

**Statement of the Association of Art Museum Directors Concerning the Request from the Government of Libya to the Government of the United States of America under Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property**

**Meeting of the Cultural Property Advisory Committee**

**July 19, 2017**

**I. Introduction**

The Association of Art Museum Directors (the “AAMD”) respectfully submits this statement for consideration by the Cultural Property Advisory Committee (the “Committee”) in connection with the request from the Government of Libya (“Libya”) to the Government of the United States of America for the imposition of import restrictions on archaeological and ethnological materials (the “Request”) representing Libyan cultural patrimony from the prehistoric to the Ottoman period under Article 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership (the “Convention”).

**II. Public Comment**

On June 16, 2017, the Cultural Heritage Center published a notice of the Request in the Federal Register.<sup>1</sup> The notice was so vague, however, that one could not reasonably discern whether the Committee would solicit written comments from the public, let alone convene an open session for the public to attend and offer oral commentary.

On July 3, 2017, the Department of State issued a notice of a Committee meeting on July 19 and 20, 2017, in order to consider the Request and further required that any written comments with respect to the Request must be filed by July 10, 2017—*a mere seven days after publishing the notice, including a federal holiday, July 4, 2017.*<sup>2</sup> The uncharacteristic (and indeed unseemly) haste with which the Committee intends to consider the Request, coupled with the lack of reasonable notice to the public severely impedes a fulsome review of the Request and compromises the Committee’s long-standing, historic welcoming of meaningful public commentary.<sup>3</sup> Particularly considering the magnitude of the Request, vetting it in this abbreviated fashion could compromise ever-important public trust in the Committee and its mission. Nor can the truncated time for comment be justified on the grounds of imminent, newfound, threats to Libya’s cultural heritage. By Libya’s own admission, the “threats” have existed for at least the last six years and in some instances for decades. By virtue of this truncated schedule, no reasonable opportunity exists for providing valuable information to the

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<sup>1</sup> Public Notice 10039, Federal Register, Vol. 82, No. 115 (June 16, 2017), 27755.

<sup>2</sup> Public Notice 10052, Federal Register, Vol. 83, No. 126 (July 4, 2017), 30936.

<sup>3</sup> For the sake of perspective, the last time a state party (Egypt) made an *initial* request for import restrictions, as opposed to a request to amend or extend an existing bilateral agreement, it took over two-and-a-half years to review, refine, and recommend the request.

Committee regarding the Request, including that of museum and other cultural heritage experts, who regularly interact with archaeologists and other government officials in Libya.

### III. Executive Summary

The Committee should not recommend any memorandum of understanding (“MOU”) with Libya (or emergency restrictions) at this time. Libya does not meet the criteria for an MOU or emergency restrictions, as required under the Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (the “CPIA”).<sup>4</sup>

Simply put, the scope of the Request is nothing short of vast; and granting it would strain, if not shatter, credulity. In order to qualify for protection under the CPIA, among other things, archaeological materials must be of “cultural significance.”<sup>5</sup> Yet Libya seeks to protect a wide array of archaeological material including “stone, metal, ceramic and clay, glass, faience, and semi-precious stone, mosaic, painting, plaster, textile, basketry, rope, bone, ivory, shell and other organics” from *12000 B.C. to 1750 A.D.*<sup>6</sup> The immense scope of archaeological material falling within the Request eradicates any notion of protecting only “culturally significant” items, while correspondingly providing little-to-no guidance for meaningful public commentary.

Similarly, in order to qualify for protection under the CPIA, among other things, ethnological material must have “distinctive characteristics,” be of “comparative rarity” or contribute “to the knowledge of the origins, development, or history.”<sup>7</sup> Yet Libya seeks to protect ethnological material in stone, metal, ceramic and clay, wood, bone and ivory, glass, textile, basketry and rope, leather and parchment, and writing from the period 1551 to 1911 A.D. As pointed out several times in previous submissions to this Committee, the CPIA’s legislative history plainly reflects that Congress intended it to apply ONLY to a “narrow range of objects possessing certain characteristics.”<sup>8</sup> Without exaggeration, the plain language of the Request seeks protection not only of potentially genuine ethnological material, but also of the most common and fungible early 20<sup>th</sup> Century items, such as glasses, plates, and furniture.

The scope of the Request alone warrants its denial, yet without prejudice to Libya submitting a more reasonably tailored proposal to the United States at any point in the future. Approving the Request, by contrast, would altogether disregard the delicate balance underlying

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<sup>4</sup> Unless otherwise noted, all “Section” references herein are to the CPIA.

