

Statement of the Association of Art Museum Directors Concerning the Proposal to Extend the Memorandum of Understanding between the Government of the United States of America and the Government of Libya Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Libya

Meeting of the Cultural Property Advisory Committee

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I. Introduction

The Association of Art Museum Directors (the “AAMD”) respectfully submits the following statement to the Cultural Property Advisory Committee (the “Committee”) in connection with the proposed renewal of the *Memorandum of Understanding between the Government of the United States of America and the Government of Libya Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Libya* (the “MOU”).¹ Under the Convention on Cultural Property Implementation Act (“CCPIA”), the United States imposed emergency import restrictions as of December 5, 2017, on certain archaeological and ethnological materials from Libya.² On February 23, 2018, the United States and Libya entered into the MOU to protect archaeological material dating from approximately 12,000 BCE to 1750 CE and ethnological material dating from 1551 CE to 1911 CE. The accompanying Designated List was published on July 9, 2018.³

II. Discussion

A. Preliminary Statement

The AAMD does not support the extension of the MOU. The Libyan government is expected to require the continued assistance of the UN Support Mission in Libya (“UNSMIL”) for the foreseeable future. Until the Libyan government is capable of functioning independently, Libya’s ability to protect its cultural patrimony remains in serious doubt.⁴ These doubts are supported by recent evidence of destruction in Libya that continues with apparent impunity.

¹ Memorandum of Understanding between the Government of the United States of America and the Government of Libya Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Libya, U.S. – Libya, Feb. 23, 2018, T.I.A.S. No. 18-223, *available at* <https://www.state.gov/18-223/>.

² Emergency Import Restrictions Imposed on Archaeological and Ethnological Materials from Libya, 82 Fed. Reg. 57346, Dec. 5, 2017, *available at* <https://www.federalregister.gov/documents/2017/12/05/2017-26278/emergency-import-restrictions-imposed-on-archaeological-and-ethnological-materials-from-libya>.

³ Import Restrictions Imposed on Archaeological and Ethnological Material from Libya, 83 Fed. Reg. 31654, July 9, 2018, *available at* <https://www.govinfo.gov/content/pkg/FR-2018-07-09/pdf/2018-14637.pdf>.

⁴ *The Situation in Libya: Reflections on Challenges and Ways Forward*, STIMSON CENTER (July 5, 2022), <https://www.stimson.org/2022/the-situation-in-libya-reflections-on-challenges-and-ways-forward/> (reporting that the UN Security Council is expected to renew UNSMIL's mandate by the end of July 2022).

Although NGOs and non-profits such as the American Society of Overseas Research (“ASOR”) are endeavoring to safeguard Libya’s vulnerable cultural heritage throughout the ongoing political unrest and mitigate the underling social issues that contribute to looting and destruction,⁵ the Libyan government has yet to establish a track record for providing meaningful support—financially, legislatively, or otherwise—for such efforts. In the absence of a stable government, extending the MOU is inconsistent with the CCPIA.

B. Renewal Requirements Not Satisfied under the CCPIA

The current challenges faced by Libya—stemming primarily from political and governmental instability—do not appear to be among those that U.S. import restrictions (in the form of an extended MOU) can alleviate. Even if a renewed MOU could stem the tide of cultural-patrimony destruction in a country lacking a stable government, Libya has not satisfied the CCPIA’s requirements for the extension.

1. Is Libya’s Cultural Heritage in Continued Jeopardy of Serious Pillage?

To make a recommendation to the President to extend an MOU, the Committee must find that each of four determinants under the CCPIA are satisfied.⁶ Among these determinants is a requirement that the requesting nation’s archaeological or ethnological materials are in jeopardy of pillage.⁷ The legislative history of the CCPIA clarifies that “there must be contemporary pillage” and not “historical evidence of pillage” to justify import restrictions.”⁸

Reports from Libya indicate that contemporary pillage exists, but whether the government is in a position to combat such destruction is another matter. According to many sources, much of Libya’s cultural patrimony appears to be under serious, active threat of loss, especially “in the eastern and northern regions, including the UNESCO sites of Cyrene and religious sites associated with Sufi communities in Tripoli.”⁹ (Incidentally, all five UNESCO World Heritage sites in Libya appear on the list of World Heritage in Danger.)¹⁰ ISIL remains active in these northern and eastern regions.¹¹

