup>69</sup> Even fewer legal protections were in place to protect Syrian and Iraqi cultural goods because the German, EU, and Canadian import regimes intending to recognize and enforce foreign export laws were not yet enacted.<sup>70</sup> In response to the significant concern for cultural property in those regions, the U.N. Security Council intervened.

In response to the U.S. failure to protect Iraqi museums and cultural sites during the 2003 invasion, the U.N. Security Council passed Resolution 1483 to facilitate the safe return of lost cultural property.<sup>71</sup> Among other provisions, the Resolution called on Member States to institute a ban on trade or transfer of Iraqi cultural property.<sup>72</sup> The Resolution was adopted under Chapter VII of the U.N. Charter,<sup>73</sup> meaning the obligations were binding on all member countries. In response to the Resolution, the United States instituted an import ban even though it had not concluded a bilateral treaty with Iraq to enforce its export ban.<sup>74</sup> The President could enact such a ban because Iraq was

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Russia and exported to the EU in five years with a simple "declaration" that it was legally exported from Russia. Holding looted goods to avoid these kinds of provisions is common practice, and thus this regulation leaves open a significant loophole. *See* Peters, *supra* note 60, at 385–86; *see also* Regulation 2019/880, *supra* note 63, art. 5.

69. *See Countering the Financing of Terrorism*, U.N. OFF. OF COUNTER-TERRORISM, <https://www.un.org/counterterrorism/cct/countering-the-financing-of-terrorism>.

70. The relevant import regulations were implemented by the EU in 2019, Canada in 1985, and Germany in 2016. *See* Peters, *supra* note 60, at 386.

71. *See* Zelig, *Recovering Iraq's Cultural Property: What Can be Done to Prevent Illicit Trafficking*, 31(1) BROOKJ. INT'L L. 289, 289, 308–309, 320 (2005).

72. "Decides that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph[.]" S.C. Res. 1483, ¶ 7 (May 22, 2003) (the second emphasis added).

73. *See id.* p.mbl.

74. "On April 30, 2008, pursuant to the Emergency Protection for Iraqi Cultural Antiquities Act, the United States imposed import restrictions on an emergency basis on certain categories of

a party to the 1970 UNESCO Convention, and the U.S. Congress had passed the Emergency Protection for Iraqi Cultural Antiquities Act of 2004, which permitted the President to enact a trade ban under an emergency conditions provision without Iraq requesting it.

Given that Ukraine is a member of the 1970 UNESCO Convention but has not requested U.S. enforcement of its export ban, the U.S. Congress should pass similar legislation permitting President Biden to impose an import ban on Ukrainian cultural property. Similar import bans on Iraqi cultural property were enacted in other major markets, such as the EU,<sup>75</sup> Canada,<sup>76</sup> and Australia.<sup>77</sup> After the United Kingdom exited the EU, it adopted the EU regulations banning trade in Iraqi cultural property.<sup>78</sup>

In 2015, to condemn ISIS's destruction of cultural heritage in Iraq and Syria, the U.N. Security Council passed Resolution 2199.<sup>79</sup> The Resolution sought to protect objects of "archaeological, historical, cultural, rare scientific, and religious importance illegally removed" from both Iraq and Syria.<sup>80</sup> The Resolution called on members to prohibit cross-border trade of these cultural objects to enable their eventual repatriation.<sup>81</sup> Again, the Resolution was adopted under Chapter VII of the U.N. Charter, conferring a binding obligation on all members.<sup>82</sup> In response to Resolution 2199, Member States widely adopted import bans on Syrian and Iraqi cultural property, including in major markets such as the United States,<sup>83</sup> the

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archaeological and ethnological material originating in Iraq." *See Current Agreements and Import Restrictions, supra* note 65.

75. Council Regulation 1210/2003, Concerning Certain Specific Restrictions on Economic and Financial Relations with Iraq and Repealing Regulation 2465/96, 2003 O.J. (L 169) 6-23 (EC).

76. Regulations Implementing the United Nations Resolutions on Iraq, SOR/2004-221 (Can.).

77. *Iraq Sanctions Regime*, AUSTL. GOV'T, DEP'T OF FOREIGN AFFS. & TRADE, <https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/iraq-sanctions-regime>.

