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THE WAR ON ANTIQUITIES:  
UNITED STATES LAW AND FOREIGN  
CULTURAL PROPERTY

*Katherine D. Vitale\**

INTRODUCTION

On the morning of January 24, 2008, federal agents raided four California museums,<sup>1</sup> combing through their galleries, offices, store-rooms, and computers in search of evidence that museum officials had knowingly acquired looted antiquities and archaeological materials.<sup>2</sup> According to warrants issued in the investigation, Robert Olson, an antiquities dealer living in California, allegedly led a smuggling ring that, over the course of many years, had succeeded in transporting thousands of ancient artifacts from Thailand, China, Myanmar, and Native American archaeological sites to art dealers in the United States.<sup>3</sup> Mr. Olson conspired with Jonathan Markell, a respected art gallery owner, to sell some of these looted antiquities to an undercover National Park Service agent posing as a collector. The undercover agent then donated the pieces to museums in exchange for

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1 The targeted museums were the Los Angeles County Museum of Art in Los Angeles, the Pacific Asia Museum in Pasadena, the Bowers Museum in Santa Ana, and the Mingei International Museum in San Diego. See Jason Felch, *Raids Suggest a Deeper Network of Looted Art*, L.A. TIMES, Jan. 25, 2008, at A1.

2 *Id.*

3 See, e.g., Search Warrant on Written Affidavit ¶¶ 15–19, *United States v. The Premises Known as: Pacific Asia Museum*, No. 08-0118M (C.D. Cal. Jan. 22, 2008) [hereinafter *Pacific Asia Search Warrant*] (revealing that Olson told the undercover agent that he had been importing Thai antiquities since 1980); see also Jason Felch, *Intrigue but No Glamour for Smuggling Case Figure*, L.A. TIMES, Jan. 31, 2008, at A1 (describing how Olson's smuggling began after a trip to Thailand in the 1970s).

inflated tax write-offs.<sup>4</sup> Museum officials, who had varying degrees of knowledge about the antiquities' provenance, agreed to the donations.<sup>5</sup>

As the culmination of a five-year undercover investigation, the raids sent shockwaves through the museum community.<sup>6</sup> Prior to the raids, newsworthy scandals involving high-profile collections of stolen art tended to be the result of complaints brought by foreign governments.<sup>7</sup> The 2008 California museum raids are therefore important not only because they mark the first major U.S.-led crackdown on museums for alleged looting, but also because they establish what may be a new level of criminal liability for museum officials under the National Stolen Property Act<sup>8</sup> (NSPA) and Archaeological Resources Protection Act<sup>9</sup> (ARPA), statutes that hold accountable those who deal in stolen property.

The use of these statutes to target art dealers and museum officials makes some observers wary, and they warn that it could lead to an increase in the black market trade of art and antiquities.<sup>10</sup> To others, however, the raids are a welcome change in U.S. policy.<sup>11</sup> These observers argue that museums that acquire looted cultural property are like any other crime network, and that the loot should be treated like contraband drugs or endangered species.<sup>12</sup> If in fact these raids indicate that the United States is now treating museum officials who acquire looted art and antiquities like drug traffickers, it is clear that the United States is not alone in its new approach. In October 2008, London's Metropolitan Police began cracking down on the illicit trade in Afghan antiquities, ominously cautioning that "[i]f [the art] industry fails to heed . . . warnings about the purchasing of

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4 See Edward Wyatt, *Four California Museums Are Raided in Looted Antiquities Case*, N.Y. TIMES, Jan. 25, 2008, at A14.

5 *Id.*; see also Jason Felch & Doug Smith, *You Say That Art Is Worth How Much?*, L.A. TIMES, Mar. 2, 2008, at A1 (describing how museum officials who accept for donation art work with inflated values may contribute to IRS tax fraud).

6 See Felch, *supra* note 1.

7 Andrew Murr, *Murky Provenance*, NEWSWEEK, Jan. 25, 2008, <http://newsweek.com/ID/105494/page/1> (web exclusive).

8 18 U.S.C. §§ 2314–2315 (2006).

9 16 U.S.C. §§ 470aa–470mm (2006).

10 See, e.g., Andrew Adler, *An Unintended and Absurd Expansion: The Application of the Archaeological Resources Protection Act to Foreign Lands*, 38 N.M. L. REV. 133, 158 & n.151 (2008).

11 For example, Brian Rose, President of the Archaeological Institute of America, believes that a federal crackdown on museums is "a good thing." See Murr, *supra* note 7.

12 *Id.*

these items, then . . . officers will move on to consider specific intelligence led operations to enforce the law.”<sup>13</sup> These operations, no doubt, will look something like the 2008 California museums investigation.

The use of NSPA and ARPA to prosecute individuals who buy, sell, or otherwise deal in cultural property stolen or illegally exported from a foreign state is in direct tension with the Convention on Cultural Property Implementation Act<sup>14</sup> (CPIA). CPIA is a statute enacted in accordance with an international treaty to which the United States is a party.<sup>15</sup> This Note explores how criminal liability under U.S. law for museum officials and others who acquire art, archaeological materials, and especially antiquities<sup>16</sup> originating in foreign nations conflicts with CPIA’s treatment of foreign cultural property. Part I discusses the principle of protection of cultural property in international law and the manifestation of this principle in the United Nations Educational, Scientific and Cultural Organization’s 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>17</sup> (1970 UNESCO Convention). Part II examines the 1970 UNESCO Convention’s influence on U.S. civil law and policy regarding foreign cultural property, and on the acquisitions policies of inter-

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13 *Police to Clamp Down on Trade in Looted Afghan Art*, DAILY TELEGRAPH (London), Oct. 21, 2008, <http://www.telegraph.co.uk/arts/main.jhtml?xml=/arts/2008/10/21/baafghan121.xml>.

14 19 U.S.C. §§ 2601–2613 (2006); *see also* PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 622–23 (2d ed. 2008) (describing the proposal and passage of CPIA).

15 *See* discussion *infra* Part I.B.

16 This Note often uses the term “cultural property,” a designation comprising works of art, archaeological materials, antiquities, and more. *See* JOHN HENRY MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS*, at xxv n.1 (5th ed. 2007). The focus of this Note on antiquities in particular is due in large part to the interest that their looting and repatriation draws from museum officials, art and antiquities dealers, foreign governments, and the U.S. government. For a discussion of the battle over what constitutes looting between source countries and market countries (like the United States), *see* generally SHARON WAXMAN, *LOOT: THE BATTLE OVER STOLEN TREASURES OF THE ANCIENT WORLD* (2008).

17 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*, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]. The 1970 UNESCO Convention was signed on November 17, 1970 and subsequently entered into force on April 24, 1972. *See* UNESCO, *States Parties: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (last visited Apr. 2, 2009) (listing the signing date, states parties to, and effective date of the 1970 UNESCO Convention).

national and domestic museums. Part III discusses criminal penalties under both NSPA and ARPA for those who knowingly acquire stolen foreign cultural property. Part IV analyzes the conflict between policies on foreign cultural property followed by the United States and domestic museums and the application of criminal penalties in art trafficking cases. In addition, this Part explores the consequences of the conflict for both the United States and individuals, and suggests resolutions to the conflict through law. Finally, this Note concludes that in order for the United States to fulfill its obligation under the 1970 UNESCO Convention, it must stop conducting a war on antiquities—and those who acquire them.

## I. INTERNATIONAL MECHANISMS FOR PROTECTING CULTURAL PROPERTY

Both international law and U.S. domestic law aim to protect the world's cultural heritage by protecting individual states' cultural property. The United States recognizes the importance of cultural property and has pledged to protect it by cooperating with other states.<sup>18</sup> How the United States protects cultural property is shaped and governed by general principles of international law and a multinational treaty, the 1970 UNESCO Convention.

### A. *The General Principle of Protection in International Law*

Cultural property manifests a state's cultural heritage and is a significant source of national pride and identity. Moveable cultural objects, such as antiquities and archaeological materials, are repositories of historical, social, and ethnographical information. Those who steal or damage cultural objects destroy more than the objects themselves—they destroy part of the culture. Moreover, destruction of cultural property belonging to any nation or people damages the cultural heritage of all mankind.<sup>19</sup> It is understandable then that the protection of cultural property is an old and important part of international law.<sup>20</sup>

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18 See 1970 UNESCO Convention, *supra* note 17, pmbl. ("Considering that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation . . .").

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

20 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (stating that in war, a "cardinal principle" is the protection of civilian populations and civilian objects); EMMERICH DE VATTTEL, *THE LAW OF NATIONS*

There are two key instruments that embody this international protection principle: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>21</sup> (1954 Hague Convention) and the 1970 UNESCO Convention. The 1954 Hague Convention deals explicitly with protection of cultural property during wartime. It prohibits the destruction or seizure of cultural property during armed conflict, whether international or civil, and the trafficking of such property seized during an armed conflict.<sup>22</sup> The 1954 Hague Convention manifests at least two propositions about cultural property: that it is important to the whole world, not just its country of origin; and that cultural property's importance in the world justifies its protection above all else.<sup>23</sup> As a complement to the 1954 Hague Convention, the 1970 UNESCO Convention was developed for the protection of cultural property primarily during peacetime.<sup>24</sup> It obliges member states to protect the cultural property of other member states through national legislation and international cooperation. Because of the relevance of the 1970 UNESCO Convention to U.S. law, it is more fully analyzed in the next subpart.

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368 (Joseph Chitty trans., 1834) ("For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society . . . such as temples, tombs, public buildings, and all works of remarkable beauty. . . . It is declaring one's self an enemy of mankind . . . to deprive them of these monuments of art and models of taste."); Mary Ellen O'Connell, *Rethinking the Remedy of Return in International Art Law*, in *THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES* 95, 96–102 (Robin F. Rhodes ed., 2007).

21 1954 Hague Convention, *supra* note 19, pmb1. The United States signed but did not ratify the 1954 Hague Convention; nevertheless, the Convention's rule against pillage is part of customary international law, and therefore binding upon the United States. See Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 *VAND. J. TRANSNAT'L L.* 1067, 1071 (2005). For more on obligations to protect cultural property during armed conflict, see KEVIN CHAMBERLAIN, *WAR AND CULTURAL HERITAGE* (2004) (providing a comparative analysis of the 1954 Hague Convention, its First and Second Protocols, and their relationship with other instruments); Mary Ellen O'Connell, *Beyond Wealth: Stories of Art, War, and Greed*, 59 *ALA. L. REV.* 1075 (2008) (offering three historical examples where international law regarding art was not adequately considered); Mary Ellen O'Connell, *Occupation Failures and the Legality of Armed Conflict: The Case of Iraqi Cultural Property*, 9 *ART, ANTIQUITY & L.* 323, 329–45 (2004) (discussing the obligations to protect cultural property during wartime).

22 See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 *AM. J. INT'L L.* 831, 833–42 (1986).

23 See *id.* at 841–42.

24 There were forerunners to the 1970 UNESCO Convention, including a similar treaty in 1964. See *id.* at 842; Marilyn E. Phelan, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 *VILL. SPORTS & ENT. L.J.* 31, 33 (1998).

### B. *The 1970 UNESCO Convention*

In November 1970, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the 1970 UNESCO Convention, a non-self-executing treaty<sup>25</sup> whose purpose was to establish a comprehensive international mechanism to prohibit the illicit import, export, and transfer of its states parties' cultural property.<sup>26</sup> The 1970 UNESCO Convention was a product of the post-World World II growth in the illicit trade of cultural property;<sup>27</sup> this trade, according to the UNESCO General Conference, had led to the "impoverishment of . . . cultural heritage," both in individual states and globally.<sup>28</sup> In part, the illicit trade in cultural property stemmed from the unequal power dynamic between market countries, where demand for art and antiquities tacitly encouraged worldwide export of cultural and archaeological objects, and source countries, which are rich in such objects but economically poor relative to market countries.<sup>29</sup>

The 1970 UNESCO Convention seeks to remedy this unequal dynamic mainly through the use of export and import restrictions.<sup>30</sup> While source countries restricted export of their cultural property prior to 1970,<sup>31</sup> the 1970 UNESCO Convention extends international effectiveness to national export prohibitions by obliging its member states "to prevent museums and similar institutions within their territories from acquiring cultural property . . . illegally exported" from another member state, and "to recover and return any such cultural

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25 The Convention is subject to ratification or acceptance by states parties in accordance with their respective constitutional procedures. See 1970 UNESCO Convention, *supra* note 17, art. 19.

26 See *id.* pmbl.

27 See GERSTENBLITH, *supra* note 14, at 552; see also Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, ART J., Autumn 1969, at 94, 94 ("In the last ten years there has been an incalculable increase in the number of monuments systematically stolen, mutilated and illicitly exported from Guatemala and Mexico in order to feed the international art market.").

