



# **Human Rights Advocates**

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**Promoting Cultural Rights Through Heritage Laws**

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## I. Introduction

Preserving cultural heritage is a norm most societies treasure because the historical, psychological and societal importance of honoring the past. Portraying history and having access to exhibits is a critical piece of upholding cultural rights.

How history is preserved is a delicate issue for countries with minority and indigenous communities. As a result, the latest resolution furthering the mandate on cultural rights invites Ms. Farida Shaheed, the Special Rapporteur in the field of cultural rights (Special Rapporteur), to examine “means to sensitize institutions and society on diverse cultural heritage.”<sup>1</sup> This report investigates how cultural heritage laws are important to reclaim stolen culture and create opportunities for public and private institutions to engage in dialogue about cultural issues.

Cultural heritage laws govern claims asserted by past owners and creators of cultural objects against the current possessor.<sup>2</sup> These laws are important to protect culture from illicit exporting and importing. The dispute between Sotheby’s and Cambodia over a 10th century CE limestone statue illustrates the importance of cultural heritage laws.<sup>3</sup> The past owners, a Cambodian community represented by the government, asserted a right to reclaim an alleged stolen statute. Yet, the current possessor, Sotheby’s, argued it received the statute from a “noble European lady.”<sup>4</sup> Furthermore, Sotheby’s argued Cambodia had the burden to demonstrate the statute was acquired illicitly. Heritage laws are vital because they outline who carries the burden of proof, and what evidence the current possessor needs to establish the provenance of the object.

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<sup>1</sup> “Promotion of the enjoyment of the cultural rights of everyone and respect for cultural diversity,” A/HRC/RES/23/10 (June 20, 2013), §13.

<sup>2</sup> Dr. Derek Fincham, Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes, 20 Va. J. Soc. Pol’y & L. 43, 45 (2012).

<sup>3</sup> Id.

<sup>4</sup> Id.

States need a strong legal framework to uphold protecting cultural heritage because, “cultural rights hinge on the perceived uniqueness of the legacy that binds a group or community to a shared memory upon which the powerful sentiment of belonging and identity is built.”<sup>5</sup> Laws that enable a community to reclaim once lost or stolen “legacy” embodied in cultural objects will help restore the sense of unity and tradition. This report will begin by addressing the international human rights standards and then present how different countries have drafted laws to protect cultural heritage.

## **II. International Human Rights Standards**

The right to enjoy one’s culture and celebrate its diversity is an international human right that covers participation and enjoyment of culture.<sup>6</sup> Additionally, under Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), State parties have the responsibility to conserve, develop and diffuse culture. Furthermore, the UN has addressed the importance of cultural heritage as critical to recognizing the rights espoused in Article 15 of ICESCR.<sup>7</sup> Moreover the UN has urged several nations to adopt more measures to curb vandalism and looting of cultural heritage sites within their territories.<sup>8</sup>

In reference to Indigenous communities’ cultural rights, Article 31(1) of the UN Declaration on the Rights of Indigenous Peoples grants an unambiguous right to indigenous communities “to maintain, control, protect and develop their cultural heritage.”<sup>9</sup> Finally, Art 27 of the International Covenant on Civil and Political Rights (ICCPR) states minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own

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<sup>5</sup> Id. at 51-52 .

<sup>6</sup> Universal Declaration of Human Rights Art. 27(1).

<sup>7</sup> O’Keefe, Roger. “Tangible Cultural Heritage and Human Rights Law.” Realising Cultural Heritage Law Festschrift for Patrick O’Keefe. Prott, Lyndell V., Redmond-Cooper, Ruth, and Urice, Stephen (eds.). Institute of Art and Law, Ltd. Pp.87-97, 90, 2013.

<sup>8</sup> Id.

<sup>9</sup> United Nations Declaration on the Rights of Indigenous Peoples, 61/295. September 13, 2007.

culture, to profess and practise their own religion, or to use their own language.” As exemplified by these treaties, the international community seeks to protect and promote the Indigenous voice in how to best preserve history and culture.

