

## COMMITTEE FOR CULTURAL POLICY REPORT:

### CULTURAL PROPERTY AGREEMENTS AND THE RIGHTS OF ETHNIC MINORITIES IN THE MIDDLE EAST<sup>1</sup>

#### A DISTURBING PATTERN OF MOUS: IRAQ, SYRIA, EGYPT, LIBYA, and NEXT YEMEN?

In February 2018, the International Council of Museums (ICOM), with the support of the United States Department of State, published the “Emergency Red List of Cultural Objects at Risk for Yemen.”<sup>2</sup> The list covers a broad range of Yemeni objects that, because of recent political turmoil, are said to be at risk of being illegally trafficked.

The U.S. State Department funded, produced, and partnered with ICOM in creating the Yemen Red List. In the past, the issuance of a Red List has often been a precursor to execution of an agreement with the United States on cultural property under the 1983 Convention on Cultural Property Implementation Act. It seems likely that Yemen will soon seek a Memorandum of Understanding (“MOU”) or other emergency import restrictions to specifically prohibit the import of Yemeni antiquities into the U.S.<sup>3</sup> Four other Arab nations experiencing political or military crises have done the very same: Iraq, Egypt, Libya, and Syria have all been granted practically all-encompassing import restrictions on their state-designated antiquities in light of social-political upheaval within their borders.

But granting an MOU to Yemen would continue a disturbing pattern of unduly comprehensive import restrictions with Middle Eastern nations under the Convention on Cultural Property Implementation Act. The restrictions exclusively benefit the States’ governments and their self-directed property claims over cultural and religious artifacts—at the expense of the ownership rights and basic human rights of individuals in minority populations. They have an especially devastating impact on the countries’ Jewish communities, which were forcibly expelled and their property confiscated by each of these States’ governments in the mid-twentieth century.

Other minority religious and ethnic groups have fared little better in the last decade of conflict in the Middle East. In Iraq, for example, Kurdish, Christian, and Yezidi minorities were

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<sup>1</sup> Copyright The Committee for Cultural Policy, Inc. Contributing CCP staff included Katherine Brennan and Kate Fitz Gibbon.

<sup>2</sup> *Emergency Red List of Cultural Objects at Risk for Yemen*, ICOM [http://icom.museum/fileadmin/user\\_upload/images/Redlists/Yemen/RL\\_YEMEN\\_EN\\_Pages.pdf](http://icom.museum/fileadmin/user_upload/images/Redlists/Yemen/RL_YEMEN_EN_Pages.pdf)

<sup>3</sup> Yemen Claims Jewish Religious Artifacts, *Cultural Property News*, <https://culturalpropertynews.org/yemen-red-list-includes-jewish-religious-artifacts/>.

subject to violence amounting to genocide, according to Secretary of State John Kerry in 2016, in regions held by Da'esh (ISIS).<sup>4</sup> However, even after elimination of Da'esh in most of Iraq, the Iraqi government continued to turn a blind eye to many arbitrary and unlawful killings, rapes, and seizures of property perpetrated on minority groups by government forces, militias, and police.<sup>5</sup> The most well-protected urban areas are not immune. In July 2016, “religious leaders, members of parliament, and Baghdad-based judges said that some political parties sanctioned criminal networks seizing Christian property” in Baghdad itself.<sup>6</sup>

The pervasive pattern of abuse of both human and property rights of religious and ethnic minorities in the Middle East raises serious questions about the protection of minority interests within the nationalist framework of cultural policy today. The inability – or unwillingness – of state actors to protect cultural interests outside of their own immediate political interest is too frequent to ignore. The devastation in the Middle East not only highlights the failure of the 1970 UNESCO Convention to ensure the protection of global cultural heritage after almost 50 years, despite its adoption by hundreds of nation states. It also makes a compelling argument for embracing broader concepts of global stewardship and international protection of heritage as a more workable approach to halting destruction in war and civil crisis, and to preserving mankind’s achievements for the future.<sup>7</sup>

## **THE 1983 CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT**

In 1983, Congress enacted the Convention on Cultural Property Implementation Act,<sup>8</sup> (“CPIA”), 19 U.S.C. § 2601–2613, to implement the United States’ ratification of two articles of 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property to preserve at-risk archaeological sites and encourage the international exchange of cultural artifacts.

Under Section 2602 of the CPIA, the United States may place import restrictions on the cultural property of a requesting foreign State, whether by a bilateral Memorandum of Understanding or in some

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<sup>4</sup> *Iraq 2016 Human Rights Report*, updated 3/29/17, United States Department of State, Bureau of Democracy, Human Rights and Labor, at 3, <https://www.state.gov/documents/organization/265710.pdf>

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 61.

<sup>7</sup> Thomas G. Weiss and Nina Connelly, *Cultural Cleansing and Mass Atrocities: Protecting Cultural Heritage in Armed Conflict Zones*, J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy, No. 1, 2017, [http://www.getty.edu/publications/pdfs/CulturalCleansing\\_Weiss\\_Connelly.pdf](http://www.getty.edu/publications/pdfs/CulturalCleansing_Weiss_Connelly.pdf).