28 1970 UNESCO Convention, *supra* note 17, art. 2.

29 Merryman, *supra* note 22, at 832. Examples of source countries include Mexico, Egypt, Greece, and India. Examples of market countries include the United States, Switzerland, France, and Germany. *Id.* Of course, a source country may also be a market country. *Id.* at 832 n.4.

30 1970 UNESCO Convention, *supra* note 17, arts. 6(b), 7(b).

31 See Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 313-14 (1982); see also, e.g., *United States v. McClain (McClain I)*, 545 F.2d 988, 997 (5th Cir. 1977) (describing Mexico's Law on Archaeological Monuments of 1897, which restricted removal of certain archaeological artifacts from Mexico without express authorization).

property.”<sup>32</sup> Cultural property as defined by the 1970 UNESCO Convention includes anything from rare specimens of minerals, to original works of statuary art, to postage stamps, and more.<sup>33</sup> Each state party must “*specifically designate*[ ]” such property “as being of importance for archaeology, prehistory, history, literature, art or science,” for it to receive protection.<sup>34</sup> The precise designation of cultural property subject to export restrictions gives fair notice to importers and others about the legality of imported art, archaeological materials, and antiquities.<sup>35</sup>

The 1970 UNESCO Convention obligates states to employ export and import restrictions on cultural property through the use of export certificates.<sup>36</sup> In particular, states parties to the Convention must prohibit exportation and importation of items of cultural property that are unaccompanied by export certificates.<sup>37</sup> States parties must also prohibit the import of documented items of cultural property stolen from another state party’s museum or similar institution *after* the date the Convention entered into force, and take appropriate steps to recover and return any such item.<sup>38</sup> In addition to employing import and export controls, states parties must also ensure the protection of their cultural property against illicit import, export, and transfer of ownership;<sup>39</sup> take necessary measures to prevent museums and institutions within their territory from acquiring cultural property illegally exported from another state party;<sup>40</sup> and restrict the movement of cultural property within their territories.<sup>41</sup>

Although it is the “keystone” of current international and municipal systems to curtail illicit international trade in cultural property,<sup>42</sup>

32 1970 UNESCO Convention, *supra* note 17, art. 7(a), (b)(ii).

33 *See id.* art. 1. Also included in the Convention’s sweeping definition are antiquities more than one hundred years old, furniture, rare manuscripts, original engravings, and cinematographic archives, among others. *Id.*

34 *Id.* (emphasis added).

35 This has been the United States’ traditional interpretation of this section. *See* CPIA § 305, 19 U.S.C. § 2604 (2006) (“[E]ach listing made under this section shall be sufficiently specific and precise to insure that . . . fair notice is given to importers and other persons as to what material is subject to such restrictions.”); *cf.* PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC 38 (2000) (noting that a state may designate all its cultural property based on fundamental principles of cultural rights).

36 1970 UNESCO Convention, *supra* note 17, arts. 6(b), 7(b).

37 *Id.* art. 6.

38 *Id.* art. 7(b).

39 *Id.* art. 5.

40 *Id.* art. 7(a).

41 *Id.* art. 10.

42 *See* Merryman, *supra* note 22, at 833.



the 1970 UNESCO Convention has its critics.<sup>43</sup> Initially, some labeled the Convention a failure because too few of the states parties to the Convention adopted implementing national legislation, and most of these were source countries, not market countries.<sup>44</sup> Today, critics point to the fact that the 1970 UNESCO Convention has no retroactive protections, and therefore, does not apply to cultural property stolen or illegally exported before November 1970.<sup>45</sup> Thus, source countries that seek repatriation of cultural property that has been looted from archaeological sites over many years, even centuries, find no recourse in the Convention.<sup>46</sup>

However, the 1970 UNESCO Convention is not a failure. Although it does not apply retroactively, there are other reasons to find that the 1970 UNESCO Convention is successful. It allows market countries and source countries to communicate and cooperate for the protection and return of cultural property through diplomatic channels and domestic legislation. It gives states parties the ability to assert claims against each other, but also encourages them to conclude special agreements about the mechanisms for returning that property.<sup>47</sup> There have been successful repatriations of cultural property under the 1970 UNESCO Convention,<sup>48</sup> and continued success depends on future states parties' ratification. In addition, major market countries such as Switzerland, the United Kingdom, France, and Germany have ratified the 1970 UNESCO Convention and adopted implementing legislation.<sup>49</sup> For its part, the United States, a signatory

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43 See, e.g., Siehr, *supra* note 21, at 1077–78 (“The UNESCO Convention is hardly an efficient obstacle to international art trade.”).

44 Merryman, *supra* note 22, at 843 (noting that as of 1986, fifty-eight nations had become parties to the 1970 UNESCO Convention, but only two, the United States and Canada, could be classified as major market nations); Siehr, *supra* note 21, at 1077 (“[The Convention’s] obligations require national implementing legislation, but only a few of the more than one hundred states that have ratified the UNESCO Convention passed implementing statutes.”).

45 See Int’l Council of Museums (ICOM), The UNESCO and UNIDROIT Conventions, <http://icom.museum/convention.html> (last visited Apr. 2, 2009) (“The UNESCO Convention of 1970 has no retroactive effect; it only enters into effect on the day of its official ratification.”).

46 See Helena Smith, *Greece Embarks on Global Hunt for Stolen Art*, *GUARDIAN* (London), July 11, 2006, at 15, available at <http://www.guardian.co.uk/world/2006/jul/11/parthenon.arttheft> (“Whatever is Greek, wherever in the world, we want back.” (quoting Giorgos Voulgarakis, Culture Minister of Greece)).

47 See 1970 UNESCO Convention, *supra* note 17, arts. 15, 17(5).

48 See, e.g., JAMES CUNO, *WHO OWNS ANTIQUITY?* 153 (2008) (describing the successful return of twelve thousand Pre-Columbian artifacts to Ecuador from Italy after seven years of litigation).

49 See UNESCO, *supra* note 17 (listing the Convention’s states parties).

to the 1970 UNESCO Convention, adopted implementing legislation in the form of CPIA,<sup>50</sup> discussed below.

## II. THE 1970 UNESCO CONVENTION IN U.S. LAW AND MUSEUM ACQUISITIONS POLICIES

As a treaty made “under the Authority of the United States,” the 1970 UNESCO Convention is the “supreme Law of the Land.”<sup>51</sup> Therefore, as domestic law implementing the 1970 UNESCO Convention, CPIA should be considered the United States’ authoritative statement on its policy toward foreign cultural property. Through CPIA, the United States created regulations that are in line with the 1970 UNESCO Convention regarding the importation, exportation, and transfers of cultural property that is stolen or illegally exported from its country of origin. Moreover, the 1970 UNESCO Convention’s influence is not limited to domestic legislation. Both international and U.S. museum organizations use the 1970 UNESCO Convention as a standard for creating acquisitions policies that guide individual museums when they acquire cultural property.

### A. *The Convention on Cultural Property Implementation Act*

In 1972, the U.S. Senate unanimously voted to ratify the 1970 UNESCO Convention, but it did not pass CPIA until 1983,<sup>52</sup> due to years of heated debates on the proper nature of U.S. action and which kinds of property should get protection.<sup>53</sup> The reason for CPIA’s passage was twofold. First, Congress recognized that as a major market country, the United States was ripe for illegal import of items of cultural property, a fact that was detrimental to U.S. relations with source countries.<sup>54</sup> Second, some members of Congress wanted to modify or overturn *United States v. McClain*,<sup>55</sup> a Fifth Circuit case whose application of the National Stolen Property Act<sup>56</sup> to foreign cultural property the Senate Finance Committee called “overly broad as a matter of

50 See GERSTENBLITH, *supra* note 14, at 557.

51 U.S. CONST. art. VI, cl. 2 (“This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

52 Pub. L. No. 97-446, tit. III, 96 Stat. 2350 (1983) (codified as amended at 19 U.S.C. §§ 2601–2613 (2006)).

53 See James Cuno, *U.S. Art Museums and Cultural Property*, 16 CONN. J. INT’L LAW 189, 193 (2001).

54 See Phelan, *supra* note 24, at 48.

55 *United States v. McClain (McClain I)*, 545 F.2d 988 (5th Cir. 1977).

56 See discussion *infra* Part III.A.

national policy.”<sup>57</sup> In *McClain*, the Fifth Circuit recognized and used foreign states’ blanket declarations of state ownership of cultural property to establish that certain property illegally exported into the United States was stolen.<sup>58</sup>

The main tenets of the 1970 UNESCO Convention align with the three purposes of CPIA: to prohibit the import of documented cultural material stolen from the museum or similar institution of a state party to the 1970 UNESCO Convention; to assist in that property’s recovery and return if it is found in the United States; and to apply specific import controls to archaeological or ethnological materials that compose a part of a state’s cultural patrimony in danger of being pillaged.<sup>59</sup>

As a non-self-executing treaty, the 1970 UNESCO Convention gives states latitude in fulfilling their treaty obligations by allowing them a measure of control over which articles they implement.<sup>60</sup> CPIA implements the Convention’s Articles 7(b) and 9. Article 7(b) prohibits the import of cultural property stolen from a state museum or similar institution.<sup>61</sup> Article 9 calls for import controls on items of cultural property composing part of a state’s cultural patrimony.<sup>62</sup> Like the 1970 UNESCO Convention, CPIA contemplates protection of a state’s cultural property only if that state has ratified, accepted, or acceded to the 1970 UNESCO Convention.<sup>63</sup>

CPIA section 308 aligns with Article 7(b) and prohibits the importation into the United States of any “article of cultural property” stolen from a state party’s museum or institution.<sup>64</sup> Cultural property includes all items described in Article 1 of the 1970 UNESCO Conven-

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57 128 CONG. REC. 25,347 (1982) (statement of Sen. Dole).

58 See *McClain I*, 545 F.2d at 992.

59 See S. Rep. No. 97-564, at 23 (1982).

60 See Molly A. Torsen, Note, *Fine Art in Dark Corners: Goals and Realities of International Cultural Property Protection*, 35 J. ARTS MGMT. L. & SOC’Y 89, 92 (2005).

61 1970 UNESCO Convention, *supra* note 17, art. 7(b)(i) (“The States Parties to this Convention undertake . . . to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention . . . provided that such property is documented as appertaining to the inventory of that institution . . .”).

62 *Id.* art. 9 (“Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake . . . to participate in a concerted international effort to determine and to carry out the necessary concrete measures . . .”).

63 See CPIA § 302(9), 19 U.S.C. § 2601(9) (2006) (“The term ‘State Party’ means any nation which has ratified, accepted, or acceded to the [1970 UNESCO] Convention.”).

64 *Id.* § 308, 19 U.S.C. § 2607 (2006); GERSTENBLITH, *supra* note 14, at 559.

tion<sup>65</sup>—that is, “virtually every sort of cultural object that might be housed in a museum or other type of public or religious institution.”<sup>66</sup> Any item of cultural property imported into the United States in violation of section 308 is subject to seizure, so long as it was a documented item stolen after the date on which *both* the United States and the county of origin were parties to the 1970 UNESCO Convention.<sup>67</sup> The state party requesting repatriation of its cultural property must pay for its return and delivery; moreover, if the cultural property was seized from a bona fide purchaser, the requesting state must pay that purchaser just compensation.<sup>68</sup>

Sections 303 and 304 align with the 1970 UNESCO Convention’s Article 9, splitting it into two parts. Combined, sections 303 and 304 provide prospective prohibition on the import of archaeological and ethnological materials that a foreign state wishes to protect. Section 303 provides a mechanism by which the United States and other states parties to the 1970 UNESCO Convention may enter into bilateral agreements to impose import restrictions on archaeological or ethnological materials that are subject to pillage.<sup>69</sup> Archaeological materials are objects of cultural significance at least 250 years old that were found as a result of any kind of scientific, clandestine, accidental, or exploratory discovery.<sup>70</sup> Ethnological materials are tribal or non-industrial societies’ products that are important to the cultural heritage of a people because of their rarity or distinctiveness.<sup>71</sup> Section 304 allows the President to unilaterally impose import restrictions if the state party has already submitted a request for a bilateral agreement under section 303.<sup>72</sup> The President may authorize such restrictions if an “emergency condition” applies with respect to any archaeological

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65 CIA § 301(6), 19 U.S.C. § 2601(6); *see also* notes 33–35 and accompanying text (describing the 1970 UNESCO Convention’s definition of cultural property).