Unfortunately, global recognition of this human right is not enough to curb the illicit trading of cultural heritage and its destruction to communities caused by uprooting cultural patrimony. The trade of cultural patrimony on the black market is the third most profitable entity just behind the selling of guns and drugs.<sup>10</sup> In response, the United Nations Educational, Scientific and Cultural Organization (UNESCO) promulgated regulations addressing the illicit trade of cultural heritage.<sup>11</sup>

The UNESCO Convention defines cultural property as, “being of importance for archaeology, prehistory, history, literature, art or science.”<sup>12</sup> Cultural heritage laws are important because the State defines cultural patrimony, whether on religious or secular grounds. The UNESCO Convention also offers guidance to whether a cultural object belongs to the past creator or current possessor.<sup>13</sup> The UNESCO Convention presumes that a past creator, or country of origin, has ownership because any cultural object found within the State’s territory is part of the individual or “collective genius” of the State.<sup>14</sup> As a result, any object discovered by archaeological, ethnological or natural science mission becomes part of the collective genius of the State.<sup>15</sup> A current possessor may acquire ownership in two ways under the UNESCO Convention. First is when a country of origin’s institution loans the object in a “freely agreed

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<sup>10</sup> Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 Chi. J. Intl. L. 623, 625 (2007).

<sup>11</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention), 823 U.N.T.S. 231, Art. 1.

<sup>12</sup> Id.

<sup>13</sup> Id. at Art. 4.

<sup>14</sup> Id.

<sup>15</sup> Id.

exchange.”<sup>16</sup> Second, a current possessor may own another country’s cultural object if the object was “purchased legally with the consent of the competent authorities of the country of origin.”<sup>17</sup>

Compliance with these international treaties is vital to ensuring that groups are able to assert ownership over their culture. More importantly, by enabling groups to reclaim once stolen or lost culture promotes cultural rights to maintain, preserve, develop and exhibit culture according to the community’s norms, values and beliefs.

### **III. Country Examples**

The United States (U.S.) and Australia portray domestic efforts to recognize the protection of cultural diversity. Indigenous communities’ cultures are at risk of illicit trading in both countries. Furthermore, both countries also passed legislation to protect foreign cultures from illegal acquisitions and trading. Alternatively, Kenya depicts a scenario of how to protect cultural heritage with limited national laws.

#### **A. United States**

The U.S. has a complex cultural heritage legal framework to resolve disputes between museums and American Indian tribes over cultural heritage and the extent of its protection. The first part will assess the national or domestic measures American Indians have to assert their cultural rights to reclaim, portray, cultivate, develop and exhibit their history. The second part will discuss the international legal mechanisms the U.S. employs to protect foreign cultures to fulfill its duties under the UNESCO Convention.

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<sup>16</sup> Id. at Art. 4(d).

<sup>17</sup> Id. at Art. 4(e).

## 1. National/Domestic Repatriation

The two primary laws that primarily govern protecting American Indian cultural heritage are the Native American Grave Protection and Repatriation Act (NAGPRA)<sup>18</sup> and the National Museum of the American Indian Act (NMAI).<sup>19</sup>

NAGPRA is seen by many as a human rights law, “enacted to correct the human rights violations caused by centuries of looting Native American graves, stealing from tribes, and displaying stolen human remains and objects in museums.”<sup>20</sup> Under NAGPRA, anyone who “knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains” can be prosecuted.<sup>21</sup> This liability also extends to cultural items.<sup>22</sup> NAGPRA also enables American Indian tribes to bring repatriation claims against a museum.<sup>23</sup> While many praise the steps taken to address past cultural injustices, some believe NAGPRA is problematic and confusing. For example, one major critique is applying NAGPRA “uniformly to groups that differ significantly in terms of resources, organization, religion, culture, and history.”<sup>24</sup> Moreover the expenses of complex litigation mean tribes with more political and economic resources are more likely to benefit from NAGPRA.<sup>25</sup> In response to this issue of resources, Colorado has a fund for American Indian tribes to pursue NAGPRA claims.<sup>26</sup> As a result, there has been a positive impact for tribes seeking the successful return of cultural patrimony. Other initiatives involve museums

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<sup>18</sup> 25 U.S.C.A. §§ 3001-3013.

<sup>19</sup> 20 U.S.C.A. § 80q-1(a).

<sup>20</sup> Cecily Harms, NAGPRA in Colorado: A Success Story, 83 U. Colo. L. Rev. 593, 594 (2012).

<sup>21</sup> 18 U.S.C.A. § 1170(a).