78. The Iraq (Sanctions) (EU Exit) Regulations 2020, c.707 (UK), <https://www.legislation.gov.uk/uksi/2020/707/contents/made>.

79. *Unanimously Adopting Resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens Further Targeted Sanctions*, U.N. (Feb. 12, 2015), <https://press.un.org/en/2015/sc11775.doc.htm>.

80. S.C. Res. 2199, ¶ 17 (Feb. 12, 2015).

81. *Id.*

82. *Id.* p.mbl.

83. As with the Iraq import ban, the U.S. waived the requirement of Syria requesting enforcement and used the emergency measures provision to enact an import ban without concluding a bilateral agreement with Syria. *See Import Restrictions Imposed on Archaeological*

EU,<sup>84</sup> and the United Kingdom.<sup>85</sup>

Both Security Council Resolutions were highly effective at giving rise to immediate action on the part of U.N. Member States to enact import bans for the protection of cultural property. Compared with the 1970 UNESCO Convention, U.N. Security Council Resolutions are significantly more effective; in the fifty-two years since the 1970 UNESCO Convention came into force, out of 143 countries who have ratified the Convention, only four countries and the EU have enacted effective import controls.<sup>86</sup>

There are no comprehensive studies on the efficacy of the Syrian and Iraqi import bans. It is unclear to what extent these bans resulted in reduced theft or trade in cultural property from these regions; however, a UNESCO publication has reported that “tens of thousands” of Iraqi and Syrian cultural objects have been seized (out of hundreds of thousands suspected stolen).<sup>87</sup> Of the cultural property stolen, only a fraction has been repatriated, due in part to looters deliberately destroying forensic evidence that would help firmly establish the country of origin and due to political difficulties around the non-recognition of state-like authorities.<sup>88</sup> Despite these difficulties, import bans are still a critical step in facilitating the restoration of stolen cultural property. Without them, countries are not legally empowered to seize the goods in question and begin the repatriation process.

Unfortunately, the U.N. Security Council has not issued a resolution directing Member States to ban the import of Ukraine’s cultural property. Because Russia holds a permanent seat on the Security Council and would presumably veto any measure to protect Ukraine’s cultural heritage, the Council will likely never issue such a resolution. In fact, to date, the Security Council has only issued one resolution regarding the war in Ukraine, declaring a “lack of unanimity of its permanent members” regarding the conflict.<sup>89</sup>

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and Ethnological Material of Syria, 19 C.F.R. 12 (2016); Protect and Preserve International Cultural Property Act, 19 U.S.C. §§ 2601–06; 19 U.S.C. §§ 2601–03.

84. Council Regulation 36/2012 of 18 Jan. 2012, Concerning Restrictive Measures in View of the Situation in Syria and Repealing Regulation 442/2011, 2012 O.J. (L. 16).

85. The Syria (United Nations Sanctions) (Cultural Property) (EU Exit) Regulations 2020, SI 2020/1233, § 7 (Eng.).

86. For the list of the countries that have ratified the 1970 UNESCO Convention, see *About 1970 Convention*, UNESCO, <https://en.unesco.org/fightrafficking/1970>; see also Peters, *supra* note 60, at 377.

87. See Samuel Hardy, *Curbing the Spoils of War*, UNESCO COURIER (Oct. 17, 2017), <https://courier.unesco.org/en/articles/curbing-spoils-war>.

88. See *id.*

89. S.C. Res. 2623, pmb. (Feb. 27, 2022).



IV. IMPORT CONTROLS AS A VIOLATION OF WTO LAW

The impossibility of a binding U.N. Security Council resolution is detrimental to the protection of Ukrainian cultural property not only because it reduces the impetus for state action but also because it presents a potential issue under WTO law. Specifically, if countries enact import bans without acting pursuant to U.N. obligations, they may violate their WTO obligations. Article XI of the GATT prohibits Member States from enacting “prohibitions or restrictions other than duties, taxes or other charges,” which includes prohibiting measures such as, *inter alia*, import or export bans, licensing schemes, or quotas.<sup>90</sup> Article XI has given rise to several disputes at the WTO Dispute Settlement Body [DSB], and the body has interpreted Article XI broadly to prohibit various trade restrictions, including *de facto* restrictions or licensing bans.<sup>91</sup> Because import bans on cultural property are outright bans on the importation of a good, these measures fall squarely under Article XI and, thus, are prohibited under the GATT.