⁵ ASOR has worked to survey the damage to Libyan cultural heritage and develop preservation strategies. See *The State of Illicit Trade and Looting of Libyan Antiquities, 2011–2020*, AM. SOC’Y OVERSEAS RESEARCH (Dec. 31, 2020), https://www.asor.org/wp-content/uploads/2021/03/CHI-Report_Libya-Illicit-Trafficking_Full_Compressed_2021-03-25.pdf.

⁶ 19 U.S.C. §§ 2602(a)(1) & 2605(f)(1).

⁷ 19 U.S.C. § 2602(a)(1)(A).

⁸ 145 CONG. REC. S12,103 (Oct. 6, 1999) (emphasis added).

⁹ *The Need for Prosecuting Participants in the Illegal Antiquities Trade*, CLOONEY FOUNDATION FOR JUSTICE 8 (June 8, 2022), https://adobeindd.com/view/publications/0b3b3d50-50b5-48f3-9ae0-5b1844ddaa9f/164q/publication-web-resources/pdf/Antiquities_Report.pdf; see also *The State of Illicit Trade*, *supra* note 5 at 41.

¹⁰ *List of World Heritage in Danger*, UNESCO, <https://whc.unesco.org/en/danger/> (last visited July 14, 2022).

¹¹ *The Need for Prosecuting*, *supra* note 9 at 68.

In addition to ancient sites and tombs, Sufi shrines and mosques have been targets of pillage and destruction by Salafist militias since at least 2010.¹² Museum collections were also targeted by looters following the 2011 revolution.¹³ The main perpetrators of pillage in the country have been identified as al-Qaeda-linked Ansar al-Sharia; Tariq Ibn Zayad Brigade; the Benghazi Revolutionary Shura Council; the ISIL-linked Islamic Youth Shura Council; and the Libyan National Army, consisting mainly of designated terrorist groups, foreign mercenaries, and tribal militias, some of which are associated with the suspected Libyan war criminal, Khalifa Haftar.¹⁴ Although most looting is perpetrated by opportunistic individuals seeking a profit, many extremist groups are likely to destroy archaeological and ethnological objects rather than sell them on the black market.¹⁵ Objects that are smuggled out of Libya typically leave the country via Egypt and Tunisia before appearing in European and American markets.¹⁶ In sum, the preservation of Libyan cultural heritage is very much in jeopardy, but it does not necessarily follow that the renewed MOU provides an appropriate mechanism to combat the problem.

2. *Are Less-Drastic Remedies Available?*

In considering whether or not to recommend the extension of the MOU, the Committee must review another determinant under the CCPIA, which is the availability of other existing (and less-drastic) remedies to address Libya's concerns.¹⁷ Indeed, there are several: the National Stolen Property Act, 18 U.S.C. §§ 2314-15 (containing civil and criminal forfeiture provisions); the Tariff Act of 1930, 19 U.S.C. §§ 1202-1683g (providing that imported items that are not declared, are improperly declared upon import, or are imported contrary to law may be subject to forfeiture); and seemingly endless state laws affording claimants the right to recover converted property, to name but a few. Perhaps most important, these are the laws that form the basis for most restitutions, not the MOU, thereby calling into question the efficacy of an MOU based on a forfeiture law that is rarely used.

¹² *The Need for Prosecuting*, *supra* note 9 at 57.

¹³ *The State of Illicit Trade and Looting*, *supra* note 5 at 19.

¹⁴ *The Need for Prosecuting*, *supra* note 9 at 56. Ansar al-Sharia appears on the Office of Foreign Assets Control's Specially Designated Nationals and Block Persons list, *available at* <https://www.treasury.gov/ofac/downloads/sdnlist.pdf>. Haftar's activities are well documented. *See, e.g.*, Guma el-Gamaty, *Militias and mercenaries: Haftar's army in Libya*, MIDDLE EAST EYE (Nov. 7, 2019), <http://www.middleeasteye.net/opinion/militias-and-mercenaries-haftars-army-libya>; Umar A. Farooq, *US judge recommends Libya's Khalifa Haftar be found liable for torture and war crimes*, MIDDLE EAST EYE (June 13, 2022), <http://www.middleeasteye.net/news/us-judge-libya-khalifa-haftar-torture-war-crimes>.

