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# RETROACTIVITY IN THE 1970 UNESCO CONVENTION: CASES OF THE UNITED STATES AND AUSTRALIA

## INTRODUCTION

On September 5, 2014, Australia announced that it would return a nine hundred-year-old bronze statue of the god Shiva to its home country of India.<sup>1</sup> The statue was purchased for \$5.6 million AUD and was returned along with a stone statue of Shiva with Nandi, which was purchased for \$300,000 AUD, by Australian Prime Minister Tony Abbott during his visit to India.<sup>2</sup> The National Gallery of Australia acquired the statues from the now infamous Subhash Kapoor, an Indian-born New York-based antiquities dealer charged with organizing a \$100 million USD smuggling ring.<sup>3</sup> The Shiva Nataraja was illegally removed from the Hindu temple at Tamil Nadu and was among the items Kapoor admitted to illegally exporting out of India after their removal.<sup>4</sup> Australia's willingness to

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1. This "dancing Shiva," also known as the "Shiva Nataraja" statue, dates to the Chola dynasty and was in the possession of the National Gallery of Australia ("National Gallery") since its purchase in 2008. India requested the return of this artifact in March 2014 under the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") agreement regarding stolen artworks. See Latika Bourke, *Dancing Shiva to be Returned During Abbott's India Visit*, SYDNEY MORNING HERALD (Sept. 5, 2014), <http://www.smh.com.au/federal-politics/political-news/dancing-shiva-to-be-returned-during-abbotts-india-visit-20140904-10cqvy.html>.

2. India and Australia have had a strained relationship since 2007, when the Australian government decided to stop the sale of uranium to India. Bourke, *supra* note 1. Tony Abbott's trip partially intended to improve Australia-India relations. See Gabrielle Chan, *Stolen Indian Statue, Shiva Nataraja, to go Home During Tony Abbott Visit*, GUARDIAN (Sept. 4, 2014), <http://www.theguardian.com/world/2014/sep/05/stolen-indian-statue-shiva-nataraja-to-go-home-during-tony-abbott-visit>.

3. See Abby Seiff, *Looted Beauty*, A.B.A. J., July 2014, at 35, 41.

4. Kapoor claimed that a diplomat's wife sold the pieces to him. *Australia Set to return Ancient Statues to India*, KHALEEJ TIMES (Mar. 27, 2014), <http://www.khaleejtimes.com/article/20140327/ARTICLE/303279924/1028>.

Among the stolen items listed was the Shiva Nataraja statue. See Chan, *supra* note 2. Authorities in India issued a warrant for Kapoor's arrest in October 2011. At that time, Kapoor was visiting an exhibition in Frankfurt, Germany, where he was ultimately arrested and extradited to India. See Tom Mashberf & Max Bearak, *The Ultimate Temple Raider?*, N.Y. TIMES, July 26, 2015, at AR1. Since his extradition, Kapoor has awaited trial in a prison in

return the Shiva to India is just one illustration of the recent trend of governments and museums cooperating with source nations in returning illegally exported artifacts.<sup>5</sup> Until recently, such cordial exchanges were a rarity.

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Chennai, India for two criminal cases pending against him. *Id.* On September 4, 2015, the Madras High Court rejected Kapoor's fourth bail plea application explaining that since his bail had already been previously extended, "it would result in prolongation of the trial as there is every likelihood of his fleeing from the clutches of law." *Bail Plea of Idol Smuggler Subhash Kapoor Rejected*, NEW INDIAN EXPRESS (Sept. 4, 2015), [http://www.newindianexpress.com/states/tamil\\_nadu/Bail-Plea-of-Idol-smuggler-Subhash-Kapoor-rejected/2015/09/04/article3009680.ece](http://www.newindianexpress.com/states/tamil_nadu/Bail-Plea-of-Idol-smuggler-Subhash-Kapoor-rejected/2015/09/04/article3009680.ece). Kapoor is facing the maximum sentence of fourteen years for smuggling antiquities. Rachel Kleinman & Amrit Dhillon, *The National gallery of Australia Dances Into Trouble with Shiva*, SYDNEY MORNING HERALD (Mar. 18, 2014), <http://www.smh.com.au/national/the-national-gallery-of-australia-dances-into-trouble-with-shiva-20140317-34xui.html>. As for the National Gallery of Australia, it claimed no knowledge of Kapoor's illicit activity and maintained that during the negotiations to purchase the Shiva Natajara the Gallery "carefully checked all known art registers [and] determined that the work was of appropriate quality for the collection and independently verified its previous owners." See NAT'L GALLERY OF AUSTL., ANNUAL REPORT 2013-14, at 17-18, [http://nga.gov.au/AboutUs/Reports/NGA\\_AR\\_13-14.pdf](http://nga.gov.au/AboutUs/Reports/NGA_AR_13-14.pdf). Furthermore, "independent art experts were consulted and specialist legal advice was sought" before the purchase was completed. *Id.* Just how in-depth all this research was remains speculative since galleries are known to turn their eye when it comes to purchases of highly desirable objects. Nonetheless, the National Gallery decried its luck and stated that "[m]any institutions across the world are in a similar situation." *Id.* Yet, the National Gallery was very reluctant to admit that the statue may have been acquired through illegal means. See Andrew Taylor, *National Gallery of Australia Director Ron Radford Reluctant to Admit Dancing Shiva is Stolen*, SYDNEY MORNING HERALD (Apr. 7, 2014), <http://www.smh.com.au/entertainment/art-and-design/national-gallery-of-australia-director-ron-radford-reluctant-to-admit-dancing-shiva-is-stolen-20140406-366mx.html>. For more information about the removal of the Shiva statue, see Michaela Boland and Amanda Hodge, *Town Prays for its Stolen God Shiva to Return*, AUSTRALIAN (Mar. 8, 2014), <http://www.theaustralian.com.au/arts/town-prays-for-its-stolen-god-shiva-to-return/story-e6f8n6-1226848649572>.

5. As a result of this scandal, the National Gallery announced on December 14, 2014, that it was independently reviewing its Asian art collection to address any provenance issues. See December Media Releases, Nat'l Gallery of Austl., National Gallery of Australia Establishes Independent Review of Asian Art Collection (Dec. 19, 2014), *available at* <http://nga.gov.au/AboutUs/press/Archive/Archiv14.cfm>. The collection features some five thousand pieces, and so far fifty-four have been shown to require further information and documentation. *Id.* This in turn prompted the Australian government to review the Protection of Movable Cultural Herit-

Millions of patrons visit the world's museums every year.<sup>6</sup> While strolling through grand halls filled with exquisite pieces of art, one rarely stops to think about how these objects made their way to what they now call home. However, the dirty secret of museum collecting is gradually seeping out into the international public sphere.<sup>7</sup> This secret is the acquisition and incorporation of stolen and looted artifacts into museum collections—a practice as old as the very institution of the museum itself.<sup>8</sup> But institutions are not the only ones making such deals; private collections are ripe with artifacts lacking prove-

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age Act (PMCHA), which has not been updated since 1986. See Australian Associated Press, *National Gallery's Stolen Shiva Prompts Review of Import and Export Laws*, GUARDIAN (Dec. 23, 2014), <http://www.theguardian.com/australia-news/2014/dec/23/import-export-cultural-objects-acquisition-scandals-shiva>.

6. The British Museum in London reports a record of 6.7 million visitors for 2013. See *British Museum, British Museum has Record Year of 6.7 Million Visitors in 2013*, BRITISH MUSEUM, [http://www.britishmuseum.org/about\\_us/news\\_and\\_press/press\\_releases/2014/record\\_visitor\\_figures.aspx](http://www.britishmuseum.org/about_us/news_and_press/press_releases/2014/record_visitor_figures.aspx) (last visited Oct. 31, 2015). The Metropolitan Museum of Art in New York (the "Met") boasted of 6.2 million visitors for fiscal year 2013, the first year the Met was open seven days a week to the public. See *Metropolitan Museum of Art, Metropolitan Museum Announces 6.2 Million Annual Attendance*, METROPOLITAN MUSEUM OF ART (July 25, 2014), <http://www.metmuseum.org/about-the-museum/press-room/news/2014/met-attendance-fy-2014>. In addition, three of its special exhibitions in 2013 are estimated to have generated some \$742 million for New York, ensuring the Met's status as a powerhouse institution in the City. See *Three Metropolitan Museum Exhibitions Stimulate \$742 Million 2013 Economic Impact for New York*, METROPOLITAN MUSEUM OF ART (Oct. 7, 2013), <http://www.metmuseum.org/about-the-museum/press-room/news/2013/economic-impact-release-october-2013>.

7. One of the most publicized museum scandals in recent history involved the Getty Museum and the arrest and criminal prosecution of its then curator Marion True who conspired to purchase illegally obtained Italian antiquities for the museum. See Elisabetta Povoledo, *Rome Trial of Ex-Getty Curator Ends*, N.Y. TIMES (Oct. 13, 2010), <http://www.nytimes.com/2010/10/14/arts/design/14true.html>.

8. See generally REINVENTING THE MUSEUM: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON THE PARADIGM SHIFT (Gail Anderson ed., 2004) (discussing museum collecting practices and their evolution in response to the modern viewer). The illicit antiquities market seems to predate ancient Greece itself, and looting has always been closely intertwined with wartime. See NEIL BRODIE, JENNY DOOLE AND PETER WATSON, *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 8–25 (2000).

nance, which are purchased at extravagant prices.<sup>9</sup> Illicit art dealing has grown into an extremely lucrative business, amounting to millions of dollars each year.<sup>10</sup> Some experts have speculated “[I]n monetary terms, the illicit art trade is second only to the narcotics business.”<sup>11</sup> Therefore, it is not surprising that looted artifacts continue to flood the antiquities market especially since many war-torn nations, such as Syria and Afghanistan,<sup>12</sup> are unable to protect their artifacts from being sto-

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9. The Boston Museum of Fine Arts (“MFA”) recently returned a number of Nigerian artifacts after an inquiry into their provenance showed that they were in fact stolen or looted. Many of these pieces were bequeathed to the MFA by William Teel after his death in 2012. An investigation into these pieces as well as others donated by Teel to the MFA, revealed that although many had a clear title, there were a number that did not. Jason Felch, *Boston MFA’s Provenance Research Reveals the Illicit Trade in African Art*, CHASING APHRODITE BLOG (July 30, 2014), <http://chasingaphrodite.com/2014/07/30/boston-mfas-provenance-research-reveals-the-illicit-trade-in-african-antiquities/>. While the MFA’s project is a commendable effort, it has not been widely adopted and the MFA itself continues to mend the mistakes of its collecting past. See Donna Yates, *November Collection of Maya Pottery*, TRAFFICKING CULTURE <http://traffickingculture.org/encyclopedia/case-studies/november-collection-of-maya-pottery/> (last updated June 11, 2014). For an extreme example of the prices collectors are willing to pay for art, whether ancient or modern, one can look to the collection of the late Adolph Alfred Taubman whose private collection sold for \$419.7 million USD on November 6, 2015 at Sotheby’s. James Tarmy, *One Man’s Art Collection Just Sold for (only) \$420 Million*, BLOOMBERG (Nov. 4, 2015), <http://www.bloomberg.com/news/articles/2015-11-06/sotheby-s-a-alfred-taubman-sale-top-10-lots-results>. Taubman’s collection includes ancient art as well as the works of Rothko, Picasso, and de Kooning to name a few. See Andrew Buncombe, *Adolph Alfred Taubman: \$500M Private Art Collection of US Tycoon to be Sold at Auction*, INDEPENDENT (Sept. 4, 2015), <http://www.independent.co.uk/news/world/americas/adolph-alfred-taubman-500m-private-art-collection-of-us-tycoon-to-be-sold-at-auction-10487203.html>.

10. In 2013, Subhash Kapoor’s sister Sareen was charged with four counts of criminal possession of stolen property for hiding four bronze statues of Hindu gods. The statues were estimated to be worth \$14.5 million. Bruce Zagaris, *U.S. and Australia Cooperate with India on the Kapoor Case on Indian Artifacts*, 30 INT’L L. ENFORCEMENT REP., no. 1, 2014, at para. 1. U.S. Immigration and Customs Enforcement have referred to Subhash Kapoor and his circle of accomplices been as “one of the most prolific commodities smugglers in the world today.” Seiff, *supra* note 3, at 67.