However, import and export restrictions are commonly maintained among WTO members to restrict trade in illegal drugs, hazardous chemicals, firearms, and more.<sup>92</sup> These restrictions violate Article XI; however, the enacting states are not in violation of their treaty obligations because the GATT includes a variety of exceptions. GATT Article XX enumerates policy-based exceptions, including, *inter alia*, restrictions that “protect human, animal[,] or plant life or health,” restrictions that “secure compliance” with domestic laws, and restrictions for

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90. General Agreement on Tariffs and Trade 1994 art. XI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994] (“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”).

91. “[T]he text of Article XI was considered by several Panels very broad in scope, covering all measures prohibiting or restricting the importation, exportation, or sale for export of products other than measures taking the form duties, taxes or other charges. These include restrictions which constitute a limitation on action, a limiting condition or regulation, as well as *de facto* restrictions or restrictions based on the design of the measure and its potential adverse effect on trade. Certain regulatory regimes, discretionary licensing schemes, price requirements, and restrictions on circumstances of importation have been considered quantitative restrictions by the WTO jurisprudence.” *Market Access: Quantitative Restrictions*, WTO, [https://www.wto.org/english/tratop\\_e/markacc\\_e/qr\\_e.htm](https://www.wto.org/english/tratop_e/markacc_e/qr_e.htm) (last visited Dec. 15, 2022).

92. See, e.g., Committee on Market Access, *Canada: Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions (G/L/59/REV.1)*, WTO Doc. G/MA/QR/N/CAN/5 (Oct. 5, 2022) [hereinafter *Canada Notification*].

the protection of national treasures.<sup>93</sup> Additionally, GATT Article XXI provides exceptions for national security purposes.<sup>94</sup> Specifically relevant here, Article XXI(c) permits Member States to enact trade-restrictive measures pursuant to an “obligation[] under the [U.N.] Charter for the maintenance of international peace and security.”<sup>95</sup>

Article XXI(c) presumably excused the import bans on Syrian and Iraqi cultural property that were enacted pursuant to U.N. Resolutions 1483 and 2199. As discussed earlier, these Resolutions were binding on U.N. Member States. Therefore, import bans on Iraqi and Syrian cultural property were permissible under Article XXI(c) as “obligations under the [U.N.] Charter[.]”<sup>96</sup> However, Member States cannot invoke Article XXI(c) to prohibit the import of Ukrainian cultural property because Russia will veto any resolution protecting Ukraine. Without a binding resolution from the U.N. Security Council, there is no “obligation” under the U.N. Charter to ban trade in Ukrainian cultural property, and the Article XXI(c) exception would likely not apply.

Of the countries that have enacted general import restrictions on cultural property (the United States, Canada, Switzerland, Germany, and the EU), most have invoked GATT Article XX(f)’s exception for the protection of national treasures.<sup>97</sup> Starting in 2012, the WTO required Member States to notify the WTO of quantitative restrictions and identify which exceptions apply.<sup>98</sup> The United States, Canada, and the

93. GATT 1994 art. XX.

94. *Id.* art. XXI(a)-(b) (“Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests[.]”).

95. *Id.* art. XXI(c). The primacy of U.N. law is recognized in both treaties. Compare U.N. Charter arts. 41, 42, which authorizes the Security Council to mandate “complete or partial interruption of economic relations” in an effort “to maintain or restore international peace and security[.]” with GATT 1994 art. XXI(c) (“Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”).

96. GATT 1994 art. XXI(c).

97. See Peters, *supra* note 60, 377-78, 384-87.

98. The WTO Decision on Quantitative Restrictions, adopted in 2012, requires Member States to notify the WTO when enacting new quantitative restrictions, which again are generally prohibited under the GATT, and requires the member to identify which exceptions apply. See Council for Trade in Goods, *Decision on Notification Procedures for Quantitative Restrictions*, WTO Doc. G/L/59/Rev.1 (adopted June 22, 2012) [hereinafter *WTO Decision on Quantitative Restrictions*]. Unfortunately, Member State compliance with the notification requirement has been inconsistent. As it relates to the import bans on Iraqi and Syrian cultural property, no Member States have filed notifications on these restrictions. Therefore, it is impossible to know