¹⁵ *Antiquities looting: an ongoing crisis as well as a shameful piece of history*, ART CRITIQUE (July 21, 2021), <https://www.art-critique.com/en/2021/07/antiquities-looting-an-ongoing-crisis-as-well-as-a-shameful-piece-of-history/>.

¹⁶ *The Need for Prosecuting*, *supra* note 9 at 8, 13.

¹⁷ 19 U.S.C. § 2602(a)(1)(C)(ii).

3. *Is Libya Taking Measures to Protect its Cultural Patrimony Consistent with the 1970 UNESCO Convention?*

Of the determinants under the CCPIA that the Committee must evaluate, Libya's performance in protecting its cultural patrimony weighs most heavily against a recommendation to renew the MOU. Libya has been plagued by internal divisions and intermittent civil war since 2011. Although efforts remain ongoing to create a unified, democratic governmental framework, Libya's political affairs "are currently dominated by armed factions, foreign governments, oil interests, smuggling syndicates, and other extrapolitical forces."¹⁸ Libya's citizens "have no role in political affairs," and are instead "subjected to violence and intimidation by . . . various armed groups."¹⁹ Such conditions offer few incentives to report destruction and looting, especially when committed by dangerous militias or terrorist-affiliated organizations.

Symptomatic of governmental instability is the lack of policing at ancient sites. The World Heritage site of Cyrene, for example, is defaced by graffiti and littered with trash.²⁰ The site lacks adequate protection by guards due to insufficient resources, which allows vandals and thieves to operate with impunity.²¹ Cultural-heritage sites and objects, including ancient relics of the Tuareg culture, are also targets of religious-extremist groups that view such works as anathemas meriting destruction.²² Other ancient sites have been caught in the crosshairs of armed conflicts, suffering from shrapnel and projectile damage as a result.²³ Still other destruction is attributable to unregulated urban growth, especially in eastern Libya.²⁴ The ancient settlement of Masa, for instance, was entirely destroyed to make way for a new subdivision of homes.²⁵ Although the developers responsible for this destruction were reportedly aware that their actions were prohibited under Libyan law, they harbored hope that "unanticipated discoveries during their unauthorized excavation [would] . . . help offset the costs of the project."²⁶ According to ASOR, the Libyan Department of Antiquities and local law-enforcement officials "currently lack the resources to adequately and independently monitor, record, and ultimately respond to and prevent these violations."²⁷

¹⁸ *Libya: Freedom in the World 2022*, FREEDOM HOUSE, <https://freedomhouse.org/country/libya/freedom-world/2022> (last visited July 14, 2022).

¹⁹ *Id.*

²⁰ *Libya's archaeological sites under threat – in pictures*, NATIONAL (Feb. 18, 20220), <https://www.thenationalnews.com/mena/2022/02/18/libyas-archaeological-sites-under-threat-in-pictures/>.

²¹ *Id.*

²² *Smuggling antiquities: A threat to strip away Libya's historical resources*, 218 NEWS (May 14, 2022), <https://en.218tv.net/2022/05/14/smuggling-antiquities-a-threat-to-strip-away-libyas-historical-resources/>.

²³ *Id.*

²⁴ *The State of Illicit Trade and Looting*, *supra* note 5 at 41.

²⁵ *The State of Illicit Trade and Looting*, *supra* note 5 at 24.

²⁶ *The State of Illicit Trade and Looting*, *supra* note 5 at 24.

²⁷ *The State of Illicit Trade and Looting*, *supra* note 5 at 24.