11. Amy Bitterman, *Settling Cultural Property Disputes*, 19 VILL. SPORTS & ENT. L. J. 1, 5 (2012).

12. Many civilian victims of the conflict in the Middle East find looting to be an easy and lucrative way to make a living, but such practices are not lim-

len. Additionally, the monetary incentives involved in smuggling cultural objects continue to promote this illegal trafficking.<sup>13</sup>

Each year powerhouse museums such as The Metropolitan Museum of Art in New York (“the Met”) and the British Museum in London, receive repatriation requests from various countries struggling to reclaim their looted heritage.<sup>14</sup> Many in-

ited to war-torn nations. Steve Schlackman, *Using Drones to Combat Archaeological Looting*, ART L.J. (Apr. 6, 2015), <http://www.bloomberg.com/news/articles/2015-11-06/sotheby-s-a-alfred-taubman-sale-top-10-lots-results> Looted sites become sources of wealth for locals and a contextual nightmare for academics due to problems with undocumented provenance. See *Afghanistan’s Looted and Lost Heritage*, NAT’L GEOGRAPHIC (Aug. 3, 2013), <http://news.nationalgeographic.com/news/2013/08/pictures/130802-afghanistan-stolen-treasures-looting-archaeology-black-market/>.

13. See Seiff, *supra* note 3, at 41. In Syria, the ravages of war have had long-lasting effects not only on the people but also on the cultural heritage of the region. Archaeologists, academics, and amateurs are working together to document the damage to sites in Syria and promote a general awareness worldwide regarding the plight of many Middle Eastern sites. See Ursula Lindsey, *Academics and Archaeologists Fight to Save Syria’s Artifacts*, N.Y. TIMES (Aug. 24, 2014), <http://www.nytimes.com/2014/08/25/world/middleeast/academics-and-archaeologists-fight-to-save-syrias-artifacts.html>.

14. For the most recent example of cooperation between museums and states in returning looted objects, see *Metropolitan Museum of Art to Return Two Khmer Sculptures to Cambodia*, METROPOLITAN MUSEUM OF ART (May 3, 2013), <http://www.metmuseum.org/about-the-museum/press-room/news/2013/cambodian-returns>. Interestingly, since May 2013, the Met has not released any news regarding any other items it intends to return in the near future. For a general overview of how museums obtain illegally removed objects, see Carl Franzen, *Ill-gotten Gains: How Many Museums Have Stolen Objects in Their Collections?*, VERGE (May 13, 2013), <http://www.theverge.com/2013/5/13/4326306/museum-artifacts-looted-repatriation>. According to the British Museum website, the last press release to mention the repatriation of cultural artifacts was issued in March 2006. See *British Museum Decides to Return two Tasmanian Cremation Ash Bundles*, BRITISH MUSEUM (Mar. 24, 2006), [www.britishmuseum.org/about\\_us/news\\_and\\_press/press\\_releases/2006/tasmanian\\_cremation\\_bundles.aspx](http://www.britishmuseum.org/about_us/news_and_press/press_releases/2006/tasmanian_cremation_bundles.aspx). There were no published returns of artifacts until July 2012, when the British Museum helped return smuggled artifacts to the National Museum in Kabul. *Stolen Artifacts Returned to the National Museum of Afghanistan in Kabul*, BRIT. MUSEUM, [http://www.britishmuseum.org/about\\_us/news\\_and\\_press/press\\_releases/2012/stolen\\_artefacts\\_returned.aspx](http://www.britishmuseum.org/about_us/news_and_press/press_releases/2012/stolen_artefacts_returned.aspx) (last visited Nov. 9, 2015). A reading of the press releases on both museums’ websites makes it clear that acquisition of

stances require formal litigation.<sup>15</sup> But more and more, museums, private collectors, and countries of origin (nations from where objects have been removed), which are seeking the restitution of their artifacts, are working together on settlements or deals that benefit all parties involved.<sup>16</sup> This is a result of both a shifting public opinion towards museums, and the growing awareness of the value of looted cultural heritage by countries of origin.<sup>17</sup>

This Note explores the domestic application of the United Nations Educational, Scientific, and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 ("UNESCO Convention" or "Convention") by both the United States and Australia. The currently growing trend of returning looted artifacts to their countries of origin highlights the need for stricter law enforcement procedures and a possible reevaluation of the U.S. policy of the nonretroactive

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presumably legally obtained objects occurs much more often than the repatriation of objects.

15. A highly publicized case was that of the J. Paul Getty Museum in Los Angeles and its long battle with Italy over the return of a number of objects. See Povoledo, *supra* note 7. The Italians brought their case against Marion True, the then curator of antiquities for the Getty. *Id.* The suit lingered on for over five years and ended with the Italian court ruling that the statute of limitations on the alleged crimes had expired. *Id.* This is believed to be the first instance of criminal charges being brought directly against a museum curator. *Id.*

16. Such deals often involve an exchange of the item being returned for other art loans in the future. See Seiff, *supra* note 3, at 37. A highly publicized example is the return to Italy of the Euphronios Krater, a two thousand five hundred-year-old Greek vase looted from an Italian tomb. See *Euphronios Krater*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/e/euphronios\\_krater/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/e/euphronios_krater/index.html) (last visited Sept. 21, 2015). The Met acquired the piece in 1972 for \$1 million, which was especially valuable because only thirty pieces made by Euphronios are known to have survived. *Id.*; see also Elisabetta Povoledo, *Ancient Vase Comes Home to a Hero's Welcome*, N.Y. TIMES (Jan. 19, 2008), <http://www.nytimes.com/2008/01/19/arts/design/19bowl.html>. In addition to arranging for future loans to the Met, Italy agreed to not pursue legal action. Seiff, *supra* note 3, at 37. Settlements like these are desirable not only because they foster positive relationships between the parties and ensure future cooperation, but also because litigation pertaining to cultural heritage is usually complex, expensive, and often lengthy. Bitterman, *supra* note 11, at 8–11.

17. Seiff, *supra* note 3, at 38.

application of the UNESCO Convention, as applied to domestic law. As a major market country, the United States can lead the way in encouraging repatriation and in establishing better relations with source countries that do not have the resources to fight for their lost heritage on their own.

Part I of this Note discusses the adoption and ratification of the UNESCO Convention and its impact on the cultural property debate. Part I also discusses the United States' adoption of the UNESCO Convention through the enactment of the domestic implementing legislation, the 1983 Convention of Cultural Property Implementation Act (CPIA), as well as the earlier National Stolen Property Act (NSPA) and their impact on American case law. Additionally, Part I examines Australia's Protection of Movable Cultural Heritage Act of 1986 (PMCHA), Australia's equivalent of the CPIA, and compares both the adoption and implementation of the UNESCO Convention by the United States and Australia. Part II discusses the core issue of the retroactive application of the UNESCO Convention and how it is approached by the United States and Australia. Part III provides a resolution to the U.S. problem of retroactive application by suggesting a middle-ground approach, which would allow a smoother process for repatriation of objects under the UNESCO Convention that may not be returned otherwise. By applying the available instruments to repatriation requests and requiring properly structured legislation applying the UNESCO Convention, market nations will become better equipped to work with many of the source nations currently seeking to reestablish their cultural pasts. This approach will also allow source nations that are parties to neither the UNESCO Convention nor any bilateral agreements, such as the U.S. Memoranda of Understanding, to participate in this process, which is a key concern in the cultural heritage protection movement. Finally, this Note concludes with a summary of the current situation and proposes a future resolution.

## I. THE BIRTH OF MODERN CULTURAL HERITAGE PROTECTION

The terms "cultural heritage" and "cultural property" conjure up a myriad of meanings, each of which is highly contextually dependent. These terms are interchangeable to some, while at complete ends of the spectrum for others. For the purpose of this Note, "cultural heritage" possesses a meaning deeply connected to our very humanity. It is precious, limited, and in dire

need of our protection. This Part will attempt to define “cultural heritage” and explore how both domestic laws (U.S. and Australian legislation implementing the UNESCO Convention) and international measures (specifically international conventions addressing these issues) try to cope with the growing need for cultural restitution and repatriation.

### A. Defining “Cultural Property”

Cultural heritage is so deeply intertwined in our understanding of the world’s history and our perceptions of current societies that it is often taken for granted. Yet every society possesses an innate sense of the great value heritage holds because it is irreplaceable.<sup>18</sup> Hence, it is only natural that cultural heritage should be protected.<sup>19</sup> But what constitutes cultural heritage? The definition of cultural heritage in its broadest meaning can be understood as “anything that is of cultural importance, whether it be art, literature, music, archaeological sites, sacred artifacts, historical artifacts, natural formations, or ancient remedies.”<sup>20</sup> The UNESCO Convention’s definition of cultural heritage is categorical, and heritage is broadly divided into cultural, natural, and heritage in the event of armed conflict.<sup>21</sup> UNESCO further divides cultural heritage into tangible

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18. This sentiment is the core concept on which UNESCO’s World Heritage Centre is founded. *About World Heritage*, UNESCO, <http://whc.unesco.org/en/about/> (last visited Sept. 21, 2015).

19. Lyndel V. Pratt & Patrick J. O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, 1 INT’L J. CULT. PROP. 307, 313 (1992).

20. Defining cultural heritage is difficult, as it can vary across cultures, and a strict definition promotes artificial boundaries as to what is and what is not “cultural” in the Western sense. For more information on the problems with defining cultural heritage, see Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 297–304 (1999).

21. Although UNESCO specifies what cultural heritage encompasses, it does not define the term. This allows each party to the UNESCO Convention to choose what it considers as cultural heritage to be protected by the treaty. See *What is Meant by “Cultural Heritage”?*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/> (last visited Sept. 21, 2015). Unfortunately, there is no explanation here as to what “heritage in the event of an armed conflict” means, but it most likely refers to both cultural and natural heritage removed or obtained during armed conflicts. The Convention for the Protection of Cultural Property in the Event of Armed Conflict gives some insight into this phrase’s meaning. See Convention for the Protec-

and intangible cultural heritage and tangible heritage into movable, immovable, and underwater heritage.<sup>22</sup> This categorical approach to cultural heritage is significant because the UNESCO Convention is the preeminent international legal instrument for the protection of cultural property. The text of the UNESCO Convention however, uses the term “cultural property” and “cultural heritage” interchangeably and only defines “cultural property.”<sup>23</sup> Therefore, the definition of cultural heritage used by UNESCO can be understood as much more inclusive than that provided by the UNESCO Convention itself.<sup>24</sup>

The measures by which cultural heritage is protected vary from nation to nation, but generally speaking they take the form of laws and acts, all of which aim to protect, preserve, and retain culturally valuable objects.<sup>25</sup> On the international scale, cultural heritage is protected by treaties, protocols, and conventions designed to provide similar guidelines as the local

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

22. *What is Meant by “Cultural Heritage”?*, *supra* note 21. UNESCO also provides examples of each type of heritage. The cultural property versus cultural heritage debate is a topic deserving a Note of its own and it is a conversation that continues to be explored. For a general introduction to the problems presented by this distinction, see Prott & O’Keefe, *supra* note 19; Manlio Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in International Law?*, 86 INT’L REV. RED CROSS 367 (2004).

23. Article 1 of the UNESCO Convention defines cultural property as “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.” UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971) [hereinafter 1970 UNESCO Convention]. The Convention then provides specific categories of cultural property. *Id.*

24. The cultural heritage debate is beyond the scope of this Note, and much has been written about this topic. *See, e.g.*, John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831 (1986); *see generally* HERITAGE AND THE CULTURE OF NATURAL HERITAGE; NORTHERN PERSPECTIVES ON A CONTESTED PATRIMONY (Kenneth R. Olwig & David Lowenthal eds., 2006); THE ETHICS OF CULTURAL HERITAGE (Tracy Ireland & John Schofield eds., 2015). It is likely that the debate will continue to inspire new questions as new approaches to heritage develop in the future.

25. *See generally* ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE (Barbara T. Hoffman ed., 2006).

laws.<sup>26</sup> International instruments, however, are loftier in that they are often the source for the equivalent domestic legislation as in the case of the UNESCO Convention.<sup>27</sup>

*B. The Birth of an International Movement: The UNESCO Convention*<sup>28</sup>

In many ways, the UNESCO Convention can be interpreted to be the natural extension of the earlier Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 ("Hague Convention").<sup>29</sup> The Hague Convention, largely a product of the post-World War II era, recognized that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."<sup>30</sup> Furthermore, the Hague Convention emphasized that "this [cultural] heritage should receive international protection."<sup>31</sup>

26. For a general discussion of the relationship between international law and cultural heritage, see CRAIG FORREST, *INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE* (2010).