<sup>8</sup> 19 U.S.C. §§ 2601–2613.

cases by unilaterally imposing emergency import restrictions, based upon Article 9 of the 1970 Convention. Import restrictions may be applied only if four parameters are met.<sup>9</sup>

First, the President must determine that the cultural patrimony of the State Party is in jeopardy from pillage. Second, the State Party must have taken measures on its own consistent with the Convention to protect its cultural patrimony. Third, implementation of the import restrictions must be in concert with “similar restrictions implemented or to be implemented within a reasonable period of time, by those nations (whether or not State Parties) individually having a significant import trade in such material” and such restrictions “would be of substantial benefit in deterring a serious situation of pillage.” Finally, application of United States import restrictions must be consistent with the general interest of the international community in the interchange of cultural property among nations.<sup>10</sup>

The protected “archaeological materials” are defined by the CPIA to encompass any object of archaeological interest first discovered within and subject to the export controls by the State Party, that are of cultural significance, at least 250 years old, and discovered as a result of scientific excavation, clandestine digging, or exploration on land or water.<sup>11</sup>

On the other hand, “ethnological materials” are defined broadly to include any object of ethnological interest first discovered within and subject to export controls by the State Party. . . that is “important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or contribution to the knowledge of origins, development or history of that people.”<sup>12</sup>

The U.S., on the recommendation of the Cultural Property Advisory Committee (CPAC), may unilaterally impose “Emergency Restrictions” if the State party submits a request to the committee outlining that the State’s archaeological and ethnological materials are in jeopardy and that the four requirements that the President must consider are met.<sup>13</sup>

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<sup>9</sup> “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.” Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 1970, Art. 9 (UNESCO).

<sup>10</sup> 19 U.S.C. § 2602(a)(1)(A)–(D).

<sup>11</sup> 19 U.S.C. § 2601(2)(i).

<sup>12</sup> *Id.* at §2601(2)(ii).

<sup>13</sup> 19 U.S.C. §2602 (f). See also William G. Pearlstein, *Buying and Selling Antiquities in Today’s Market*, 3 *Spencer’s Art L. J.* (2012) <http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal-7-17-12.asp#pearlstein>.

“Source countries,” or countries with a rich history of archaeological or ethnological materials found within their borders, have enacted legislation throughout the twentieth century that place blanket prohibitions on the export of cultural artifacts found within the country. In many, if not most cases, nations that enact export restrictions apply them to virtually all objects of 100 years of age – sometimes even less. (For example, Libyan law makes documents of all kinds over 50 years old subject to State ownership.<sup>14</sup>) These restricted objects often include not only ancient and archaeological materials, but also scientific floral, animal, mineral and fossil samples, books, historical papers, coins, currency, furniture, and even postage stamps.<sup>15</sup>

Some countries with comprehensive export restrictions have recently experienced violent socio-political upheaval and widely publicized looting and destruction of cultural property within their own countries. Articles in the international press, many now recognized as wildly exaggerated,<sup>16</sup> have repeatedly reported that terrorist organizations like ISIS profit extensively from the international trafficking and sale of antiquities.<sup>17</sup>

These Middle Eastern States in conflict have looked to market nations, particularly the United States, to enforce import restrictions on the import on *any* cultural property on comprehensive “designated lists” of objects. The false emphasis on a supposed major market for looted activities has resulted in giving import restrictions priority over any other forms of ameliorative activity. The temporary safe harbor offered by U.S. and European museums for objects during war and civil crisis, for example, has been largely ignored. So have concerns

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<sup>14</sup> *Law Concerning Archaeological Monuments, Museums, and Documents*, Libyan Arab Jamahiriya. Law No. 2 (March 3, 1983) Art. 1 (third).

<sup>15</sup> Import restriction legislation in signatory State Parties often utilize the broadest possible definition of “cultural property” in the 1970 UNESCO Convention, although the convention itself states that the term “cultural property” is whatever is “specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science,” and then goes on to list categories of tangible property. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 1970, Art. 1 (UNESCO).

<sup>16</sup> Katherine Brennan and Kate Fitz Gibbon, *Bearing False Witness: The Media, ISIS, and Antiquities*, Committee for Cultural Policy, (Dec. 1, 2017) <https://committeeforculturalpolicy.org/wp-content/uploads/2017/12/CCP-Bearing-False-Witness-The-Media-ISIS-and-Antiquities-2.pdf>; Michael Press, *How Antiquities Have Been Weaponized in the Struggle to Preserve Culture*, Hyperallergic (Dec. 7, 2017), <https://hyperallergic.com/415471/how-antiquities-have-been-weaponized-in-the-struggle-to-preserve-culture/>

<sup>17</sup> Following a more than 5-year dearth of seizures in US or Europe of looted items from conflict-territory, two 31-year-old art dealers from Spain were arrested in March 2018, and the arrest was said to be a “smoking gun” linking antiquity sales to terrorism. Georgi Kantchev, *Suspected Traders of Ancient Art Linked to Islamic State Are Detained*, Wall Street Journal, March 29, 2018) <https://www.wsj.com/articles/spanish-police-detain-two-men-suspected-of-selling-antiquities-linked-to-islamic-state-1522327053>. Compare a well-researched report from the perspective of Syrian subsistence diggers, which analyses theft and trafficking of cultural objects. See Neil Brodie and Isber Sabrine, *The Illegal Excavation and Trade of Syrian Cultural Objects: A View from the Ground*. <https://www.tandfonline.com/doi/full/10.1080/00934690.2017.1410919?scroll=top&needAccess=true&>

about government forces themselves taking part in looting and in targeting historical monuments and sites.

