

Potentiating Loopholes: How Erratic and Piecemeal Implementation of the 1970 UNESCO Convention Has Failed to Protect Cultural Antiquities

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INTRODUCTION

Despite centuries-old international concerns, American protection of international cultural antiquities is a relatively recent phenomenon. For example, the United States joined a 1954 multilateral treaty on the protection of cultural antiquities only once the treaty had become binding international customary law, and thus likely binding on the United States nonetheless.¹ The United States has been reticent to join many of the major treaties that protect cultural antiquities, and its adoption of these treaties remains piecemeal and inconsistently enforced.

An example of the piecemeal American implementation is the Protect and Preserve International Cultural Property Act, which President Obama signed into law in May 2016.² This law sought to halt the import of antiquities from Syria during its still-ongoing civil war.³ The Syrian Civil War began in March 2011,⁴ but the law only came into force in May 2016.⁵ These dates raise several questions: How did the United States handle Syrian imports before the passage of this law? How did American laws protect the cultural antiquities at great risk in the five years of civil war that preceded the enactment of the Protect and Preserve International Cultural

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1. The United States ratified the 1954 Hague Convention in 2009, after several provisions of the convention were considered binding customary international law. For a discussion of which parts of the 1954 Hague Convention were customary international law before the United States' ratification, see generally Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT'L L. 185, 222-23 (2005).

2. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, 130 Stat. 369 (2016).

3. *Id.*

4. Christopher M. Ford, *Syria: A Case Study in International Law*, 85 U. CIN. L. REV. 185, 187 (2017).

5. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, 130 Stat. 369 (2016).

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Property Act? The world has seen large-scale pillage and looting before in several different wars, so why was this cultural heritage not properly protected earlier? And why were Syrian antiquities the only antiquities deemed worthy of increased protection in this law?

As this Note will explain, the American system of protecting cultural antiquities is convoluted and imperfect. As a result, until the passage of the Protect and Preserve International Cultural Property Act, Syrian antiquities, which were subject to greater risk of illicit export and sale than antiquities from countries not suffering from civil war, were protected only by generally applicable laws that are not designed to deal with countries in such a crisis. In fact, in order for a foreign country to secure protection of its cultural heritage, the State normally has to enter into a bilateral agreement with the United States,⁶ which Syria would be incapable of undertaking at this moment.⁷ Accordingly, Syria has had to rely on the United States and other major art market nations to take it upon themselves to ban the export and trade of its looted antiquities.

In an analogous situation, the United States has prohibited the trade of all Iraqi cultural antiquities since 2004.⁸ At the time of the laws' enactments, Iraq and Syria represented extreme situations where the country's government could not negotiate with the United States for a bilateral agreement for protection, but where the country's cultural antiquities were at such grave risk that the United States took notice. At the other end of the spectrum of cultural antiquities protection is Italy, a country that is deeply concerned with protection of its cultural history and that has both strict cultural patrimony laws and a legally enforceable bilateral agreement with the United States. In between Italy and Syria lies every country with robust collections of cultural antiquities that could be subject to illicit trade and export and could make their way into major art market countries, and each of those countries has its own level of precautions and protections enacted.

There are loopholes in the present international system that continue to permit looting and pillaging to take place worldwide. In this Note, I posit that the current implementation scheme of the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership and Cultural Property (1970 UNESCO Convention), both in the United States and in other countries, creates these loopholes, which in turn render the entire system ineffectual. Despite the many attempts at creating broad, multilateral conventions to globally protect cultural antiquities, the United States is only party to two sections of the 1970 UNESCO Convention,⁹ and it only joined the 1954 Hague Convention in 2009. Additionally, joining the 1954 Hague Convention was merely a formality for the

6. PATRICK J. O'KEEFE, PROTECTING CULTURAL OBJECTS: BEFORE AND AFTER 1970 224–28 (2017); Patty Gerstenblith, *Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations*, in *THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY* 70, 75 (Jane Anderson & Haidy Geismar eds., 2017).

7. The turmoil in Syria presumably prevents this possibility. See also O'KEEFE, *supra* note 6, at 227; U.S. DEP'T OF STATE, *U.S. Relations with Syria* (Jul. 23, 2018), <http://perma.cc/B8X9-VFXG>.

8. Emergency Protection for Iraqi Cultural Antiquities Act of 2004, Pub. L. No. 108–429, 118 Stat. 2434.

9. UNESCO stands for the United Nations Educational, Scientific and Cultural Organization.

United States because several provisions had already become customary international law and were thus binding on the United States nonetheless.¹⁰ As I will show below, the United States' failure to fully adopt international law on the protection of cultural antiquities hinders the judiciary, as well as our fellow signatories to the 1970 UNESCO Convention, in protecting international cultural antiquities.

I. HISTORY OF INTERNATIONAL MULTILATERAL TREATIES FOR THE PROTECTION OF CULTURAL ANTIQUITIES

Since the 1648 passage of the Peace of Westphalia, the first international treaty to specifically mention cultural antiquities, international protection of cultural antiquities has been a subject of international law and debate.¹¹ The international legal scheme as it relates to cultural heritage has grown to encompass several treaties, most of which were passed over the course of the twentieth century. Not much formal law was enacted on the topic of international cultural antiquities protection between the Peace of Westphalia, which initiated the dialogue, and the mid-twentieth century, largely in response to World War II. Before 1954, the main attempts to protect cultural antiquities from illicit sale were concerned protection in times of war,¹² when the pandemonium of conflict would facilitate pillaging and export. The international community's choice to focus on this specific type of protection in the mid-twentieth century was largely a response to the massive looting that had occurred during World War II.¹³

During World War II, the Axis powers and, later, the Soviet Union, actively engaged in systemic looting of the European nations torn apart by the war.¹⁴ The United States government has estimated that upwards of twenty percent of Europe's art was looted by the Nazis alone.¹⁵ In addition to the vast quantities of stolen

10. See Sandholtz, *supra* note 1.

11. JIRI TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 5 (1996) ("Beginning with the Peace of Westphalia (1648), we find more and more clauses providing for the restoration of things to their places of origin, first of archives alone and then of works of art, displaced in the course of the fighting.")

12. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 47, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter 1907 Hague Convention]. See also O'KEEFE, *supra* note 6, at 4.

13. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict Preamble, May 14, 1954, 249 U.S.T. 240 [hereinafter 1954 Hague Convention]. See also John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 37 (2004) (citing LYNN H. NICHOLAS, *THE RAPE OF EUROPA* (1994)) ("The first international agreement to directly protect art and other cultural objects from wartime pillage was crafted as a reaction to the unparalleled damage caused by the plundering and bombing of artwork, first by the Nazis, then by the allies, during World War II.")

14. Throughout this note, the term "looting" may be used interchangeable with pillaging and plundering. Wikipedia defines looting, pillaging, and plundering as "the indiscriminate taking of goods by force as part of a military or political victory, or during a catastrophe, such as war, natural disaster (where law and civil enforcement are temporarily ineffective), or rioting." WIKIPEDIA, *Looting*, <http://perma.cc/NAZ3-NTYG> (last visited May 9, 2018).

15. Greg Bradsher, *Documenting Nazi Plunder of European Art*, RECORD (National Archives and Record Administration), Nov. 1997, <http://perma.cc/ANG6-2ZZS>.

artworks, an enormous amount of art was destroyed during the War.¹⁶ More than 100,000 pieces of art are estimated to still be at large, and efforts, such as the Holocaust Art Restitution Project at the National Museum of American Jewish History¹⁷ and the Mosse Art Restitution Project in San Francisco,¹⁸ have been established to document and find the still-missing artworks. To respond to this crisis, the first major international convention of the twentieth century on the topic of cultural heritage protection came about in 1954 with the Hague Convention.

The 1954 Hague Convention was merely the start of the push toward protecting cultural antiquities on the international level. Since the ratification of the 1954 Hague Convention, two major multilateral treaties have been adopted: the 1970 UNESCO Convention,¹⁹ and the 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention).²⁰ With the 1954 Hague Convention, these three treaties make up UNESCO's primary sources of international law for the protection of cultural heritage.²¹

While overlapping on subject matter, each of the three aforementioned treaties serves a different purpose. As mentioned previously, and least relevant to this Note,²² the 1954 Hague Convention concerns itself with the protection of cultural antiquities during wartime.²³ The 1970 UNESCO Convention, the primary focus of this Note, is a multilateral treaty whose motivation is the public law aspect of cultural heritage protection.²⁴ The 1970 UNESCO Convention provides nations with principles for reclaiming art stolen from their countries by relying on fellow signatories to recover the cultural heritage objects.²⁵ The UNIDROIT Convention, in contrast, is concerned with private law and focuses on the culpability of, and the recovery of stolen property from, individuals.²⁶ These treaties are designed to work

16. *Id.*

17. HOLOCAUST ART RESTITUTION PROJECT, <http://perma.cc/F5CA-U83H> (last visited Feb. 15, 2018).

18. MOSSE ART RESTITUTION PROJECT, <http://perma.cc/5Z6Y-4C49> (last visited May 9, 2018).

19. 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].

20. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

21. Jane Warring, Note, *Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 245–46 (2005) (“UNESCO’s main conventions in the field of antiquities are the 1954 Hague Convention . . . , the 1970 Convention . . . , and the 1995 UNIDROIT Convention . . .”).

22. Though the Hague Convention covers issues such as the current armed conflict in Syria mentioned *supra* Part I, it is not the focus of this Note due to its limited scope (only applying to instances of armed conflict), its “lack of enforcement mechanisms”, and the fact that it entails “practically no sanctions for non-compliance.” Zoë Howe, Note, *Can the 1954 Hague Convention Apply to Non-State Actors?: A Study of Iraq and Libya*, 47 TEX. INT'L L.J. 403, 413 (2012).

23. 1954 Hague Convention, 249 U.N.T.S. 240.

24. Richard Crewdson, *Putting Life into a Cultural Property Convention—UNIDROIT: Still Some Way to Go*, 17 INT'L LEGAL PRACTITIONER 45, 45 (1992) (noting that the 1970 UNESCO Convention “was essentially a public law measure,” in comparison to the 1995 UNIDROIT Convention).

25. Warring, *supra* note 21, at 232 (“The [1970 UNESCO] Convention calls for Member States to take a variety of specific actions to curb the illicit trade of cultural property.”).

26. UNIDROIT Convention art. 4, 34 I.L.M. 1322 (the Convention focuses on the responsibility of

in tandem and to provide solutions in different types of situations.

Beyond the differences in subject matter between the 1970 UNESCO and UNIDROIT Conventions, the major difference between the two treaties is the broad, widespread ratification of the 1970 UNESCO Convention, in contrast to the broad rejection of the UNIDROIT Convention. The 1970 UNESCO Convention has 137 State Parties (including the United States), whereas the UNIDROIT Convention only has forty-five (not including the United States).²⁷ The comparative lack of ratification of the UNIDROIT Convention²⁸ may have to do with its requirement of complete ratification, seemingly contradictory provisions, and potential to give rise to complex litigation.²⁹ There are still recent pleas for adoption of the UNIDROIT Convention,³⁰ but after twenty-three years, the treaty has still yet to attract widespread support or adoption.

In contrast, the 1970 UNESCO Convention has been partially adopted by most countries in the world. Even so, many of these countries have not adopted the whole, or even the most important provisions, of the Convention.³¹ For example, Japan is a signatory to the Convention, but whether it actually follows the treaty's requirements may be questioned because of how little of the Convention Japan has incorporated into its own domestic law.³²

At present, a debate rages between "internationalist" countries and "retentionist" countries, which are terms I will use throughout this Note. Internationalist countries comprise the largest art markets; they are the countries whose economies are bolstered by large-scale art sales.³³ Because of these segments of their economies, these countries mostly favor lax laws on art imports and do not favor strict restrictions imposed by cultural heritage protection laws.³⁴ On the other hand, retentionist countries are the countries who prefer to keep cultural heritage primarily

the "possessor", rather than a Member State, as the possessor is in the most favorable position to return the stolen property).