27. As in the case of most of the UNESCO instruments, the aim is also "the promotion of understanding between nations and mutual appreciation." P.J. O'KEEFE & L.V. PROTT, *LAW AND THE CULTURAL HERITAGE* 8–9 (1984). The hope is that a better understanding of each country's cultural differences will result in better cooperation in the future. *Id.* Of course this also fosters national identity, which is often the main driving force between many cultural clashes. *Id.*

28. For a general discussion of the UNESCO Convention, its effects, and adoption, see PATRICK J. O'KEEFE, *COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC* (2000).

29. The Hague Convention was preceded by earlier Hague Conferences in the early 1900s, which in turn were heavily influenced by the United States' Lieber Code that was drafted during the American Civil War. James G. Garner, *General Order 100 Revisited*, 27 *MIL. L. REV.* 1, 2 (1965). Article 35 of the code limits the destruction of cultural heritage, while Article 36 discusses ownership of heritage claimed during wartime stating "ultimate ownership is to be settled by the ensuing treaty of peace." See Gen. Order No. 100, *Instructions for the Government of Armies of the United States in the Field* (1863) reprinted in 2 F. LIEBER, *MISCELLANEOUS WRITINGS* 246 [hereinafter *The Lieber Code*].

30. Hague Convention, *supra* note 21, pmb. ¶2.

31. *Id.* ¶3.

The goals of the Hague Convention were expanded and further promoted by the UNESCO Convention.<sup>32</sup> The drafting process was long and arduous, as is the case with many international instruments.<sup>33</sup> The final text of the UNESCO Convention was the product of over a decade of dedicated cooperation among more than fifty nations.<sup>34</sup> In essence, the UNESCO Convention defines cultural property and its categories<sup>35</sup> and places obligations on states that restrict the importation and exportation of cultural property that falls under its protection.<sup>36</sup> It is important to note that the UNESCO Convention, unlike the Hague Convention, extended the protection of cultural heritage to peacetime.<sup>37</sup> UNESCO reports,

To date, the 1970 Convention has been ratified by 127 Member States of UNESCO . . . . However, given the spectacular globalization of illegal trade of cultural objects over the past decades, it is now more than ever essential that all countries join the ranks of State Parties to the Convention, to prevent

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32. On its website, UNESCO provides a quick glimpse of why the UNESCO Convention was adopted:

At the end of the 1960s and in the beginning of the 1970s, thefts were increasing both in museums and at archaeological sites, particularly in the countries of the South. In the North, private collectors and, sometimes, official institutions, were increasingly offered objects that had been fraudulently imported or were of unidentified origin. It is in this context, and to address such situations, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was created in 1970.

1970 *Convention*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/> (last visited Sept. 21, 2015).

33. For a brief overview of the context and process of preparation of the UNESCO Convention, see O'KEEFE, *supra* note 28, at 8–14.

34. Kevin F. Jowers, Comment, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145, 148–149 (2003).

35. ART, CULTURAL HERITAGE AND THE MARKET 5 (Valentina Vadi & Hildegard E.G.S. Schneider eds. 2014).

36. Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1840 (2009).

37. Jane Warring, Comment, *Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 247, 250 (2005).

further impoverishment of their own heritage, which also belongs to all of humanity.<sup>38</sup>

### 1. The Text

The text of the UNESCO Convention commences with a preamble that states the purpose of the document's twenty-six articles and outlines the scope of the Convention.<sup>39</sup> Article 1 is perhaps the most important provision as it provides UNESCO's definition of cultural property, and designates the types of cultural heritage protected under its umbrella.<sup>40</sup> Furthermore, it allows States to designate their own items of cultural significance to protect.<sup>41</sup> Article 3 dictates that "the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit,"<sup>42</sup> and is to be read in conjunction with Article 6's requirement that parties "introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized."<sup>43</sup> The impact of reading Articles 3 and 6 together is significant because it "suggest[s] that, a State Party to the Convention is required to regard as unlawful, in its national law, the import of goods exported from another State Party contrary to that State's export provisions."<sup>44</sup>

Articles 7 and 9 are of special interest because they are the only two Articles implemented by the United States through the CPIA.<sup>45</sup> Article 7 necessitates that States take the appropriate measures in implementing the UNESCO Convention in

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38. See *1970 Convention State Parties*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/> (last visited Sept. 21, 2015). The newest member to ratify the UNESCO Convention is Chile as of April 18, 2014. For the full list of parties to the UNESCO Convention, see *Legal Instruments*, UNESCO, [www.unesco.org/eri/la/convention.asp?KO=13039&language=E](http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E) (last visited Sept. 21, 2015).

39. See 1970 UNESCO Convention, *supra* note 23, arts. 1–26.

40. *Id.* art. 1.

41. *Id.*

42. *Id.* art. 3.

43. *Id.* art. 6(a).

44. O'KEEFE, *supra* note 28, at 42. In other words, unless the exportation of the cultural property was authorized by the source country, it should be considered illegal.

45. Vitale, *supra* note 36, at 1844.

a way consistent with national legislation.<sup>46</sup> Article 9 then allows any State Party whose cultural heritage may be in danger of pillage or illicit removal to call upon other Parties for aid.<sup>47</sup> Many of the remaining twenty-six articles have often been referred to as “mere rhetoric”<sup>48</sup> and do not impose any real requirements on the State Party signatories.<sup>49</sup>

## 2. Challenges in Drafting the UNESCO Convention and the Resulting Limitations

The main challenge faced by the drafters of the UNESCO Convention was “reaching a compromise that would be acceptable to a broad international community, due to the diverging views and priorities among states.”<sup>50</sup> This refers to the differing goals related to cultural property, as understood by market nations and source nations.<sup>51</sup> Market nations are mostly developed countries with established antiquities markets,

46. See 1970 UNESCO Convention, *supra* note 23, art. 7. The United States was responsible for the insertion of the phrase “consistent with national legislation,” which gave the effect of constricting “the effect of this measure to museums whose acquisition policies are controlled by the State.” See O’KEEFE, *supra* note 28, at 58.

47. See 1970 UNESCO Convention, *supra* note 23, art. 9. Article 9 is limited in that it only refers to archaeological and ethnographical materials in danger and does not protect other types of cultural patrimony, such as art, which may be in danger.

48. See PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 42–43 (1983).

49. Most notably, authors cite Article 2 as the best example of this “rhetorical rather than substantive” type of provision. Paul M. Bator, *An Essay on the International Trade in Art*, 34 *STAN. L. REV.* 275, 377 (1982). Article 2 is a general statement on the negative impact of illicit trade in cultural heritage on states and provides that states will battle this evil “with the means at their disposal.” See 1970 UNESCO Convention, *supra* note 23, art. 2. The problem with such a provision is that the source nations being plundered usually do not have the means to battle the illicit antiquities trade while the market nations do, but these market nations have taken many years to become parties to the UNESCO Convention or have never signed it at all. Nina R. Lezner, Comment, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 *U. PA. J. INT’L BUS. L.* 469, 480 (1994).

50. Ronald D. Abramson & Stephen B. Huttler, Note, *The Legal Response to the Illicit Movement of Cultural Property*, 5 *J.L. & POL’Y INT’L BUS.* 932, 935 (1973).

51. Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 *COLUM. L. REV.* 377, 385 (1995).

like the United States. Source nations (countries of origin) are countries from which antiquities are removed, and are usually developing countries such as Cambodia or countries ravaged by war and other large scale catastrophes.<sup>52</sup> This dichotomy has further surfaced as two separate doctrines within the cultural property debate.<sup>53</sup>

Another challenge is the fact that, like many other UNESCO instruments, the UNESCO Convention is more of a model than a set rule of law; it proposes an international mission and leaves its signatories "to implement its tenets through their own national legislation."<sup>54</sup> It is challenging to reinforce a document that seemingly has no legal effect and is impossible to enforce, especially when it is inconsistent with a signatory party's national legislation.<sup>55</sup> Therefore, if a country cannot see the potential repercussions of its actions, it will continue to act in ways it finds most beneficial to itself and its constituents. Not surprisingly the United States, one of the largest market nations in the world, was a key party to the drafting of the UNESCO Convention and sought to include provisions favorable to its own views on cultural heritage protection.<sup>56</sup> However,

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52. *Id.*

53. This is the debate between cultural nationalism (advocated by source nations in terms of source-country rights) and cultural internationalism (advocated by museums and private collectors and dealers in terms of the free market and international exchange of artifact rights). Merryman, *supra* note 24, at 846.

54. Matthew R. Hoffman, *Cultural Pragmatism: A New Approach to the International Movement of Antiquities*, 95 IOWA L. REV. 665, 677 (2010). Paul Bator, who was a member of the U.S. delegation to the Special Committee for the UNESCO Convention, has stated that "only a small fraction of the Convention was intended to have serious operative consequences." *Id.* at 370. Furthermore, Bator refers to the provisions of the UNESCO Convention as "ceremonial, rhetorical and ineffective." *Id.* at 376.

55. How a state undertakes to fulfill its obligations under the UNESCO Convention "depends on its political, legal and administrative structure." O'KEEFE, *supra* note 28, at 102. This translates to the passage of legislative acts implementing the obligations of the UNESCO Conventions in some countries, while mere administrative acts may suffice in others. *Id.*

56. Jowers, *supra* note 34, at 149. The United States produced its own draft of the text of the UNESCO Convention, and the final draft was strongly influenced by this American version. O'KEEFE, *supra* note 28, at 13. On the other side of the spectrum were nations like Mexico, which were interested mainly in a document that offered more protectionist measures to source nations. Initially, however, the United States was not interested in helping draft the UNESCO Convention, but the changing political scene developing

the drafters of the UNESCO Convention understood that the instrument itself would not be enough to provide the necessary level of protection against the illegal antiquities market and expected that the proper level of protection would be “advanced through additional measures by states.”<sup>57</sup>

The UNESCO Convention is further limited by the fact that it fails to provide any binding mechanisms for dispute resolution except for “extend[ing] its good offices to reach a settlement between States Parties engaged in a dispute on implementation of the Convention.”<sup>58</sup> It is more than problematic that “[t]here is no other mechanism indicated to resolve disputes arising from the Convention.”<sup>59</sup> Nonetheless, the UNESCO Convention has made some impact in lieu of a lack of a uniform approach to eliminating illegal antiquities market. Most importantly, it has paved the ways for other treaties such as the 1995 International Institute for the Unification of Private Law Convention (“UNIDROIT Convention”) and the other numerous conventions dealing with specific types of cultural heritage.<sup>60</sup>

More frequently, however, the UNESCO Convention has been highly criticized for its shortcomings and is often labeled a failure.<sup>61</sup> One reason that the UNESCO Convention has been underutilized is that international litigation is very costly and

in the 1960s “motivated [the U.S.] government to seek better relations with a number of developing States, particularly those in its own hemisphere.” O’KEEFE, *supra* note 28, at 13.

57. See 1970 UNESCO Convention, *supra* note 23, arts. 5, 6, 10, 13 & 14.

58. *Id.* art. 17(5). Interestingly, the provision states that UNESCO will only do so “at the request of at least two States Parties to this Convention which are engaged in a dispute over its implementation.” *Id.*

59. O’KEEFE, *supra* note 28, at 96.

60. There are now conventions designed to protect intangible cultural heritage, underwater cultural heritage, world heritage, and natural heritage. See *Conventions*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., [http://portal.unesco.org/en/ev.php-URL\\_ID=12025&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html) (last visited Sept. 24, 2014)

61. Critics point to the lack of retroactivity as an example. In addition, “too few of the states parties to the Convention adopted implementing national legislation, and most of these were source countries, not market countries.” Vitale, *supra* note 36, at 1842. This is significant because market countries were the main players during the drafting of the UNESCO Convention and many of the goals and definitions reflected in the text stem from those countries interests.

time consuming.<sup>62</sup> Other reasons may be that state parties are slow to implement national legislation to make the UNESCO Convention applicable, while others have simply not joined or were very slow to do so.<sup>63</sup> Furthermore, complications arise from the actual text of the UNESCO Convention that are the result of the lack of compromise by nations during the actual drafting process.<sup>64</sup> This has led to “variable interpretations and differential implementation of the Convention in the State Parties.”<sup>65</sup> In addition, since the UNESCO Convention is non-self-executing, parties to the agreement have wide latitude in how they choose to implement it and which articles they wish to adopt.<sup>66</sup>

### *C. Cultural Heritage Legislation in the United States*

Cultural heritage legislation existed in the United States existed before the adoption of the UNESCO Convention in the form of criminal statutes such as the NSPA. However with the implementation of the UNESCO Convention, it became apparent that the existing body of U.S. legislation was at odds with itself. In fact, the UNESCO Convention, the very pinnacle of international heritage protection, had neither the expected impact nor the efficacy of what it promised to deliver.