In addition, the broad and inclusive language of these MOUs, import restrictions, and Designated Lists of protected objects have resulted in all-encompassing embargos on nearly all cultural property that could be sourced from one of these States, whether that State has a rightful property claim to it or not.<sup>18</sup> As can be seen in the import restrictions imposed for countries such as Libya or Syria, the category of “ethnological materials” in an import restriction can be used to encompass almost any object of cultural value, including extremely common objects, made for trade as recently as the early 20<sup>th</sup> century, whether that object is specifically culturally relevant to the country of origin, or a true ownership right on the part of the government exists.

## HUMAN RIGHTS AND OVER-BROAD CULTURAL PROPERTY DEFINITIONS

The Designated Lists of restricted objects for Iraq, Syria, Libya, and Egypt all state the purpose of the United States’ implementation of the CPIA as “preserving cultural treasures that are of importance to nations from which they originate” and achieving a “greater international understanding of our [alternatively mankind’s] common heritage.”<sup>19</sup>

This is, of course, a worthy goal—if application of this goal was not so difficult to reconcile with traditional notions of culture, property rights, and human rights—or to reconcile the content of existing MOUs with the very requirements of the CPIA itself. The fourth requirement of the CPIA states that import restrictions on cultural property must be “consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.”<sup>20</sup>

We must then ask: what is the “general interest of the international community in the interchange of cultural property” that the CPIA requires CPAC to consider?

To some scholars, the 1970 UNESCO Convention “globalized the concept that cultural property is worth protection on moral, not just economic, grounds.”<sup>21</sup> Several scholars have noted that the protection of human rights is one of the central tenets of international art law.<sup>22</sup>

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<sup>18</sup> Channah Farber, *CPIA* (2018) (on file with author).

<sup>19</sup> See e.g. Executive Order 13350 (2005); Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq, 73 FR 23,334 (Apr. 30, 2008) (19 C.F.R. 12).

<sup>20</sup> 19 U.S.C. § 2602(a)(1)(D).

<sup>21</sup> Kimberly L. Alderman, *The Human Right to Cultural Property*, 20 Mich. State Int’l L. Rev. 69, 74 (2011).

<sup>22</sup> Erik Jayme, *Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a model for Uniform Rules?*, *Kunstrechtsspiegel* 49 (2007) <https://journals.uni-heidelberg.de/index.php/kunstrsp/article/viewFile/35873/29520>

Beyond mere physical protection of cultural sites, advocates argue that governments should “ensure the continued relationship of people in occupied territories with those sites.”<sup>23</sup>

While there is no internationally recognized “human right to cultural property” or “human right to cultural heritage,”<sup>24</sup> international law does indeed recognize a “human right to culture.”

Article 22 of the Universal Declaration of Human Rights states that:

“Everyone, as a member of society. . . is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”<sup>25</sup>

The UNESCO Declaration of the Principles of International Cultural Co-operation, (1966) echoes the same sentiment to protect “mankind’s common heritage” that the CPIA and the import restrictions seek to protect:

1. Each culture has a dignity and value, which must be respected and preserved.
2. Every people has the right and the duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.<sup>26</sup>

Still, even definitions of the “human right to culture” range from the right and ability to interact with culture,<sup>27</sup> to broader definitions that define cultural rights to encompass other rights listed under the Universal Declaration of Human Rights, including the right to self-determination, the right to education, and of course, basic property rights.<sup>28</sup>

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<sup>23</sup> Alderman, *supra* note 21 at 74, citing Kimberly Alderman, *The Designation of West Bank Mosques as Israeli National Heritage Sites: Using the 1954 Hague Convention to Protect Against In Situ Appropriation of Cultural Sites*, 44 CREIGHTON L. REV. (2011).

<sup>24</sup> In fact, one scholar has written that “culture” and “heritage” are phrases that are inherently contradictory: “Culture is not a heritage, an accumulation of received ideas, but the method adopted by each social group to organize its own experience by relating it to the experience of others.” Giulio Carlo Argan, *Two Cultures*, Unesco Cultural Rights at 89.

<sup>25</sup> Universal Declaration of Human Rights, art. 22 (1948).

<sup>26</sup> Declaration of Principles of International Cultural Co-operation, art. 1, Nov. 4, 1966.