The apathy with respect to cultural-heritage preservation extends to the Public Prosecutors Office in Tripoli, which opened a mere 14 cases between 2013 and 2020 for violations of existing Libyan antiquities law.²⁸ According to ASOR, none of these cases have been tried.²⁹ The low priority placed on preservation may be attributable to government instability (recently evidenced by the abandonment of scheduled elections in December 2021), as well as chronic shortages of essential commodities, such as electricity, petroleum, and water.³⁰ The continued decline in living standards has sparked protests as recent as early July 2022.³¹

Although recent reports suggest that Libyan authorities are beginning to renew preservation efforts,³² at least one Department of Antiquities official acknowledged that “[t]he fate of antiquities in Libya is in fact unknown” because “[s]uccessive governments have neglected this sector while also failing to develop other vital sectors such as health or education.”³³ Libya’s recent history and current circumstances demonstrate that the government must stabilize before it can make material strides toward cultural-patrimony preservation. Until that time, Libya cannot satisfy all of the determinants under the CCPIA for the MOU’s renewal.

The issuance of the original emergency restrictions and the MOU was inconsistent with the CCPIA. While renewing the MOU may seem like a praiseworthy effort to protect the cultural heritage of Libya, doing so ignores the Congressional mandates set forth in the CCPIA and violates the delegation of authority to the President set forth in the CCPIA. What should have happened—and what can still happen—is a recommendation from this Committee to the State Department to pursue legislation to address the problem, exactly as was done with two other situations that bear striking similarities to Libya—Iraq³⁴ and Syria.³⁵ In both instances, Congress passed legislation to make the CCPIA import restrictions applicable to covered objects where the requirements of the CCPIA could not be met. Instead of torturing the CCPIA in order to achieve a desired result, thereby usurping the role of Congress, special legislation should be pursued to impose import restrictions on Libyan archaeological material—an opportunity for bipartisan action by Congress.

²⁸ *The State of Illicit Trade and Looting*, *supra* note 5 at 9.

²⁹ *The State of Illicit Trade and Looting*, *supra* note 5 at 9.

³⁰ *Libya’s new period of uncertainty*, INT’L INST. STRATEGIC STUD. (Mar. 2022), <https://www.iiss.org/publications/strategic-comments/2022/libyas-new-period-of-uncertainty>.

³¹ Kamel Abdallah, *Protests sweep Libya as political stalemate drags on*, AHRAM ONLINE (July 8, 2022), <https://english.ahram.org.eg/NewsContent/50/1203/471185/AIAhram-Weekly/World/Protests-sweep-Libya-as-political-stalemate-drags-.aspx>.

³² See Sghaier Hidri, *Libyan antiquities at risk from political instability, conflict*, AL-MONITOR (July 10, 2022), <https://www.al-monitor.com/originals/2022/07/libyan-antiquities-risk-political-instability-conflict> (reporting, for example, that the undersecretary of the Ministry of Local Government for Municipal Affairs recently met with a Department of Antiquities official to discuss the government’s plan to restore and maintain vandalized and neglected archaeological sites).

³³ *Id.*

³⁴ Emergency Protection for Iraqi Cultural Antiquities Act of 2004, Pub. L. No. 108-420, § 3001 *et seq.*, 118 Stat. 2594 (2004).

³⁵ Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, § 1 *et seq.*, 130 Stat. 370 (2016).

C. CCPIA's Limited Scope of Protections

Whether the Designated List accompanying the MOU complies with the plain language of the CCPIA should be moot, given that Libya is ineligible for an extension. If, nevertheless, the Committee resolves to recommend a renewal, then the Committee should narrow the Designated List so that it complies with the limits contemplated under the CCPIA.

The CCPIA provides that the United States may enter into or extend a bilateral agreement, like the MOU, with a foreign state that has adopted the 1970 UNESCO Convention and is requesting the imposition of United States import restrictions on certain archaeological or ethnological materials (*i.e.*, the Designated List) from the foreign state.³⁶ The CCPIA, in turn, charges the Committee with the responsibility of reviewing, evaluating, and making recommendations regarding such requests for import restrictions.