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62. O'KEEFE *supra* note 28, at 120.

63. For example, it took over a decade for the United States to pass legislation implementing the UNESCO Convention while Belgium ratified the UNESCO Convention only in 2009. See *1970 Convention State Parties*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?ko=13039&language=e> (last visited Sept. 24, 2015)

64. Lyndel V. Prott, *Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 Years After its Adoption*, at 4, U.N. Doc. CLT/2011/CONF.207/7 (Mar. 15, 2011), available at <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/strengths%20and%20weaknesses%20of%20the1970%20convention.pdf>.

65. *Id.*

66. Article 7(a) requires parties “to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned.” See *1970 UNESCO Convention*, *supra* note 23.

## 1. CPIA

The United States implemented the UNESCO Convention with the passing of the CPIA in 1983.<sup>67</sup> The CPIA addresses import controls,<sup>68</sup> authorizes the President to enter into agreements with nations requesting U.S. cooperation in the application of import restrictions on cultural heritage,<sup>69</sup> and regulates transfer, recovery, and return of cultural property.<sup>70</sup> The CPIA also created the Cultural Property Advisory Committee (CPAC) responsible for determining whether requesting source countries' heritage is in jeopardy and deciding whether or not to restrict the import of objects from that country.<sup>71</sup>

67. 19 U.S.C. §§2601–13 (2010). The CPIA can be understood as a way to improve relations with source countries since the United States is a major market country with an active illegal antiquities trade, a fact Congress recognized. Vitale, *supra* note 36, at 1843. Furthermore, the CPIA aimed to modify and possibly overturn the Fifth Circuit's decision in *United States v. McClain*, where the court applied the NSPA and recognized that foreign laws of the country of origin that vest ownership of cultural heritage create ownership recognized by the United States. 545 F. 2d 988, 992 (5th Cir. 1977). Hence, cultural property illegally entering into the United States is considered stolen. Vitale, *supra* note 36, at 1842. It is important to point out that the United States only adopted Articles 7(b)(1) and 9 of the UNESCO Convention. Vitale, *supra* note 36, at 1844. Article 7(b)(1) is the prohibition of import of cultural property that is stolen, while Article 9 allows any source country whose heritage is under pillage to request the help of other State Parties in its prevention. See 1970 UNESCO Convention, *supra* note 23. For information on the United States' approach to drafting and ratifying the UNESCO Convention, as well its reasons for adopting the Convention in limited form, see Bator, *supra* note 49.

68. Specifically, these import controls impose restrictions relating to objects that are being looted and pillaged from archaeological sites as well as ethnographic materials. Jowers, *supra* note 34, at 155. The President makes his determination as to whether or not impose import restrictions based on whether (a) the cultural heritage of the source country in question is being looted despite that country's attempt to protect such heritage; (b) the restriction on importation would be the correct and effective way of curbing the problem; and (c) whether the action would be in the general interest of the international community. John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part II)*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 47 (2004).

69. § 2602 (discussing the President's enforcement of Article 9 of the UNESCO Convention).

70. See §§ 2601, 2606–07.

71. § 2605 (describing the makeup, tenure, and purpose of the Committee). Because the Committee makes its determinations based on the merit of each request, Vitale, *supra* note 36, at 1846, there is no guarantee that these re-

In addition, the CPIA allows the United States to enter into bi- and multilateral agreements under the authority of the President to restrict the importation of cultural materials as understood in Article 9 of the UNESCO Convention.<sup>72</sup> Known as Memoranda of Understanding (“MOU”), these agreements are useful as they allow the United States to negotiate favorable terms with other State Parties to the UNESCO Convention without the need for Senate ratification of a new treaty, a process that can be very time consuming.<sup>73</sup>

To enter into an MOU, a country has to bring a request to the United States that is then referred to CPAC.<sup>74</sup> The request must satisfy four statutorily required criteria<sup>75</sup> in order to be

quests will be successful. Hence, the CPIA has a built in mechanism limiting import controls.

72. § 2602(a)(2)(A)–(B). These agreements are referred to as Memoranda of Understanding or MOUs. For a list of restrictions on these agreements, see § 2602(a)(2)(c)(1), and for a list of exceptions to such restrictions, see § 2602(a)(2)(c)(2). The President can also act under § 2603 in an emergency measure, but here again, the source nation must make a request. One of the main problems with these MOUs is that they “fail to satisfy the basic legal requirements of the CPIA” and “[t]hey cannot be reconciled with the plain language of the CPIA.” William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 *CARDOZO ARTS & ENT. L.J.* 561, 575 (2014).

73. Archaeological Inst. of Am., *United States Implementation of the 1970 UNESCO Convention: The Convention on Cultural Property Implementation Act*, [https://www.archaeological.org/pdfs/sitepreservation/CPAC\\_OverviewAIA.pdf](https://www.archaeological.org/pdfs/sitepreservation/CPAC_OverviewAIA.pdf) (last visited Nov. 19, 2015) [hereinafter *AIA Overview*].

74. *Id.*

75. The four criteria are:

(A) that the cultural patrimony of the State Party is in jeopardy from the pillage of archaeological or ethnological materials of the State Party;

(B) that the State Party has taken measures consistent with the Convention to protect its cultural patrimony;

(C) that--

(i) the application of the import restrictions set forth in section 2606 of this title with respect to archaeological or ethnological material of the State Party, if applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material, would be of substantial benefit in deterring a serious situation of pillage, and

further considered, and once this determination is made, “CPAC makes recommendations to the delegated decision maker as to whether to enter into or extend an agreement.” The delegated decision maker will usually be a State Department official who is part of the Bureau of Educational and Cultural Affairs.<sup>76</sup> Once signed, a MOU remains effective for five years and may be renewed a limitless number of times.<sup>77</sup>

The CPIA also allows for import restrictions in cases of emergency, without the need to negotiate a bilateral agreement.<sup>78</sup> However, such emergency action can only be implemented if the State Party requesting it has made a request for an MOU.<sup>79</sup> Should an emergency measure be allowed, it may stay in place for up to five years and can be extended for an additional three years, but only once.<sup>80</sup>

These agreements, however, are designed to be made *only* between State Parties to the UNESCO Convention, and, to date,

(ii) remedies less drastic than the application of the restrictions set forth in such section are not available; and

(D) that the application of the import restrictions set forth in section 2606 of this title in the particular circumstances is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes;

19 U.S.C. § 2602 (a)(1). In addition to these requirements there are also applicable exceptions to criterion (3):

Notwithstanding paragraph (1), the President may enter into an agreement if he determines that a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions, but--

(A) such restrictions are not essential to deter a serious situation of pillage, and

(B) the application of the import restrictions set forth in section 2606 of this title in concert with similar restrictions implemented, or to be implemented, by other nations (whether or not State Parties) individually having a significant import trade in such material would be of substantial benefit in deterring a serious situation of pillage.

*Id.* § 2602 (c)(2).

76. AIA Overview, *supra* note 73.

77. 19 U.S.C. § 2602 (c)(2).

78. *Id.* § 2603.

79. *Id.* § 2603 (c)(1).

80. *Id.* § 2603 (c)(3).

the United States has signed seventeen treaties.<sup>81</sup> Hence, the CPIA effectively prohibits nonsignatories to the UNESCO Convention from gaining any aid benefits from the United States.

The CPIA is limited by the United States' adoption of only two Articles of the UNESCO Convention. During the ratification process, the United States reserved the right to "determine whether or not to impose export controls over cultural property"<sup>82</sup> and further limited its acceptance of the treaty through six "understandings."<sup>83</sup> This meant that the United States un-

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81. Agreements have been signed with Bolivia, Bulgaria, Cambodia, Canada, China Colombia, Cyprus, El Salvador, Greece, Guatemala, Honduras, Iraq, Italy, Mali, Nicaragua, and Peru. The United States and Peru are also parties to the 1981 Agreement Respecting the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties. Lawrence J. Persick, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 PENN. ST. INT'L L. REV. 89, 101 (1985). Each agreement specifies items designated for protection. See *Bilateral Agreements*, BUREAU OF EDUC. & CULT. AFFAIRS, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> (last visited Sept. 24, 2015). Noticeably, the majority of the agreements are with developing source countries. In addition to these agreements, the United States has earlier agreements with nations like Mexico. James E. Sherry, Note, *U.S. Legal Mechanisms for the Repatriation of Cultural Property: Evaluating Strategies for the Successful Recovery of Claimed National Patrimony*, 37 GEO. WASH. INT'L L. REV. 511, 522 (2005). The Treaty of Cooperation, which was signed in 1970, is "unique in that it specifically authorizes the U.S. attorney general to commence a judicial action for the recovery of property claimed by the Government of Mexico to constitute part of its national patrimony." Sherry, *supra* note 81, at 522.

82. 118 CONG. REC. 27,925 (1972).

83. The six understandings were:

(1) The United States understands the provisions of the Convention to be neither self-executing nor retroactive.

(2) The United States understands Article 3 not to modify property interests in cultural property under the laws of the States parties.

(3) The United States understands Article 7 (a) to apply to institutions whose acquisition policy is subject to national control under existing domestic legislation and not to require the enactment of new legislation to establish national control over other institutions.

(4) The United States understands that Article 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the States parties for the recovery of stolen cultural property to the rightful owner without payment of compensation. The United States is further prepared to take the additional steps contemplated by Article 7(b)(ii) for the return of covered stolen cultural property without payment of compensation, except to the extent required by the Con-

derstood its obligations to extend only to museums and similar institutions and not to private individuals. Not surprisingly, U.S. courts have rarely invoked the CPIA.<sup>84</sup>

## 2. The NSPA

In addition to the CPIA, the United States passed earlier criminal statutes relating to cultural property and its theft. The NSPA passed in 1934, an extension of the National Motor Vehicle Theft Act of 1919, criminalized the interstate or international transportation of any stolen property as well as the

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stitution of the United States, for those States parties that agree to do the same for the United States institutions.  
 (5) The United States understands the words “as appropriate for each country” in Article 10(a) as permitting each State party to determine the extent of regulation, if any, of antique dealers and declares that in the United States that determination would be made by the appropriate authorities of state and municipal governments.  
 (6) The United States understands Article 13(d) as applying to objects removed from the country of origin after the entry into force of this Convention for the States concerned, and, as stated by the Chairman of the Special Committee of Governmental Experts that prepared the text, and reported in paragraph 28 of the Report of that Committee, the means of recovery of cultural property under subparagraph (d) are the judicial actions referred to in subparagraph (c) of Article 13, and that such actions are controlled by the law of the requested State, the requesting State having to submit necessary proofs.

*Id.* [hereinafter the Six Understandings]. These points were key issues in the United States’ ratification of the treaty and reflect the earlier concerns of the U.S. delegation of too much emphasis on protection of patrimony at the expense of competing interests, specifically the “free-trade agenda.” See ANA FILIPA VRDOLJAK, *INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS* 242 (2006). However, it was well understood that the participation of the United States in such international endeavors was absolutely necessary “if the Convention was ever to be effective.” O’KEEFE, *supra* note 28, at 14.

84. As of 2005, “no published judicial opinion has been decided pursuant to section 2606 [import restrictions section] since the CPIA’s enactment.” See Sherry, *supra* note 81, at 521. More recently, some authors have suggested that policy changes since the initial adoption of the CPIA have resulted in judicial favor of criminal and forfeiture laws for the prosecution of cultural heritage cases. Pearlstein, *supra* note 72, at 564. For example, in *United States v. Schultz*, the Second Circuit stated, “The CPIA is an import law, not a criminal law; it is not codified in Title 18 [on] Crimes and Criminal Procedure[], with the NSPA, but in Title 19 [on] Customs Duties[].” 333 F.3d 393, 409 (2003).

possession, transfer, and receipt of stolen property that an individual knows to be stolen.<sup>85</sup> The original 1919 Act was passed as a response to problems arising out of the growing automobile culture that provided new ways of escape for criminals moving goods through interstate commerce.<sup>86</sup> However, the improved NSPA lacked a definition of “goods” and was left to be interpreted by courts.<sup>87</sup> However, “no court has interpreted ‘goods’ in a prosecution under 18 U.S.C. § 2315 [but] courts have considered the appropriate definition in litigation under the other operative section of the NSPA.”<sup>88</sup> Later in 1986, Congress amended two provisions of section 2315 of the NSPA. First, Congress expanded the scope of the offense requirement with the addition of “possession” to receipt and concealment and second, by changing the language in the requirement that goods be moving or be part of interstate or foreign commerce.<sup>89</sup> The new language included goods “which have crossed a State or United States boundary after being stolen.”<sup>90</sup>

The NSPA was first successfully applied in *United States v. Hollinshead*, a 1974 case involving a Mayan stele removed from its original location by looters, cut into pieces, and later smuggled from Guatemala to the United States.<sup>91</sup> Clive Hollinshead, a dealer of pre-Columbian art who, along with a conspirator, arranged to procure and bring to the United States a number of artifacts from Central America.<sup>92</sup> The stele, which is a slab or pillar of stone usually carved or inscribed,<sup>93</sup> was val-

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85. The NSPA lists the value of the stolen good at \$5000 or more and provides that anyone found guilty under this statute “shall be fined or imprisoned not more than ten years, or both.” 18 U.S.C. § 2314 (2014)

86. Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 133 (2010).