<sup>27</sup> Breten Breytenbach, *Cultural interaction*, UNESCO Definition of Cultural Rights at 42.

<sup>28</sup> Working Paper prepared by the Secretariat, in *Cultural Rights as Human Rights*, UNESCO at 10 (1970). In fact, dating as far back as the 1863, the Lieber Code specifically defines cultural property as a form of “private property. Matthew D. Thurlow, *Note: Protecting Cultural property in Iraq: How American Military Policy Comports with International Law*, 8 Yale Human Rights & Development L. J.153, 156 (2005) (citing Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 34 (Apr. 24, 1863)).

When examining the “property” component of “cultural property,” the Universal Declaration on Human Rights states that, “everyone has the right to own property alone as well as in association with others [and that] no one shall be arbitrarily deprived of his property.”<sup>29</sup> Some would even argue “the distinction sometimes made between property rights and human rights is spurious. Human rights are simply part of a person’s property rights.”<sup>30</sup>

States’ cultural property legislation clearly reflects that “cultural heritage” and “cultural property” is ultimately *property*—subject to possession and ownership (in many cases by the States). But international law also says that “cultural rights” are *human* rights to culture, and they are this inextricably tied to the property ownership rights of *humans*, whether alone or “in association with others.” One contributor to UNESCO, in defining “cultural rights” in 1970, noted that “[t]here can be no doubt that the most strenuous efforts must be made to protect the cultural rights (the absolute freedom of expression) of the *individual*, who is the basic cultural unit.”<sup>31</sup> It is difficult to see how an entity (the State’s government) can assert a superior ownership claim to both human and community rights to cultural property.<sup>32</sup>

That a national government determines what is “cultural heritage” is further problematic in regard to the enforcement of these rights. In discussing the challenges of how we actually conceptualize cultural rights, Yehudi A. Cohen points to the shift in “social organization” from local communities to nation states, noting that “people are no longer deriving their rights (political, economic, religious, educational, etc.) from their local communities. According to Cohen, as a result, “governments are having considerable difficulty in maintaining a balance between loyalty to the State and allegiances to ethnic groups among others.”<sup>33</sup>

This failure to properly balance the interest of local communities or certain ethnic groups is even clearer when considering that *access* to one’s cultural heritage is often considered one of the most important attributes of a human right to culture:

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<sup>29</sup> Universal Declaration of Human Rights, art. 17.

<sup>30</sup> Yoram Barzel, *Economics Analysis of Property Rights*, 4 (1997).

<sup>31</sup> Breten Breytenbach, *Cultural interaction*, UNESCO Definition of Cultural Rights at 40.

<sup>32</sup> Indeed, according to the United Nations Human Rights Office of the High Commissioner, “human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent, and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. *What are Human Rights?*, OHCHR, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

<sup>33</sup> Yehudi A. Cohen, *From Nation State to International Community*, UNESCO (1970) at 77; 79. <http://unesdoc.unesco.org/images/0000/000011/001194eo.pdf>. Cohen does argue that strengthening national regimes, will ultimately assure securing of individual rights.

The right of access to and enjoyment of all forms of cultural heritage is guaranteed by international human rights law, including . . . in particular, from the right to take part in cultural life, the right of members of minorities to enjoy their own culture and the right of indigenous people to self-determination and to maintain, control, protect and develop cultural heritage.<sup>34</sup>

So in a world where culture is often based on individualism and participation in a community—not a state—why then should States have the sole authority to decide what culture should be protected—and rights of exclusive ownership be held by the State—especially when State ownership of cultural property *excludes* the interests of certain cultural groups?

### **CASE STUDIES: DENIAL OF ACCESS AND PROPERTY RIGHTS IN MENA STATES**

In response to requests from four Arab states facing violent internal socio-political upheaval, CPAC, leveraging 19 U.S.C. § 2603, has enacted MOUs or other emergency import restrictions with the following States: Iraq in 2004 and 2007,<sup>35</sup> Egypt in 2016,<sup>36</sup> Syria in 2016,<sup>37</sup> and Libya in 2017.<sup>38</sup>

All four states declare state ownership of cultural property found within the state; all four states have requested extremely broad import restrictions on essentially all cultural property within that state. Importantly, the import restrictions imposed on behalf of these countries include broad language that includes *all* cultural heritage tangentially tied to those states: covering categories that span antiquities to ephemera.

And all four countries have long and ignominious history of mistreatment of Jewish citizens and their property within that State.<sup>39</sup>

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<sup>34</sup> Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59 at 12; *See also* Kimberly L. Alderman, *The Human Right to Cultural Property*, 20 Mich. St. L. Rev. 69, 73 (2011) (“individuals “have the human right to access cultural materials and sites, and that this access is necessary for meaningful participation in cultural life.”)

<sup>35</sup> Executive Order 13350 (2005); Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq, 73 FR 23,334 (Apr. 30, 2008) (19 C.F.R. 12)

<sup>36</sup> Import Restrictions Imposed on Certain Archaeological Material From Egypt, 81 Fed. Reg. 87,805 (Dec. 6th 2016) (to be codified at 19 C.F.R. pt.12).