EU have filed notifications with the WTO.<sup>99</sup> In their notifications, Canada and the United States list the 1970 UNESCO Convention and the GATT Article XX(f) exception to support their import restrictions on cultural property,<sup>100</sup> while the EU only cites Article XX(f).<sup>101</sup> If the WTO Committee on Open Markets or another member reviews the Member State's notification and has concerns, it can issue a list of questions to further clarify the extent of the restrictions.<sup>102</sup> Neither the Committee nor another member has issued questions relating to the restrictions on cultural property or the states' invocation of Article XX(f) to support these restrictions, which may indicate that this application of the exception is permissible. However, a lack of Committee questions is an unclear signal of the WTO's perspective. Even if the Committee did agree with this application of Article XX(f), there are no assurances that a dispute resolution panel would agree with the Committee's perspective. No disputes relating to Article XX(f) have been brought before the panel, so no case law exists to indicate how the dispute resolution body would interpret and apply this provision.

Violations of WTO obligations could result in litigation at the WTO DSB, which, if found to have a violation, would force the enacting state to repeal the ban on stolen Ukrainian cultural property. However, even if no litigation arises, WTO Member States are still required to notify the WTO of all quantitative restrictions and must declare the

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whether Member States would invoke Article XXI(c) or some other exception to exempt bans on trade in Iraqi and Syrian cultural property.

99. *Canada Notification*, *supra* note 92; Committee on Market Access, *United States: Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions (G/L/59/REV.1)*, WTO Doc. G/MA/QR/N/USA/6 (Oct. 10, 2022) [hereinafter *U.S. Notification*]; Committee on Market Access, *European Union: Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions (G/L/59/REV.1)*, WTO Doc. G/MA/QR/N/EU/6 (Oct. 7, 2022) [hereinafter *EU Notification*].

100. *See Canada Notification*, *supra* note 92, at 11-12; *see also U.S. Notification*, *supra* note 99, at 9. The WTO acknowledges that members undertake prohibitions pursuant to other international obligations, but requires the member identify a WTO justification for the restriction in filing its notification with the Committee on Market Access: "Members have also adopted prohibitions or restrictions to trade as a result of international obligations undertaken outside the WTO framework ... [w]hen a Member applies a quantitative restriction as a result of other international commitments, it shall also notify it under the QR Decision and indicate which WTO provision would justify it." WTO ANALYTICAL INDEX: GATT 1994 ARTICLE XI (PRACTICE), § 1.4.4, [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art11\\_oth.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art11_oth.pdf) (emphasis added).

101. *EU Notification*, *supra* note 99, at 52.

102. *See Market Access: Quantitative Restrictions*, *supra* note 91.

exception under which the restrictions are permitted.<sup>103</sup> Therefore, WTO members who seek to ban trade in stolen Ukrainian property must identify proper grounds under WTO law prior to enactment.

Without a U.N. Security Council resolution sufficient under Article XXI(c), there are several alternative legal approaches available to Member States to avoid violating their WTO obligations while prohibiting trade in Ukrainian cultural property. First, WTO Member States could still enact import restrictions under the GATT XXI(c) exception by claiming to act pursuant to a non-binding Security Council resolution that calls for protection of cultural property. Second, the WTO Member States could also invoke two policy exceptions under GATT Article XX, including the exception for the protection of national treasures and the exception to secure compliance with domestic laws. Of the three alternative justifications, the national treasures exception under GATT Article XX(f) likely provides the strongest basis for states to enact unilateral import controls on Ukrainian cultural property.

#### A. Action Pursuant to a Non-Binding Security Council Resolution

First, although the U.N. Security Council cannot pass a resolution prohibiting trade in Ukrainian cultural property, the Security Council has previously passed a general resolution against illicit trade in cultural property. U.N. Security Council Resolution 2347, adopted in March 2017, focuses on eliminating trade in cultural property originating from the context of *any* armed conflict.<sup>104</sup> This Resolution differs from earlier resolutions, which specifically targeted cultural property