<sup>22</sup> Id. at § 1170(b).

<sup>23</sup> Rebecca Kitchens, Insiders and Outsiders: The Case for Alaska Reclaiming Its Cultural Property, 29 Alaska L. Rev. 113, 127 (2012).

<sup>24</sup> Id. at 129.

<sup>25</sup> Id.

<sup>26</sup> Supra note 20 at 616.

cooperating irrespective of a filed legal claim.<sup>27</sup> A final critique of NAGPRA is that it only applies to federal or tribal lands. Thus, any illicit excavation of a sacred site off tribal land, or on private land means a tribe can only seek redress through state or local laws.<sup>28</sup>

Like NAGPRA, the NMAI is restricted by subject matter. The NMAI only covers the collections of Native American artifacts and cultural heritage owned and managed by the federal government and its institutions. This act also created a repatriation department within the National Museum of the American Indian to establish relationships with federally recognized tribes to pursue returning cultural heritage.<sup>29</sup>

The NMAI defines repatriation as, “the process whereby specific kinds of American Indian cultural items in a museum collection are returned to lineal descendants and culturally affiliated Indian tribes, Alaska Native clans or villages, and/or Native Hawaiian organizations.”<sup>30</sup> Cultural heritage that may qualify for repatriation include, “human remains, funerary objects, sacred objects, and objects of cultural patrimony.”<sup>31</sup> Once human remains, sacred, funerary or cultural patrimony objects’ cultural affiliation is established with a federally recognized nation, then the Federal institution must immediately act to return the objects or remains.<sup>32</sup> It is also important to note the NMAI encourages Federal agencies and museums to share information with American Indian tribes.<sup>33</sup>

The two statutes are meant to restore the broken links created by colonization practices and also celebrate the diversity of American heritage. In fact, both statutes operate by protecting

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<sup>27</sup> Id. at 617.

<sup>28</sup> Supra note 23 at 131.

<sup>29</sup> The National Museum of the American Indian. “Repatriation.” Smithsonian Institute (2014), paragraph 1. Available at <http://nmai.si.edu/explore/collections/repatriation/>.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> 25 U.S.C.A § 3005.

<sup>33</sup> Id. at § 3005(d).

“American Indians’ unique art forms and their respective cultures as well as to compensate native communities for past injustices.”<sup>34</sup> By returning lost culture to its original owners and caretakers, communities can assert their right to maintain, exhibit, and control their culture according to their customs. Encouraging dialogue to resolve contentious issues of ownership of culture reinforces the latest resolution’s request for the Special Rapporteur to report on ways to sensitize institutions to diverse cultures. However, it is important to highlight only federally recognized tribes are able to benefit from these laws.<sup>35</sup>

Under the Federally Recognized Tribes List Act,<sup>36</sup> the U.S. Department of the Interior must keep a database of all federally recognized tribes and update its information for public access. According to the Department of the Interior, there are 566 “federally recognized American Indian and Alaska Native tribes and villages.”<sup>37</sup> The Office of Federal Acknowledgement (OFA), an agency within the Department of the Interior, is in charge leading the recognition process.<sup>38</sup> Many critique the OFA as having a slow process that relies more on evidentiary or document support rather than oral tradition and proof of social cohesion.<sup>39</sup>

U.S. laws narrowly construe who may benefit as a federally recognized tribe while the international community has a broader conception for indigenous rights.<sup>40</sup> This has led the U.S. to assess whether to endorse the United Nations Declaration of the Right of Indigenous Peoples by consulting Native American Nations.<sup>41</sup> Just recently in 2010, President Barack Obama

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<sup>34</sup> *Supra* note 23 at 115.

<sup>35</sup> Goldberg, Carole E. A United States Perspective. International Trade in Indigenous Cultural Heritage. Edward Elgar Publishing Limited, p. 336, 2012.

<sup>36</sup> 25 U.S.C. §§479a, 479a-1.

<sup>37</sup> U.S. Department of the Interior: Indian Affairs. “Frequently Asked Questions.” (2014), paragraph 6. Available at <http://www.bia.gov/FAQs/>.

<sup>38</sup> *Supra* note 35 at 337.

<sup>39</sup> *Id.* at pp. 337-338.

<sup>40</sup> *Id.* at 340.