87. While the NSPA provides a number of definitions, “goods” is not defined. § 2311. This may have been intentional to protect a greater number of stolen items under the NSPA.

88. Urice, *supra* note 86, at 133.

89. *Id.* at 134.

90. *Id.* This was significant because the defense that the goods had left interstate commerce by “coming to rest” or by the passage of time was now eliminated. *Id.*

91. *U.S. v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974).

92. *Id.*

93. *Stela*, MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/stela> (last visited Dec. 29, 2014). Both “stele” and

ued at thousands of dollars and was unsuccessfully shopped around to a number of museums and collectors once it reached the United States.<sup>94</sup>

Guatemala made a strong case under the NSPA for the return of the stele. Their claim was strengthened by the fact that Guatemala's ownership of the object was uncontested.<sup>95</sup> The Ninth Circuit affirmed the district court's holding by finding that under Guatemala's patrimony law "all such artifacts are the property of the Republic, and may not be removed without permission of the government."<sup>96</sup>

The *Hollinshead* holding was further developed in 1977 in *United States v. McClain*, where the defendants were convicted of "conspiring to transport, receive, and sell assorted pre-Columbian artifacts" of Mexican origin as well as "receiving, concealing, bartering, and selling these items" in violation of the NSPA.<sup>97</sup> Although the Fifth Circuit agreed with the district court on the applicability of the NSPA to instances of illegal exportation of cultural property deemed by a source country's laws to be the national property of that country,<sup>98</sup> it held that "only in 1972 . . . did the [Mexican] government declare that *all* pre-Columbian artifacts were owned by the Republic."<sup>99</sup> This

"stela" are considered correct spellings, as it a transliteration from the ancient Greek word *στῆλη*.

94. See *Hollinshead*, 495 F.2d at 1155. The stele ultimately remained in Hollinshead's possession. *Id.*

95. Jowers, *supra* note 34, at 168.

96. See *Hollinshead*, 495 F.2d at 1155. The Court further added that evidence showed that the defendants knew that removal of artifacts was prohibited under Guatemalan law. *Id.*

97. See *U.S. v. McClain*, 545 F. 2d 988, 992 (5th Cir. 1977). The defendants were specifically found guilty of violating §§ 2314–15 of the NSPA. *Id.* at 991. The items in question were terra cotta figurines, pottery, beads, and pieces of stucco. *Id.* at 992. The defendants contended that "there was no evidence showing that the artifacts had been taken without consent from private individuals or that the artifacts had been in the possession of the Republic of Mexico." *Id.* at 992, 994.

98. *Id.* at 996.

99. *Id.* at 1000. This was a key issue in this case as Mexico had cultural heritage laws as early as 1897, and the 1972 statute referred to by the Court was simply the most recent modification of that law. *Id.* at 993. The Fifth Circuit remanded the case to the trial court and the case was appealed. *Id.* at 1004. Again, the Fifth Circuit reaffirmed the applicability of the NSPA but reversed the conviction on the substantive count, stating that a jury likely believed "that Mexico declared itself owner of all artifacts as early as 1897"

fact may have been the decisive factor for the defendants during the jury trial, and was also a major factor in leading the Fifth Circuit to reverse the convictions.<sup>100</sup>

In certain aspects, the NSPA can be said to provide more prudent protections than the CPIA because it is a criminal statute and allows for criminal prosecutions.<sup>101</sup> Critics of the CPIA point to the fact that its passing did not add much substance to the already existing body of cultural heritage protection law in the United States, since the NSPA had already been in existence and provides a wider scope of protection.<sup>102</sup> On the other hand, proving the scienter requirement of the NSPA (i.e. showing that the defendant knew that the item was stolen) is often very difficult, especially when the stolen object is undocumented.<sup>103</sup> The CPIA with its MOU requirement and the review process under CPAC's authority can be circumvented by litigation under the NSPA, so long as the source country has a "valid patrimony law and a restriction on exportations of the kind of property contemplated by the patrimony law."<sup>104</sup> Together, the CPIA and the NSPA, along with a few other statutes pertaining to cultural heritage protection, aim to provide a comprehensive doctrine of the American stance on protection of cultural patrimony.<sup>105</sup>

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but "has not expressed that view with sufficient clarity to survive translation into terms understandable by and binding upon American citizens." U.S. v. McClain 593 F.2d 658, 670 (5th Cir. 1979). Hence, the law was "too vague to be a predicate for criminal liability under our jurisprudential standards." *Id.*

100. *McClain*, 545 F.2d at 1000-03.

101. Kavita Sharma, *From the Mayan Machaquila Stele to Egyptian Pharaoh Amenhotep's Head: United States Courts' Enforcement of Foreign National Patrimony Laws After United States v. Schultz*, 56 HASTINGS L.J. 749, 756 (2005).

102. In addition what was already provided for by the NSPA, "the civil provisions in the CPIA added little to the existing law except to enable action by customs officials." See VRDOLJAK, *supra* note 83, at 243.

103. Leila Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 729, 757-758 (2014). It is important to note that there is no *mens rea* requirement under the CPIA to prove a good was "stolen" because it is not a criminal statute.

104. Vitale, *supra* note 36, at 1851.

105. In cases where defendants claimed that the CPIA should be understood as "the only mechanism by which the United States government would deal with antiquities and other 'cultural property' imported into the United States," courts found that "nothing in the language of the CPIA supports that

*D. Cultural Heritage Legislation in Australia: The PMCHA*<sup>106</sup>

Australia officially implemented the UNESCO Convention with the passing of the PMCHA in 1986.<sup>107</sup> A counterpart to the CPIA, the PMCHA protects national and international cultural property and imposes import and export controls consistent with the intent of the UNESCO Convention.<sup>108</sup> Like the CPIA, the PMCHA also creates a committee, the National Cultural Heritage Committee,<sup>109</sup> which is responsible for advising the Minister of the Arts on matters of operation of the PMCHA, the National Cultural Heritage Control List, and the National Cultural Heritage Account.<sup>110</sup>

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interpretation, and the legislative history shows that exactly the converse is true." See *U.S. v. Schultz*, 333 F.3d 393, 408 (2003). Furthermore, the Second Circuit added that "the CPIA affects neither existing remedies available in state or federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce (e.g. National Stolen Property Act)." *Id.* (quoting S. Rep. No. 97-564, at 33 (1982)). The court concluded "that the passage of the CPIA does not limit the NSPA's application to antiquities stolen in foreign nations," and the Hollinshead-McClain doctrine remained in place. *Id.* at 409. The Second Circuit's reasoning was followed as recently as 2012, when a New York district court rejected a defendant's argument that "Congress decided not to regulate the import of undocumented paleontological objects when it passed the CPIA." *U.S. v. One Tyrannosaurus Bataar Skeleton*, 12 Civ. 4760 (PKC), 2012 U.S. Dist. LEXIS 165153, at \*5 n.1 (S.D.N.Y. Nov. 14, 2012).

106. For a thorough exposition of Australia's approach to cultural heritage protection, see Craig Forrest, *Australia's Protection of Foreign States' Cultural Heritage*, 27 U.N.S.W. L.J. 605 (2004).

107. VRDOLJAK, *supra* note 83, at 244. The PMCHA was in some ways an extension of the laws already in existence, specifically the Customs Act of 1901, *Customs Act 1901* (Cth) (Austl.). The Customs Acts however, protected "fixed cultural property" and "was reactive, in the sense that it was applied on a piecemeal basis to address crises as they arose." VRDOLJAK, *supra* note 83, at 244.

108. *Protection of Movable Cultural Heritage Act 1986* (Cth) pt. II (Austl.) [hereinafter *PMCHA*]. Part 2 of the PMCHA specifically describes the import and export controls and provides that the PMCHA operates based on the National Cultural Heritage Control List, which divides cultural movable heritage into Class A—objects that cannot be exported from Australia unless they have been imported temporarily and have a certificate of exemption for re-export—and Class B—all other objects that can only be exported with a permit or certificate. O'KEEFE, *supra* note 28, at 103.

109. See *PMCHA supra* note 108, pt. III.

110. For current information about the makeup of the Committee and other information in connection to its activities, see *National Cultural Heritage*

Unlike the restrictions placed on the ratification of the UNESCO Convention by the United States, Australia only had one with respect to Article 10.<sup>111</sup> This meant that Australia was not as limited in scope in its application of the UNESCO Convention under its national laws.<sup>112</sup> Furthermore, unlike the CPIA, the PMCHA is not restricted to State Parties to the UNESCO Convention and

applies to objects imported into Australia after 1 July 1987<sup>113</sup> but which were previously exported from another country at

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*Committee*, AUSTL. GOV'T: DEP'T OF COMM. AND THE ARTS, <http://arts.gov.au/movable/committee> (last visited Sept. 24, 2015)

111. Article 10 states:

The States Parties to this Convention undertake: (a) To restrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject; [and] (b) to endeavour by educational means to create and develop in the public mind a realization of the value of cultural property and the threat to the cultural heritage created by theft, clandestine excavations and illicit exports.

1970 UNESCO Convention, *supra* note 23, art. 10. Australia's reservation states:

The Government of Australia declares that Australia is not at present in a position to oblige antique dealers, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject. Australia therefore accepts the Convention subject to a reservation as to Article 10, to the extent that it is unable to comply with the obligations imposed by that Article.

1970 UNESCO Convention, *supra* note 23, Declarations and Reservations.

112. However, in reality, most of the PMCHA is predominantly concerned with protecting Australia's cultural heritage. Hugh H. Jamieson, *The Protection of Australia's Movable Cultural Heritage*, 2 INT'L J. CULT. PROP. 215, 218 (1995). This may mean that countries who submit requests to Australia have no real legal recourse.

113. PMCHA became Australian law on this date. See Commonwealth Gazette 1987, No.S138.

any time where there was a cultural heritage protection law in force, contrary to the provision of that law.<sup>114</sup>

Also the PMCHA does not require reciprocity, making Australia one of the few countries that do not possess such a requirement.<sup>115</sup> Finally, “[t]o give effect to the UNESCO Convention . . . the PMCHA provides for the seizure and forfeiture of illicitly imported cultural heritage, and the imposition of penalties for infringement.”<sup>116</sup>

The PMCHA differentiates between “repatriation” and “restitution,” the former seeking to return sacred objects and human remains, and the latter seeking to return other objects whether secular or sacred.<sup>117</sup> Repatriation is divided further into categories based on the subject of the repatriation claim. In the broadest sense, claims can be seen as arising out of claims where property was “legally obtained or collected but where the circumstances of collection breach traditional beliefs or ethical principles,”<sup>118</sup> “legally obtained but disposed of illegally,”<sup>119</sup> and “illegally obtained but is legally held.”<sup>120</sup> These can then be even further divided when useful. Claims that are “legally obtained but disposed of illegally” are the only types of claims that fall under the PMCHA.<sup>121</sup>

Yet the PMCHA is not without its problems, even if it seems more closely aligned with the UNESCO Convention’s ideals than some other market nations’ cultural property regulations, “particularly when compared to the reluctance . . . [of] the United States.”<sup>122</sup> While it addresses “the movement of objects across national boundaries . . . [i]t does not address the remov-

114. VRDOLJAK, *supra* note 83, at 244–45 (quoting JOHN F. LEY, AUSTRALIA’S PROTECTION OF MOVABLE CULTURAL HERITAGE 125 (1991)).

115. Canada, on the other hand, is an example of a country that *does* require reciprocity. Forrest, *supra* note 106, at 620–21.

116. *Id.* at 621.

117. Shane Simpson, *Repatriation of Cultural Material*, COLLECTIONS L. (Sept. 22, 2009), <http://www.collectionslaw.com.au/1repatriation>.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* Claims that fall into the third category would be particularly well served by the protections offered by the UNESCO Convention. However, these types of claims must not fall under the protection of the PMCHA.