<sup>37</sup> Import Restrictions Imposed on Certain Archaeological Material From Syria, 81 FR 53916, <https://www.federalregister.gov/documents/2016/08/15/2016-19491/import-restrictions-imposed-on-archaeological-and-ethnological-material-of-syria>

<sup>38</sup> Emergency Import Restrictions Imposed on Archaeological and Ethnological Materials From Libya, 82 FR 57,346 (Dec. 5, 2017) (to be codified at 19 C.F.R. pt. 12).

<sup>39</sup> Ron Prosor, *The Middle East's Greatest Untold Story*, The Huffington Post, [https://www.huffingtonpost.com/ron-prosor/the-middle-east-s-greatest-untold-story\\_b\\_1652777.html](https://www.huffingtonpost.com/ron-prosor/the-middle-east-s-greatest-untold-story_b_1652777.html)



Yet restrictions on importation that would return any listed property to the State governments fail entirely to recognize these histories of abuse, neglect and denial of access. They merely grant excessively broad rights of ownership and control to State governments.

To give just a single example, the list of items restricted from import from Syria includes writing “On paper, parchment, leather, wood, ivory, stone, metal, textile, stucco, clay, mosaic, painting, and ceramic, in pictographic, cuneiform, Phoenician, Aramaic, Syriac, Hebrew, Greek, Latin, and Arabic scripts,” in a time period that includes “Paleolithic, Neolithic, Bronze and Iron Ages, Persian, Greco-Roman, Byzantine, and Islamic until the end of the Ottoman Period, a total span from roughly 1,000,000 BC to 1920 AD.”<sup>40</sup>

## IRAQ AND THE IRAQI JEWISH ARCHIVES

Under the Antiquities Law No. 59 of 1936 as amended by No. 120 of 1974 and No. 164 of 1975, all antiquities are considered property of the state, and no individuals are allowed to dispose of such property or claim ownership of such antiquities.<sup>41</sup>

In 2008, the United States imposed emergency import restrictions on any archaeological or ethnological materials from Iraq.<sup>42</sup> Iraq’s designated list of endangered cultural property protects “Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance illegally removed” from Iraqi cultural institutions. The list specifically states: “[r]itual and ecclesiastical objects pertaining to Iraq’s religious communities include, but are not limited to, crosses, chalices, Kiddush cups, candelabra, and Torah pointers.”<sup>43</sup>

A recent and well-publicized example of access to Jewish cultural property came when the State Department began considering the return of 2,700 Jewish objects to Iraq. The objects had been discovered in a flooded basement of an Iraqi intelligence office in Baghdad in 2003 and were brought to the United States. They underwent approximately \$3 million in restoration and were on display at the National Archives and Records Administration (NARA) and in the Jewish

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<sup>40</sup> <https://www.federalregister.gov/documents/2016/08/15/2016-19491/import-restrictions-imposed-on-archaeological-and-ethnological-material-of-syria>

<sup>41</sup> Antiquities Law No. 59 of 1936, art. 3 (Iraq).

<sup>42</sup> The import restrictions were based on the earlier “Emergency Protection for Iraqi Cultural Antiquities Act of 2004,” H.R. 1047, which authorized the President’s emergency authority under the CPIA, 19 U.S.C. § 2603.

<sup>43</sup> Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq, 3 FR 23,334 (19 CFR 12), art. G (6).

Museum of Maryland, traveling also to institutions in New York City, Miami, Atlanta, and Southern California and other venues.<sup>44</sup>

Objects in the collection ranged from personal documents, such as school records and family memorabilia,<sup>45</sup> to religious texts and artifacts, including portions of a Hebrew Bible from 1568, fragments of Torah Scrolls and "tikis" (cases for Torah scrolls) and a Haggadah (Passover guide), hand-written and decorated by an Iraqi youth.

The objects had been placed in a Baghdad synagogue for safekeeping when the majority of Iraq's Jewish population fled the country in the 1950s, following almost a decade of violence, executions, and kidnappings that led many Jews to flee Iraq, leaving behind their personal assets.<sup>46</sup>

The objects, seized in the middle of the night by armed police from the synagogue where they were stored, were subsequently stored in the basement of a building housing Saddam Hussein's secret police. Many other community records and property were taken under similar situations of duress. When talks began in 2013 to return the artifacts brought to the U.S., known as the Iraqi Jewish Archives, Iraq's position was that the objects were legally owned by the *Iraqi* people and that "the current government should not be held responsible for the pillage of the prior regime."<sup>47</sup>

In 1949, Iraq's Jewish population was estimated at 130,000.<sup>48</sup> With Israel's establishment in 1948, Iraqi Jews became the targets of violence.<sup>49</sup> Between 1950 and 1951, about 90 percent of the Jewish population left Iraq. Most went to Israel.<sup>50</sup> By the early 1970s, only a few elderly Jews remained in Baghdad, and an estimated more than \$200 million worth of Jewish community property was left behind. After the exodus of Iraqi Jews, some feeble attempts were

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<sup>44</sup> Susan Ingram, *Exhibit at Jewish Museum preserves Iraqi Jewish heritage*, Washington Jewish Week (Oct 27, 2017), [http://washingtonjewishweek.com/42011/exhibit-at-jewish-museum-preserves-iraqi-jewish-heritage/arts/arts\\_features/museums/](http://washingtonjewishweek.com/42011/exhibit-at-jewish-museum-preserves-iraqi-jewish-heritage/arts/arts_features/museums/).