66 GERSTENBLITH, *supra* note 14, at 559.

67 CIA § 308, 19 U.S.C. § 2607 (2006); GERSTENBLITH, *supra* note 14, at 559–60.

68 CIA § 310(b)–(c), 19 U.S.C. § 2609(b)–(c) (2006).

69 *Id.* § 302, 19 U.S.C. § 2602 (outlining the President’s power to enter into agreements pursuant to Article 9 of the 1970 UNESCO Convention). The United States has concluded bilateral treaties with several countries, including Bolivia, Cambodia, Canada (now expired), Colombia, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. *See* Bureau of Educ. & Cultural Affairs, U.S. Dep’t of State, International Cultural Property Protection Overview, <http://culturalheritage.state.gov/overview.html> (last visited Apr. 2, 2009) [hereinafter ICCP Overview].

70 CIA § 301(2)(i), 19 U.S.C. § 2601(2)(i) (2006).

71 *Id.* § 301(2)(ii), 19 U.S.C. § 2601(2)(ii).

72 *Id.* § 304(b), (c)(1), 19 U.S.C. § 2603(b)(c)(1).

or ethnological material specifically designed by the requesting state.<sup>73</sup>

In order to enter into a bilateral agreement, the President or his designee must make four determinations: (1) that the cultural patrimony of the foreign state is in jeopardy; (2) that the foreign state has attempted to protect its cultural patrimony; (3) that import controls on the objects requested by the foreign state would substantially benefit the deterrence of their pillage; and (4) that import controls are “consistent with the general interest of the international community in the interchange of cultural property among nations.”<sup>74</sup> CPIA established the Cultural Property Advisory Committee (CPAC) to assist the President in making these four determinations.<sup>75</sup>

In practice, the U.S. Department of State accepts, and CPAC reviews, requests from countries that desire import restrictions on archaeological or ethnological materials.<sup>76</sup> CPAC recommends import controls based on the four determinations.<sup>77</sup> In order to receive protection through import controls, ethnological and archaeological materials must comprise a part of a state’s cultural patrimony that is in danger of being pillaged. Unlike the 1970 UNESCO Convention, which does not distinguish between cultural property and cultural patrimony, CPIA clearly contemplates a difference. Cultural property is any item described under Article 1 of the 1970 UNESCO Convention.<sup>78</sup> Cultural patrimony is a tricky concept and means more than a collection of individual pieces of cultural property.<sup>79</sup> One scholar has explained the difference between cultural property and cultural patrimony as the difference between “all old bells” and “the Liberty bell.”<sup>80</sup>

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73 *Id.* § 304(a), 19 U.S.C. § 2603(a) (describing an “emergency condition” with respect to archaeological or ethnological material). Import restrictions last for five years, and may be renewed at the discretion of the President if certain conditions apply. *Id.* § 303(e), 19 U.S.C. § 2602(e).

74 *Id.* § 303(a), 19 U.S.C. § 2602(a); see also James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L.J. 83, 84–85 (2001) (noting that “[c]ultural *patrimony* . . . suggests a level of importance greater than that of cultural *property*”).

75 CPIA § 306, 19 U.S.C. § 2605 (2006).

76 See H.R. 14171, 94th Cong. § 2 (1976); Cuno, *supra* note 74, at 83–84.

77 See Cuno, *supra* note 74, at 83–84.

78 See CPIA § 301(6), 19 U.S.C. § 2601(6) (2006).

79 See Cuno, *supra* note 74, at 83–85.

80 *Id.* at 85.

Under CPIA, there is no guarantee that a foreign state requesting import controls will receive them.<sup>81</sup> Yet despite this drawback, the process laid out in CPIA is more effective at protecting cultural property than is the enforcement of broad foreign export controls. Blanket enforcement of foreign laws in the United States may drive items of cultural property into the black market, thus endangering the cultural heritage that the 1970 UNESCO Convention seeks to protect.<sup>82</sup> In sum, although CPIA selectively enforces import controls, and therefore some foreign states' export controls will not be enforced, it also establishes clear policy regarding cultural property imported into the United States, giving notice to foreign states as to what steps they need to take in order to obtain U.S. protection of their cultural property.

### B. *The Acquisition Guidelines of International and Domestic Museums*

Although the 1970 UNESCO Convention does not bind museums as private actors, the International Council of Museums (ICOM), a UNESCO organization, requires its member museums to exercise due diligence in researching the provenance<sup>83</sup> of any antiquity or item of cultural property it wishes to acquire, and to acknowledge the 1970 UNESCO Convention, among other international treaties, as a standard for interpreting ICOM's Code of Ethics and in developing institutional policies.<sup>84</sup> Unlike the 1970 UNESCO Convention and CPIA, ICOM does not distinguish between states parties to the 1970 UNESCO Convention and other states. ICOM recommends that museums not acquire an item of cultural property that was illegally obtained in or exported from *any* state where it originated or *any* intermediate state where it might have been legally owned, including the museum's own state.<sup>85</sup> In addition, ICOM maintains that muse-

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81 For example, because a state's request must meet CPIA's four criteria, it is possible that CPAC could decide that although ancient statuary comprises a part of its cultural patrimony, there are enough examples of ancient statuary still present within that state so that the cultural patrimony of that state is not "in jeopardy." *See id.* at 86.

82 *Cf.* Juan Carlos Uribe, *The Protection of Cultural Heritage in Colombia*, in *ART AND CULTURAL HERITAGE* 119 (Barbara T. Hoffman ed., 2006) (noting the inadequacy of Colombian export restrictions to protect its cultural property, and Colombia's request for U.S. compliance with the CPIA process).

83 The word "provenance" as used in the art and museum world means an object's history of ownership, which may include exhibitions in which it was shown as well as published references to it. *See* Barbara T. Hoffman, *Introduction, Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy*, in *ART AND CULTURAL HERITAGE*, *supra* note 82, at 6 n.34.

84 *See* ICOM, Code of Ethics for Museums §§ 2.3, 7.2, <http://icom.museum/ethics.html> (last visited Apr. 2, 2009).

85 *Id.* § 2.3–4.

ums have the duty to acquire, preserve, and promote their collections in order to safeguard the cultural heritage.<sup>86</sup>

One of ICOM's member organizations is the American Association of Museums (AAM), which comprises 3000 United States museums.<sup>87</sup> The direct link between ICOM and the 1970 UNESCO Convention puts AAM and its member museums in the position of establishing and following ethical guidelines consistent with international law. Additionally, the Association of Art Museum Directors (AAMD) is the second largest museum organization in the United States with 190 museum members.<sup>88</sup> Both AAM and AAMD promulgate guidelines to help museums fulfill their ethical, fiduciary, and custodial responsibilities in acquiring and maintaining art, antiquities, and archaeological materials. In 2008, AAM and AAMD introduced new standards regarding the acquisition of antiquities and archaeological materials, which was a watershed moment in the museum community.<sup>89</sup> These new standards brought AAM and AAMD closer to the ICOM Code of Ethics' acquisitions policy, and consequently, more in line with the 1970 UNESCO Convention. The 2008 guidelines of the AAM and AAMD call for museums to publish their collections policies so that they are available to the public, rigorously research the provenance of an object prior to its acquisition, require export and import documentation and written ownership history of objects from sellers and donors, and comply with all applicable U.S. domestic law and international treaties.<sup>90</sup>

Most importantly, AAM's and AAMD's new guidelines emphasize the importance of the 1970 UNESCO Convention. Prior to 2008, AAM directed member museums to discourage illicit trade in antiquities without weighing in on whether the museums could acquire

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86 *Id.* § 2.

87 See Am. Ass'n of Museums, About AAM, <http://www.aam-us.org/aboutaam/index.cfm> (last visited Feb. 21, 2009); Am. Ass'n of Museums, ICOM-US: The U.S. National Committee of the International Council of Museums, <http://www.aam-us.org/museumresources/icom/index.cfm> (last visited Apr. 2, 2009).

88 See Ass'n of Art Museum Dirs., Members, <http://www.aamd.org/about/#Members> (last visited Apr. 2, 2009).

89 See Am. Ass'n of Museums, Standards Regarding Archaeological Material and Ancient Art (July 2008), <http://www.aam-us.org/museumresources/ethics/upload/Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf> [hereinafter AAM, Standards]; Ass'n of Art Museum Dirs., New Report on the Acquisition of Archaeological Materials and Ancient Art (June 4, 2008), <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> [hereinafter AAMD, New Report].

90 See AAM, Standards, *supra* note 89, at Standard 2; AAMD, New Report, *supra* note 89, art. I.E.

undocumented items.<sup>91</sup> Likewise, AAMD recommended that museums require documented provenance for an object for the ten years prior to acquisition.<sup>92</sup> Now, both AAM and AAMD recommend that museums require documentation that an object was “out of its probable country of modern discovery” by November 17, 1970—the date the 1970 UNESCO Convention was signed.<sup>93</sup> However, AAM and AAMD disagree about how far restrictions on acquisitions should go. AAMD gives museums leeway to acquire objects known to be out of their source countries prior to November 1970.<sup>94</sup> In contrast, AAM recommends that museums not acquire any objects that, to their knowledge, have been illegally exported from their countries of modern discovery or the countries where they were last legally owned—even if they were illegally exported from those countries *prior* to November 17, 1970 and thus, not contemplated by the 1970 UNESCO Convention.<sup>95</sup> AAM’s new recommendation goes beyond CIA, which only applies if an item of cultural property was illegally exported and imported after the entry into force of the 1970 UNESCO Convention.<sup>96</sup>

### III. U.S. CRIMINAL LAW AND FOREIGN CULTURAL PROPERTY

Against the backdrop of the 1970 UNESCO Convention, CIA, and the acquisitions policies of international and national museum organizations two criminal statutes emerge, the National Stolen Property Act and the Archaeological Resources Protection Act. The application of NSPA or ARPA in certain cases may result in civil forfeiture of cultural property looted in a foreign state and criminal prosecution

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91 See Ildiko P. DeAngelis, *How Much Provenance Is Enough? Post-Schultz Guidelines for Art Museum Acquisition of Archaeological Materials and Ancient Art*, in ART AND CULTURAL HERITAGE, *supra* note 82, at 398, 404–05.

92 See Ass’n of Art Museum Dirs., Report on Acquisition of Archaeological Materials and Ancient Art (June 4, 2004), [http://www.aamd.org/papers/documents/TaskForceReportwithCoverPage\\_Final.pdf](http://www.aamd.org/papers/documents/TaskForceReportwithCoverPage_Final.pdf) (“While each member museum should determine its own policy as to length of time and appropriate documentation, a period of 10 years is recommended.”).

93 See AAM, Standards, *supra* note 89, at Standard 2; AAMD, New Report, *supra* note 89, art. I. E.

94 See AAMD, New Report, *supra* note 89, arts. I.F, I.I.E. AAMD recognizes that members “normally should not acquire a work unless provenance research substantiates that the work was outside its country of probable modern discovery before 1970” or was legally exported from such country after 1970. However, coupled with AAMD’s recognition of a licit trade in antiquities, this qualification of “normally” anticipates exceptions to the rule. *Id.* art. I.I.E.

95 AAM, Standards, *supra* note 89, at standard 2.

96 See *infra* note 172, and accompanying text.



for individuals involved in its trade.<sup>97</sup> Neither NSPA nor ARPA was originally intended specifically to protect foreign cultural property. Congress passed NSPA in 1934 as an extension of the National Stolen Motor Vehicle Act of 1919,<sup>98</sup> and intended it to reach individuals who stole property in one state in the United States and brought it into another.<sup>99</sup> Congress did not specifically contemplate including or excluding theft of art, archaeological material, or antiquities from a foreign state within NSPA's scope.<sup>100</sup> Nor was ARPA intentionally designed to reach foreign cultural property: it was enacted in 1979 to further the protection of archaeological and cultural artifacts found on U.S. public lands and Indian lands, not cultural property taken from a foreign state.<sup>101</sup> In fact, ARPA was not applied to foreign cultural property until 1996.<sup>102</sup>

### A. *The National Stolen Property Act*

Almost all criminal prosecutions of art theft in the United States have been based on NSPA.<sup>103</sup> NSPA is codified at Title 18 of the United States Code §§ 2314 and 2315. Section 2314 provides in relevant part:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . .

. . . .

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97 See discussion *infra* Parts III.A & III.B.

98 18 U.S.C. § 2312 (2006).

99 Ch. 333, 48 Stat. 794 (codified as amended at 18 U.S.C. §§ 2314–2315 (2006)) (stating that NSPA is “[t]o extend the provisions of the National Motor Vehicle Act to other stolen property”); see also Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT’L L. 1199, 1206 (2005) (noting that NSPA is an extension of the National Stolen Motor Vehicle Act of 1919); George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT’L L. & COM. 77, 89–90 (1978) (discussing NSPA’s legislative history).