122. S.R.M. MACKENZIE, GOING, GOING, GONE: REGULATING THE MARKET IN ILLICIT ANTIQUITIES 102 (2005).

al or destruction of cultural objects within Australia.”<sup>123</sup> There are also problems with the enforcement of the PMCHA,<sup>124</sup> a general lack of public awareness<sup>125</sup> of the law, and the extent of the illegal antiquities market in Australia.<sup>126</sup> And like the CPIA, the PMCHA has not been frequently applied in the prosecution of cases concerning the return of illegally traded art nor has it frequently been applied to refusing export permits.<sup>127</sup>

A major problem in Australia is the general lack of a “systematic or single source of information . . . regarding the dimensions of the Australian market for antiquities.”<sup>128</sup> Essentially, Australian enforcement bodies simply cannot successfully battle the problem of the illegal antiquities trade because they do not even know how expansive it may be. This in turn, means that any legislation designed to protect cultural heritage and antiquities will be *prima facie* ineffective if it cannot target the object it is designed to protect. Furthermore, because the PMCHA focuses mainly on criminal offences and criminal enforcement mechanisms, a higher standard of proof is required, meaning that “making and securing convictions [is] very difficult.”<sup>129</sup> Some scholars argue that the PMCHA will not be able to offer “any meaningful protection and priority . . . to protected

123. VRDOLJAK, *supra* note 83, at 245. A separate Act, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), protects Australia’s indigenous cultural heritage. *Id.* at 247.

124. The PMCHA gives the Australian police and customs officials the power to search, seize, and arrest. MACKENZIE, *supra* note 122, at 74. However, police and customs officials are often not adequately trained to recognize pieces that may be culturally significant. *Id.*

125. See Jamieson, *supra* note 112, at 226. Not only is the public ignorant of the provisions of the PMCHA, but officials are as well. *Id.* at 227. Even those “involved in the operation” of the PMCHA are “confused about it.” *Id.*

126. Duncan Chappell & Damien Huffer, *Protecting Cultural Heritage: A Review of Some Contemporary Developments in Australia and Near Environs*, in CONTEMPORARY PERSPECTIVES ON THE DETECTION, INVESTIGATION AND PROSECUTION OF ART CRIME 237–38, 239 (Duncan Chappell & Saskia Hufnagel eds., 2014).

127. For example, up until 1994 there were only eight objects whose export was prohibited by the PMCHA. Jamieson, *supra* note 112, at 222. Four more were added to that list by 1995. *Id.* Between 2000 and 2012, there were nineteen seizures of some forty-three objects under the PMCHA, thirty-four of which were successfully returned to their countries of origin. Chappell & Huffer, *supra* note 126, at 245.

128. Chappell & Huffer, *supra* note 126, at 239.

129. Simpson, *supra* note 117.

cultural heritage objects illegally exported from other countries” unless it is amended to overcome some of its existing deficiencies.<sup>130</sup> Only then can Australia hope to effectively protect not only its own cultural heritage but also the global heritage the UNESCO Convention aimed to preserve.

## II. THE PROBLEM WITH THE RETROACTIVE APPLICATION OF THE UNESCO CONVENTION

The concept of the retroactive application of a convention is one that is not often applied to international instruments. In fact, conventions are *prima facie* not retroactive unless otherwise specified. Yet retroactivity was important to the United States during the drafting process of the UNESCO Convention.<sup>131</sup> This Part illustrates the importance of retroactivity and explores how the United States and Australia approached this issue when passing their implementing legislation in order to understand how a retroactive UNESCO Convention would alter the current situation.

### A. *Why Should Retroactivity Matter?*

Black’s Law Dictionary defines the term “retroactive” as “extending in scope or effect to matters that have occurred in the past.”<sup>132</sup> Retroactivity as a legal concept is “often used . . . but rarely defined . . . moreover . . . it is used to cover at least two distinct concepts.”<sup>133</sup> As applied to international treaties, retroactivity is a rarity and most international conventions are not retroactive.<sup>134</sup> A number of member State parties to the draft-

130. Chappell & Huffer, *supra* note 126, at 254.

131. See the Six Understandings, *supra* note 83.

132. *Retroactive*, BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014).

133. *Retroactivity*, BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014). Retroactivity is either “true” or “quasi.” *Id.* True retroactivity “consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated.” *Id.* Quasi-retroactivity “occurs when a new rule of law is applied to an act or transaction in the process of completion.” *Id.*

134. This standard was established by Article 28 of the Vienna Convention on the Law of Treaties, which states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

ing of the UNESCO Convention were dissatisfied with such a provision, or lack thereof, largely because they believed that cultural heritage looted before the effective date of the UNESCO Convention should have been available to them for recovery.<sup>135</sup> Other States, including the United States, felt that retroactivity should not be present in the UNESCO Convention and made this understanding a key provision to ratifying the treaty.<sup>136</sup> This sentiment pertains mainly to market nations and nations with a long history of colonial and noncolonial plunder, such as the United Kingdom, which is especially opposed to this day to the return of many objects in its possession.<sup>137</sup>

The lack of the retroactive application of the UNESCO Convention has been described as one of its many shortcomings.<sup>138</sup> Yet there is *nothing* in the text of the UNESCO Convention itself that prevents a retroactive application.<sup>139</sup> Technically speaking, retroactivity can be read into the UNESCO Conven-

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Vienna Convention on The Law of Treaties, May 23, 1969, 155 U.N.T.S. 331, 8 I.L.M. 679 (*entered into force* Jan. 27, 1980) [hereinafter Vienna Convention]. For a general discussion of how retroactive application of treaties can be read into a convention, see William A. Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J.L. & PUB. POL'Y 36 (2010).

135. O'KEEFE, *supra* note 28, at 14. Many of these States were source nations coming out of an era of colonialism and the UNESCO Convention was a crucial protective measure in their view. Lyndel Prott, *The Ethics and Law of Returns*, 61 MUSEUM INT'L 101, 103–04 (2009).

136. See the Six Understandings, *supra* note 83.

137. The most notorious example of this attitude is the never-ending battle between the British Museum and Greece over the Elgin Marbles, which were previously removed from the Parthenon in Athens. See Ian Johnston, *British Museum Offers to Lend Elgin Marbles Back to Greece*, INDEPENDENT (Mar. 27, 2015), <http://www.independent.co.uk/news/world/europe/british-museum-offers-to-lend-elgin-marbles-back-to-greece-10140267.html>. In March 2015, the United Kingdom refused to join U.N. mediation proceedings over the ownership of the Marbles and offered to lend the Marbles to the Greeks, claiming the objects were legally obtained by Lord Elgin. *Id.*

138. Vitale, *supra* note 36, at 1842. Other major critiques include the “clumsiness” of the final text of the UNESCO Convention, limitations imposed on it by national legislative efforts to apply the UNESCO Convention, and “the need for claims to show an established legal link with the object being claimed in another country” in private law. See Prott, *supra* note 64, at 4.

139. Retroactivity is not explicitly mentioned in the text of the UNESCO Convention nor is it explicitly prevented. See 1970 UNESCO Convention, *supra* note 23. Rather, retroactivity is understood as nonoccurring under the standards of the Convention. See *supra* note 134.

tion through a provision of a member State's domestic law enforcing the UNESCO Convention.<sup>140</sup> A State can also indicate its intent to apply a given treaty retroactively at the time of signing.<sup>141</sup> In fact, Article 15 of the UNESCO Convention "makes clear the obvious point that nothing in the Convention prevents the parties from going beyond its terms and restoring cultural property previously removed from another party's territory."<sup>142</sup>

Retroactivity matters in questions regarding timing of export and import, hence "the enactment date of a national ownership law or an international or bilateral agreement is significant in determining legal ownership of cultural property."<sup>143</sup> This is well illustrated in the Canadian case of *R v. Heller*.<sup>144</sup> In 1981, Ben Heller, a New York-based art dealer, imported a Nigerian Nok terracotta sculpture into Canada.<sup>145</sup> The sculpture was illegally removed from Nigeria, and both Canada<sup>146</sup> and Nigeria were parties to the UNESCO Convention at the time the sculpture was imported.<sup>147</sup> Nigeria, however, had made it illegal to

140. If the domestic legislation allows retroactivity, common sense dictates that nothing really prevents a convention from functioning in this way

141. DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 33 (2001).

142. Bator, *supra* note 49, at 378. *See also* 1970 UNESCO Convention, *supra* note 23, art. 15.

143. *Provenance Guide*, INT'L FOUND. FOR ART RES., [http://www.ifar.org/provenance\\_guide.php](http://www.ifar.org/provenance_guide.php) (last visited Sept. 24, 2015).

144. *R v. Heller* (1983), 27 Alta. L.R. 2d, 346 (Can. Alta. Prov. Ct.).

145. *Id.* paras. 1–2.

146. Canada implemented the UNESCO Convention in 1985 through its Cultural Property Export and Import Act (CPEIA). R.S.C. 1985, c. C-51 (Can.). For the text of the CPEIA, see *Cultural Property Export and Import Act*, GOV'T OF CAN., JUST. LS. WEBSITE, <http://laws-lois.justice.gc.ca/eng/acts/C-51/> (last updated Nov. 5, 2015). Canada's primary focus was on Article 3 of the UNESCO Convention, which not only controls imports of cultural heritage into the country but also helps protect Canada's own heritage and its illegal export. Patty Gerstenblith, *Expert Report for Participants in the Second Meeting of States Parties to the 1970 Convention: United States of America and Canada* 6 (June 20, 2012), [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Gerstenblith\\_en.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Gerstenblith_en.pdf) (last visited Sept. 24, 2015). One important distinction between the CPEIA and the United States' CPIA is that Canada does not require specific designation of an object in the way the CPIA does, giving the CPEIA broader application. *Id.* at 12.

147. *See Heller* (1983), 27 Alta. L.R. 2d, paras. 17–18. Canada implemented the UNESCO Convention in 1977 and became a party to it in 1978. *Id.* Nige-

export cultural antiquities as early as 1924.<sup>148</sup> This made Heller's importation illegal. However, it was unclear when the sculpture was removed from Nigeria.<sup>149</sup> The key issue was whether or not the Canadian legislature applying the UNESCO Convention "intended to ban the import of cultural property illegally exported from Nigeria at any time, or only that illegally exported after the entry into force of the legislation."<sup>150</sup> Presiding Judge Stevenson resolved the quarry, stating "I am satisfied that the meaning attached to the words 'illegally exported' must be restricted to that time frame following the entry by Canada as a party to the international convention."<sup>151</sup> The case was dismissed and failed on subsequent appeal.<sup>152</sup>

Cases like *Heller* demonstrate that retroactivity does matter and perhaps should be considered in the adjudication of cultural heritage disputes. In the very least, such decisions suggest that the concept of retroactivity can have a real impact on case law and should not be dismissed completely, as it can have a major impact on source nations' ability to reembrace their lost past.<sup>153</sup>

### *B. United States and Retroactivity of the UNESCO Convention*

As previously mentioned, a nonretroactive UNESCO Convention was the only convention to which the United States was willing to be a party.<sup>154</sup> This stance is understandable from the perspective of a major market country. Allowing retroactivity to apply to the UNESCO Convention through the CPIA would potentially mean that any source country could request the return of all its culturally significant objects currently in possession by American institutions and possibly even private collec-

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ria ratified the UNESCO Convention in 1972. See 1970 Convention State Parties *supra* note 40.

148. See *Heller* (1983), 27 Alta. L.R. 2d, para. 32.

149. *Id.* paras. 32-33. The court could only determine that the sculpture was removed prior to 1977, but the exact date remains unknown. *Id.* para. 54.

150. O'KEEFE, *supra* note 28, at 15.

151. See *Heller* (1983), 27 Alta L.R. 2d, para. 51.

152. R v. *Heller* (1984), 51 A.R. 73 (Can. Alta. C.A.).

153. However, both the *Heller* and Australian approaches are not without problems primarily because "[r]equiring evidence that export occurred after 1970 and import after the date of local implementing legislation may therefore very severely limit the reach of the Convention." O'KEEFE, *supra* note 28, at 17.

154. See the Six Understandings, *supra* note 83.

tions. This seems like an unthinkable proposition, because it equates to severe economic losses.<sup>155</sup> Cultural heritage is priceless only in theory; in practice, it is the source of great revenue for those involved in its illegal trade.