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103. *WTO Decision on Quantitative Restrictions*, *supra* note 98, art. 2(v) (requiring countries to declare “an indication of the grounds and WTO justification for the measures maintained, including any relevant international commitment where appropriate, and the precise WTO provisions which the Member cites as justification”). It is important to highlight that this notification requirement was not implemented until 2012 and faced weak and inconsistent compliance. See WTO General Council, *Communication from Argentina, Costa Rica, the European Union, Japan, and the United States: Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements*, pmbll., WTO Doc. JOB/CTG/14, JOB/GC/204 (Nov. 1, 2018) (“[a]cknowledging the chronic low level of compliance with existing notification requirements under many WTO agreements[.]”). Therefore, while we can assume that countries would claim the GATT Article XXI(c) exception to justify measures banning trade in Syrian and Iraqi cultural property, without litigation or notification, there is no way to confirm their legal basis for action. They may have claimed one of the other exceptions discussed in this paper.

104. S.C. Res. 2347, ¶ 8 (Mar. 24, 2017) (“*Requests* Member States to take appropriate steps to prevent and counter the illicit trade and trafficking in cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance originating from a context of armed conflict, notably from terrorist groups, *including by prohibiting cross-border trade in such illicit items where States have a reasonable suspicion that the items originate from a context of armed*

originating from conflicts in Iraq or Syria.<sup>105</sup> Therefore, WTO Member States that want to enact import bans on cultural property from Ukraine could claim to act pursuant to U.N. Security Council Resolution 2347, qualifying them for the GATT XXI(c) exception.

However, there are difficulties with this approach. U.N. Security Council Resolution 2347 was not enacted under Chapter VII of the U.N. Charter, meaning that the resolution is not binding on U.N. Member States. If the resolution is not binding, states likely cannot claim that they are acting pursuant to an “obligation” under the U.N. Charter, and the GATT XXI(c) exception may not apply. The term “obligation” implies a binding commitment; however, the WTO DSB has never decided a case regarding this GATT provision; therefore, it is unclear how they would interpret the term.

The WTO DSB could adopt either a narrow or broad interpretation of GATT XXI, and strong arguments support both approaches. On the one hand, sections (a) and (b) of GATT XXI permit Member States to enact trade-restrictive measures “which [the Member State] considers” essential to certain national security interests.<sup>106</sup> The WTO DSB has interpreted this phrase to mean that those exceptions are self-judging, where the Member States are given large discretion to determine whether the exception applies.<sup>107</sup> However, GATT XXI(c) does not include the phrase “which [the Member State] considers,” implying that less deference would be given to Member States to determine for themselves whether they are acting pursuant to an obligation under the U.N. Charter. This supports a narrower interpretation of the provision. On the other hand, the WTO is also a political body that would likely not want to be seen to side with Russia in this conflict or appear to be against the protection of Ukrainian cultural property, especially when bans on Ukrainian cultural property would overall not significantly hamper global trade. To that end, a WTO Panel or Appellate Body may take a wider stance and interpret Article XX(c) to apply to actions taken pursuant to non-binding U.N. resolutions.

Given that an interpretation of the GATT XXI national security exception is uncertain, Member States might alternatively look to the public policy exceptions provided in Article XX of the GATT. The two most relevant exceptions are Article XX(f), which permits trade-

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*conflict*, notably from terrorist groups, and which lack clearly documented and certified provenance, thereby allowing for their eventual safe return[.]” (the second emphasis added).

105. See S.C. Res. 2199, *supra* note 80, ¶ 17; see also S.C. Res. 1483, *supra* note 72, ¶ 7.

106. GATT 1994 art. XXI(a)-(b).

107. See generally Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

restrictive measures for the protection of national treasures, and Article XX(d), which permits trade-restrictive measures that are intended to secure compliance with domestic laws.