100 See Nowell, *supra* note 99, at 91.

101 Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa–470mm (2006)); see also *id.* § 2(a), 93 Stat. at 721 (codified as amended at 16 U.S.C. § 470aa) (“The Congress finds that— . . . [archaeological resources] are increasingly endangered because of their commercial attractiveness . . . .”); Adler, *supra* note 10, at 140–42 (describing how ARPA was enacted to remedy “two major deficiencies” in the Antiquities Act of 1906: the lack of a definition for the phrase “object of antiquity” and a need for more severe penalties).

102 Adler, *supra* note 10, at 143–44.

103 See Kreder, *supra* note 99, at 1206.

Shall be fined under this title or imprisoned not more than ten years, or both.<sup>104</sup>

Section 2315 provides in relevant part:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods . . . of the value of \$5,000 or more . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . .

. . . .

Shall be fined under this title or imprisoned not more than ten years, or both.<sup>105</sup>

In effect, NSPA makes it illegal for an individual to possess, receive, transfer, or otherwise deal in valuable stolen property that has traveled in interstate or foreign commerce if the individual knows that the property was obtained by theft.

Property removed from a foreign state is obviously not taken from somewhere within the territorial jurisdiction of the United States, so determining whether it has been stolen can prove difficult for courts.<sup>106</sup> In *McClain*, the Fifth Circuit overcame this difficulty by applying a broad definition of theft and using foreign state ownership laws to determine whether the archaeological objects at issue had been stolen.<sup>107</sup> Today, NSPA applies to cultural property that is taken from a foreign state whose government “asserts actual ownership of the property pursuant to a valid patrimony law.”<sup>108</sup> A patrimony law automatically vests in the country of origin ownership of archaeological materials and antiquities as defined by statute.<sup>109</sup> In order to bring NSPA into play, it is necessary that a state have both a valid patrimony law and a restriction on exportation of the kind of property contemplated by the patrimony law.<sup>110</sup>

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104 18 U.S.C. § 2314 (2006).

105 *Id.* § 2315.

106 See Nowell, *supra* note 99, at 91.

107 See *id.* at 91–92.

108 *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003); see also James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 VILL. SPORTS & ENT. L.J. 19, 24 (1998) (“Even if a foreign state has not reduced an illegally exported object to its possession, it may validly claim ownership over the property *so long as* it has previously declared so by law.”).

109 See Siehr, *supra* note 21, at 1085.

110 See *United States v. McClain (McClain I)*, 545 F.2d 988, 996 & n.14 (5th Cir. 1977) (“The general rule today in the United States . . . is that it is not a violation of law to import simply because an item has been illegally exported from another country.” (quoting Paul M. Bator, *International Trade in National Art Treasures: Regulation*

*McClain* is the second in a trilogy of cases that sets out the basis for federal prosecution under NSPA in the context of cultural property taken from a foreign state. The first, *United States v. Hollinshead*,<sup>111</sup> involved a defendant who was convicted after he unearthed and removed pieces of a Mayan stele from Guatemala, knowing that Guatemalan law prohibited the removal of such property without the government's permission.<sup>112</sup> Although *Hollinshead* set the precedent of liability under NSPA for those who deal in antiquities and ancient materials composing cultural property, it was not a controversial decision due to the fact that the defendant had been present in Guatemala and participated in the stele's removal from its borders and importation into the United States.<sup>113</sup> Yet *McClain*, which dealt with the removal of Pre-Columbian artifacts from Mexico, caused no fewer than six art and antiquities dealers' associations to file three amicus curiae briefs in favor of the defendants.<sup>114</sup>

In *McClain*, the defendants (who had connections to *Hollinshead*) were convicted of conspiring with others for the removal, exportation, importation, and eventual sale of Pre-Columbian artifacts.<sup>115</sup> The court's decision turned on the definition of "stolen."<sup>116</sup> Under a 1972 Mexican statute,<sup>117</sup> Pre-Columbian artifacts could not be removed without the government's permission—even those owned

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and *Deregulation*, in ART LAW 295, 300 (Leonard D. DuBoff ed., 1975)); JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 163 (3d ed. 2007); see also Bator, *supra* note 31, at 287 (describing that this general rule also applies in other major art-importing countries).

111 495 F.2d 1154 (9th Cir. 1974).

112 *Id.* at 1155.

113 *Id.*

114 See *McClain I*, 545 F.2d at 991 n.1.

115 *Id.* at 992–93. While the court reversed the convictions and remanded for further proceedings in *McClain I*, it upheld the convictions for conspiracy to violate NSPA in *United States v. McClain (McClain II)*, 593 F.2d 658, 671–72 (5th Cir. 1979). The bases of the Fifth Circuit's reversal and remand in *McClain I* were that the federal government had not shown when or from where the artifacts were taken—which was necessary to establish whether Mexican ownership laws were in force at the time—and that the jury had not been given an opportunity to decide those relevant facts. *McClain I*, 545 F.2d at 1004. In *McClain II*, the court upheld the conspiracy conviction but reversed the substantive convictions because of the likelihood that the jury improperly characterized Mexican statutes earlier than 1972 as ownership laws. *McClain II*, 593 F.2d at 671–72.

116 *McClain I*, 545 F.2d at 992.

117 *Id.* at 1000.

by private parties.<sup>118</sup> Although the artifacts had not been stolen from Mexico in the sense that they had been taken from an individual, the court recognized “the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures.”<sup>119</sup> Therefore, by conspiring with those who unearthed and removed Pre-Columbian objects from Mexico in contravention of the Mexican government’s declaration of ownership of those objects, the *McClain* defendants were guilty of stealing.<sup>120</sup>

The *McClain* amici worried that the court’s validation of foreign state patrimony laws would result in art dealers and museum officials facing charges of receiving and transporting stolen property “[m]erely by dealing in art work that ha[d] originated—albeit many years earlier—in countries whose laws include broad declarations of national ownership in art.”<sup>121</sup> The *McClain* court responded to this assertion when it reasoned that the date of exportation of Pre-Columbian artifacts was the proper benchmark for applying NSPA because illegal exportation after the enactment of Mexico’s 1972 patrimony law constituted a sufficient act of conversion to be deemed a theft.<sup>122</sup> Essentially, because the 1972 Mexican law vested ownership of Pre-Columbian artifacts in the Mexican government and forbade their export, all Pre-Columbian artifacts that had left Mexico after that date were “stolen” for purposes of NSPA. Therefore, any U.S. museum official or art dealer who possessed Pre-Columbian artifacts might be subject to prosecution under NSPA if he or she knew that the artifacts were stolen, meaning that they had left Mexico after the enactment of its 1972 patrimony and exportation law. This was true even if the artifacts had been legally imported into the United States, because at the time, there was no importation prohibition on the kind of artifacts the defendants were accused of conspiring to steal.<sup>123</sup>

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118 *Id.* at 993; *see also id.* at 997–1000 (noting that previous statutes of 1897, 1930, 1934, and 1970, while creating state interest in the possession and removal of Pre-Columbian artifacts, did not vest Mexico with unequivocal ownership).

119 *Id.* at 992; *see also id.* at 1000–01 (“[A] declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered ‘stolen,’ within the meaning of the [NSPA].”); *cf. Peru v. Johnson*, 720 F. Supp. 810, 815 (C.D. Cal. 1989) (ruling against Peru because Peru’s claim of ownership was uncertain and it could not prove that the Pre-Columbian artifacts at issue were found in or exported from Peru).

120 *McClain I*, 545 F.2d at 1003.

121 *Id.* at 991 n.1.

122 *Id.* at 1003 n.33.

123 *Id.* at 996 & n.14.

A third case, *United States v. Schultz*,<sup>124</sup> focused on NSPA's scienter requirement. Schultz, a New York art dealer, conspired to smuggle antiquities out of Egypt in contravention of an Egyptian patrimony law.<sup>125</sup> It was clear that Schultz knew his conduct was illegal: he had conspired to smuggle antiquities out of Egypt and into the United States by coating them with plastic to make them look like cheap souvenirs; had invented a phony collection in order to deceive potential buyers as to the origin of the antiquities; and had communicated with his co-conspirators via coded letters.<sup>126</sup> However, the jury did not have to find that Schultz knew his conduct was illegal under NSPA—only that he knew beyond a reasonable doubt that the antiquities were “stolen, unlawfully converted, or taken” in contravention of Egypt's patrimony law.<sup>127</sup> The court held that in assessing Schultz's contention that he was unaware of the Egyptian patrimony law, the jury could consider Schultz's *colleagues'* knowledge of the patrimony law and Schultz's expertise in Egyptian antiquities as evidence of Schultz's knowledge that the antiquities were stolen.<sup>128</sup> Despite the broad range of circumstances that could evidence a defendant's knowledge that the antiquities were stolen, the *Schultz* court held that NSPA's scienter requirement would “protect innocent art dealers who unwittingly receive stolen goods.”<sup>129</sup>

In sum, because NSPA is used to recognize a foreign state's right to its cultural property through patrimony and exportation laws—regardless of whether there is a U.S. importation law in place—it “convert[s] a crime against the people [of a foreign state] into a crime against the people of the United States.”<sup>130</sup> *Schultz* reiterated the

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124 333 F.3d 393 (2d Cir. 2003).

125 *Id.* at 398 (“[Egyptian Law 117] provides for all antiquities privately owned prior to 1983 to be registered and recorded, and prohibits the removal of registered items from Egypt. The law makes private ownership or possession of antiquities found after 1983 illegal.”).

126 *Schultz*, 333 F.3d at 412.

127 *Id.* at 411 (quoting 18 U.S.C. § 2315 (2000)).

128 *Id.* at 414–16. The court below had concluded that Schultz's colleagues' testimony tended to show that “even an ignoramus in this field would know at least about patrimony laws.” *Id.* at 415. The court further reasoned that “[i]t would have been natural for Schultz to know about [the Egyptian law]” given that he was “an acknowledged expert in the field of Egyptian antiquities, with many years of experience.” *Id.* at 416. The court also upheld a conscious avoidance jury instruction that allowed the jury to consider whether Schultz had purposely remained ignorant of Egyptian law because he implicitly knew that there was a high probability that the Egyptian law vested ownership of the antiquities in the Egyptian government. *Id.* at 412–14.

129 *Id.* at 410.

130 MERRYMAN ET AL., *supra* note 16, at 278.

court's finding—originally articulated in *McClain*—in support of a broad application of NSPA to protect the property of foreign states.<sup>131</sup> This broad application of NSPA to foreign cultural property remained unchanged even after the enactment of CPIA, “whose definition of ‘stolen’ property clearly exclude[d] claims based on blanket declarations of state ownership.”<sup>132</sup> The *Schultz* court rejected the argument that CPIA, and not NSPA, was the proper standard to apply in determining whether foreign cultural property was actually stolen, concluding that the “potential overlap” between CPIA (a customs law) and NSPA (a criminal law) should not limit the reach of NSPA.<sup>133</sup>

### B. *The Archaeological Resources Protection Act*

Like NSPA, ARPA is concerned with the protection of cultural property. ARPA is a relatively new weapon in the federal government's arsenal. ARPA protects archaeological resources, which it defines as “any material remains of past human life or activities of archaeological interest” that are at least one hundred years old.<sup>134</sup> Archaeological material includes, among other things, pottery, tools, and human skeletal materials.<sup>135</sup> The stated purpose of ARPA is “to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands,” and to foster cooperation among governmental authorities, archaeologists, and private individuals who have an interest in such resources.<sup>136</sup> To accomplish these objectives, ARPA criminalizes the excavation, removal, damage, alteration, or defacement of such resources without permission.<sup>137</sup> Moreover, it prohibits anyone from selling, exchanging, transporting, or dealing in any way in archaeological resources excavated or removed from public or Indian lands in violation of ARPA<sup>138</sup> or from trafficking in those archaeological resources contrary to federal, state, or local law.<sup>139</sup>

While the plain language of ARPA and its legislative history seem to “repeatedly and unambiguously proclaim” ARPA's purpose to be

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131 See *id.*; *United States v. McClain (McClain I)*, 545 F.2d 988, 1001 (5th Cir. 1977).

132 MERRYMAN ET AL., *supra* note 16, at 289.

133 *Schultz*, 333 F.3d at 409.

134 16 U.S.C. §§ 470aa–470bb(1) (2006).

135 *Id.* § 470bb(1).

136 *Id.* § 470aa(b).

137 *Id.* § 470ee(a).

138 *Id.* § 470ee(b).