In a culture of free market economy, any limitation on goods is detrimental, even if those goods are of questionable provenance and even more questionable procurement.<sup>156</sup> Some of the strongest opponents to repatriation come from the museum community itself, notably the Getty Museum,<sup>157</sup> since they are likely to be the most seriously affected by such a retroactive law. This cultural internationalism position prompted the United States to not only provide its own drafts of the UNESCO Convention but also to adopt only two articles of the Convention through the CPIA.<sup>158</sup> Interested in participating, seemingly to obtain the result it desired, the United States ensured that the burden would not fall on importing countries like itself when it came to curbing the illegal art trade.<sup>159</sup> As a result, “[t]he resulting Convention imposes the primary duty to prevent illicit traffic in cultural heritage in the developing exporting states rather than the developed importing states such as the United States.”<sup>160</sup> A lax application of the

155. The Parliamentary Assembly of the Council of Europe estimates that as much as \$6 billion worth of stolen antiquities are traded globally each year. *Report of the Committee on Economic Affairs and Development*, at para. 55, EUR. PARL. DOC. 9018 (Apr. 6, 2001), available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9242&lang=EN> (last visited Sept. 24, 2015). The FBI also found that this figure was accurate, adding that “[w]orldwide, only five percent to ten percent of artwork reported stolen is recovered.” *New FBI Task Force on Art Theft Hopes to Learn About Global Trade From Professionals in Art, Museum Worlds*, 5 WORLD TRADE REV., Feb. 2005 (Muhammad Saeed ed.), available at <http://worldtradereview.com/news.asp?pType=N&iType=A&iID=100&siD=9&nID=19344&pPage=Y> (last visited Sept. 24, 2015).

156. See generally Pearlstein, *supra* note 72.

157. See, e.g., James Cuno, *Culture War: The Case Against Repatriating Museum Artifacts*, FOREIGN AFF., <http://www.foreignaffairs.com/articles/142185/james-cuno/culture-war> (last visited Sept. 24, 2015). Lacking a central cohesive argument, this sentiment is found less and less often among museum directors as a result of recent strides toward developing friendlier and speedier exchanges and returns between American Museums and source nations.

158. See Jowers, *supra* note 34.

159. VRDOLJAK, *supra* note 83, at 243.

160. Forrest, *supra* note 106, at 611.

UNESCO Convention also supported the United States' "aversion to the enforcement of foreign laws by its domestic courts"<sup>161</sup> and allowed for the assertion of "the values of both preservation and free trade."<sup>162</sup> Collectively, these measures ensured that an active market in illegal antiquities would continue to thrive.

Theoretically, the nonretroactive approach prevents a possible flood of repatriation requests. In reality the United States, through the CPIA, limits the requests themselves to cooperation with only MOU countries leaving those source countries without agreements with no recourse.<sup>163</sup> There appears to be no real danger for a potential Pandora's box effect of repatriation. The current situation neither suggests that this would occur nor has there been any sign of such a flood of requests in the years since the adoption of the UNESCO Convention.

### *C. Australia and Retroactivity of the UNESCO Convention*

Australian and American acceptance of the UNESCO Convention and its implementation through their respective domestic legislation highlights different approaches to the illegal antiquities market. Generally speaking, "Australia has not been a prominent importing state, and few requests have been received from other states for the return of their cultural heritage."<sup>164</sup> The Australian illicit art and antiquities market has also not been well studied until recent years.<sup>165</sup> Additionally, Australia may also be considered more as a source country since there seems to be a growing interest in the cultural arti-

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161. VRDOLJAK, *supra* note 83, at 243. This sentiment reflects the attitude of the United States at the time of the drafting.

162. Barbara B. Rosencrance, Note, *Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 CORNELL INT'L L.J. 311, 313 (1986).

163. See 19 U.S.C. § 2602(a)(2)(A)–(B).

164. Forrest, *supra* note 106, at 617.

165. For example, a 2000 report exploring Australia's illegal art market was "a first exploration of the place of illegality in the art market of Australia." Kenneth Polk et al., *An Exploration of the Illegal Art Market of Australia 1* (2000), <http://www.criminologyresearchcouncil.gov.au/reports/8-98-9.pdf>. Australia was "introduced" to the illegal trafficking in archaeological commodities from the Middle East, for example, through its involvement in the conflicts in Iraq and Afghanistan, and has witnessed an increase in the importation of these commodities due to immense looting in these war-torn countries. Forrest, *supra* note 106, at 608–609.

facts of its Aboriginal population.<sup>166</sup> These factors make Australia somewhat unique and may be the explanation for its slightly broader understanding of the UNESCO Convention with respect to the Convention's retroactive application.

Although Australia did not adopt a fully retroactive approach to the UNESCO Convention through the PMCHA, this legislation is more inclusive than the CPIA. Through the PMCHA, Australia understands the UNESCO Convention as applying "to objects imported after 1 July 1987, but which were previously exported from another country at *any time where there was a cultural heritage protection law in force*, contrary to the provision of that law."<sup>167</sup> Specifically, Section 14 of the PMCA does not have a "cut-off date for the illegal export from the exporting state . . . and it does not matter that the export took place prior to the PMCHA coming into force."<sup>168</sup> Hence unlike the CPIA, the PMCHA does not require that agreements be made between a source nation and Australia in order for the PMCHA to apply. This gives countries that may not be parties to the UNESCO Convention the chance to seek the restitution of their cultural property, which is not possible under the CPIA.<sup>169</sup>

It is worth noting that the nonretroactivity of the UNESCO Convention under the U.S. CPIA and similar foreign legislation may be a hindrance to Australian attempts in recovering its own cultural heritage.<sup>170</sup> Truly ironic is the fact that "[t]hrough Australian indigenous material would be recognized under these [the CPIA] definitions, the kind of items described in the

166. Aboriginal art is particularly popular among collectors in England, North America, and Europe. Polk et al., *supra* note 170, at 21. Aboriginal art is also "a major component of Australian art, especially in terms of its overseas market." *Id.* at 16. In the United States, the trade in Native American artifacts is also very active, and indigenous groups constantly battle for returns. *See, e.g., Farida Jhabvala Romero, Lake Country Cracks Down on Looting of Native American Artifacts*, KQED NEWS (Sept. 21, 2015), <http://ww2.kqed.org/news/2015/09/21/lake-county-cracks-down-on-looting-of-native-american-artifacts>.

167. O'KEEFE, *supra* note 28, at 17 (quoting JOHN F. LEY, AUSTRALIA'S PROTECTION OF MOVABLE CULTURAL HERITAGE 125 (1991)).

168. Forrest, *supra* note 106, at 619–20.

169. *Id.* at 620.

170. Linda Young, *Australian and International Laws on Export Controls for Cultural Heritage* 7 (1999), [http://www.aic.gov.au/media\\_library/conferences/artcrime/young.pdf](http://www.aic.gov.au/media_library/conferences/artcrime/young.pdf) (last visited Sept. 24, 2015)

most recent Protection of Movable Cultural Heritage permit list . . . would not be recognised.”<sup>171</sup> This, once again, only underlines the need for uniformity in both implementing legislation and definitions within those laws. As it currently stands, certain cultural objects may be excluded due to semantics and it is largely due to the fact that the text of the UNESCO Convention allows State Parties great latitude in the implementation of its provisions.<sup>172</sup>

### III. TOWARD A RESOLUTION

The UNESCO Convention has proven useful despite its many limitations, mostly in the areas of inspiring the international community to think about cultural heritage seriously and leading the way for the creation of other international instruments that now protect a wide variety of “heritage.” This section explores the ways in which the UNESCO Convention may yet be salvaged and suggests solutions to broadening the scope of protection through the use of diplomacy and creative legislation.

#### A. “Quick Fixes” to the UNESCO Convention’s Limitations

Cultural heritage is not a static concept, therefore the main international instrument dedicated to its protection, the UNESCO Convention, should also be flexible and amenable to change. In order to address the issues surrounding the implementation of the UNESCO Convention, the most obvious suggestion is amending the UNESCO Convention itself.<sup>173</sup> One solution would be making the UNESCO Convention apply retroactively as a whole. However, this would be an unusual step to take because it would directly oppose the standards promulgated by the Vienna Convention.<sup>174</sup> Furthermore, Article 25 of the UNESCO Convention provides that though the Convention

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171. *Id.* at 8.

172. 1970 UNESCO Convention, *supra* note 23, arts. 5–14.

173. Recent suggestions for resolving the UNESCO Convention’s inadequacy include drafting an entirely new convention based both on the UNESCO Convention and the 1995 UNIDROIT Convention. Zsuzsanna Veres, Note, *The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention*, 12 SANTA CLARA J. INT’L L. 91, 111–13 (2014). This hypothetical convention would include the most successful provisions of both Conventions and additional provisions aimed at bolstering the international scope of cultural heritage protection. *Id.*

174. See Vienna Convention, *supra* note 134, art. 28.

may be revised, it will “bind only the States which shall become Parties to the revising convention.”<sup>175</sup> Amending the UNESCO Convention would be a cumbersome process, since a new set of signatories would be needed, and some nations may not agree with such a revision.

Another solution is the amendment of a particular Article in the UNESCO Convention. One suggestion has been to revise Article 7 to include any party or person, both private and public, rather than only institutions.<sup>176</sup> This would require the United States to apply the Article not only to nationally controlled entities as it does presently, but to all institutions.<sup>177</sup> Furthermore, if Article 7 was amended to apply retroactively it would become possible for source nations to request the return of their cultural heritage exported pre-1970.<sup>178</sup> The success of such an amendment is questionable, as any amendment to the UNESCO Convention would necessitate the cooperation of the entire international community.

Alternatively, the United States could amend the CPIA to include provisions similar to those of Australia’s PMCHA. Specifically, countries that are not parties to the UNESCO Convention and countries without MOUs with the United States could be granted protection under the CPIA. Nothing prevents the United States from broadening the scope of the CPIA as it currently stands. In fact, if the American approach became more open and dedicated to full international cooperation, other nations may follow suit.<sup>179</sup> Coupled with the changing attitudes among American museums toward genial repatriation, a truly international movement would surface.<sup>180</sup>

One reason the CPIA was constructed to limit repatriation returns could be the existence of the NSPA. Since the NSPA

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175. See 1970 UNESCO Convention, *supra* note 23, art. 25.

176. John P. Shinn, *A New World Order for Cultural Property: Addressing the Failure of International and Domestic Regulation of the International Art Market*, 34 SANTA CLARA L. REV. 977, 1001 (1994).

177. See 118 CONG. REC. 27, 925 (1972).

178. Shinn, *supra* note 176.

179. One scholar has noted that “the United Nations, and by extension UNESCO, is virtually a useless body without the active participation of the United States of America.” *Id.* at 998. Therefore, a rededication of the United States to its commitments toward the UNESCO Convention could signal a new era in the war against illicit exportation of cultural heritage worldwide. *Id.*

180. See generally Seiff, *supra* note 3.

recognizes vesting patrimony laws, perhaps it seemed unnecessary to extend the CPIA to resemble the PMCHA.<sup>181</sup> The NSPA also covers a much wider category of cultural heritage.<sup>182</sup> In some ways, the NSPA is the better vehicle for repatriation than the CPIA. The NSPA can also be applied retroactively to foreign patrimony laws and renders illegal the possession of “cultural property that may have been in the United States for years . . . illegal, whether or not such items were legally imported into the United States.”<sup>183</sup> Perhaps the United States did not insert similar provisions into the CPIA because they already existed in the NSPA, and providing a double layer of protection would undermine the future security of past cultural imports.<sup>184</sup> To prevent this, awareness should be raised as to the benefits offered by the UNESCO Convention and states not currently parties to it should be encouraged to sign. This is significant because the UNESCO Convention requires that nations pass legislation that comports to the provisions of the treaty.<sup>185</sup> The result could be very beneficial because countries could effectively strengthen their current import and export laws dealing with cultural heritage.

Another approach to retroactivity could be the stipulation of retroactive application “to regulate certain situations that without it would be against the law.”<sup>186</sup> How this would play out in the cultural heritage scenario is dubious however, since it could potentially open the doors to claims that would otherwise remain untouched. Furthermore, a solution may be gleaned from the UNIDROIT Convention, which stipulates that member states im-

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181. The “NSPA protect[s] any foreign state’s cultural property—not just the cultural property of those states parties to the 1970 UNESCO Convention—as long as a court determines that the state has enacted a valid patrimony law.” See Vitale, *supra* note 36, at 1859.

182. *Id.*

183. *Id.* at 1861.

184. However, applying the NSPA undermines “the effectiveness of [the] CPIA, which in turn hinders the United States’ ability to fulfill its obligations under international law.” *Id.* at 1862.

185. *Id.* at 1870.