<sup>5</sup> 19 U.S.C. § 2601(2)(c)(i)(I).

<sup>6</sup> Public Summary, Request by the Government of Libya to the Government of the United States of America for Imposing Import Restrictions to Protect its Cultural Patrimony under Article 9 of the UNESCO Convention (1970), [https://eca.state.gov/files/bureau/libya\\_request\\_public\\_summary.pdf](https://eca.state.gov/files/bureau/libya_request_public_summary.pdf) .

<sup>7</sup> 19 U.S.C. § 2601(2)(c)(ii)(II).

<sup>8</sup> “Implementing Legislation for the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property,” U.S. Senate Report 97-564 (Washington, D.C.: U.S. Senate 1982, 4, <http://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 this term[ ]. 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” (Ibid, 4). A copy of the report can be found at the following link: <https://eca.state.gov/files/bureau/97-564.pdf> (accessed July 10, 2017).

the CPIA: to give protection where and to the extent protection is due, yet protect and encourage the legitimate exchange of cultural property.

#### IV. The Libyan Request Fails to Meet Any of the Required Determinants

In order to recommend the Request be approved, the Committee must expressly find that four determinants (one with two subsections) under the CPIA are met.

A. Libya's cultural patrimony must be in jeopardy from the pillage of its archaeological or ethnological materials.<sup>9</sup>

Libya does not satisfy the first determinant if only because the public summary of the Request, on its face, contains not one concrete example of pillage, but rather sweeping generalizations regarding a professed problem. Like any region of historic significance, Libya undoubtedly experiences a measure of pillage; however, the question is whether such pillage genuinely places its cultural patrimony in jeopardy. One measure of jeopardy is the extent to which there are verified instances of pillage due to theft or plunder. During the abbreviated review and comment period afforded to the public, however, the AAMD has been unable to determine the true scope of pillage in this regard. For example, Interpol shows 64 statues reported as missing, as well as 11 paintings, 4 miscellaneous items (3 cinerary jars and a plaque), 13 gold/silverware, and 34 ancient stones.<sup>10</sup> While theft and looting of any kind cannot and should not be endorsed or overlooked, these instances, individually or collectively, do not reflect cultural patrimony in genuine jeopardy.

Further, the Libyan government itself has denied that pillaging exists at some of the most important and sensitive sites. When UNESCO put Leptis Magna on the Heritage in Danger List, Libya's Antiquities Department (the "DoA") asserted that such categorization was inappropriate and "baseless" because "the city is totally secure."<sup>11</sup> In fact, this DoA representative questioned placing all five Libyan World Heritage Sites on the danger list, adding that "the ancient city of Sabratha and the old Town of Ghadamès . . . are in good condition."<sup>12</sup>

B. Libya must have taken measures consistent with the Convention to protect its cultural patrimony.<sup>13</sup>

Of all the determinants, this one weighs most heavily against granting the Request. In the wake of the 2011 civil war, Libya has at least two, potentially *three*, governments and any

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<sup>9</sup> 19 U.S.C. § 2602(a)(1)(A).

<sup>10</sup> A sampling of the most popular categories was performed using Interpol's Stolen Work of Arts Database (July 6, 2017). There were no religious items, documents/books, stamps, mosaics, or tapestries reported.

<sup>11</sup> Abdullah Ben Ibrahim, "Libya's Antiquities Department Refutes UNESCO Report on Leptis Magna," Libya Observer (August 7, 2016), <https://www.libyaobserver.ly/culture/libyas-antiquities-department-refutes-unesco-report-lepits-magna>.

<sup>12</sup> Ibid. Also see Safa Alharathy, "Libya Rejects UNESCO's Decision to place Five Sites on Endangered List," Libya Observer (June 11, 2017), <https://www.libyaobserver.ly/culture/libya-rejects-unesco%E2%80%99s-decision-place-five-sites-endangered-list>.