<sup>45</sup> Sandi Fox, *Who owns the Jewish treasures that were hidden in Saddam Hussein's basement?* PBS (Apr. 29, 2014), <https://www.pbs.org/newshour/world/stolen-treasures-iraqi-jewish-community>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Stephen Farrell, *Baghdad Jews Have Become a Fearful Few*, New York Times (June 1, 2008), <http://www.nytimes.com/2008/06/01/world/middleeast/01babylon.html>.

<sup>49</sup> Speculation about the inciters of the violence has varied from Israeli operatives to anti-Zionist groups. Dalia Hatuqa, *Iraqi-Jewish archive triggers 'traumatic memories'*, Al Jazeera (Jan. 22, 2018), <https://www.aljazeera.com/news/2018/01/iraqi-jewish-archive-triggers-traumatic-memories-180122153032515.html>.

<sup>50</sup> *Id.* citing Fischbach.

made to encourage Jewish Iraqi citizens to return.<sup>51</sup> However a violent regime change in 1963 led to laws banning Jews from selling property unless they proved citizenship and laws requiring all Iraqi Jews, whether living in Iraq or abroad to register for identification cards within 90 days or otherwise be stripped of their citizenship and property.<sup>52</sup> In the years that followed, Jews were executed on trumped up charges and barred from attending universities.<sup>53</sup> Jews remaining in Iraq regularly faced show trials and executions, and following the Six Day War in 1967, Jewish savings and properties were blocked, their jobs were taken from them, and their movements and communications restricted.<sup>54</sup>

Later, in 1970, these anti-Jewish laws would be abolished and some sequestered property was released. But still, the damage was done: by 1975, most Jews had already had their property confiscated and had been forcibly expelled, leaving the “refugees destitute, with no funds or property to start their life anew.”<sup>55</sup> Now, Baghdad’s Jewish population alone has dwindled to less than ten—insufficient numbers to perform important religious ceremonies like the minyan.<sup>56</sup>

The National Archives and Records Administration, which restored and holds the Iraqi Jewish Archives, describes its role as providing accessibility to the written record of Iraqi Jewish life in what had once “generally been a tolerant, multicultural society” through preservation and digitization of the records seized when “most Iraqi Jews fled and were stripped of their citizenship and assets.”<sup>57</sup> Some observers who have argued the merits of returning or retaining the archives to Iraq have noted that the Iraqi Jewish Archives are not really “archives” but rather a somewhat random assembly of community records and personal possessions. It has also been said that the NARA digitization program has made the most valuable items in the archives accessible to all scholars. Others feel strongly that the archives are the property of Jews forced from the country, and returning them to Iraq would deny both full access and the possibility of making claims for individual personal property.

The American Jewish community has consistently maintained that Torah Scrolls belong in use in synagogues and not in storage, especially in the hands of governments and in countries where there are few Jews to make us of them. After lengthy negotiations between Iraqi

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<sup>51</sup> The Iraqi government passed Law No. 11 of 1960, eliminating a prior law that affecting Jewish Iraqi citizens that invalidated Jewish Iraqi passports and sequestered their property. Fischbach at 64.

<sup>52</sup> *Id.* Fischbach at 64.

<sup>53</sup> Fox, *supra* note 45. Carol Basri, *The Jewish Refugees from Arab Countries: An Examination of Legal Rights — A Case Study of the Human Rights Violations of Iraqi Jews*, 267 *Fordham Int’l. L. J.* 656 (2003).

<sup>54</sup> *Id.* at 686.

<sup>55</sup> *Id.* at 706 (citing Sabri Jrivis, Director of the Institute of Palestine Studies).

<sup>56</sup> Farrell, *supra* note 48.

<sup>57</sup> <https://www.ija.archives.gov/>

government authorities and the National Archives, a number of Torah Scroll fragments found in the Iraqi Jewish Archives which could not be repaired and put to use were buried in a Jewish cemetery in NY, at a ceremony attended by the Iraqi Ambassador to the US at the time.<sup>58</sup>

In August 2003, after the Iraqi Jewish Archives were already in the U.S., an agreement was signed between the Coalition Provisional Authority (CPA) in Baghdad and the National Archives and Records Administration (NARA),<sup>59</sup> with the support of the U.S. Department of State, which specified that the archives were brought to the US for repair and restoration and to be exhibited, after which they would be returned to Iraq. This agreement, made soon after the Iraq invasion, was not an MOU, but nonetheless reflected the U.S. State Department's longstanding tendency to support nationalizing cultural property ownership laws, rather than adhering to Congress' statutory criteria for cultural property agreements under the Cultural Property Implementation Act.<sup>60</sup>