B. *Acting Under the GATT Article XX(d) Exception for Securing Compliance with Domestic Laws*

WTO Member States may be able to implement import restrictions on Ukrainian cultural property without violating WTO obligations by invoking the GATT Article XX(d) exception, which provides that states may enact trade-restrictive measures that are “necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement[.]”<sup>108</sup> GATT Article III focuses on national treatment provisions, which dictate that member countries cannot treat imported products less favorably than domestic products.<sup>109</sup> However, the Article XX(d) exception clarifies that states can enact laws to ensure that importers face the same internal regulatory environment as domestic producers.<sup>110</sup> To successfully claim that a law satisfies the Article XX(d) exception, Member States must demonstrate that the law is necessary, is not inconsistent with other provisions of the GATT, and that the measure is “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade[.]”<sup>111</sup>

Using this exception, WTO Member States could impose trade restrictions on Ukrainian cultural property by claiming the measure is necessary to secure compliance with a myriad of different laws, such as domestic restrictions on the sale of cultural property or against the sale of stolen goods. For instance, the U.S. Stolen Property Act prohibits interstate transport of stolen goods exceeding \$5,000.<sup>112</sup> To secure

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108. GATT 1994 art. XX(d) (“nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]”).

109. *Id.* art. III, ¶ 4 (“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”).

110. *See id.* art. XX(d).

111. *Id.* art. XX.

112. 18 U.S.C. § 2314.

compliance with this law, the United States could enact an import ban on stolen goods exceeding the same amount. However, immediate difficulties arise. The United States has enacted a law that prohibits the importation of stolen cultural property, but the law does not include the same value restrictions as the U.S. Stolen Property Act.<sup>113</sup> If the United States were to claim that it enacted the import ban to secure compliance with the U.S. Stolen Property Act under Article XX(d), it would lose any legal challenge. Because the domestic law permits the transport of goods under \$5,000 and the import ban does not, the ban arguably disfavors international smugglers and, therefore, fails to satisfy the GATT's national treatment requirements. While the obligation to treat smugglers fairly sounds absurd, this example illustrates the legal difficulties of ensuring any import ban perfectly mirrors domestic obligations.

Different legal regimes across jurisdictions could also prevent uniform import bans on Ukrainian cultural property. For example, the United States has few domestic laws regulating the sale of cultural property,<sup>114</sup> and therefore, the most relevant domestic laws will relate to banning the sale and transportation of stolen goods. However, as discussed above, Ukraine's export laws do not confer state ownership on illegally exported goods;<sup>115</sup> therefore, most will only be considered illegally exported and not stolen. This is additionally complicated by Russia's claims of legally removing certain cultural property under martial law.<sup>116</sup> If the United States is confined to implementing import bans only on those goods that were stolen from Ukraine, the United States may inadvertently become a hub for trafficked Ukrainian cultural property. In general, different legal regimes will lead to varying levels of import restrictions and a regulatory arbitrage for trafficking in these goods. Because of the practical difficulties in designing an import ban that would satisfy Article XX(d) and achieve satisfactory protection for Ukrainian cultural property, Article XX(d) is not the best justification under WTO law for imposing import bans on cultural objects from Ukraine.

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113. 19 U.S.C. § 2607. Note this law does not apply to Ukrainian cultural property because illegally exported cultural property is not considered "stolen" under Ukraine's legal regime. See Ukraine Law on Cultural Values, *supra* note 56.

114. See, e.g., 18 U.S.C. § 2314.

115. See *supra* Section II.B.

116. See Dafoe, *supra* note 8.

C. *Acting Under the GATT Article XX(f) Exception for the Protection of National Treasures*

WTO Member States may consider invoking GATT Article XX(f)'s exception, which permits trade-restrictive measures that are "imposed for the protection of national treasures of artistic, historical or archaeological value."<sup>117</sup> Because any import bans on Ukrainian cultural property would be enacted for the purpose of preserving Ukraine's national treasures of artistic, historical, or archeological value, this provision would arguably apply. Again, there have not been any WTO dispute resolution cases interpreting this exception, so it is unclear how the WTO would apply this exception. On the one hand, "national treasures" may be interpreted to mean measures protecting the nation's own treasures and not those of other nations. This provision was included in the original GATT 1947 and thus was drafted before the 1954 Hague Convention, and the 1970 UNESCO Convention codified international obligations to protect world heritage.<sup>118</sup> The timing of the provision may suggest a narrow scope for interpretation, applying only to the protection of domestic, not foreign, "treasures." In that case, another country's import ban protecting Ukraine's national treasures would not fall under this exception.