139 *Id.* § 470ee(b)–(c). Penalties for knowingly violating or using others to violate the prohibitions include hefty fines and imprisonment. *Id.* § 470ee(d).

the protection of archaeological resources on U.S. public and Indian lands,<sup>140</sup> since 1996, federal attorneys have applied ARPA § 470ee(c) with varying degrees of success to those in possession of archaeological resources stolen from foreign states.<sup>141</sup> The first successful application was an *in rem* civil forfeiture claim involving an ancient Etruscan vase illegally excavated from Italy; the case ended in a default judgment.<sup>142</sup> In 2003, the government again employed ARPA in prosecuting an art dealer who eventually pled guilty of selling Peruvian artifacts to an undercover customs agent.<sup>143</sup> Most recently, in 2008, the government alleged violations of ARPA § 470ee(c) during its investigation of the California museums.<sup>144</sup> Thus, if the federal government eventually brings charges in connection with this investigation, it will be the first time that a federal court has had the opportunity to assess the application of ARPA to foreign antiquities.<sup>145</sup>

Section 470ee(c) of ARPA provides in relevant part: “No person may sell, purchase, exchange, transport, receive . . . in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect *under State or local law.*”<sup>146</sup> In order to satisfy § 470ee(c)’s requirement that a person who has trafficked in a foreign state’s archaeological resources in interstate or foreign commerce has done so in violation of state or local law, the government uses a state theft law criminalizing the possession or receipt of stolen property.<sup>147</sup> The government’s theory is that if a state’s theft statute makes it a crime to knowingly receive or possess property stolen from another country, then for purposes of § 470ee(c), an archaeological resource removed in contravention of a foreign government’s cultural patrimony law is considered stolen, and

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140 See H.R. Rep. No. 96-331, at 7 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1710; Adler, *supra* note 10, at 145.

141 See Adler, *supra* note 10, at 143–44 (describing the three cases).

142 Default Judgment, *United States v. An Archaic Etruscan Pottery Ceremonial Vase c. Late 7th Century, B.C. and a Set of Rare Villanovan and Archaic Etruscan Blackware with Bucchero and Impasto Ware, c. 8th–7th Century, B.C., Located at Antiquarium, Ltd., 948 Madison Avenue, New York, N.Y., 10021, No. 96 Civ. 9437* (S.D.N.Y. Mar. 24, 1997).

143 See Maria Glod, *Arlington Man Pleads Guilty to Selling Protected Artifacts*, WASH. POST, Sept. 25, 2003, at B3.

144 See discussion *infra* Part IV.B.1.

145 See Jori Finkel, *Thai Antiquities, Resting Uneasily*, N.Y. TIMES, Feb. 17, 2008, at Arts.

146 16 U.S.C. § 470ee(c) (2006) (emphasis added).

147 See, e.g., Adler, *supra* note 10, at 144–45 (analyzing the application of New York law in an ARPA case involving a stolen vase).

thus, violates state law.<sup>148</sup> This application of a foreign state's cultural patrimony law to satisfy the state theft law mirrors the application of patrimony laws in NSPA.<sup>149</sup> It is classic choice-of-law analysis.

Given that NSPA already applies to cultural property stolen from a foreign state and ARPA is clearly tailored for archaeological resources taken from public or Indian lands, why would prosecutors rely on ARPA at all? There are at least two reasons. First, unlike NSPA, which only applies if the stolen property is worth at least five thousand dollars,<sup>150</sup> ARPA does not contain a minimum monetary value requirement. In other words, by using ARPA, prosecutors do not have to worry about assessing the value of an archaeological resource. Second, while ARPA, similarly to NSPA, has a scienter requirement, its burden of proof is slightly different. NSPA requires that an individual know that the cultural property he or she possessed or received was stolen;<sup>151</sup> section 470ee(c) of ARPA requires only that an individual know that he or she received archaeological resources—it does not require knowledge that they were removed or obtained contrary to law.<sup>152</sup> If the government applies a state theft law to activate § 470ee(c), it may not have to prove that an individual who purchased or received the stolen property had the same level of knowledge as would be required under NSPA.<sup>153</sup>

Although it is clear that the federal government seeks to deter looting by criminalizing the receipt and possession of cultural property taken from a foreign state, its reliance on ARPA in addition to NSPA appears misplaced. One scholar has noted that “assisting for-

148 *See id.*

149 *See* discussion *supra* Part III.A. *But see* Adler, *supra* note 10, at 150 (“Under the *McClain-Schultz* doctrine, the knowing possession of property removed in violation of a foreign nation’s patrimony law renders it stolen for the purposes of NSPA. However, it is unclear whether the same act of possession would and should be considered a violation of analogous state theft laws.” (footnote omitted)).

150 NSPA § 4, 18 U.S.C. § 2314 (2006); *see also supra* notes 104–05 and accompanying text (outlining NSPA’s requirements).

151 *See* NSPA §§ 3–4, 18 U.S.C. §§ 2314–2315 (2006) (applying the statute to those who engage in the prohibited activities “knowing [the items] to have been stolen, converted or taken by fraud”).

152 *See* Adler, *supra* note 10, at 156 & n.144; *cf.* *United States v. Lynch*, 233 F.3d 1139, 1145–46 (9th Cir. 2000) (applying a similar provision in § 470ee(a) and holding that the government must merely “prove that a defendant [knows or has reason to know] that he was removing an ‘archaeological resource’”).

153 For example, California Penal Code section 497 makes it a violation of state law to receive property stolen in another country and to bring it into California knowing that the property was stolen. *See* CAL. PENAL CODE § 497 (West 1999). Section 31 treats individuals who have advised, encouraged, aided, or abetted the commission of a crime as principals in that crime. *See id.* § 31.



eign nations in deterring the destruction of their cultural property is a worthy objective.” At the same time, however, he recognizes that “ARPA’s global expansion may subject wholly innocent American art collectors to criminal liability.”<sup>154</sup> How ARPA and NSPA may potentially be applied to individuals, such as museum officials, who acquire illegally exported foreign cultural property, whether or not they do so with fraudulent intent, is discussed in the next Part.

#### IV. CONFLICTS, CONSEQUENCES, AND RESOLUTIONS

When the United States accepted the 1970 UNESCO Convention, it did so with several understandings,<sup>155</sup> one of which was that the remedies under Article 7(b) would be adopted without prejudice to other civil or penal remedies available under domestic law.<sup>156</sup> Article 7(b), which was eventually implemented in CPIA sections 303 and 304, prohibits the import of documented cultural property stolen from a state party’s museum or similar institution and requires the United States to take appropriate steps to recover cultural patrimony at the request of another state party.<sup>157</sup> Arguably, NSPA and ARPA are domestic penal remedies that may be appropriately used in addition to CPIA for the protection of cultural property because the prosecution of individuals who trade in stolen property will deter transactions and curb future looting.<sup>158</sup> However, as this Part demonstrates, applying NSPA and ARPA to individuals who acquire antiquities and archaeological materials taken in contravention of a foreign state’s patrimony law weakens the effectiveness of CPIA and, consequently, may undermine the United States’ obligations under international law. The result of the conflicts between CPIA and NSPA/ARPA is the endangerment of cultural property.

##### A. *Conflicts Between CPIA and NSPA/ARPA*

Neither NSPA nor ARPA is tailored to protect foreign cultural property. As an extension of the National Stolen Motor Vehicle Act of 1919, NSPA was enacted to reach individuals who stole property in

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154 Adler, *supra* note 10, at 158.

155 See O’KEEFE, *supra* note 35, at 107.

156 See *id.*

157 See discussion *supra* Part II.A.

158 See *United States v. Schultz*, 333 F.3d 393, 409 (2d Cir. 2003) (applying NSPA to defendant’s conduct that could also be reached under CPIA because it was “not inappropriate for the same conduct to result in . . . both civil penalties and criminal prosecution,” and further because the potential overlap between the CPIA and the NSPA was not a reason to limit the latter’s reach).

one state in the United States and brought it into another.<sup>159</sup> ARPA was designed to protect archaeological resources found on U.S. public lands and Indian lands, not cultural property taken from a foreign state.<sup>160</sup> In contrast, CPIA was enacted to implement the 1970 UNESCO Convention, an international treaty created to give effect to states parties' import and export controls, and to provide a platform for dialogue about the best way to protect cultural heritage.<sup>161</sup> Because NSPA and ARPA conflict with CPIA, their application may muddle U.S. policy on cultural property and makes CPIA less effective.<sup>162</sup>

CPIA and NSPA/ARPA differ in their treatment of foreign states' cultural property. CPIA protects a much more limited category of cultural property than either NSPA or ARPA. Like the 1970 UNESCO Convention, CPIA protects the cultural property of a state *only* if that state is party to the Convention.<sup>163</sup> In order for a state party to obtain U.S. import controls on its cultural property, CPAC must make four determinations, including whether the cultural property at issue is an archaeological or ethnological material—meaning it is either of cultural significance and over 250 years old, or is an important cultural product of a tribal or nonindustrial society—and whether it a part of the state's cultural patrimony jeopardized by pillage.<sup>164</sup> In addition, the foreign state requesting import controls must show that it has taken measures consistent with the 1970 UNESCO Convention to protect its cultural patrimony within its territory.<sup>165</sup>

In contrast to CPIA, ARPA and NSPA protect *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.<sup>166</sup> NSPA and ARPA have few limitations on the kind of cultural property they protect. NSPA only requires that property be worth more than five thousand dollars, which is not a difficult threshold to overcome given the variety of ways

159 See *supra* note 99 and accompanying text.

160 See Adler, *supra* note 10, at 140–41.

161 See discussion *supra* Part II.A.

162 See, e.g., Graham Green, Note, *Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases*, 44 HARV. J. ON LEGIS. 251, 262 (2007).

163 CPIA § 302(9), 19 U.S.C. § 2601(9) (2006) (“The term ‘State Party’ means any nation which has ratified, accepted, or acceded to the [1970 UNESCO] Convention.”). CPIA’s provisions then only apply to nations that fit this definition. See, e.g., *id.* § 305, 19 U.S.C. § 2604.

164 *Id.* §§ 302(2), 301(a), 19 U.S.C. §§ 2601(2), 2602(a).

165 *Id.* § 302(a)(1)(B), 19 U.S.C. § 2602(a)(1)(B).

166 See discussion *supra* Parts III.A & III.B.

that art, antiquities, and archaeological resources are valued.<sup>167</sup> ARPA, which does not have a monetary value threshold, requires only that the property be an archaeological resource over one hundred years old.<sup>168</sup> In addition, unlike CPIA, ARPA and NSPA do not require a foreign state to have taken steps to protect its cultural property within its own territory other than issuing a blanket declaration of national ownership passed prior to the item's removal and its importation into the United States.<sup>169</sup> Additionally, neither NSPA nor ARPA require executive branch evaluation of the foreign patrimony law as does CPIA. Courts applying NSPA and ARPA determine only whether the foreign state's patrimony law contemplates the kind of cultural property at issue.<sup>170</sup> Aside from that determination, courts do not have to take into consideration whether the foreign state attempted to protect its cultural property or whether such property is important to the cultural patrimony of that state. In effect, ARPA and NSPA shift the ability to decide what is cultural property away from the executive branch—which Congress specifically designated to make such determinations—and toward the judicial branch.<sup>171</sup>

The second conflict between CPIA and NSPA/ARPA is when they apply. Under CPIA, a foreign state may seek the return of its stolen item of cultural property only if the cultural property was a documented item stolen from a museum or similar institution after the date *both* the United States and the foreign state were parties to the 1970 UNESCO Convention.<sup>172</sup> In contrast, NSPA and ARPA both recognize a foreign state's patrimony law in force *before* even the 1970

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167 See Damian Fowler, *Exiled US Philanthropist 'Probed'*, BBC News, May 8, 2004, <http://news.bbc.co.uk/2/hi/americas/3687919.stm> (discussing the difficulty in valuing antique instruments); *How Antiquities Rise in Price*, N.Y. TIMES, July 13, 1913, at A1 (illustrating how an antique cup originally purchased for two thousand dollars was later sold for twelve thousand dollars).

168 ARPA § 3(1), 16 U.S.C. § 470bb(1) (2006).

169 See *United States v. McClain (McClain I)*, 545 F.2d 988, 1000–01 (5th Cir. 1977) (“[A] declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered ‘stolen,’ within the meaning of the [NSPA].”).

170 See *id.*

171 Cf. William G. Pearlstein, *Cultural Property, Congress, the Courts, and Customs: The Decline and Fall of the Antiquities Market?*, in *WHO OWNS THE PAST?* 9–10, 27 (Kate Fitz Gibbon ed., 2005) (“Unless and until Congress reforms US criminal laws to base liability on archaeological looting and not the mere breach of foreign-ownership law, the potential for a proactive US cultural diplomacy will be forgone in favor of the reflexive enforcement of foreign patrimony laws. . . . [T]his important area of US cultural policy will be regulated by the courts instead of by Congress.”).

172 CPIA § 308, 19 U.S.C. § 2607 (2006).

UNESCO Convention.<sup>173</sup> This means that NSPA and ARPA recognize the applicability of a foreign patrimony law to items of cultural property that may have been in the United States for years, and renders their possession illegal, whether or not such items were legally imported into the United States.