In October 2017, Senator Charles Schumer requested that the archive of 2,700 items not be sent back to Iraq, stating "This collection does not belong to the Iraqi government, it belongs to the ancient and proud Iraqi Jewish community – many now here in the States -- that was exiled many years ago and forced to leave their belongings behind"<sup>61</sup>

Other Jewish objects have been under scrutiny for whether they should be returned to Iraq, in light of the Iraq's actions against its Jewish community, such as a 200 year-old Torah

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<sup>58</sup> Frank Eltman, *Damaged Iraqi Torah Scrolls Buried in Long Island*, Times of Israel, 12/17/2013, <https://www.timesofisrael.com/damaged-iraqi-torah-scrolls-buried-in-long-island/>

<sup>59</sup> Agreement between The Coalition Provisional Authority and The National Archives and Records Administration, <http://iraqijewisharchives.org/wp-content/uploads/2013/10/Agreement-between-The-Coalition-Provisional-Authority-and-The-National-Archives-and-Records-Administration-.pdf>

<sup>60</sup> See, for example, "The Executive is not authorized to establish import controls without international cooperation unless an emergency condition exists as defined by law, and Congress did not intend to authorize comprehensive import controls on all archeological objects exported from a country of origin without its permission. The purpose of the program is not to keep art at home, but to help protect archeological resources from pillage; the findings required by the CCPIA were established for that purpose." Mark B. Feldman, Conference Statement at Symposium: Reform of U.S. Cultural Property Policy: Accountability, Transparency, and Legal Certainty, Benjamin N. Cardozo School of Law, New York, N.Y. April 10, 2014. <https://culturalpropertynews.org/mark-b-feldman-reform-of-u-s-cultural-property-policy/>

<sup>61</sup> Press Release, *Schumer: State Dept once again unwisely plans to return confiscated Judaica collection to Iraq; Senator renews call to not send back to Iraq nearly 3,000 Jewish artifacts that were originally seized by Saddam Hussein's regime*, Oct. 3, 2017.

scroll that mysteriously ended up at the Israel’s embassy in Jordan, where Jewish artifacts were often brought during the Iraq War.<sup>62</sup>

## LIBYA

The most recent Memorandum of Understanding restricting importation into the U.S. of cultural property is with the State of Libya. The “Emergency Import Restrictions Imposed on Archaeological and Ethnological Materials from Libya” were published in the Federal Registry by the Department of Homeland Security on December 5, 2017.<sup>63</sup>

Libya’s Law no. 2 of March 3, 1983 concerns archeological monuments, museums and documents protects any object created by man connected with the human cultural heritage, and that are more than one hundred years old, on condition that it was discovered or found within the Socialist People’s Libyan Arab Jamahiriya.<sup>64</sup> The Act establishes the Libyan Antiquities Authority to determine what “must be considered as an archaeological monument, relic, or documents.”<sup>65</sup>

Libya has a very comprehensive national-ownership law that applies to cultural property only fifty years old. The Libyan law includes illustrative examples of what may be considered archaeological monuments, relics, or documents; for example, protected texts (which may be written on any material) “includes manuscripts, political, administrative and... other documents more than fifty years old,” are all considered government-owned cultural property,<sup>66</sup> unless they have been registered to the Libyan Antiquities Authority’s inventory.<sup>67</sup> Any buildings within an archaeological area are considered “the private property of the antiquities authority” and “may not be made available to another without the authority’s agreement.”<sup>68</sup>

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<sup>62</sup> Justin Moyer, How a long-lost Torah went from Iraq to Israel — and why Iraq may want it back, The Washington Post (Jan. 23, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/01/23/how-a-long-lost-torah-went-from-iraq-to-israel-and-why-iraq-may-want-it-back/?utm\\_term=.24606f972fe4](https://www.washingtonpost.com/news/morning-mix/wp/2015/01/23/how-a-long-lost-torah-went-from-iraq-to-israel-and-why-iraq-may-want-it-back/?utm_term=.24606f972fe4).

<sup>63</sup> Emergency Import Restrictions Imposed on Archaeological and Ethnological Materials From Libya, 82 FR 57346 (Dec. 5, 2017) (to be codified at 19 C.F.R. pt. 12) (hereinafter “Libyan Import Restrictions”).

<sup>64</sup> Law Concerning Archaeological Monuments, Museums, and Documents, Libyan Arab Jamahiriya. Law No. 2 (March 3, 1983) (Libya) Art. 1 (A).

<sup>65</sup> *Id.* at Art. 3.

<sup>66</sup> *Id.* at Art 1 (Fourth).

<sup>67</sup> *Id.* at Art. 5.

<sup>68</sup> *Id.* at Art. 7.