186. João Grandino Rodas, *The Doctrine of Non-Retroactivity of International Treaties*, 68 REVISTA DE FACULDADE DE DIREITO, UNIVERSIDADE DE SÃO PAULO 341, 346 (1973) (exploring the core of the retroactivity concept and debating the issue on a philosophical level with some creative suggestions for why a nation may choose to implement treaties nonretroactively or retroactively).

plement all of the treaty provisions instead of choosing which ones they want to adopt.<sup>187</sup> The lacking requirement of the implementation of all treaty provisions is a very real problem with the UNESCO Convention. For example, the previously mentioned Articles 3 and 6 are truly meant to be understood in conjunction and together have a real force between them. If one State Party chooses not to implement both Articles and another State Party adopts both, there arises a real discrepancy in uniformity and the uniformity of application is what the UNESCO Convention has suffered from the most.<sup>188</sup> Ultimately, the “Convention fails to promote adherence to a uniform set of laws; rather, it permits individual states to maintain their own import and export regulations as well as laws regarding restitution of stolen property.”<sup>189</sup> This however harks back to the problem of participation discussed earlier; states may be reluctant to become signatories to a convention that requires acquiescence to all enumerated provisions.

A very real problem, which is not often discussed by critics of the UNESCO Convention’s lack of retroactivity, is the concern pertaining to the impact on the rights of property holders and the possible human rights and constitutional issues that could arise.<sup>190</sup> These types of repercussions have the potential to discourage states from becoming parties to the UNESCO Convention or encourage other states to opt to leave. Because cultural heritage is so deeply connected to a human component, it is important that heritage protection is enforced while still being

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187. Alexandra Love Levine, *The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry For the 1995 UNIDROIT Convention*, 36 BROOK. J. INT’L L. 751, 762 (2011). Additionally, Article 18 of the UNIDROIT Convention states, “No reservations are permitted except those expressly authorized in this Convention,” and this further ensures that the UNIDROIT Convention is implemented as intended. International Institute for the Unification of Private Law Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457, 34 I.L.M. 1322, 8 A.J.I.C.L. 239 [hereinafter UNIDROIT Convention]. The UNESCO Convention, on the other hand, allows member states to more narrowly tailor how they will apply the treaty. 1970 UNESCO Convention, *supra* note 23, arts. 5–14.

188. Jennifer H. Lehman, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT’L & COMP. L. 527, 543 (1997).

189. Spencer A. Kinderman, Comment, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT’L L. REV. 457, 470 (1993).

190. FORREST, *supra* note 26, at 41.

respectful to the human element of the equation. Both tangible and intangible cultural heritage and cultural property shape individual and group identities.<sup>191</sup> Where cultural heritage can impact human rights is the murky area where cultures clash. One can see this being especially true in areas where more than one distinct cultural group can be seen living side by side.<sup>192</sup> Because cultural "heritage is also intertwined with identity and territory, where individuals and communities are often in competition or outright conflict"<sup>193</sup> it is not unusual that "[c]onflicts may occur . . . between ethnic minorities and dominant majorities disputing the right to define and manage the cultural heritage of the minority."<sup>194</sup> This problem of ownership is the same problem the UNESCO Convention addresses on an international scale, where the part of the minority group is played by source nations and the part of the majority group is played by market nations.<sup>195</sup> How such violations would be resolved is problematic on its own because the international community would not be quick to give them the same status and gravity as say, violations of political and civil rights.<sup>196</sup>

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191. CULTURAL HERITAGE AND HUMAN RIGHTS 3 (Helaine Silverman & D. Fairchild Ruggles eds., 2007). Heritage is generally seen as something that has positive value and as such benefits all people because it a "shared common good." *Id.*

192. Interestingly, this phenomenon can be seen in Australia, where indigenous peoples still clash with the majority population and this case be also seen in the realm of cultural heritage protection. For information on the official policy for protecting indigenous culture, see AUSTRALIAN GOVERNMENT ATTORNEY GENERAL'S DEPT., *Australian Government's Policy on Indigenous Repatriation* 4 (Oct. 10, 2013), [http://arts.gov.au/sites/default/files/indigenous/repatriation/Repatriation%20Policy\\_10%20Oct%202013.pdf](http://arts.gov.au/sites/default/files/indigenous/repatriation/Repatriation%20Policy_10%20Oct%202013.pdf).

193. CULTURAL HERITAGE AND HUMAN RIGHTS, *supra* note 191.

194. *Id.*

195. *Id.* According to Silverman and Ruggles,

The inherent conflict between world and national heritage and individual or local rights emerges at this critical point. Heritage is by no means a neutral category of self-definition not an inherently positive thing: It is a concept that can promote self-knowledge, facilitate communication and learning, and guide stewardship of the present culture and its historical past. But it can also be a tool for oppression. For this reason, heritage has an uneasy place in the United Nations' call for universal human rights and it merits examination as an urgent contemporary problem.

*Id.*

Since the UNESCO Convention is a widely recognized international instrument and has proven to be a rather problematic one over the years,<sup>197</sup> the United States should feel certain that if the UNESCO Convention ever becomes retroactive, its effects would still not be far reaching enough to cause a major decline of the illegal antiquities market due to the sheer volume of this market itself, and the continued attractiveness of art and ancient art as collectibles. In fact, the illicit art and antiquities market seems to be growing as a result of armed conflicts around the world.<sup>198</sup> Without the cooperation of both market nations and source nations, the UNESCO Convention will remain largely underutilized.

### *B. Approaching a Realistic Solution*

There can be no “quick” fix to the current limitations imposed by the UNESCO Convention and such an approach would discourage rather than encourage nations from participating in a comity-driven repatriation process. It is clear from the discussion above that amending the UNESCO Convention may not be a viable option and the promotion of additional MOUs, although a positive start, is a slow-moving process. Many source nations simply do not have the resources to play the waiting game while their cultural heritage continues to be looted, destroyed, and sold.

The first step towards a workable solution is to promote uniformity among the many national laws implementing the UNESCO Convention. Ironically, international agreements usually aim to promote such uniformity, and the UNESCO Convention would benefit from a reformulation in the fashion of the UNIDROIT Convention.<sup>199</sup> When a convention must be adopted

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196. How human rights intersect with cultural rights in a particular context and why such rights may not be given the same treatment as primary political and civil rights of is a problem first faced by proponents of economic, social, and cultural rights since they surfaced in the post-Cold War era. For a general discussion of this dichotomy and how it developed in international human rights law, see Theo van Boven, *Categories of Rights, in INTERNATIONAL HUMAN RIGHTS LAW* 143–56 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2d ed. 2014).

197. See generally Prott, *supra* note 64, at 4.

198. For a general discussion of the effect of war on the illicit market, see Seiff, *supra* note 3, at 35.

199. See Levine, *supra* note 187.

in its full form, there will be a higher degree of consistency in the domestic legislature that implements that convention.<sup>200</sup> Uniformity of the legal framework of repatriation has the potential of promoting a more even, comity-driven process and has the potential of creating a real opportunity for the consideration of equitable retroactive returns. In addition, uniformity in legislation will be more beneficial to source nations that simply may not have the resources to navigate complicated legal frameworks where no predictability of outcome exists.<sup>201</sup>

Should the United States choose to provide easier routes for source nations to regain their looted pasts, it could not only set the example for other market nations but also establish valuable relationships with other source countries.<sup>202</sup> This in turn, could lead to the opening of new legal paths for the exchange of cultural heritage and the establishment and nurturing of international economic opportunities for all parties involved. For source nations looking to cement their futures through looking to the past, this would provide an easier solution to a major dilemma. For these reasons, the United States should consider extending MOU agreements to those nations currently making frequent repatriation requests that are not currently parties to any such agreement with the United States in the spirit of international comity and recognition of the importance of the value of cultural heritage worldwide.

The best solution can be gleaned from a combination of the above mentioned “quick fix” solutions—one that is tailored in a such a way as to not undermine the source nations, while mak-

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200. It is important to note the distinction between ownership laws and export laws, which often for political reasons, remain largely muddled and create additional difficulties by creating “escape clauses.” Lauren Henderson, *The Duryodhana Dilemma: United States v. A 10th Century Cambodian Sandstone Sculpture and a Proposed Code of Ethics-Based Response to Repatriation Requests for Auction Houses*, 163 U. PA. L. REV. 249, 271 (2014). It is worth considering that if a uniform code of ethics helps auction houses and museums avoid repatriation claims, a similar uniformity in legislation may benefit nations subject to repatriation claims as well. This may be a good starting point for the United States to address its fears of retroactive repatriation claims. For an enlightened discussion of this problem and how it applies to museums and auction houses, see generally *Id.*

201. However, the question of whether or not nations would even be willing to conform to such a proposition raises an entire issue of its own.

202. The example of Australia and India discussed in the beginning of this Note underlines this very idea. See Bourke, *supra* note 1.

ing sure that market nations are able to obtain artifacts in a respectful and legal manner. In theory, each state party will still be able to somewhat create the legal framework for their respective country's situation. A key ingredient in achieving a more structured and uniform repatriation process must be the adoption of more uniform domestic and national legislation by state parties to the UNESCO Convention that implement Convention's provisions. This should be the main focus for reform in the United States, because such reform would prove highly beneficial to international relations and aid in crafting a better long-term solution to the problem of cultural heritage protection. What is certain is that the time to act is now; the longer the United States waits to correct and address some of the shortcomings of its current repatriation regime, the more difficult it will become to renegotiate its terms.

#### CONCLUSION

While the UNESCO Convention introduced a standard for the protection of cultural heritage within international law, this ambitious goal has yet to be achieved in the years since its implementation.<sup>203</sup> The UNESCO Convention suffers from its lack of retroactive application provisions, which limits its temporal reach. Furthermore, it does not encourage uniformity of law since State parties are allowed to choose which provisions they adopt and how they adapt those provisions to their national legislation.<sup>204</sup> Nevertheless, one cannot overlook the UNESCO Convention's impact, for it was the start of a truly international movement to protect cultural heritage.

Ultimately, the solution may lie with the State Parties themselves. After all, the efficacy of the UNESCO Convention depends heavily on the "reciprocity offered by its members."<sup>205</sup> National governments have the real power to implement changes in their cultural heritage policies and have more tools now than ever before to form and implement such policies effectively.<sup>206</sup> There is need for global cooperation and this can be

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203. Prott, *supra* note 64, at 4.

204. See Kinderman, *supra* note 189.

205. Simpson, *supra* note 117.

206. Today, nations around the globe have the benefit of UNESCO's guiding hand more than ever with a number of conventions tailored to particular cultural heritage protection needs. See *Culture: Themes* UNESCO, <http://www.unesco.org/new/en/culture/themes/> (last visited Sept. 24, 2015).

seen in the culmination of the conferences on the protection of endangered heritage of Syria and Iraq.<sup>207</sup>

In many ways, the UNESCO Convention is very much a product of its time. Today, public opinion strongly supports both the protection of cultural heritage and repatriation, which is increasingly reflected through state and institutional cooperation in artifact repatriation. In many ways then “[t]he non-retrospective nature of the Convention therefore acts to distinguish between two eras in relation to the illicit trafficking of cultural heritage: pre and post entry into force of the 1970 Convention.”<sup>208</sup> This public support may be the key to implementing lasting changes in the future of cultural heritage law. As the illicit trading of cultural heritage continues to grow, the inadequacies of the current system of protection will become more apparent, and the need for a complete and uniform system will come to the forefront. Large market nations like the United States have a real opportunity to lead the way in the new wave of cultural protection laws, and the legacy and founding intentions of the UNESCO Convention may yet be redeemed.

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207. This truly international endeavor brought together scholars and experts from museums, auction houses, and humanitarian organizations worldwide to develop a strategy that would curtail the cultural plundering that occurs in conflict-torn nations on a grand scale. See *International High Level Conference on the Endangered Heritage and Cultural Diversity of Iraq and Syria*, UNESCO (Nov. 27, 2014), [http://www.unesco.org/new/en/media-services/single-](http://www.unesco.org/new/en/media-services/single-view/news/international_high_level_conference_on_the_endangered_heritage_and_cultural_diversity_of_iraq_and_syria/back/9597/#.VKLAZBakFD)

[view/news/international\\_high\\_level\\_conference\\_on\\_the\\_endangered\\_heritage\\_and\\_cultural\\_diversity\\_of\\_iraq\\_and\\_syria/back/9597/#.VKLAZBakFD](http://www.unesco.org/new/en/media-services/single-view/news/international_high_level_conference_on_the_endangered_heritage_and_cultural_diversity_of_iraq_and_syria/back/9597/#.VKLAZBakFD).

208. FORREST, *supra* note 26, at 41.

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