27. UNESCO, <http://perma.cc/JU7W-PW8X> (last visited Feb. 20, 2019); UNIDROIT, <http://perma.cc/C26-XJ4K> (last visited Feb. 20, 2019).

28. Alexandra Love Levine, Note, *The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention*, 36 BROOK. J. INT'L L. 751, 772–75 (2011).

29. *Id.* at 772–75.

30. *Id.* at 780.

31. See O'KEEFE, *supra* note 6, at 193–239 (noting throughout this section the several different ways countries have implemented the UNESCO Convention and which specific provisions were adopted and implemented by Australia, Japan, Switzerland, the United Kingdom, and the United States).

32. *Id.* at 207 ("[T]he implementation of the 1970 Convention by Japan is so limited it could be asked why the UNESCO Member States accepted its ratification.").

33. See Ana Sljivic, *Why Do You Think It's Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism*, 31 GEO. WASH. J. INT'L L. & ECON. 393, 413–14 (1997–98) ("Cultural internationalists perceive cultural objects 'as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.'" (quoting John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831 (1986))).

34. See, e.g., Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1060–61 (1992) (noting that internationalists prefer the laws that permit them to remain in possession of the cultural property at hand).

where it was created, and these countries are often those whose cultural heritage is at risk of being trafficked into the internationalist countries with large art markets.³⁵ These distinct viewpoints are the extremes in any debate about international protection of cultural heritage and drive the compromises seen in international law on the subject. Additionally, these viewpoints encourage debates in other parts of the art world, especially among museums and curators.³⁶

Due to countries' different levels of protection for cultural antiquities, recently proposed EU regulations may make several countries' cultural property protection regimes into loopholes to the entire 1970 UNESCO Convention and disrupt the stricter regulations present within Europe.³⁷ More broadly, the fact that piecemeal implementation of the 1970 UNESCO Convention is permitted creates discrepancies across States Parties to the Convention, calling into question the Convention's effectiveness as an international treaty. For the remainder of this Note, I will trace the United States' history with the major conventions, explain the treaties' different purposes, and then provide suggestions for how to remedy the current international scheme and better protect cultural antiquities from looting, theft, and illicit sales.

II. THE UNITED STATES' IMPLEMENTATION OF THE 1970 UNESCO CONVENTION

The United States has implemented the 1970 UNESCO Convention in a unique way and has not adopted the majority of the treaty. Two years after the finalization of the Convention, the U.S. Senate gave its advice and consent to join the Convention.³⁸ Congress did not find the treaty to be self-executing,³⁹ and because of political disagreements within Congress,⁴⁰ the implementing legislation did not come to fruition until 1983, eleven years after the Senate's initial advice and consent.⁴¹ The implementing legislation was titled the Convention on Cultural Property Implementation Act (CPIA).⁴² Despite the thirteen-year gap since the initial drafting of the Convention, the United States was one of the first art market countries to become a signatory to the Convention: China joined in 1989, France in 1997, and the United Kingdom in 2002.⁴³ The United States was, however, the

35. See CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 157 (2010). Source and retentionist countries have also been described as "nationalist." See Slijvic, *supra* note 33, at 393.

36. For examples of the debate among curators and museums, which mirrors the debate between internationalist and retentionist countries, see James Cuno, *Culture War: The Case Against Repatriating Museum Artifacts*, FOREIGN AFFAIRS, Nov./Dec. 2014, at 119; Alexander Forbes, *The Getty's James Cuno Speaks Out Against Repatriation*, ARTNET NEWS (Nov. 4, 2014, 7:41 AM), <https://perma.cc/2FM4-AKJK>.

37. See *infra* Part IV.A (discussing the proposed regulations).

38. *Cultural Property Protection: Process and Purpose*, U.S. DEP'T OF ST. BUREAU OF EDUC. & CULTURAL AFF., <https://perma.cc/YYC8-AW7H> (last visited Feb. 18, 2018).

39. Gerstenblith, *supra* note 6, at 71.

40. O'KEEFE, *supra* note 6, at 222.

41. *Cultural Property Protection: Process and Purpose*, *supra* note 38.

42. *Id.*

43. See List of State Parties to Convention on the Means of Prohibiting and Preventing the Illicit

fiftieth country to join the Convention, out of a current total of 139 States Parties.⁴⁴

The United States' adoption of the Convention, however, did not include a majority of the Convention. The United States chose to adopt only two sections of the Convention: Article 7(b)(i) and Article 9.⁴⁵ Article 7(b)(i) of the 1970 UNESCO Convention reads:

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 after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution.⁴⁶

Article 9 reads:

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, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.⁴⁷

In sum, Article 7(b)(i) concerns imported stolen cultural property that had previously been inventoried in an institution's collection, and Article 9 "provides a mechanism by which States Parties may call upon each other for assistance in cases of jeopardy to cultural heritage."⁴⁸ The CPIA explicitly implements Article 9 as well as the contents of Article 7(b)(i).⁴⁹ Notably, both implemented Articles concern imports, and the CPIA does not relate at all to exports from the United States. The only American law that specifically concerns the export of cultural heritage is the 1979 Archaeological Resources Protection Act, which has not yet been used as the basis for any prosecution.⁵⁰

Remarkably, the United States has not adopted the core section of the 1970 UNESCO Convention: Article 3.⁵¹ Article 3 reads: "The import, export or transfer

Import, Export and Transfer of Ownership of Cultural Property, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <https://perma.cc/2X4R-LW7F> (last visited Feb. 14, 2019) [hereinafter List of State Parties]. See also RACHEL A.J. POWNALL, THE EUROPEAN FINE ART FOUND., TEFAF ART MARKET REPORT 2017, at 36 (2017), <https://perma.cc/W62C-L6AS> (listing the United States as one of the largest art market nations).

44. List of State Parties, *supra* note 43.

45. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2329 (1983) (codified at 19 U.S.C. §§ 2601–2613 (2017)).