Archaeological materials are protected under the CCPIA if they are (a) of cultural significance; (b) at least 250 years old; and (c) typically discovered through scientific excavation, clandestine or accidental digging, or exploration on land or underwater.³⁷ The term “cultural significance” does not apply to all objects of a certain type or composition. The legislative history reveals that bilateral agreements under the CCPIA were intended to apply only to a “narrow range of objects possessing specific characteristics.”³⁸ Yet the MOU includes objects created, in some instances, over a period of more than *thirteen-thousand years*,³⁹ without any limitation as to archaeological sites, geographical location, or cultural identity. Although some contend that all archaeological material is of cultural significance, such a stance renders the limitation language of the CCPIA meaningless.

The limitations stated in the CCPIA and its legislative history are intended to preserve the delicate balance between the interests of the United States in supporting the international art market against situations where protection is required due to jeopardy from the pillage of archaeological and/or ethnological material. The practicalities of implementing the import restrictions outlined in a bilateral agreement provide a temptation not only to foreign states to request, but also for the Committee to approve, Designated Lists that outline overly broad categories of objects entitled to protections—as is clearly the case with Libya. Although broadly defined Designated Lists may streamline customs and border-patrol agents’ work, broad categories prevent such agents from making nuanced differentiations between legally and

³⁶ 19 U.S.C. § 2602(a)(2)(A), (e).

³⁷ 19 U.S.C. § 2601(2)(C)(i); *see also* ANN GUTHRIE & MARIA PAPAGEORGE KOUROUPAS, *Information on Convention on Cultural Property Implementation Act (PL 97-445) 2* (1985).

³⁸ S. REPORT NO. 97-564, at 4, (1982), *available at* <https://eca.state.gov/files/bureau/97-564.pdf> (“Only the term ‘archaeological or ethnological materials of the State Party’ requires fuller explication here. The Convention does not define these terms. The definition is intended by the committee to reflect the understanding of U.S. negotiators that the application of import restrictions under agreements entered into under **Section 203** or emergency actions taken under **Section 204** is limited to a narrow range of objects possessing certain characteristics.”) (original emphasis).

³⁹ The Designated List imposes blanket restrictions on archaeological material from 12,000 BCE to 1750 CE.

illegally imported objects. The CCPIA’s legislative history shows that Congress did not intend for Designated Lists to include sweeping categories of objects. For some time now, in contravention of the CCPIA, the Committee has recommended the acceptance of broadly defined Designated Lists. This is not what Congress intended.

D. Boilerplate Article II

The current MOU contains a “boilerplate” Article II. A boilerplate Article II, devoid of specifics, divorced from actual experience, cannot possibly foster the interchange of cultural property. Since approximately 2017, the State Department has approved MOUs that use certain standardized provisions. Troublingly, and despite the successful outcomes that tailored Article II provisions foster, the Committee has, the AAMD has been advised, adopted a policy of using standardized Article IIs. The adoption of boilerplate provisions in Article II is illogical for the simple reason that no two countries are alike. Each foreign state has its own history and cultural property and faces different threats to those materials and different interests from those in the U.S. for excavations, exhibition loans, scientific research, etc. Implementing the same Article II for Belize and Libya, for example, makes no logical sense, especially when considering the purpose of Article II.

What is undoubtedly an administrative convenience for the State Department as a result of current policy is a disservice to the American public and inconsistent with the CCPIA. Article II is comprised of “goals . . . contained in a special section of any agreement”⁴⁰ with programmatic elements meant to “open the way to improved and sustainable strategies for protecting a country’s national patrimony and making such patrimony accessible for,” among other things, cultural exchange.⁴¹ At least one former member of the Committee, Lothar van Falkenhausen, recognized that MOUs must be tailored to address a foreign state’s specific needs: he opined that each renewal request provides “an opportunity for recommending improvements in the form of amendments to the agreement”⁴² and that the MOUs are “tailored” to each country; indeed, “there are no boilerplate agreements here.”⁴³ Yet the State Department’s adoption of generic, boilerplate language in MOUs means that specific mandates regarding cultural-exchange practices,⁴⁴ as well as provisions regarding anti-looting measures⁴⁵—former mainstays of MOUs—have disappeared.