<sup>13</sup> 19 U.S.C. § 2602(a)(1)(B).

number of militia-controlled sub-governments.<sup>14</sup> In 2014, the Ministry of Culture and Civil Society “was disbanded for budgetary reasons.”<sup>15</sup> According to Susan Kane, writing in 2015, “at the current time, there are two Departments of Antiquities, one in the Tripolitania and one in Cyrenaica, who report to two different ‘governments.’ It is unclear if there is any ministerial oversight of either department.”<sup>16</sup> The exact government making the Request on behalf of Libya is not expressly disclosed in the public summary of the Request, but presumably, it is by the government recognized in the City of Tripoli. This government, however, controls nothing more than a strip of Libya’s coast.<sup>17</sup> Its control appears dwarfed by other governmental factions, including those controlled by or affiliated with ISIS.<sup>18</sup>

Consequently, the Committee cannot conclude with any reasonable degree of certainty that Libya has taken or can take future steps to protect its cultural patrimony when the very governmental party presumably advancing the Request on behalf of Libya truly does not appear to control the State Party itself.

The troublesome effects of Libya’s continuing inter-governmental power struggles are widely recognized within Libya. For example, Ramadan al-Shibani, head of the technical department at the Tripoli Archaeology Directorate stated that “Without an effective government locals can destroy archaeological sites by accident, by building without permission” even “rebuild[ing] homes by raiding stones from ancient monuments’.”<sup>19</sup> Preservation of sites is threatened by political chaos<sup>20</sup>—the ill-effects of having no one central government but rather two or three plus various tribal and militia factions that have resulted in “a lawless state.”<sup>21</sup> It is the “unmanaged, unregulated development and civil disorder”<sup>22</sup> that is the real threat. In fact, since 2011, Libya has struggled with the challenge of building a new country with no constitution, no clearly operating legal system, no defined property rights,<sup>23</sup> and no organized police force<sup>24</sup> – “a major land-grab is underway ... causing more damage to archaeological sites

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<sup>14</sup> See for example, Christopher M. Blanchard, *Libya: Transition and U.S. Policy*, Congressional Research Service (March 29, 2017), <https://fas.org/sgp/crs/row/RL33142.pdf>; *Libya: World Report 2017*, Human Rights Watch, <https://www.hrw.org/world-report/2017/country-chapters/libya>; and Emily Estelle, “Fighting Forces in Libya,” *Critical Threats*, January 18, 2017, <https://www.criticalthreats.org/analysis/fighting-forces-in-libya-january-2017>.

<sup>15</sup> Susan Kane, “Archaeology and Cultural Heritage in Post-Revolution Libya,” *North Eastern Archaeology*, 78:3 (September 2015), 206, <http://www.jstor.org.ezphost.dur.ac.uk/stable/10.5615/neareastarch.78.3.0204>.

<sup>16</sup> *Ibid.*

<sup>17</sup> Christopher M. Blanchard.

<sup>18</sup> *Ibid.* See also “Fighting Forces in Libya.”

<sup>19</sup> Nick Miller, “Protecting Antiquities in Syria and Libya from the Islamic State,” *The Sydney Morning Herald* (September 4, 2016), <http://www.smh.com.au/world/antiquities-syria-libya-seo-here-20160901-gr6mfh.html>.

<sup>20</sup> Aidan Lewis, “Libya’s Ancient Sites not exposed to the Same Risk as in Syria, Libya – Experts,” *Reuters* (May 11, 2016), <http://uk.reuters.com/article/uk-libya-security-culture-idUKKCN0Y22FA>.

<sup>21</sup> Nick Miller.

<sup>22</sup> Susan Kane and Sam Carrier, “Archaeological and Cultural Heritage in the New Libya” *ASOR Blog* (2013), <http://asorblog.org/2013/10/09/archaeology-and-cultural-heritage-in-the-new-libya/>.

<sup>23</sup> For a discussion on this topic, see Mary Fitzgerald and Tarek Megerisi, “Libya: Whose Land is it?” *Legatum Institute* (April 16, 2015), <http://www.li.com/events/libya-whose-land-is-it>.

<sup>24</sup> Susan Kane, “Archaeology and Cultural Heritage in Post-Revolution Libya,” 204-5.

than the events that occurred in 2011.”<sup>25</sup> Now, in the wake of this internal chaos, the Committee is being asked to establish the U.S. Customs and Border Patrol as the *de facto* Libyan police force to interdict what Libya itself cannot or will not protect – this was *never* the purpose of the CPIA.