46. 1970 UNESCO Convention, *supra* note 19, art. 7(b)(i).

47. *Id.*, art. 9.

48. Gerstenblith, *supra* note 6, at 72.

49. 19 U.S.C. §§ 2602, 2607.

50. O'KEEFE, *supra* note 6, at 224.

51. Gerstenblith, *supra* note 6, at 72 (citing PATRICK J. O'KEEFE, COMMENTARY ON THE 1970 UNESCO CONVENTION 41, 108 (2d ed. 2007)) ("The United States explicitly failed to view Article 3, which other countries consider to be the Convention's core obligation, as substantive in nature and

of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.”⁵² Article 3 is the main provision for actually banning the illicit trade of cultural heritage, and yet the United States did not find it to be central to the Convention.

Furthermore, the United States’ implementation of the Convention is complicated by the need for bilateral agreements with other countries to make Article 9 enforceable.⁵³ This is due to the United States’ interpretation of Article 9, which requires an “emergency condition” to make Article 9 relevant.⁵⁴ Switzerland is the only other country to have such a requirement.⁵⁵ At present, the United States has bilateral agreements in place with sixteen out of a possible 138 other States Parties to the Convention: Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, Egypt, El Salvador, Greece, Guatemala, Italy, Honduras, Mali, Nicaragua, and Peru.⁵⁶ Patrick J. O’Keefe, a prominent scholar on the international law of cultural antiquities, notes, however, that with the exception of the agreements with Italy, Mali, and Nicaragua, all of these agreements are formally “memorandums of understanding,” which have no legally binding force.⁵⁷ He further laments that the United States does not follow international law’s strict terminology and treaty language when titling these agreements, since the agreements are intended to be legally binding but are formed and titled as non-legally binding instruments.⁵⁸

Even with the CPIA in place, American courts often rely primarily on the United States’ own preexisting legislation, such as the National Stolen Property Act (NSPA),⁵⁹ which applies to all property and not just cultural heritage property, as the substantive basis for finding defendants liable for the illicit sale or import at hand.⁶⁰ At the very least, the courts invoke the NSPA *as well as* the CPIA as justification for finding defendants liable.⁶¹ For example, in *United States v. Schultz*, defendant Schultz’s conviction for conspiracy to receive stolen cultural heritage was upheld as a violation of the NSPA.⁶² In *Schultz*, the Second Circuit emphasized that the CPIA’s usage is differentiated from that of the NSPA. However, the distinct purpose of the CPIA did not prevent reliance on the NSPA in cases of stolen international cultural heritage: The Senate Report on the CPIA expressly states that the CPIA “neither pre-empts state law in any way, nor modifies any Federal or State remedies that may pertain to articles to which [the CPIA’s] provisions . . . apply.”⁶³ The court further clarified:

therefore refused to include it within the U.S. implementing legislation.”).

52. 1970 UNESCO Convention, *supra* note 19, art. 3.

53. O’KEEFE, *supra* note 6, at 224.

54. *Id.* at 225.

55. *Id.* at 208.

56. *Cultural Property Protection: Bilateral Agreements*, U.S. DEP’T OF ST. BUREAU OF EDUC. & CULTURAL AFF., <https://perma.cc/8WEM-ST36> (last visited Feb. 18, 2018).

57. O’KEEFE, *supra* note 6, at 226.

58. *Id.*

59. National Stolen Property Act, 18 U.S.C. §§ 2601–15 (2017).

60. *See, e.g.*, *United States v. Schultz*, 333 F.3d 393, 408 (2d Cir. 2003).

61. *Id.* at 408.

62. *Id.* at 416.

63. *Id.* (citing S. Rep. No. 97-564, at 22 (1982)).

The CPIA is an import law, not a criminal law; it is not codified in Title 18 (“Crimes and Criminal Procedure”), with the NSPA, but in Title 19 (“Customs Duties”). It may be true that there are cases in which a person will be violating both the CPIA and the NSPA when he imports an object into the United States. But it is not inappropriate for the same conduct to result in a person being subject to both civil penalties and criminal prosecution, and the potential overlap between the CPIA and the NSPA is no reason to limit the reach of the NSPA.⁶⁴

As shown above, the two laws serve different functions, and the CPIA lacks all of the enforcement power that the NSPA retains. The fact that the United States still relies on its own preexisting laws and not on any law related to the 1970 UNESCO Convention for prosecuting individuals who have trafficked illicit cultural property shows the country’s lack of commitment to the 1970 UNESCO Convention.⁶⁵ Furthermore, it is difficult to reconcile the fact that the United States had to enact specific legislation to implement the 1970 UNESCO Convention with its continued reliance on preexisting legislation to prosecute illicit trafficking of cultural heritage.⁶⁶

The United States’ requirements for acknowledging and enforcing a foreign country’s national patrimony laws expose the United States’ lack of interest in protecting against the theft of international cultural heritage. Retentionist countries that have highly valuable cultural heritage to protect, such as Italy, enact strict national patrimony laws that take ownership of all cultural antiquities found after the law is enacted.⁶⁷ In handling requests from those countries for return of their stolen art, American prosecutors have to prove the four-prong test for establishing a country’s national ownership in addition to proving that the defendant violated the NSPA beyond a reasonable doubt. This additional four-prong test forces countries with national patrimony laws to show: “(1) that the artifact was sourced within its borders; (2) when the artifact was removed from the country; (3) that its patrimony laws are clear and unambiguous; and (4) that [the government] owned the artifact when it was removed from the country.”⁶⁸ This test thus gives courts some discretion to decide whether or not to return the property to its country of origin and does not provide entirely objective criteria.

The United States’ reluctance to protect international cultural heritage is further underscored by its indifference toward other treaties designed to prevent the illicit sale or export of cultural heritage—notably, the 1954 Hague Convention for the

64. *Id.* at 409 (emphasis added).

65. Additionally, the United States could handle this by joining the UNIDROIT Convention, which is focused on the culpability of private individuals rather than the responsibility of States.