However, there are significant reasons to believe the Article XX(f) exception applies more broadly. First, unlike other Article XX exceptions, Article XX(f) is not preceded by the language requiring the measures to be "necessary" for or "in pursuit of" certain policy objectives. Again, Article XX(f) has never been interpreted by the DSB; however, the DSB has ruled on other Article XX exceptions that also do not contain the language "necessary" for or "in pursuit of." In those cases, the DSB has ruled that Article XX exceptions that do not contain the language "necessary" for or "in pursuit of" are permitted to have a looser connection between the measure enacted and the legitimate policy enumerated in the Article.<sup>119</sup> Therefore, the Article XX(f) exception permits a looser connection between measures enacted and the policy goal of protection of national treasures. Given this interpretation,

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117. GATT 1994 art. XX(f) ("nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . imposed for the protection of national treasures of artistic, historic or archaeological value[.]" ).

118. *See* General Agreement on Tariffs and Trade art. XX(f), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

119. *See* Nafziger & Paterson, *supra* note 51, at 41–42; *see, e.g.*, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Nov. 6, 1998) (invoking Article XX(b), (g)).



import bans for the protection of Ukraine's national treasures could feasibly fall under the scope of this exception.

In addition to WTO case law, state practice also supports a wider interpretation of Article XX(f). In 2019, the EU passed a regulation banning the import of cultural goods illegally exported from any origin country, as discussed above.<sup>120</sup> The regulation was enacted to protect cultural goods that were created or discovered outside the EU and explicitly does not apply to the national treasures of EU nations.<sup>121</sup> In 2022, the EU filed a Notification of Quantitative Restrictions with the WTO's Open Market Committee, notifying the WTO of these import restrictions.<sup>122</sup> The EU listed the WTO justification for this measure as "[p]rotection of treasures of artistic, historical or archaeological value," which mirrors the language of Article XX(f).<sup>123</sup> Thus, the EU cited Article XX(f) as a justification for import restrictions on cultural items that are national treasures of non-EU countries.

Additionally, Thailand, Ukraine, and Canada have all cited Article XX(f) as a justification for similar import bans on other countries' cultural property.<sup>124</sup> Canada lists both Article XX(f) and the 1970 UNESCO Convention as justifications for import restrictions on cultural property, which further supports the idea that states interpret Article XX(f) as a means to fulfill their obligations under the UNESCO Convention.<sup>125</sup> State practice thus supports a broader interpretation of the Article XX(f) exception. Given that both WTO case law and state practice support a broad interpretation of the exception, Article XX(f) provides the strongest basis for states to enact import restrictions on Ukrainian cultural property without violating their WTO obligations.

## V. CONCLUSION

In reviewing relevant international treaties on cultural property, none give rise to binding obligations on relevant actors to provide significant protection for Ukrainian cultural property today. Therefore,

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120. Regulation 2019/880, *supra* note 63, arts. 3, 4, Annex B. Specifically, import licenses are required for products of archeological sites or elements of monuments exceeding 250 years old or any liturgical icons or statues that would be considered cultural goods. *Id.* Annex B.

121. *Id.* ¶¶ 2-5 ("this Regulation should not apply to cultural goods which were created or discovered in the customs territory of the Union.").

122. See generally *EU Notification*, *supra* note 99.

123. See *id.* at 52.

124. Committee on Market Access, *Thailand: Notification Pursuant To The Decision On Notification Procedures For Quantitative Restrictions* (G/L/59/Rev.1), WTO Doc. G/MA/QR/N/THA/1 (Oct. 26, 2012); *Ukraine Notification*, *supra* note 55; *Canada Notification*, *supra* note 92.

125. *Canada Notification*, *supra* note 92, at 11-12.

states will have to act independently to enact protections. Import bans on cultural property from Ukraine provide the greatest protection of the available domestic law tools. However, countries who enact such import bans risk a violation of their WTO treaty obligations. Though the exception historically used for this type of action, Article XXI(c), is likely unavailable for Ukraine-focused measures, other exceptions can be utilized. Of the other exceptions available, GATT Article XX(f)'s exception for restrictions protecting national treasures is the strongest legal justification for action. Given significant state practice invoking this exception for similar import bans, states can enact import bans on Ukrainian cultural property without fearing WTO backlash. Based on robust prior international commitments to protect cultural property like the 1970 UNESCO Convention, states should immediately impose import bans on Ukrainian cultural property and dedicate significant resources to enforcing bans, prosecuting violating individuals, and restoring looted materials.