Lastly, because CPIA aims at protecting and returning cultural property, and NSPA/ARPA are intended for the prosecution of individuals who deal in stolen cultural property, they differ regarding what constitutes a stolen item of cultural property. Although it does not define the word “stolen,” CPIA limits the word’s scope to documented items of cultural property taken from a foreign state’s museum or similar institution.<sup>174</sup> Yet neither NSPA nor ARPA limit protection the way that CPIA does. Under both NSPA and ARPA, *any* item of cultural property—whether or not it is in a museum or “similar institution”—is stolen if it is removed from a foreign state that has enacted a patrimony law affecting that item.<sup>175</sup> These different definitions make it more desirable for a foreign state to rely on NSPA and ARPA than on CPIA because NSPA and ARPA will apply to a foreign state’s cultural property so long as the state had a valid patrimony law declaring ownership and the cultural property was imported into the United States after the patrimony law was in effect. In contrast, CPIA does not require the United States to automatically treat any item of cultural property illegally exported as stolen, even if that item was exported in contravention of a foreign state’s sweeping patrimony law declaring ownership of the item.<sup>176</sup>

During the CPIA ratification hearings, members of Congress were concerned that *McClain*’s application of NSPA in cases where the alleged act of stealing was solely based on a broad foreign patrimony law “could significantly undermine the intention and scope of the [1970 UNESCO Convention],” and therefore, CPIA.<sup>177</sup> However,

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173 For example, in *McClain*, the Fifth Circuit, applying NSPA, found that Mexico enacted an effective patrimony law in 1972; however, they evaluated purported patrimony laws from 1897 and 1934 to determine if they were “true” patrimony laws. *McClain I*, 545 F.2d at 997–1000. Nowhere did the Court suggest 1970 as a cutoff for making patrimony laws legally enforceable. Until *McClain*, NSPA had never been used to recognize the broad application of foreign patrimony laws. See *Convention on Cultural Property Implementation Act: Hearing on H.R. 5643 and S. 2261 Before the Subcomm. on Int’l Trade of the Senate Comm. on Fin.*, 95th Cong. 48 (1978) (testimony of Douglas Ewing) [hereinafter *CPIA Hearings*].

174 19 U.S.C. § 2607; see GERSTENBLITH, *supra* note 14, at 559.

175 See MERRYMAN ET AL., *supra* note 16, at 289; Adler, *supra* note 10, at 145.

176 See O’KEEFE, *supra* note 35, at 57–58, 64; Cuno, *supra* note 53, at 193.

177 Both Douglas Ewing, President of the American Association of Dealers in Ancient, Oriental and Primitive Art, and Douglas Dillon, President of the Metropoli-

Congress' passage of CPIA did not modify or overturn *McClain*, allowing for additional criminal prosecutions under NSPA such as *Schultz*. Moreover, by not remedying application of NSPA in cases of stolen foreign cultural property, Congress opened the door for application of other statutes like ARPA.<sup>178</sup>

### B. Consequences of Using NSPA/ARPA

There are two broad consequences that result from applying ARPA and NSPA to protect the cultural property of a foreign state. First, their applications have serious ramifications for those individuals such as museum officials who acquire antiquities and archaeological resources. Second, their applications erode the effectiveness of CPIA, which in turn hinders the United States' ability to fulfill its obligations under international law.

#### 1. For Individuals

The 2008 California museums investigation illustrates the consequences of applying NSPA and ARPA to a case of illegally exported foreign cultural property. In that investigation, federal agents focused on officials at several museums, including the Pacific Asia Museum (PAM), Mingei International Museum, and the Bowers Museum. The investigations at the PAM, Mingei, and Bowers mainly involved donations of unearthened Thai antiquities<sup>179</sup> allegedly removed in contraven-

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tan Museum of Art, proposed revisions to the draft version of CPIA to nullify *McClain's* application of the NSPA. Neither proposal was accepted, nor was *McClain* overturned by Congress' eventual passage of CPIA. See *CPIA Hearings*, *supra* note 173, at 41 (testimony of Douglas Ewing); *id.* at 119 (testimony of Douglas Dillon). Several senators introduced a bill attempting to overturn *McClain* in the 97th and 98th sessions of Congress; however, the State Department and Customs opposed the bill, which was defeated both times. See Cuno, *supra* note 53, at 193.

178 See Adler, *supra* note 10, at 140–41.

179 The majority of the antiquities donated to the museums were Ban Chiang, a culture that existed in Northeast Thailand from approximately 1000 B.C. until 200 A.D. See Search Warrant on Written Affidavit ¶ 20, *United States v. The Premises Known as: Bowers Museum*, No. 08-0093M (C.D. Cal. Jan. 19, 2008) [hereinafter *Bowers Search Warrant*]. In addition, some of the donations were Native American ladles, apparently stolen from El Malpais National Monument and Chaco Canyon National Historical Park in New Mexico. See *id.* ¶¶ 52, 56. However, because this Note focuses mainly on the appropriateness of applying ARPA and NSPA to foreign cultural property, I have chosen not to discuss the application of NSPA and ARPA to these donations. Obviously, ARPA was intended to apply to archaeological resources such as these. See Adler, *supra* note 10, at 145. NSPA would also apply if they were worth more than five thousand dollars. See *supra* notes 103–06 and accompanying text.

tion of Thailand's 1961 Act on Ancient Monuments, Antiquities, Objects of Art and National Museums (1961 Thai Act),<sup>180</sup> which is both a patrimony law and exportation restriction. At all three museums, the scheme was the same: Robert Olson, an antiquities seller and alleged longtime smuggler, looted antiquities from dig sites in Thailand, smuggled them into the United States, and sold them to Jonathan Markell, an art gallery owner; and "Tom Hoyt," the pseudonym of a National Park Service undercover agent posing as an antiquities collector.<sup>181</sup> The antiquities that Mr. Olson sold to Mr. Markell and Mr. Hoyt were from Ban Chiang—an archaeological site in Northeast Thailand inhabited from approximately 1000 B.C. until 200 A.D.<sup>182</sup> Subsequently, Mr. Hoyt attempted to donate the antiquities that he had bought to museums in exchange for tax write-offs.<sup>183</sup> In each case, museum officials met with Mr. Hoyt and either Mr. Markell or Mr. Olson, and eventually accepted the donations without much, if any, provenance research.<sup>184</sup> All of the museum officials knew that

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180 Warrant on Written Affidavit ¶ 9, *In re* Warrant Application Under 18 U.S.C. § 2703 for the Account Identified as "Rxbrown@aol.com" Maintained by America Online, No. 08-1665M (C.D. Cal. July 1, 2008); *id.* app. ¶ 2(c) (stating that under the 1961 Thai Act, antiques that are buried, concealed, or abandoned are state property); *id.* app. ¶ 2(d) (stating that under the 1961 Thai Act, antiques are defined as "an archaic movable property, whether produced by man or nature, or being any part of an ancient monument or human skeleton or animal carcass which, by its age or characteristics of production or historical evidence, is useful in the field of art, history or archaeology"); *id.* app. ¶ 2(e) (stating that under the 1961 Thai Act, no person shall export any antique or object or art irrespective of whether it is registered or not, unless a license has been obtained).

181 See Search Warrant on Written Affidavit ¶ 12, *United States v. The Premises Known as: Mingei International Museum*, No. 08-0205M (C.D. Cal. Jan. 17, 2008) [hereinafter *Mingei Search Warrant*]. In some cases, Mr. Hoyt purchased antiquities directly from Mr. Olson. See *Pacific Asia Search Warrant*, *supra* note 3, ¶ 15.

182 See *Bowers Search Warrant*, *supra* note 179, ¶ 20.

183 See *Mingei Museum Search Warrant*, *supra* note 181, ¶ 26; *Pacific Asia Search Warrant*, *supra* note 3, ¶ 15.

184 In one case, the extent of the museum officials' provenance inquiry was asking if Mr. Hoyt had dug up the pieces, to which he replied that he had not. See *Pacific Asia Search Warrant*, *supra* note 3, ¶ 39(a)–(c). Mr. Olson told one Bowers official, Armand Labbé, that he never got permits for export from Thailand, but it is not clear whether a second Bowers official, Peter Keller, was privy to the same information. See *Bowers Search Warrant*, *supra* note 179, ¶¶ 39, 50. After the investigation was revealed, Mr. Keller said that he and his staff had been unable to find evidence of any Thai law forbidding export of Thai antiquities in the computer database that they regularly consulted. See Edward Wyatt, *Museum Workers Called Complicit*, N.Y. TIMES, Jan. 26, 2008, at B13. When asked about the copy of the Thai Act that Mr. Hoyt had sent to him, Mr. Keller responded, "I don't recall ever seeing that correspondence." *Id.* (quoting Peter Keller).

the Thai Act prohibited the export of antiquities since 1961, yet it is not clear that they knew *when* or *how* these particular antiquities had left Thailand.<sup>185</sup> In the affidavits and search warrants issued in connection with the investigations of these museums, federal agents charged museum officials who had accepted antiquities with violating NSPA and ARPA.<sup>186</sup> Yet, because of the differences between CPIA and NSPA/ARPA in terms of the kind of cultural property they protect, their definition of the word “stolen,” and when they apply, museum officials did not violate CPIA.

Just as the defendant in *Schultz* disguised Egyptian antiquities as cheap souvenirs,<sup>187</sup> in this case, Mr. Olson attempted to make the Thai antiquities appear to be souvenirs to fool customs agents by placing “Made in Thailand” stickers on them.<sup>188</sup> Additionally, NSPA applied in *Schultz* because the Egyptian antiquities were sold for hundreds of thousands of dollars.<sup>189</sup> Similarly, in this case, the Thai antiquities were covered under NSPA as they had a market value over five thousand dollars.<sup>190</sup> Moreover, ARPA applies to the Thai antiquities because they are over one hundred years old and are “material remains of past human life or activities which are of archaeological interest.”<sup>191</sup> At first glance, CPIA also seems to apply because the Thai antiquities also fit under CPIA’s definition of archeological material for which a state could receive import controls: they are culturally significant, at least two hundred and fifty years old, and were discovered as the result of a clandestine digging.<sup>192</sup> The Thai antiquities fit into the definition of cultural property under 1970 UNESCO Convention

185 See Mingei Search Warrant, *supra* note 181, ¶ 22.

186 Bowers Search Warrant, *supra* note 179, ¶ 4; Pacific Asia Search Warrant, *supra* note 3, ¶ 4. In the case of the Mingei, officials did not charge a violation of NSPA, only ARPA. Mingei Search Warrant, *supra* note 181, ¶ 4(a).

187 See *United States v. Schultz*, 333 F.3d 393, 396–97 (2d Cir. 2003).

188 Bowers Search Warrant, *supra* note 179, ¶ 45(b).

189 See *id.*

190 See NSPA § 7, 18 U.S.C. § 2314 (2006) (“Whoever transports . . . any goods . . . of the value of \$5,000 or more . . .”). For purposes of NSPA, the value of property may be proven in different ways. Market value, which is demonstrated by the price a thief asks for stolen goods and the price for which he sells them, is the means by which the value of most goods, wares, and merchandise will be established. See *United States v. Wigerman*, 549 F.2d 1192, 1193 (8th Cir. 1977). What a willing seller accepts and a willing buyer pays also serves to show value. See *United States v. Jones*, 421 F.2d 841, 842 (4th Cir. 1970). In donating to the Bowers, Mr. Hoyt purchased the items for over twelve thousand dollars and received a potential tax write-off of over twenty thousand dollars. Bowers Search Warrant, *supra* note 179, ¶¶ 26–27.

191 ARPA § 3, 16 U.S.C. § 470bb (2006) (stating that archaeological materials include, but are not limited to, pottery, tools, and human skeletal materials).

192 CPIA § 302(2)(c), 19 U.S.C. § 2601(2)(C)(i)(I)–(III) (2006).

Article 1, so CPIA would apply to them if Thailand designated them as cultural property.<sup>193</sup> However, CPIA would not apply in this case because Thailand is not a state party to the 1970 UNESCO Convention, and the United States and Thailand do not have a bilateral agreement in place for import restrictions.<sup>194</sup>

Furthermore, because they were taken from a clandestine dig site, CPIA treats the Thai antiquities in this case differently than documented items stolen from a Thai museum or similar institution.<sup>195</sup> CPIA does not treat the antiquities as stolen even though the Thai antiquities were removed from Thailand in violation of the 1961 Thai Act, because foreign governments' export restrictions have to be recognized by the United States through bilateral agreements before they can become effective for purposes of CPIA.<sup>196</sup> Yet under both NSPA and ARPA, any item of cultural property is stolen if it is removed from a foreign state that has enacted a patrimony law affecting that item—an item taken from a museum and an item unearthed from a clandestine dig site are treated the same.<sup>197</sup> In this case, because the Thai antiquities were taken from Thailand in violation of its patrimony law and export restriction, both NSPA and ARPA treat them as stolen.