66. Further, American courts are generally reticent or incapable of enforcing international law and treaties on their own. *See generally* Oona A. Hathaway, Sabrina McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT’L L.* 51, 51 (2012).

67. *See, e.g.*, Adam Wallwork, Opinion, *The Archaeology Paradox: More Laws, Less Treasure*, *L.A. TIMES*, Apr. 7, 2014, <https://perma.cc/J8XW-U8CY> (“Cultural property, or patrimony, laws limit the transfer of cultural property outside the source country’s territory, including outright export prohibitions and national ownership laws.”).

68. Hannah D. Willet, Note, *Ill-Gotten Gains: A Response to the Islamic State’s Profits from the Illicit Antiquities Market*, 58 *ARIZ. L. REV.* 831, 851–52 (2016) (citing *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003)); *see also* *Gov’t of Peru v. Johnson*, 720 F. Supp. 810, 815 (C.D. Cal. 1989).

Protection of Cultural Property in the Event of Armed Conflict and First Protocol and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. As noted above, the United States only joined the former after it had become international customary law, and thus binding on the United States regardless, and the United States is still not a party to the UNIDROIT Convention.⁶⁹

III. THE EUROPEAN UNION'S RELATIONSHIP TO THE 1970 UNESCO CONVENTION

As this Note will address a European Union regulation, it is important to identify how the European Union (EU) is connected to the 1970 UNESCO Convention. The EU and UNESCO maintain a partnership for protecting cultural heritage in Europe and worldwide.⁷⁰ However, the parties to the 1970 UNESCO Convention are exclusively States, not international organizations such as the EU.⁷¹ Nonetheless, the EU and the Council of Europe concern themselves with the protection of cultural heritage and have disseminated their own regional treaties that cover the protection of various types of cultural heritage.⁷²

Further, while the European Union as a body is not responsible for each country's implementation of international cultural heritage conventions, the EU does handle customs for all countries that comprise the EU.⁷³ There are no longer cross-country customs amongst EU countries.⁷⁴ Thus, while the EU is not involved with how each country handles its implementation or lack of implementation of the 1970 UNESCO Convention, the regulations around EU customs directly affect European countries' abilities to enforce the Convention within their borders.

Additionally, it is important to note that the European Union issues two primary types of laws: regulations and directives.⁷⁵ Regulations are "binding legislative act[s]."⁷⁶ In contrast, directives are "legislative act[s] that set[] out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals."⁷⁷ The proposed laws discussed in this Note are *regulations* rather than directives, so, if they are enacted, countries will not have discretion regarding how to best implement the laws for their countries' purposes.

69. See Sandholtz, *supra* note 1. A complete list of the forty-two parties to the 1995 UNIDROIT Convention can be found at <https://perma.cc/YKD7-36YN>.

70. See European Union and UNESCO, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <https://perma.cc/793R-H48P> (last visited Mar. 27, 2019).

71. See List of State Parties, *supra* note 43.

72. See Mehmet Komurcu, *Cultural Heritage Endangered by Large Dams and Its Protection under International Law*, 20 WIS. INT'L L.J. 233, 265–71 (2002).

73. See *Customs: Free Trade in Europe*, EUROPEAN UNION, <https://perma.cc/5YT5-2UPJ> (last visited Feb. 18, 2018).

74. *Id.*

75. See *Regulations, Directives and Other Acts*, EUROPEAN UNION, <https://perma.cc/A5ZV-DSRR> (last visited May 10, 2018).

76. *Id.*

77. *Id.*

IV. PROBLEMS OF IMPLEMENTATION

A. THE EU LOOPHOLES: THE UNITED STATES

The United States' incomplete adoption of the 1970 UNESCO Convention could soon come to harm other States Parties to the Convention. In July 2017, the European Commission, an EU institution responsible for proposing and enforcing legislation,⁷⁸ proposed legislation that would have had the effect of making countries with weak adherence to the 1970 UNESCO Convention, such as the United States, into loopholes for trafficking illicit cultural heritage into the EU.⁷⁹ Such a proposal could decrease the value of the entire international system, since it would allow European regulations, which are stricter than the United States' laws and more adherent to the Convention, to be entirely circumvented. In December 2018, the Council of the European Union then proposed a new regulation that somewhat altered and replaced the 2017 proposal.⁸⁰ The 2018 proposal narrows the loophole that the 2017 proposal would have created, but does not successfully eradicate it. Both proposed regulations and their foreseeable effects offer insight into the poor implementation of the 1970 UNESCO Convention in the United States and outside of Europe, and I will consider each proposal in turn.

The 2017-proposed regulation bifurcated the import process for cultural heritage entering the EU between exporting countries that are States Parties to the 1970 UNESCO Convention and those that are not. When considering the legality of an import into the EU under the 2017-proposed legislation, officials would review imports from countries that are parties to the Convention differently from imports from countries that are not parties to the Convention.⁸¹ For imports coming from states that are parties to the 1970 UNESCO Convention, so long as the import or export from that country was in keeping with the law of that country, the cultural heritage would then be permitted to enter into the EU. While creating uniformity across cases and making application of the import requirements straightforward for any European country, such a regulation would diminish the effectiveness of any European laws already in effect that are stricter than the United States' or that follow the intentions of the 1970 UNESCO Convention more closely than the United States' legislation.⁸²

The 2018 proposal attempted to close some of the loopholes the 2017 proposal left open. In contrast to the 2017 proposal, the 2018 proposal does not rely exclusively on the exporting country's status as a 1970 UNESCO Convention

78. See *European Commission: Overview*, EUROPEAN UNION, <https://perma.cc/8R5G-BBJB> (last visited Feb. 18, 2018).

79. *Proposal for a Regulation of the European Parliament and of the Council on the Import of Cultural Goods*, COM (2017) 375 final (July 7, 2017) [hereinafter 2017 Proposal].

80. *Proposal for a Regulation of the European Parliament and of the Council on the introduction and the import of cultural goods*, 2017/0158(COD) (Dec. 16, 2018) [hereinafter 2018 Proposal].

81. 2017 Proposal, art. 4.