<sup>41</sup> *Id.*



changed the U.S. stance to support the Declaration.<sup>42</sup> Recognizing a broader conception would mean the U.S. could be more assertive in reclaiming cultural objects that leave U.S. jurisdiction. A recent example of American Indian artifacts being sold overseas is the auction of Hopi and San Carlos Apache sacred objects in Paris.<sup>43</sup> Despite failed attempts to block the sale of the cultural objects, the tribes will have all but three of the sacred objects returned. The Annenberg Foundation secretly and successfully bid to purchase all but three of the disputed listings and is seeking the most appropriate way to return them home.<sup>44</sup> While a success, no tribe should have to buy back cultural objects that were once in its communities. This speaks to the need of more international cooperation and sensitivity to pursue legal claims of disputed objects.

## **2. International Repatriation**

To carry out the obligations under the UNESCO Convention, Congress passed the Convention on Cultural Property Implementation Act (CPIA).<sup>45</sup> The administrative agency in charge of overseeing the CPIA is the Cultural Property Advisory Committee (CPAC), a branch of the State Department.<sup>46</sup> Under the CPIA, foreign states seeking an import restriction send their request with the relevant documentation to the CPAC. The requesting State must be a party to the UNESCO Convention and demonstrate they are in “jeopardy from the pillage of archaeological or ethnological materials.”<sup>47</sup> If these conditions are met, then the CPAC recommends the President enter into a “bilateral agreement” to apply the import restrictions.<sup>48</sup> A

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<sup>42</sup> U.S. Department of State. “Announcement of U.S. Support for the UN Declaration on the Rights of Indigenous Peoples,” p. 1, (2010). Available at <http://www.state.gov/documents/organization/184099.pdf>.  
<http://www.state.gov/s/tribalconsultation/declaration/>.

<sup>43</sup> Mashberg, Tom. “Secret Bids Guide Hopi Indians’ Spirits Home.” New York Times. December 16, 2013. Available at

[http://www.nytimes.com/2013/12/17/arts/design/secret-bids-guide-hopi-indians-spirits-home.html?\\_r=0](http://www.nytimes.com/2013/12/17/arts/design/secret-bids-guide-hopi-indians-spirits-home.html?_r=0).

<sup>44</sup> Id.

<sup>45</sup> 19 U.S.C.A. § 2602.

<sup>46</sup> Id. at § 2605.

<sup>47</sup> 19 U.S.C.A. § 2602 at (a)(1)(A).

<sup>48</sup> Id. at § 2602(a)(2)(A).

violation of this agreement will result in forfeiture, seizure and condemnation for violating customs laws.<sup>49</sup> Additionally, any seized or forfeited property will be offered to be returned to the State Party.<sup>50</sup> To seize the object, the government must establish that the object is on the import restriction list, is documented as part of a State Party institution's inventory and was stolen from such institution.<sup>51</sup> Currently, the US has a bilateral agreement with 17 other State parties to the UNESCO Convention.<sup>52</sup>

The U.S. cultural heritage laws, while far from perfect, provide internal and external legislation to restrict the illicit trading of artifacts. The NMAI and NAGPRA are vital to further understanding and mending cultural injustices. The CPIA and CPAC are instrumental to ensuring other countries' indigenous communities are not exploited by American institutions. Utilizing this legal framework encourages dynamic relationships to address issues of cultural rights and how to best preserve history. It is through such exchanges the deficiencies in the legal framework can be resolved to better preserve the history of indigenous communities.

## **B. Australia**

Like the U.S., Australia is a party to the UNESCO Convention. Furthermore, Australia has laws that govern internal repatriation of Indigenous culture as well as external legislation to protect another State's culture from illicit trade.

### **1. National/Domestic Repatriation**

The Australian Constitution is similar to the US Constitution because the Constitution outlines powers of the Commonwealth (Federal government) and those that belong to the

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<sup>49</sup> *Id.* at § 2609.

<sup>50</sup> *Id.* at § 2609(b).

<sup>51</sup> *Id.* at § 2610(1)-(2)(A-B).