Lastly, although Thailand attempted to protect its cultural property through the 1961 Thai Act, CPIA would not apply to its property because, as mentioned above, Thailand is not a party to the 1970 UNESCO Convention.<sup>198</sup> As a result, it has no mechanism for protecting or recovering its cultural property through CPIA. However, under both NSPA and ARPA, U.S. courts recognize Thailand's declaration of ownership through the 1961 Thai Act, permitting law enforcement to seize and return the Thai antiquities. Therefore, Thailand may use the courts' willingness to apply NSPA and ARPA to circumvent CPIA.

The problem with using NSPA and ARPA in the 2008 California museums investigation is that prosecution under these acts of an individual who knowingly receives or possesses stolen cultural property is only appropriate where that individual's conduct is truly criminal—

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193 See 1970 UNESCO Convention, *supra* note 17, art. 1(c) (products of archaeological excavations).

194 See Bureau of Educ. & Cultural Affairs, U.S. Dep't of State, Chart of Emergency Actions and Bilateral Agreements (Sept. 26, 2007), <http://culturalheritage.state.gov/chart.html>.

195 See CPIA § 308, 19 U.S.C. § 2607 (2006).

196 CPIA §§ 303–304, 19 U.S.C. §§ 2602–2603; O'KEEFE, *supra* note 35, at 57–58, 64; Cuno, *supra* note 53, at 193.

197 See MERRYMAN ET AL., *supra* note 16, at 289; Adler, *supra* note 10, at 145.

198 UNESCO, *supra* note 17.



that is, when he or she has taken an active role in unearthing, smuggling, looting, or concealing cultural property, or has solicited such actions.<sup>199</sup> This was the case in *Hollinshead* and *Schultz*, and possibly in *McClain*.<sup>200</sup> Arguably, given that ARPA also subjects individuals to hefty fines and imprisonment,<sup>201</sup> the “truly criminal” bar should apply in cases where it is used as well. Nevertheless, in the affidavits and search warrants issued in conjunction with the 2008 California museums investigation, federal agents charged violations of NSPA and ARPA even though it appears that museum officials did not engage in, or solicit, looting or smuggling of cultural property.<sup>202</sup>

Furthermore, in theory, NSPA and ARPA also could have applied even if the museum officials were acting in accordance with their institutions acquisitions’ policies and either AAM or AAMD guidelines.<sup>203</sup> Because ICOM, AAM, and AAMD recommend that museums require documentation that an object was “out of its probable country of modern discovery” by November 17, 1970—the date the 1970 UNESCO Convention was signed—museum officials following policies in line with these guidelines may seek an item’s provenance after 1970, but no further.<sup>204</sup> If the item of cultural property were not illegally exported from its country of origin on or after November 17, 1970, then CPIA would not apply to it. However, NSPA and the ARPA *would* apply if the item had been taken from the foreign state after its patrimony law went into effect, which might have been earlier than 1970. Therefore, a museum official complying with AAM or AAMD guidelines (and his or her own museum’s acquisitions policies) is acting within the parameters of CPIA, but would still be criminally liable under NSPA and ARPA if he or she knew beyond a reasonable doubt that the object was removed from its country of origin in contravention of a valid patrimony law. Consequently, compliance with CPIA and the 1970 UNESCO Convention might not insulate an individual from liability under ARPA and NSPA. This discrepancy appears to be one reason that AAM’s 2008 guidelines recommend that museums not acquire any objects that, to their knowledge, have been illegally exported from their countries of modern discovery or the countries

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199 See Kreder, *supra* note 99, at 1205–19.

200 See *supra* Part III.A.

201 16 U.S.C. § 470ee(d) (2006).

202 The agents also charged that by accepting the donations, the museum officials “enabled others to conspire to aid and assist in the preparation of false tax returns in violation of 18 U.S.C. section 371 and 26 U.S.C. section 7206(2).” See Bowers Museum Search Warrant, *supra* note 179, ¶ 5.

203 See *supra* Part II.B.

204 See *supra* notes 90–95.

where they were last legally owned—even if they were illegally exported from those countries prior to November 17, 1970.<sup>205</sup>

While the *Schultz* court addressed the conflicts between CPIA and NSPA, it concentrated mostly on the fact that their potential overlap would not undermine U.S. policy on foreign cultural property.<sup>206</sup> Some might agree with the *Schultz* court that “it is not inappropriate for the same conduct to result in a person being subject to both civil penalties and criminal prosecution.”<sup>207</sup> Yet, in practice, this is not the case. The individuals in the 2008 California museums investigation did not allegedly violate NSPA, ARPA, and CPIA, but only NSPA and ARPA. If in fact the 2008 California museums investigation augurs the beginning of a new era in the United States’ crackdown on museums using NSPA and ARPA, the *Schultz* court’s claim that a scienter requirement “protect[s] innocent art dealers who unwittingly receive stolen goods”<sup>208</sup> appears less credible.

What, exactly, constitutes an *innocent* art dealer (or, in this case, museum official)? How, given that they are trained in art and antiquities, would museum officials unwittingly receive stolen goods? Only, it seems, by not doing their due diligence in researching provenance, or if someone like Mr. Markell colluded with others to dupe them. There is no implication in the warrants that museum officials at the Bowers, PAM, or Mingei engaged in *truly* criminal conduct in the way contemplated by NSPA and ARPA.<sup>209</sup> Yet it is not difficult to imagine how, given the museum officials’ positions and expertise, they could be held liable under both statutes. While their conduct is not lauda-

205 See *supra* note 94 and accompanying text.

206 See *United States v. Schultz*, 333 F.3d 393, 408–09 (2d Cir. 2003).

207 *Id.* at 409.

208 *Id.* at 410.

209 The possible exception to this assertion is Mr. Armand Labbé, late chief curator of the Bowers and an expert in Southeast Asian antiquities. Mr. Labbé had published two books on the subject of Ban Chiang antiquities and had worked for the Bowers for twenty-five years. See *Bowers Search Warrant*, *supra* note 179, ¶¶ 47–48. Mr. Labbé appeared to have extensive knowledge of Mr. Olson and Mr. Markell’s scheme: he was aware that Mr. Olson smuggled antiquities out of Thailand without permits; visited Mr. Olson’s warehouse; examined the smuggled Thai antiquities with “Made in Thailand” labels affixed to them; saw photographs of the dig sites in Thailand; selected bronzes, rollers, punch stamps, beads, and flanges for donation; and purchased beads “filled with dirt” that had “obviously just been dug up.” *Id.* ¶¶ 47–50. After Mr. Labbé’s death, Mr. Hoyt dealt with the director of the Bowers. *Id.* ¶¶ 24, 33–34, 40. The director initially refused Mr. Hoyt’s attempt at another donation; eventually, however, he agreed to accept the materials on temporary loan. *Id.* ¶¶ 38–41. The director admitted to Mr. Hoyt that he did not know if it was legal to bring antiquities out of Thailand. In response, Mr. Hoyt gave him a copy of the Thai Act. *Id.* ¶¶ 49–50.

ble, it is also not unique. Across the country, “[m]useums are . . . turning a blind eye” to what they know “in their heart of hearts is going on”<sup>210</sup>: that antiquities without provenance usually have an illicit past. They do this because proving the provenance of antiquities is very difficult.<sup>211</sup> Ultimately, because of the way that many curators acquire antiquities, it is not farfetched to suggest that there will be more prosecutions of museum officials based on application of NSPA or ARPA. While such prosecutions may be desirable to some who believe that they will deter the black market trade in antiquities, in reality, using NSPA and ARPA—two statutes into which foreign cultural property has been shoehorned<sup>212</sup>—in the criminal investigation and prosecution of museum officials negatively affects the United States’ obligation to protect cultural property and the effectiveness of CPIA. If the United States’ obligation is impaired and CPIA is made less effective, then cultural property is threatened.

## 2. For the United States

If the federal government continues to employ NSPA and ARPA in cases where it is not clear that museum officials engaged in clear-cut fraud,<sup>213</sup> museums will cease acquiring antiquities and archaeological artifacts because curators will not want to be held criminally liable for acquiring what ends up being an item illegally exported from its source country. Museum officials have reason to fear liability because, according to *Schultz*, when applying NSPA, to determine if an individual knew that the property he received is stolen, it is appropriate to look at both an individual’s expertise in his field and what his contemporaries knew about foreign patrimony laws.<sup>214</sup> A museum official’s expertise would be useful in proving knowledge under the ARPA standard as well: the government would need to prove that the official knew that he or she received archaeological materials—but not that those materials had been stolen.<sup>215</sup>

Museums’ nonacquisition of antiquities is unlikely to stem the black market trade in antiquities. In fact, it might actually fuel such trade by driving antiquities into the hands of private collectors who will not fear large-scale government crackdown, given the likelihood

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210 See Wyatt, *supra* note 184 (quoting Patty Gerstenblith).

211 *Id.* (quoting Peter Keller).

212 See *supra* Part III.

213 See *supra* Part IV.B.1.

214 See *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003).

215 See Adler, *supra* note 10, at 156 & n.144.

that they will escape detection.<sup>216</sup> Unlike museums, which have a duty to care for and research items of cultural property they acquire<sup>217</sup>—and return them to their source countries if it turns out they were illegally exported<sup>218</sup>—individuals who buy and sell on the black market do not have such a duty. It is likely that items will not be cared for in the way that is required, and that they will be lost to their countries of origin and the public forever.

Certainly, forcing items onto the black market is not what the United States had in mind when it ratified the 1970 UNESCO Convention whose purpose was to stem the tide of illicit traffic in antiquities.<sup>219</sup> As a manifestation of the international principle of protection of cultural heritage, the 1970 UNESCO Convention is committed to the protection of cultural objects, and obliges its members to take necessary steps to ensure that protection. However, the 1970 UNESCO Convention is limited in its obligations. Only those states that sign it can take advantage of the protection it offers.<sup>220</sup> Some may argue that, given that the principle of protection of cultural property is so entrenched in international law,<sup>221</sup> such protection should not extend only to those states that have signed the 1970 UNESCO Convention, but to all states whose cultural property is in need of protection.<sup>222</sup> Therefore, the theory goes, use of NSPA and ARPA is proper because they protect *all* cultural property regardless of whether the state to which it belongs is a state party to the 1970 UNESCO Convention. However, this argument fails because, as explained above, ARPA and NSPA do not actually protect foreign cultural property, but are only used as mechanisms to prosecute individuals who trade in it.<sup>223</sup>

Instead, the United States should promote the international principle of protection by encouraging states not yet signatories to the 1970 UNESCO Convention to join. The best way for the United States to achieve this goal is to adhere to the 1970 UNESCO Convention through CPIA. Using CPIA as a touchstone for the 1970 UNESCO Convention encourages foreign states to communicate with the

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216 See *id.* at 136 & n.4.

217 ICOM, *supra* note 84, § 2.18–26.

218 *Id.* §§ 5.1, 6.2.

219 See discussion *supra* Part II.B.

220 See 1970 UNESCO Convention, *supra* note 17, arts. 7–9.

221 See discussion *supra* Part I.A.

222 See Merryman, *supra* note 22, at 841–42.

223 See discussion *supra* Part IV.A; see also Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 601 (2007) (arguing that, by itself, large-scale prosecution of individuals who acquire looted property will not reduce illicit trade).

United States, and might even encourage more source countries and market countries to join the 1970 UNESCO Convention.<sup>224</sup> By doing so, these countries would be required to enact their own implementing legislation, which may include export and import controls for the protection of their cultural property within their territories.<sup>225</sup> In contrast, the application of NSPA and ARPA to foreign cultural property actually discourages states from joining the 1970 UNESCO Convention or other comparable treaties,<sup>226</sup> which puts the onus on states parties to protect their cultural property and dialogue with other nations. If a state can rely on the United States to protect its cultural property using NSPA and ARPA, there is no incentive for the state to dialogue with the United States in the way contemplated by the 1970 UNESCO Convention. NSPA and ARPA create an incentive for foreign states to declare ownership of unspecified cultural property through all-encompassing patrimony statutes, which is an easier feat—and infinitely more attractive—than specifically designating which pieces constitute cultural patrimony for prospective import controls, or identifying those items of cultural property that have been taken from state museums or similar institutions.<sup>227</sup>

Lastly, CPIA import controls are clear, delineated, and specific, giving fair notice to importers and others about which property is being protected.<sup>228</sup> In contrast, because NSPA and ARPA rely on foreign states' broad declarations of ownership, museum officials must learn and understand the foreign patrimony laws of all the countries from which they suspect antiquities have originated.<sup>229</sup> At the same time, because of its scienter requirement, NSPA seems to incentivize

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224 Switzerland finally implemented the 1970 UNESCO Convention after the international community admonished its mishandling of cultural property. See Leah J. Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 847 (2007).