82. This also could turn on interpretation of what is meant by "Contracting Party" and whether a specific country's implementation of the UNESCO Convention is sufficient under the proposed regulation to be considered a "Contracting Party" to the UNESCO Convention.

signatory.⁸³ Rather, the 2018 proposal relies on the exporting laws of the country where the artifact was initially created or found, not on the laws of the most recent exporting country.⁸⁴ This would most likely increase protection, given that retentionist countries are often those with the most valuable antiquities.⁸⁵ However, the exemptions that were left in the newer proposal would still leave the United States as a loophole when the provenance of an artifact is uncertain, which is a common problem for many artifacts.⁸⁶ When the provenance is not clear, the EU import license would be determined by the export laws of the exporting country that has owned the item for five years.⁸⁷ The United States' export laws would thus be the determinants for exporting to Europe any cultural good that has been in the United States for more than five years and whose provenance could be disputed. Thus, while not categorically permitting all U.S. exports to enter Europe due merely to the United States' status as a signatory to the 1970 UNESCO Convention, the 2018 regulation's reliance on U.S. laws and the weak implementation of the Convention in the United States preserves the loophole that the initially proposed regulation would have created.

Importantly, the United States has not adopted the core section of the 1970 UNESCO Convention: Article 3.⁸⁸ Thus, if the EU regulation proposed in 2017 had been enacted, an artifact exported from the United States may have been able to enter into an EU country that follows a stricter implementation of the 1970 UNESCO Convention than the United States. This would not prevent that European country from pursuing prosecution or restitution measures on behalf of the country of origin, but it would permit such an antiquity to enter into the EU with less surveillance, which would frustrate the 1970 UNESCO Convention's purposes. So, if (1) a piece of art were to enter the United States from a country with a national patrimony law, and then (2) under U.S. law, it was determined that the piece did not actually belong to the foreign State, it is reasonable to believe that that piece could make it into the EU legally despite the higher standards imposed by the individual European countries.

B. THE EU LOOPHOLES: JAPAN

Japan's implementation of the 1970 UNESCO Convention presents another potential loophole for trafficking illicit cultural heritage into Europe. Japan became party to the 1970 UNESCO Convention in 2002, thirty years after the Convention

83. 2018 Proposal, art. 4.

84. *Id.*

85. *See supra* Part I.

86. *See, e.g.*, Katherine D. Vitale, Note, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1868 (2009) ("proving the provenance of antiquities is very difficult").

87. 2018 Proposal, art. 4.

88. Gerstenblith, *supra* note 6, at 72 ("The United States explicitly failed to view Article 3, which other countries consider to be the Convention's core obligation, as substantive in nature and therefore refused to include it within the U.S. implementing legislation" (citing PATRICK J. O'KEEFE, COMMENTARY ON THE 1970 UNESCO CONVENTION 41, 108 (2d ed. 2007))).

entered into force.⁸⁹ Japan's implementation of the Convention, however, is considered one of the most bare-bones implementations,⁹⁰ and scholars have questioned whether Japan should even be considered a party to the treaty given its implementation.⁹¹

Much like the United States, Japan's incomplete adoption of the 1970 UNESCO Convention into its domestic law would create a substantial loophole under the proposed European regime. Japan implemented the 1970 UNESCO Convention into its domestic law by enacting the Act on Controls of the Illicit Export and Import of Cultural Property and amending provisions of its previously enacted Act for the Protection of Cultural Properties.⁹² The Japanese implementation scheme adopts only Article 7(b)(i) of the Convention,⁹³ which requires States Parties to the Convention to prohibit import of cultural property stolen from a museum or similar institution.⁹⁴ Further, even this adoption comes with the major caveat that for any piece of cultural heritage to be protected under Japanese law, the piece must have been specially designated in an institution's inventories before any attempt to prevent its sale.⁹⁵

The EU regulation would make Japan a loophole for importing illicit cultural heritage into more highly regulated European countries because the Japanese law only concerns itself with foreign cultural property that was stolen from an institution and that has been inventoried at that institution.⁹⁶ The law's purview is "fairly limited" and does not concern "the case of export without an export certificate provided for in Article 6(b) of the Convention."⁹⁷

As such, the major Japanese loophole that would arise would be in the context of exporting property from Japan into the EU that had not previously been catalogued in an institution's inventory. Under the bifurcated import process proposed by the European Commission in 2017 and Japan's law, which permits the exportation of this property, the property would be permitted to enter the EU despite EU countries' protections for non-inventoried items.⁹⁸ Even under the 2018 proposal's regulation, Japan will remain a loophole when a cultural good's provenance is unknown because

89. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970, UNITED NATIONS EDUC., SCI. & CULTURAL ORG., <https://perma.cc/GQ4W-3BHE> (last visited Feb. 19, 2018) ("This Convention entered into force on 24 April 1972").

90. Gerstenblith, *supra* note 6, at 85 ("Japan has likely taken the most minimal approach to implementation of the 1970 UNESCO Convention among State Parties.").

91. O'KEEFE, *supra* note 6, at 207 ("[T]he implementation of the 1970 Convention by Japan is so limited it could be asked why the UNESCO Member States accepted its ratification.").

92. KEUN-GWAN LEE, AN OVERVIEW OF THE IMPLEMENTATION OF THE 1970 UNESCO CONVENTION IN ASIA 12 (2012), <https://perma.cc/D3W7-PERL>.

93. *Id.*

94. 1970 UNESCO Convention, *supra* note 19, art. 7(b)(i).

95. Gerstenblith, *supra* note 6, at 85.

96. *Id.*

97. Lee, *supra* note 92, at 13. Article 6(b) of the UNESCO Convention compels States Parties to undertake "to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate." 1970 UNESCO Convention, *supra* note 19, art. 6(b).

98. For example, Germany amended its law in 2016 to explicitly cover looted non-inventoried antiquities. Gerstenblith, *supra* note 6, at 81.

of its own weak importation and exportation laws.