⁴⁰ Maria P. Kouroupas, *Combatting Cultural Property Looting and Trafficking: the US Experience*, 20 UNIF. L. REV. 528, 531 (2015), <https://academic.oup.com/ulr/article/20/4/528/2472097>.

⁴¹ *Id.* at 533.

⁴² See Lothar von Falkenhausen, *Trying to do the Right Thing to Protect the World’s Cultural Heritage: One Committee Member’s Tale*, in OBAMA AND TRANSNATIONAL AMERICAN STUDIES 375, 377 (Alfred Hornung ed., 2016).

⁴³ *Id.*

⁴⁴ John G. Roberts, *Memorandum for Fred F. Fielding; Ronald Reagan Presidential Library Digital Library Collections; Collection: Roberts, John G./Cultural Property Review Board (1 of 4); Box 15*, (1985).

⁴⁵ Kouroupas, *supra* note 40 at 533.

A “standardized” Article II fails to provide verifiable goals for the Committee and State Parties, preventing them from taking effective measures consistent with the MOU to protect their own cultural property and stop looting within their own borders. When a State Party requests an extension, the Committee lacks the criteria to evaluate performance without verifiable goals. By implementing a “standardized” Article II now, the Committee hinders its ability to carry out its responsibilities in the future. Specific goals can provide the Committee with criteria to evaluate Belize's performance under an extended MOU. As Congress specified, countries with an MOU must “take significant self-help measures”⁴⁶ to justify the imposition of import restrictions under the CCPIA. With evaluation criteria embedded in an extended MOU, the Committee can assess compliance with this Congressional objective as it applies to cultural exchange.

The AAMD has learned that the State Department has begun, at least in some recent cases, to create “action plans” that outline the cultural exchange goals that a foreign State Party to an MOU is expected to achieve. Among the countries for which action plans have been developed are Cambodia, Mali, and, of course, Libya. The action plans appear to provide the country-specific objectives outlined in Article IIs before 2017. How the action plans function, *i.e.*, whether they are part of the MOU and “binding” on the relevant State Parties, is unclear. The absence of clarity regarding the action plans extends to the fact that they are not widely accessible; for instance, they are not posted on the Committee’s website alongside the MOUs and the Designated Lists. The AAMD continues to request additional information from the Committee regarding the function of action plans, specifically whether they serve as a substitute for country-specific, custom-tailored Article IIs and whether they carry the same weight as Article II.

If such action plans carry the same weight as tailored Article IIs, then the AAMD does not oppose developing an action plan for Libya (provided that the Committee resolves to recommend the MOU’s extension) that incorporates the recommendations outlined in this Statement. All action plans, whether for Libya or any other State Party, should be made publicly accessible in the same manner as MOUs and Designated Lists and should be at least referenced, if not incorporated, in the MOU so as to have a legal basis for review. The question still remains, if such action plans are equivalent to Article II, why have a separate action plan and a generic Article II?

III. Conclusion

The issues Libya currently faces regarding protecting its cultural heritage do not appear to be among those an MOU can address, at least not until a stable government is installed for a reasonable period of time. Should the Committee determine nevertheless that the MOU with Libya should be extended, (1) the objects protected under the extended MOU should be limited to those archaeological and ethnological objects that meet the requirements for protection under the CCPIA; (2) the MOU should not contain the boilerplate Article II; and (3) the Designated List should be revised and appropriately tailored to encompass only archaeological and ethnological material currently under threat.

⁴⁶ Kate Fitz Gibbon, *Congress Holds CPAC Accountable*, CULTURAL PROP. NEWS (July 25, 2017), <https://culturalpropertynews.org/congress-holds-cpac-accountable/>.

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The Association of Art Museum Directors (AAMD), established in 1916, is a professional organization of approximately 240 directors of major art museums throughout the United States, Canada, and Mexico. The purpose of the AAMD is to support its members in increasing the contribution of art museums to society. The AAMD accomplishes this mission by establishing and maintaining the highest standards of professional practice, serving as a forum for the exchange of information and ideas, acting as an advocate for its member art museums, and being a leader in shaping public discourse about the arts community and the role of art in society.