<sup>52</sup> U.S. Department of State: Bureau of Educational and Cultural Affairs. "Bilateral Agreements." (2014). Available at <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements>.

individual States.<sup>53</sup> Moreover, the Commonwealth laws are superior to the state laws in the event of a conflict.<sup>54</sup> What distinguishes the Australian Commonwealth legislative power from the American Federal system is the ability to make special laws based on race.<sup>55</sup> Under the Australian Constitution, Parliament may pass laws regarding the “people of any race for whom it is deemed necessary to make special laws.”<sup>56</sup> As a consequence, the Australian Parliament has the ability to pass laws designed to protect Indigenous land and culture.<sup>57</sup> The most recent policy statement from the Australian government cites the importance of its rich diverse cultural heritage, and particularly identifies Aboriginal and Torres Strait Islander culture as part of Australian identity.<sup>58</sup>

To protect and further enhance the rich and diverse cultures of Australia, the government passed two important pieces of legislation, the Protection of Movable Cultural Heritage Act (PMCHA)<sup>59</sup> and the Aboriginal and Torres Strait Islander Cultural Heritage Protection Act (Cultural Heritage Act).<sup>60</sup>

Under the PMCHA, the government created a National Heritage Control List that divides cultural heritage into two classes (A or B).<sup>61</sup> Class A lists objects that may not be exported. There are specific references to Aboriginal and Torres Strait Islander’s heritage such as, “sacred and secret ritual objects, bark and log coffins used as traditional burial objects, human remains,

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<sup>53</sup> Justice Ronald Sackville, Legal Protection of Indigenous Culture in Australia, 11 *Cardozo J. Int'l & Comp. L.* 711, 718 (2003).

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Australian Constitution section 51, xxvi.

<sup>57</sup> *Supra* note 53 at 719.

<sup>58</sup> Australian Government: Attorney General’s Department. “Australian Government’s Policy on Indigenous Repatriation.” Part I, p. 4. (2013). Available at [http://arts.gov.au/sites/default/files/indigenous/repatriation/Repatriation%20Policy\\_10%20Oct%202013.pdf](http://arts.gov.au/sites/default/files/indigenous/repatriation/Repatriation%20Policy_10%20Oct%202013.pdf)

<sup>59</sup> Act No. 11 of 1986, C2011C00238. Part II, Division 1. (Prepared in 2011). Available at [http://www.comlaw.gov.au/Details/C2011C00238/Html/Text#\\_Toc290360542](http://www.comlaw.gov.au/Details/C2011C00238/Html/Text#_Toc290360542).

<sup>60</sup> Act No. 79 of 1984, C2010C00807. Part II, Division 1. (Prepared in 2011). Available at [http://www.comlaw.gov.au/Details/C2010C00807/Html/Text#\\_Toc280161578](http://www.comlaw.gov.au/Details/C2010C00807/Html/Text#_Toc280161578)

<sup>61</sup> *Supra* note 59 at Part II, Division 1, §8(2)(a-b).

rock art, and dendroglyphs (carved trees).”<sup>62</sup> Class B stipulates these items must have permission to be exported. While Class B contains some Aboriginal culture, the government ensures there must be properly certified permits before any item leaves.

The Cultural Heritage Act grants Aborigines the ability to request the Minister for the Arts to declare certain objects under special protection.<sup>63</sup> The petitioner must meet two criteria: first, establish the significance of the object and second, demonstrate a “threat of injury or desecration.”<sup>64</sup> This ability to petition the government to extend its protection of cultural heritage objects strengthens the government’s efforts to curb illicit trafficking and promote the culture of Aboriginal and Torres Strait Islanders. To facilitate this process, Australia also has a national domestic repatriation program that is part of the Ministry for the Arts. As the main entity for protecting cultural heritage, this agency handles domestic and foreign affairs regarding Indigenous cultural patrimony. Like the institutions in the U.S., the Indigenous repatriation program seeks to reconcile past offenses by restoring stolen artifacts, remains and cultural objects to the communities.<sup>65</sup>

The culture is directly tied to the artifact because the art or object represents “Ancestral Beings, their travels and experiences (known as Ancestral Events), the things they created, and the places associated with them. . .of fundamental significance are the pre-existing designs.”<sup>66</sup> Pre-existing designs refer to “the artistic manifestations of one or more of an Ancestral Being, Ancestral Event, or area of country associated with such Being or Event.”<sup>67</sup> A significant aspect

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<sup>62</sup> Australian Government: Attorney General’s Department, Ministry for the Arts. “The National Cultural Heritage Control List.” (2014). Available at <http://arts.gov.au/movable/export/list>.