C. BILATERAL AGREEMENT REQUIREMENT

One of the largest issues with the United States' implementation of the 1970 UNESCO Convention is the way in which Article 9 was adopted. As Part II explained, the United States' interpretation of Article 9 of the UNESCO Convention requires an "emergency condition" to exist for Article 9 to be enforceable, and the existence of that emergency condition must be formalized in a bilateral agreement with the foreign State.⁹⁹ Because the United States has only sixteen such agreements in place, and because only three of them are legally enforceable,¹⁰⁰ the United States' implementation of Article 9 does not allow for protection of cultural heritage in most cases.¹⁰¹ The United States gives high-level attention to these sixteen countries with which it has negotiated bilateral agreements, while not giving nearly enough attention to the countries that do not have such an agreement in place.

For example, if a country does not have an Article 9 bilateral agreement with the United States, then the United States has no immediate legal basis to aid the country in recovering its stolen artifact. Without such an agreement, the foreign country lacks the proper framework to pursue a restitution claim with the United States. While the foreign country could always attempt to enter into a bilateral agreement with the United States, it is not at all guaranteed that the agreement would be signed or how quickly it could be entered into. Starting the process could delay recuperation of the artifact indefinitely, and, as shown below, such agreements are not always feasible.

The issues created by the United States' (and Switzerland's) bilateral agreement requirement could be alleviated in a number of ways. Since the United States' need for bilateral agreements is based on its interpretation of the Convention, UNESCO could issue its own interpretation of Article 9 that dispels any notions that bilateral agreements are required for Article 9 to be effective. That said, any ex-post, official UNESCO interpretation of Article 9 would not be binding on the United States or its courts.

An obvious but impractical solution to the issues created by bilateral agreements would be the creation of bilateral agreements between the United States and each and every State Party to the Convention. This solution would be virtually impossible. Initiating, negotiating, and ratifying treaties are notoriously difficult diplomatic tasks.¹⁰² The amount of time required for the United States to create even one bilateral agreement may not be viewed as worthwhile to the United States if very little trade occurs with the country and if there is even less trade of cultural heritage specifically. The United States, as a major art market country, has little incentive to

99. See O'KEEFE, *supra* note 6, at 224.

100. See discussion *supra* Part II.

101. The United States only has sixteen bilateral agreements in place while there are 136 State Parties to the UNESCO Convention. *Cultural Property Protection: Bilateral Agreements*, U.S. DEP'T OF ST. BUREAU OF EDUC. & CULTURAL AFF., <https://perma.cc/55RG-D6SK> (last visited Feb. 18, 2018).

102. See, e.g., Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 708–09 (analyzing the relative difficulty of enacting treaties in differently structured countries).

seek out other countries and create such bilateral agreements. The burden is then on the other countries to pursue bilateral agreements with the United States, which may not be the country's priority if the country has other diplomatic problems to solve, if trade of cultural heritage with the United States is not a large market, and if the country does not have highly expensive cultural heritage of its own.¹⁰³ Furthermore, a bloat of 138 bilateral agreements, each with its own specific terms that may not be identical to the terms of the Convention or to the terms of the United States' adoption of the Convention, could constitute an impossibly unworkable system.

V. PROPOSED SOLUTIONS

As enumerated above, the current regime for protecting cultural antiquities internationally faces several problems. These include inconsistency in implementation, loopholes within the system, and an inability to protect certain types of antiquities. There are several ways that UNESCO and the States Parties could address these issues, in the form of amendments to the current treaty, an additional protocol, or even an entirely new treaty, which would be much to the dismay of scholars in the field.¹⁰⁴ Suggestions for such changes follow below.

A. CLOSURE OF LOOPHOLES: DEMAND FOR COMPLETE IMPLEMENTATION

The most straightforward response to fixing the loopholes and inconsistency caused by several countries' piecemeal implementations of the Convention is to prohibit piecemeal implementation of the Convention. The barely adopted 1995 UNIDROIT Convention is a treaty concerning illicit trade of cultural heritage that prevents States from choosing to adopt only certain parts of the Convention.¹⁰⁵ A similar scheme would improve the 1970 UNESCO Convention's regime and, at the very least, prevent the loophole problem that the European Commission proposal would create.¹⁰⁶ However, without creating a new treaty, this would be a difficult task; furthermore, the lack of adoption of the UNIDROIT Convention (only forty-two States are parties to the Convention¹⁰⁷) reflects the possible outcome that a treaty that does not give States flexibility in adoption will simply not be adopted.

Amending the 1970 UNESCO Convention to outlaw piecemeal implementation under domestic law, or to specify which parts of the treaty must be adopted for the adopting State to be considered a party to the Convention, could also solve the loophole that the EU proposal creates. At present, there are no specific articles of the Convention that must be adopted for a State to be considered party to the treaty if the State has deposited an instrument that is sufficient under the Convention's

103. Several of the countries that have bilateral agreements with the U.S. do so because of the domestic importance of that country's cultural heritage and because that country has a strong national patrimony law such as Egypt, Italy, and Peru.

104. See, e.g., Gerstenblith, *supra* note 6, at 86 ("A new convention is not, however, needed").

105. Levine, *supra* note 28, at 768.

106. See *supra* Part IV.A.

107. A complete list of the forty-two parties to the 1995 UNIDROIT Convention can be found at <https://perma.cc/T2RM-CLKB>.

terms. Additionally, per treaty law, there are several ways in which a State can become party to the treaty.¹⁰⁸ The differences in the ways a State can become party to a treaty, which are further complicated by the domestic laws of States, have created differences in how much of the Convention States Parties have adopted. Thus, an amendment requiring the adoption of certain articles for States to be considered parties to the treaty could minimize some of these differences as well.

The most effective tool for removing the piecemeal adoption of the 1970 UNESCO Convention from the international regime would be to create a new treaty. This would address several problems and update the treaty to meet current cultural property needs, which differ at least in part from the cultural property needs in 1970. However, this would also be the most difficult option and require an enormous amount of support from the international community. As improbable as this method would be, it is probably the only method that could close these loopholes fully. An optional protocol or a non-mandatory amendment would leave the current system with the same problems it already faces.