A 2013 conference sponsored by the World Bank and the one of the Departments of Archaeology in Libya revealed several disturbing specifics with respect to the decay of Libyan cultural heritage sites.<sup>26</sup> These include:

- litter pollution on all archaeological sites;
- sewage pollution;
- houses built even within the most sensitive archaeological areas;
- large scale development uncomfortably close to ancient centers like Apollonia, Ptolemais, and even Leptis Manga – with an attempt to build a coastal highway across the site of Ptolemais;
- lack of fencing and security on most sites;
- uncontrolled vegetation cover;
- use of sensitive parts of sites for animal husbandry; and
- a general lack of maintenance and restoration.<sup>27</sup>

There are even reports of land that was supposed to be included in the core of the World Heritage Site located in Cyrene being completely bulldozed.<sup>28</sup> None of the above qualifies as “pillage,” but they do demonstrate the absence of government control, which absence U.S. import restrictions cannot rectify.

Though Libya received and continues to receive support from UNESCO, Libya acknowledges the assistance is insufficient, yet contemporaneously fails to further its cause with UNESCO by declining to send representatives to meetings and failing to submit required or requested reports.<sup>29</sup>

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<sup>25</sup> Susan Kane and Sam Carrier. *See also* Susan Kane, “Archaeology and Cultural Heritage in Post-Revolution Libya,” 205.

<sup>26</sup> “Libyan Heritage in the Digital Age, the First Step,” A Workshop at the Museum of Libya, Tripoli (February 10-13, 2013), sponsored by The World Bank (Multi-Donor Trust Fund for Cultural Heritage and Sustainable Tourism) and The Department of Archaeology, Libya, [http://www.docartis.com/pagina2/Libia/Hafed%20Walda/hafed\\_walda-Lecture.pdf](http://www.docartis.com/pagina2/Libia/Hafed%20Walda/hafed_walda-Lecture.pdf) .

<sup>27</sup> Ibid.

<sup>28</sup> Susan Kane and Sam Carrier.

<sup>29</sup> Libya did not file the two required reports under the Convention nor did they timely provide or file conservation information for sites now listed as World Heritage in Danger.

A truly impartial evaluation of Libya’s inter-governmental power struggles and overall inability (and in some instances outright refusal) to protect its cultural patrimony leads to but one reasonable conclusion: Libya does not satisfy the second determinate under the CPIA and, therefore, the Committee cannot reasonably recommend that the United States approve the Request or enter into a corresponding MOU.

C. The application of the import restrictions . . . with respect to archaeological or ethnological material of Libya, applied in concert with similar restrictions implemented, or to be implemented within a reasonable period of time, by those nations . . . having a significant import trade in such material, would be of substantial benefit in deterring the serious situation of pillage.<sup>30</sup>

The Request suggests that the United States represents an overwhelming market for Libyan “pillaged” antiquities. During the extremely abbreviated time period afforded to review, consider, and test the validity of the assertions in the Request, the AAMD has been unable to conclude that there is significant import trade in the United States for Libyan archaeological or ethnological material. Further, the evidence as provided by Libya consists of merely “15 sculptures known to have come from Cyrene . . . sold in the United States between 2007 and 2014”<sup>31</sup> plus some other artifacts. Setting aside the fact that the Request does not suggest that any of these works were looted, fifteen sculptures sold over the course of seven years does not constitute significant import trade. The Request similarly provides no information with respect to other nations purportedly having a significant import trade in Libyan cultural property, the extent to which such trade is illicit, or the extent to which restrictions similar to those proposed in the Request have been or will be implemented within a reasonable period of time by those other countries.

D. Remedies less drastic than the proposed import restrictions are unavailable.<sup>32</sup>

If Libya’s argument is that official sites are being pillaged, there are ample remedies in place to stop pillaged objects at the U.S. border, seize and return them to Libya without any MOU or emergency restrictions, including Section 2607 of the CPIA, the National Stolen Property Act (18 U.S.C. §§ 2314, 2315), and customs laws (*e.g.*, 19 U.S.C. §1595a).

E. Import restrictions are consistent with the general interest of the international community and the interchange of cultural property.<sup>33</sup>

According to Libya, its cultural property is safer in Libyan museums than it would be on exhibition or long-term loan to American institutions.<sup>34</sup> This sentiment does not reflect a state

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<sup>30</sup> 19 U.S.C. § 2602(c)(i) (*emphasis added*).

<sup>31</sup> Public Summary, Request by the Government of Libya to the Government of the United States of America for Imposing Import Restrictions to Protect its Cultural Patrimony under Article 9 of the UNESCO Convention (1970), [https://eca.state.gov/files/bureau/libya\\_request\\_public\\_summary.pdf](https://eca.state.gov/files/bureau/libya_request_public_summary.pdf).