<sup>63</sup> Supra note 60 at Part II, Division 1, §9.

<sup>64</sup> Supra note 60, at Part II, Division 1, §12, 1(b)(i-ii).

<sup>65</sup> Australian Government: Attorney General’s Department, Ministry for the Arts. “Australian Government Policy on Indigenous Repatriation.” Part I, p. 4, paragraph 5. (2013). Available at <http://arts.gov.au/indigenous/repatriation>.

<sup>66</sup> Supra note 53 at 715.

<sup>67</sup> Id.

of the pre-existing designs is they “are believed to have been created in the Ancestral Past by the Ancestral Beings, and they have been handed down through the generations.”<sup>68</sup> Therefore, illicitly removing such an object from the community would result in serious harm since it would incur more than property right damage.

Since the cultural heritage embodies more than just an object, many criticize the heritage protection laws for not incorporating more of an Indigenous perspective. This drive is slowly changing how museums and institutions interact, yet it is confined to the academic world.<sup>69</sup> Many groups want to be included in more negotiations and other initiatives pertaining to the protection of their cultural heritage.<sup>70</sup> For example, under the Cultural Heritage Act, some Aboriginal and Torres Strait Islander groups are wary to divulge too much information regarding a particular artifact.<sup>71</sup> Some information must be kept confidential for spiritual reasons.<sup>72</sup> Yet, withholding a vital piece of information may result in a rejected petition from the Minister of the Arts for special protection. Overall, many agree the Cultural Heritage Act is an important tool that needs to be strengthened to incorporate more views from the communities most affected by its implementation.

## **2. International Cultural Rights Protection**

The PMCHA also bars illicit imports of a foreign country’s cultural heritage. In fact, this statute prohibits any object “exported contrary to the state of origin’s export laws.”<sup>73</sup> This is meant to further the interests of the UNESCO Convention. The broadness of the statute even

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<sup>68</sup> Id.

<sup>69</sup> Bowery, Kathy. “International trade in indigenous cultural heritage: an Australian perspective.” International Trade in Indigenous Cultural Heritage. Edward Elgar Publishing Limited, p. 420, 2012.

<sup>70</sup> Supra note 53 at 730.

<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> Craig Forrest, Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage, 4 Melb. J. Int’l L. 592, 599 (2003).

applies to “to all states whose cultural heritage is illegally imported into Australia,” even if the State is not a member of the UNESCO Convention.<sup>74</sup>

An Australian salvage company acquired artifacts from a 19th century Chinese vessel (Tek Sing) it found off the coast of Bangka Island in Indonesian jurisdiction.<sup>75</sup> An informant alleged the objects were illegally removed from Indonesian waters.<sup>76</sup> To trigger the PMCHA, the Indonesian government had to petition the Australian government with evidence of the ceramics’ Indonesian cultural heritage and their export was in violation of Indonesia’s cultural heritage laws.<sup>77</sup> Due to complications of determining the legality of the export, many of the artifacts were sold to be auctioned in Europe since Australian authorities could not bar their leaving Australia. Yet, the ones that remained were eventually returned to Indonesia once the illegal export was proven.<sup>78</sup> This displays the importance for nations to have robust cultural heritage laws so that other countries can more quickly recognize their origin and the illegal act to redress the harm.

### **C. Kenya**

Kenya provides an example of how to protect cultural heritage in absence of a rigorous legal framework. Kenya also represents difficulties African nations face in seeking repatriation requests because other countries perceive the lack of cultural institutions as detrimental to their claims.<sup>79</sup> Yet, such reasoning cannot be a condition for repatriation.<sup>80</sup>

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<sup>74</sup> Id.

<sup>75</sup> Id. at 595.

<sup>76</sup> Id.

<sup>77</sup> Id. at 596.

<sup>78</sup> Id.

<sup>79</sup> Shyllon, Folarin. “Museums and Universal Heritage: Right of Return and Right of Access for Africans.” Realising Cultural Heritage Law Festschrift for Patrick O’Keefe. Prott, Lyndell V., Redmond-Cooper, Ruth, and Urice, Stephen (eds.). Institute of Art and Law, Ltd. Pp.133-144, 136, 2013.