Adopting new treaties and amending treaties can be difficult to impossible, especially for a country like the United States.¹⁰⁹ Political issues and concerns dominate the field of international law; the domestic political situation of each and every country also comes into play and affects which international agreements any country can adopt. It would be naïve to think that if the political support existed for adoption of the entire Convention, the United States would still have chosen to adopt and implement only discrete parts of the Convention. Like all countries, the United States has a complicated process for adoption and implementation of any parts of a treaty, so changes to the United States' implementation of the 1970 UNESCO Convention will be difficult. Regardless, as impractical as a new treaty or amendment to the current treaty may be, there is a need for changes to the current regime.

B. ADDING A UNIFORMITY REQUIREMENT

The process of creating uniformity within the international scheme of cultural antiquities protection could take many forms. As suggested above, uniformity of implementation is a lofty goal that could solve several problems within the field.¹¹⁰ However, without requiring complete implementation of the *entire* Convention, requiring implementation of at least certain important sections could help; then, there would at least be a uniformity in the base minimum required for a country to be considered a State Party to the Convention. Additionally, standardizing the definition a 'cultural object' has been suggested as a way to improve the protection

108. Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, in INTERNATIONAL LAW 166, 170–75 (Malcolm D. Evans ed., 4th ed. 2014) (noting that the Vienna Convention on the Law of Treaties permits ratification, acceptance, approval and accession as several different means for a State to establish its consent to be bound by a treaty).

109. See Ginsburg, *supra* note 102, at 722–23 (noting that the bicameral legislature and executive veto make treaty-implementing legislation more difficult to pass in the United States than in other countries).

110. See discussion *supra* Part V.B.

of cultural antiquities.¹¹¹ This too would aid in resolving the inconsistencies that plague the field. Going forward, a singular and comprehensive definition of what is to be protected through these treaties could greatly improve the system in its current form. While the ambiguity within the treaty may be constructive and designed to encourage greater adoption of the treaty, that comes at the expense of better protection of cultural heritage.

C. MANDATED EXCEPTIONS TO INVENTORYING

An option that solves the issues specifically created by Japan would be to create a mandated exception to inventorying. In Japan, cultural property is not protected by its law unless it had been previously catalogued in an institutional inventory.¹¹² This solution to this problem could take several forms and cover various situations in which inventorying should not be critical for whether the artifact may be considered a piece of cultural heritage protected by the treaties. However, without any way of closing the piecemeal adoption loophole mentioned above, this solution would not provide a full remedy to even the issues created by Japan's implementation.

D. ADDING RETROACTIVITY

Several critics have lamented the 1970 UNESCO Convention's lack of retroactivity.¹¹³ For archaeological artifacts, specifically, the lack of retroactivity presents a huge hurdle for securing adequate protection of the artifacts from illicit sale and trade. Not allowing retroactivity creates a hard cutoff for which objects will be granted protection and which ones will not; such a cutoff is inherently arbitrary. While the cutoff surely makes enforcement and implementation of the Convention easier for law enforcement and for application in general, it does not protect cultural heritage to the extent that it could.

VI. CONCLUSION

The United States needs to update its laws for the protection of cultural property and adhere more closely to the 1970 UNESCO Convention and burgeoning norms of international law. The European Commission's proposed regulations would make the United States a loophole for trafficking antiquities, but more significantly, the proposed regulations underscore the potential problems that the international community could face because of the United States' unwillingness to join the international community in protecting cultural antiquities. The problems that could be faced do not only belong to the United States and they go beyond its borders.

111. Katarzyna Januskiewicz, Note, *Retroactivity in the 1970 UNESCO Convention: Cases of the United States and Australia*, 41 *BROOK. J. INT'L L.* 329, 364 (2015) (noting that Australian indigenous material is only sometimes recognized as cultural heritage, which "underlines the need for uniformity in both implementing legislation and definitions within those laws").

112. See *supra* Section IV.B.

113. See Gerstenblith, *supra* note 6, at 86; Januskiewicz, *supra* note 111, at 357–58.

As one of the largest art markets in the world,¹¹⁴ the United States has a duty to be a leader in this space. Even if the United States has fewer motivations to sign on to protective treaties than would retentionist countries that have greater quantities of cultural heritage at risk, it makes sense for a country that considers itself a world leader to take part in the charge for greater protections worldwide. Furthermore, as the United States nears 250 years in age, it has a greater interest in protecting its own antiquities, as cultural heritage from the founding of the country will soon reach the commonly imposed 250-year age minimum to be considered an antique.¹¹⁵

Regardless of these points, changes to the United States' implementation of the 1970 UNESCO Convention at this point are unlikely. As mentioned above, the United States' political system and its methods of becoming party to a treaty make change incredibly difficult.¹¹⁶ As unlikely as the United States is to finally become party to the 1995 UNIDROIT Convention, any change to its implementation of the 1970 UNESCO Convention is also highly unlikely. Nevertheless, there are holes in the system that should be addressed at this point, and as explained, the United States becomes complicit if it makes no changes.

114. POWNALL, *supra* note 43, at 36.

115. See, e.g., 19 U.S.C. § 2601(2)(C)(i)(II) (restricting the goods protected under U.S. implementation of the 1970 UNESCO Convention to only material that is "at least two hundred and fifty years old"); *Appendix to Proposal for a Regulation of the European Parliament and of the Council on the Import of Cultural Goods*, COM (2017) 375 final (July 7, 2017) (listing the 250-year minimum as a restriction for most cultural property to be classified as an antiquity).

116. For a stark example, the United States is not party to the United Nations Convention on the Law of the Sea, a treaty adopted by 167 States that is close to being considered international customary law, and thus binding on all States. Despite support from several U.S. Presidents and the U.S.' frequent compliance with the treaty, the Senate has refused to ratify the Convention for twenty-three years. See Herman, *International Law in a Turbulent World*, 41 CAN.-U.S. L.J. 51, 62 (2017) (stating that the United States has yet to ratify the treaty despite the Convention's "generally-accepted rules" and the benefits the United States could gain).