225 See *supra* notes 36–41 and accompanying text.

226 E.g., UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1332 (1995).

227 See James R. McAlee, *The McClain Case, Customs, and Congress*, 15 N.Y.U. J. INT'L L. & POL. 813, 837 (1982).

228 See CPIA § 305, 19 U.S.C. §§ 2604 (2006) (“[E]ach listing made under this section shall be sufficiently specific and precise to insure that . . . fair notice is given to importers and other persons as to what material is subject to such restrictions.”).

229 All of the museum officials in the 2008 California museums investigation were experts, curators, directors, or registrars who, in the words of one PAM official, were “supposed to know [about] cultural patrimony laws.” See Pacific Asia Search Warrant, *supra* note 3, ¶ 31(a).

ignorance of these laws.<sup>230</sup> In addition, applying foreign states' patrimony laws forces U.S. law enforcement and courts to decide what is cultural property, whether a foreign state's patrimony law is effective, whether the patrimony law encompasses the kind of property at issue, and whether individuals who violated NSPA and ARPA did so with the required *mens rea*.<sup>231</sup> This kind of inquiry requires U.S. law enforcement and courts to expend time and energy protecting foreign states' cultural property without expecting that foreign states do the same.

### C. Resolutions

The 1970 UNESCO Convention, having been duly ratified, is the supreme law of the land<sup>232</sup> and should be regarded as the United States' authoritative statement on protecting cultural property. Therefore, if NSPA and ARPA hinder the United States' ability to fulfill its duties under the 1970 UNESCO Convention by interfering with CPIA, then the United States must stop applying NSPA and ARPA to foreign cultural property. Undeniably, valid federal laws are also the law of the land. Treaties, however, go beyond the borders of the United States; they represent solemn obligations made by the United States on the international stage.<sup>233</sup> Therefore, because NSPA and ARPA make CPIA—and the 1970 UNESCO Convention—less effective, prosecutors must not apply NSPA or ARPA to museum officials who acquire antiquities and archaeological materials in violation of a foreign state patrimony law unless those officials looted, smuggled, or solicited the excavation or removal of such objects. Instead, the United States must use CPIA, which has a civil forfeiture provision for objects taken contrary to law.<sup>234</sup> This puts the onus on foreign states, which have the greatest knowledge on these issues, to protect their own cultural property, identify those pieces that have been taken from them, and apply to the United States through diplomatic channels for the return of those objects.

Second, the United States should develop penalties under CPIA for the illegal importation of cultural property. CPIA already subjects any ethnological or archaeological material or item of cultural prop-

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230 Of course, conscious avoidance of the law would not aid a defendant's case. See *United States v. Schultz*, 333 F.3d 393, 412–14 (2d Cir. 2003) (upholding a jury instruction that allowed the jury to consider whether Schultz had purposely remained ignorant of Egyptian law because he implicitly knew that there was a high probability that the law vested ownership of the antiquities in the Egyptian government).

231 See Pearlstein, *supra* note 171, at 9–11.

232 See U.S. CONST. art. VI, cl. 2.

233 See discussion *supra* Part IV.A.

234 See CPIA § 310, 19 U.S.C. § 2609 (2006).

erty imported into the United States in violation of CPIA to seizure and forfeiture.<sup>235</sup> Moreover, the 1970 UNESCO Convention contemplates sanctions and penalties for infringing its prohibitions under Article 8,<sup>236</sup> and other countries have interpreted its provision to apply to unlawful import.<sup>237</sup> For example, Canada's maximum penalty for such unlawful importation is imprisonment for up to five years and a fine of twenty-five thousand dollars.<sup>238</sup> Congress may, of course, decide that NSPA is the best way to punish those who deal in stolen cultural property. However, in that case, Congress should actively confront the tension between NSPA and its obligations under the 1970 UNESCO Convention—reflected in CPIA—and explicitly choose whether it will follow NSPA's standard or CPIA's standard.

Lastly, the United States should implement the 1970 UNESCO Convention's Article 7(a), which requires states parties "[t]o take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property . . . which has been illegally exported" from another member state.<sup>239</sup> In theory, museums develop policies regarding acquisitions of antiquities and archaeological materials in accordance with AAM or AAMD guidelines. In reality, many museums are ineffective at self-policing when it comes to compliance with AAM and AAMD guidelines.<sup>240</sup>

235 *Id.*

236 See 1970 UNESCO Convention, *supra* note 17, art. 8; see also O'KEEFE, *supra* note 35, at 70 (detailing the Convention's impositions).

237 See O'KEEFE, *supra* note 35, at 70.

238 See Cultural Property Export and Import Act, R.S.C., ch. C-51, no. 45 (1985).

239 1970 UNESCO Convention, *supra* note 17, art. 7(a).

240 For example, the Museum of Fine Arts, Boston, purports to comply with AAM and AAMD reports. To this end, its Acquisitions and Provenance Policy contains a statement of purpose:

In recognition of the November 1970 UNESCO Convention, the Museum will not acquire any archaeological material or work of ancient art known to have been "stolen from a museum, or a religious, or secular public monument or similar institution." In addition, the Museum will not acquire an object *known* to have been part of an official archaeological excavation and removed in contravention of the laws of the country of origin.

Museum of Fine Arts, Boston, Resources: Acquisitions, <http://www.mfa.org/master/sub.asp?key=41&subkey=3090> (last visited Apr. 2, 2009) (emphasis added). This policy does not address whether the Museum will require documentation that the object was out of its probable country of modern discovery by November 17, 1970, as recommended by AAM and AAMD. Although it is hypothetically possible for AAM and AAMD to eject a member-museum for failure to adhere to its policies, it is highly unlikely. See Martin Sullivan, Director, Smithsonian Nat'l Portrait Gallery, Remarks at DePaul University College of Law Symposium on Acquiring and Maintaining Collec-

Furthermore, even if museums develop stringent institutional acquisition policies in compliance with AAM and AAMD guidelines, they may not always follow them faithfully.<sup>241</sup> If a museum fails to follow acquisition guidelines and acquires an illegally imported or stolen item of cultural property, the consequences include financial risk, public condemnation, and civil forfeiture of that item.<sup>242</sup> The problem with the enforcement of AAM and AAMD guidelines is that they have no legal effect.<sup>243</sup> While both AAM and AAMD can blacklist or kick out member museums for egregious violations of ethics and acquisitions policies, neither organization mandates that members strictly follow their recommendations—they exist simply to guide the museum.<sup>244</sup>

In order for AAM and AAMD guidelines to be truly effective in furthering the goals of the 1970 UNESCO Convention, their guidelines need to be strictly enforced. If the United States wants to stop museums from acquiring illicit antiquities, it must help museums

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tions of Cultural Objects: Challenges Confronting American Museums in the 21st Century (Oct. 16, 2008) (podcast available at [http://www.law.depaul.edu/centers\\_institutes/ciplit/museum/symposium\\_program.asp](http://www.law.depaul.edu/centers_institutes/ciplit/museum/symposium_program.asp)).

241 An example: In 2005, the Italian government charged Dr. Marion True, antiquities curator at the J. Paul Getty Museum from 1986 until 2005, who had overseen a tightening of its ethics policies, with conspiring to import illegally excavated antiquities. See Elisabetta Povoledo, *Trial of Curator at the Getty Postponed by Italian Court*, N.Y. TIMES, July 18, 2005, at E3. Greece also brought charges against Dr. True which were subsequently dropped. See, e.g., Anthee Carassava, *Greek Court Dismisses Case Against Ex-Curator*, Nov. 17, 2007, N.Y. TIMES, at E1. It is unclear whether Dr. True was a rogue acquisitionist within her institution; however, letters that she wrote to members of the Getty Trust in which she claimed that the Trust “approved all of the acquisitions made during [her] tenure” indicate a massive failing at the institutional level. Elisabetta Povoledo, *Casting Blame for Looting in Trial of Getty Ex-Curator*, N.Y. TIMES, Jan. 18, 2007, at E3 (quoting letter from Dr. Marion True to three Getty Museum officials). Unfortunately, Dr. True’s actions are not anomalous in the museum community. See Felch, *supra* note 1 (“The documents [i.e., warrants] suggest that the involvement of American museums in the purchase of looted art is far more extensive than even recent high-profile scandals have indicated.”).

242 See Kreder, *supra* note 99, at 1222–35.

243 Cf. Marilyn Phelan, *Legal and Ethical Considerations in the Repatriation of Illegally Exported and Stolen Cultural Property: Is There a Means to Settle the Disputes?* 8 (ICOM Conference Paper, 2004), <http://www.intercom.museum/conferences/2004/phelan.pdf> (suggesting that ICOM establish an international arbitration panel on cultural property, so that the panel can enforce ICOM’s policies through “binding arbitration”).

244 See AAM, Standards, *supra* note 89 (“AAM offers the following standards to guide the operations of museums . . .” (emphasis added)); AAMD, New Report, *supra* note 89 (“Member museum directors . . . are urged to accept and be guided by this Task Force Report . . .” (emphasis added)).



police themselves by mandating universal acquisitions policies. Even private museums or similar institutions can be considered instrumentalities of the government because they obtain tax advantages and support from federal and state coffers.<sup>245</sup> By making further federal government support contingent on the standardization of museums' acquisition policies, the United States could ensure that these institutions comply with the ethical standards established by the 1970 UNESCO Convention.<sup>246</sup> In addition to providing museum officials clear, universal guidelines to follow when acquiring antiquities and archaeological materials, such a law would, combined with the other resolutions, put the United States on the path to fulfilling its responsibilities under the 1970 UNESCO Convention.

### CONCLUSION

The economic losses from illicit trafficking in cultural property are difficult to measure, but they are certainly significant. In 2005, UNESCO put the total value of stolen or smuggled antiquities and art trafficked across the globe at more than six billion dollars—illicit revenue second only to the international drug trade.<sup>247</sup> This comparison to the drug trade is not merely superficial. In the 2008 California museums investigation, federal investigators conducted a sting operation much as they would have to infiltrate a drug network. As the pressure on museums to return cultural treasures increases, and more items of illegally exported or stolen cultural property come tumbling out of museums' galleries, the more reason it gives to federal agencies to keep a close eye on museums.

Of course, the United States has an obligation to protect cultural property. This obligation, a general principle of international law, is manifested in the 1970 UNESCO Convention. Pursuant to this treaty, the United States implemented CPIA to protect the cultural property of its member states. However, by using ARPA and NSPA to investigate and potentially prosecute museum officials, the United States is not protecting cultural property. The application of NSPA and ARPA to art trafficking cases conflicts with U.S. policy regarding cultural property under CPIA. While CPIA contemplates protecting specifi-

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245 See James A.R. Nafziger, *Article 7(a) of the UNESCO Convention*, in *ART LAW*, *supra* note 110, at 387, 388–89.

246 See O'KEEFE, *supra* note 35, at 58–59 (“This [governmental regulation] has happened in England where adherence to ethical codes adopted by the International Council of Museums and the Museums Association is a condition of registration with funding sources.”).

247 See Green, *supra* note 162, at 252 & n.10.

cally designated, narrowly tailored categories of cultural patrimony, NSPA and ARPA enforce each nation's broad declarations of ownership through criminal penalties.<sup>248</sup> Using NSPA and ARPA potentially drives more cultural property into the black market and nullifies the importance of CPIA. In order to remedy this problem, the United States should stop using ARPA and NSPA against those who trade in illicit art and antiquities unless they engage in truly criminal activities, such as looting, smuggling, or soliciting such conduct. In addition, the United States should pass legislation mandating uniform acquisitions policy for all U.S. museums that is in line with the 1970 UNESCO Convention.

The United States should be enforcing the standards of CPIA, not those of NSPA and ARPA, because NSPA and ARPA expose museum officials to prosecution and lead to unintended consequences.<sup>249</sup> If foreign states can enact ownership laws and export prohibitions knowing that United States courts will enforce them through NSPA or ARPA, then what is the function of CPIA? In plain terms, NSPA and ARPA allow United States courts to enforce foreign laws in contradiction of the spirit and letter of CPIA, and thus, the 1970 UNESCO Convention.<sup>250</sup>

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248 See *CPIA Hearings*, *supra* note 173, at 41 (testimony of Douglas Ewing).

249 See James A.R. Nafziger, *The Underlying Constitutionalism of the Law Governing Archaeological and Other Cultural Heritage*, 30 WILLAMETTE L. REV. 581, 589 (1994).

250 See James Cuno, *View from the Universal Museum*, in *IMPERIALISM, ART AND RESTITUTION* 30 (John Henry Merryman ed., 2006).