<sup>80</sup> Id.

Kenya's main cultural heritage laws are the National Museums Act (NMA)<sup>81</sup> and the Antiquities and Monuments Act (AMA).<sup>82</sup> The NMA offers a departmental structure and duties for National museums.<sup>83</sup> The AMA seeks to preserve antiquities.<sup>84</sup> An antiquity is defined as, "any moveable object other than a book or document made in or imported into Kenya before the year 1895, or any human, faunal or floral remains of similar age which may exist in Kenya."<sup>85</sup> Under the AMA, it is illegal to conduct illicit excavations for cultural objects dated before 1895 without a permit.<sup>86</sup>

A significant gap in Kenya's legislation pertains to artifacts made after 1895, such objects receive no protection under the current legal framework. During the 20th century, sacred burial markers found on Kenya's coast, known as vigango, have been targeted by "some unscrupulous art dealers."<sup>87</sup> Vigango (plural for Kigango), of the Mijikenda communities, are created from wood to honor departed ancestors. Each one has its own "motif" and the more elaborate the Kigango, the more important the individual.<sup>88</sup> Since the Mijikenda believe a Kigango embodies the ancestor's spirit, removing it harms the community.<sup>89</sup>

The coastal communities have struggled to reclaim to the Vigango because there is a "lack of direct legal prohibition of their taking."<sup>90</sup> The Vigango stolen from villages in Kenya are

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<sup>81</sup> National Museums Act (1983). Full text available through UNESCO at [http://www.unesco.org/culture/natlaws/media/pdf/kenya/ke\\_natmuseums1983\\_eorof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/kenya/ke_natmuseums1983_eorof.pdf)

<sup>82</sup> National Antiquities and Monuments Act. (1983.) Full text available through UNESCO at [http://www.unesco.org/culture/natlaws/media/pdf/kenya/ke\\_antiq&monuments1983\\_engorof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/kenya/ke_antiq&monuments1983_engorof.pdf)

<sup>83</sup> Supra Note 81 at §8(1), p. 3.

<sup>84</sup> Supra Note 82 at Part II, §4.

<sup>85</sup> *Id.* at Part I, 2.

<sup>86</sup> *Id.* at Part III, 5(1).

<sup>87</sup> Supra note 2 at 93.

<sup>88</sup> Supra note 2 at 93, quoting George O. Abungu, "Universal Museums": New Contestations, New Controversies, in *Utimit: Past Heritage--Future Partnerships, Discussions on Repatriation in the 21st Century* 32, 38 (Mille Gabriel & Jens Dahl eds.), 2008.

<sup>89</sup> *Id.* at 94.

<sup>90</sup> *Id.* at 93.

not antiquities under the AMA's definition and not protected.<sup>91</sup> Without a legal framework, these communities rely on social justice pleas to restore the broken link between ancestors and their descendants.

Some museums have responded to these social justice initiatives. For example, the Denver Museum of Nature and Science just returned 30 Vigango it received as donations in the 1990s that were believed to have been stolen.<sup>92</sup> The museum's curator of anthropology, Chip Colwell-Chanthaphonh, asserted the absence of a legal claim does not negate a museum's ethical duty to return cultural objects.<sup>93</sup> While this is an example of a successful voluntary effort to restore stolen cultural heritage, other museums will not act without a legal obligation. Through a strong legal framework, States can initiate repatriation proceedings to bring home lost or stolen cultural heritage so that all communities can voice their right to reclaim their culture.

#### **IV. Recommendations**

Human Rights Advocates urges:

- Governments to assess their legal framework to protect groups at risk of cultural exploitation by encouraging their public and private museums to reach out to indigenous communities to better understand the impact of restoring stolen culture.
- The Human Rights Council to request the Special Rapporteur to investigate how to protect the portrayal of history by assessing ways public and private institutions acquire cultural patrimony.

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<sup>91</sup> Id.

<sup>92</sup> Mashberg, Tom. "Sending Artworks Home, but to Whom? Denver Museum to Return Totems to Kenyan Museum." New York Times. January 3, 2014. Available at <http://www.nytimes.com/2014/01/04/arts/design/denver-museum-to-return-totems-to-kenyan-museum.html>

<sup>93</sup> Id.