<sup>32</sup> 19 U.S.C. § 2602(c)(ii).

<sup>33</sup> 19 U.S.C. § 2602(a)(1)(D).

party amenable to fostering interchange of cultural property with other state parties or otherwise. Moreover, Libya is closed to tourists (Libya currently does not issue tourist visas), has no cultural management system in place, no secure police force, and all of the museums in the country are closed.<sup>35</sup>

Under the circumstances, the Request appears to be somewhat of a ruse; a calculated attempt to exploit the Convention and CPIA for purposes of *sequestering* Libyan cultural heritage, rather than encouraging its interchange for the benefit of the international community, including United States citizens. Nothing precludes Libya from making loans of its museum property to American institutions, and nothing would help to demonstrate the issues taking place in Libya better than such a cultural exchange.

#### F. Libya fails to meet the determinants.

Because Libya does not satisfy the statutorily required prerequisites for imposing import restrictions, the Request should be denied. Libya should instead be encouraged to resubmit a more fulsome Request demonstrating and substantiating how each of the determinants is satisfied, and the general public should be afforded a reasonable opportunity to review, test, and comment on such submission. In the alternative, if those at the State Department who believe that import restrictions should be imposed (and who apparently drafted the Request) wish to pursue import restrictions, they should follow the example of the United States response to the situations in Iraq and Syria (without suggesting that the facts are the same) and make their case to Congress, not to the President through the Committee. If such a course of action is pursued, then Congress should also follow the example of the Syrian legislation<sup>36</sup> and create an exception for safe havens in the United States. This would allow great works to be protected and preserved from the possibilities of looting and destruction. The alternative, as suggested by the Request, is simply to sequester the works in Libya where they are prey to the competing factions and governments.

#### V. **Emergency Conditions Do Not Exist**

If the Committee determines to explore emergency restrictions under Section 2603 as an alternative to an MOU under Section 2602, such restrictions are unsupported. The Request is devoid of any mention of whether an “emergency condition” exists, and it is incumbent upon *Libya*, as the requesting state party, to provide information supporting such a determination.<sup>37</sup> Among other things, there is no proof of *newly discovered material* important for understanding the history of humankind.<sup>38</sup> There is no mention of material coming from any site recognized to be of high cultural significance and jeopardized by pillage, dismantling, dispersal, or

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<sup>34</sup> Public summary of Request at 7-8 (describing dwindling efforts to promote interchange of cultural property). See also Tim Cornwell, “Looters Exploit the Political Chaos in Libya,” *The Art Newspaper* (October 26, 2016), <http://theartnewspaper.com/news/looters-exploit-the-political-chaos-in-libya/> (denoting that museums, though closed, are secure).

<sup>35</sup> Susan Kane and Sam Carrier; see *also* public summary of Request at 4 (acknowledging closure of all museums).

<sup>36</sup> Pub. L. 114-151.

<sup>37</sup> 19 U.S.C. §2603(c)(1).

<sup>38</sup> 19 U.S.C. §2603(a)(1).

fragmentation of *crisis proportions*.<sup>39</sup> There is no proof that the record of Libya's culture or civilization is jeopardized by pillage, dismantling, dispersal, or fragmentation which is, or threatens to be, of *crisis proportions*.<sup>40</sup> Libya's museum collections are indeed secure,<sup>41</sup> as acknowledged by a spokesperson for the International Council of Museums.<sup>42</sup> Moreover, much of the Request seems to be driven by political instability stemming directly from the 2011 civil war. There nevertheless is an inverse relationship between the passage of time and the genuineness of an emergency. If an emergency condition ever existed in Libya, then it existed six years ago, and there simply is no explanation for Libya's delay in seeking relief under the CPIA due to any such condition.

## VI. Conclusion

For all of the reasons above, the Request should be denied. Alternatively, the Request should be removed from the Committee's July 19, 2017, agenda and placed on a future agenda that affords substantially more time for consideration and comment by the general public, as would be consistent with historic Committee practice. Doing so will only enhance the Committee's ability to prepare, substantiate, and defend its ultimate report and recommendation to the President.

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The AAMD is a professional organization consisting 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.

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<sup>39</sup> 19 U.S.C. §2603(a)(2).

<sup>40</sup> 19 U.S.C. §2603(a)(3).

<sup>41</sup> Public summary of Request at 4.

<sup>42</sup> Tim Cornwell.