The U.S. import restrictions came after reports of looting in Libya following the Arab Spring, including vague reports of illicitly trafficked Ottoman-era objects, classical statues and Jewish manuscripts.<sup>69</sup>

An emergency MOU was recommended by the State Department, despite Libya's clear failure to meet the self-help provisions of the CPIA or to make Libyan heritage publicly available through museum loans or other methods. Instead, the Request effectively highlighted the Libyan government's poor record of archaeological preservation and its acknowledged inability to protect its artifacts from theft and destruction by its own troops and those of the three other major militias holding large areas of territory in the country. The Libyan Government's Request for an MOU stated that every one of Libya's 24 museums was indefinitely closed. Museum artifacts were said to be hidden behind locked doors and camouflaged by furniture.<sup>70</sup>

Libya's General Tourism Authority (GTA) criticized the decision of the UNESCO World Heritage Committee to place five archaeological sites in Libya on the endangered world heritage list, stating the information was false<sup>71</sup> and that major sites such as Leptis Magnis were not at risk.<sup>72</sup> Just two months prior to State Department review of Libya's Request, Libya issued a list of items said to have been stolen from Libyan museums. One statue on the list was allegedly stolen during WW2, and had been on public exhibit at the Cleveland Museum of Art for more than 25 years, but had never been claimed by Libya.<sup>73</sup>

Despite Libya's apparent failure to meet Congressional criteria for a bilateral agreement under the CPIA, on February 23, 2018, the United States and Libya agreed to sign a Memorandum of Understanding imposing import restrictions on Libya's cultural heritage dating from 12,000 B.C. through 1750 A.D. and ethnological materials "derived from sites of religious and cultural importance" in Libya dating from 1551 to 1911 A.D.<sup>74</sup>

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<sup>69</sup> Katie A. Paul, *From Hearing to Signing: What's Happened While Libya Awaited Their MOU*, Antiquities Coalition, Mar. 2, 2018.

<sup>70</sup> "Looters exploit the political chaos in Libya," *The Art Newspaper*, 10/20/2016,

<http://theartnewspaper.com/news/news/looters-exploit-the-political-chaos-in-libya/>

<sup>71</sup> *Libya rejects UNESCO's decision to place five sites on endangered list*, Libya Observer, <https://www.libyaobserver.ly/culture/libya-rejects-unesco%E2%80%99s-decision-place-five-sites-endangered-list>, last visited 07/09/2017.

<sup>72</sup> Abdullah Benibrahim, *Libya's Antiquities Department refutes UNESCO report on Leptis Magna*, Libya Observer, <https://www.libyaobserver.ly/culture/libyas-antiquities-department-refutes-unesco-report-lepits-magna>, Last visited July 8, 2017.

<sup>73</sup> Libyan authorities issue international circular on looted antiquities from Libya, <http://www.embassyoflibyadc.org/libyan-authorities-issue-international-circular-on-looted-antiquities-from-libya/>, last visited 07/09/2017.

<sup>74</sup> Press Release, U.S. Department of State, United States and Libya Sign Cultural Property Protection Agreement (Feb. 20, 2018), <https://www.state.gov/r/pa/prs/ps/2018/02/278502.htm>.

The regulations are far-reaching, covering both individual personal property (“jewelry and personal adornments”, “luxury furniture” even “funerary monuments”) and “ceremonial paraphernalia” “including boxes (such as Koran boxes, plaques, pendants, candelabra,”<sup>75</sup> amongst other things, and broad categories of ethnological materials made on or before 1911 AD including architecture with religious motifs (e.g. such as architectural ornaments as would be found in homes and synagogues); and “books and manuscripts,” including texts written on vellum and which may “include the Koran and other Islamic books and manuscripts.”<sup>76</sup> Jewish writings are simply not mentioned, but the broad scope and use of “includes” clearly places the contents of synagogues, menorahs, and Torahs firmly in the restricted categories: the list includes, for example, “scroll and manuscript containers for Islamic, Jewish, or Christian manuscripts.”<sup>77</sup> Jewish activists condemned the MOU, arguing that the agreement “legitimizes the confiscation of Jewish property” by the Libyan government.<sup>78</sup>

Throughout the twentieth century, anti-Semitism pervaded the socio-political atmosphere in Libya. Countless stories detail Jews forcibly expelled from the country, allowed to bring with them only one suitcase.<sup>79</sup> Most of Libya’s Jews left the country soon after Israel’s establishment in 1948; when a wave of anti-Jewish violence broke out in Libya; June of 1948 saw the death of twelve Jews and destruction of an estimated 280 homes in protest to Israel’s founding.<sup>80</sup> Between 1949 and 1951, more than thirty thousand Jews fled their country.<sup>81</sup> With Libya’s independence in 1951, anti-Semitic laws followed,<sup>82</sup> including two laws in 1970 that confiscated the property

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<sup>75</sup> Libyan Import Restrictions, Sec. II B (6).

<sup>76</sup> Libyan Import Restrictions, Sec. II (H)(1).

<sup>77</sup> Libyan Import Restrictions, Sec. I B (2).

<sup>78</sup> Josefin Dolsten, *US agrees to Libyan request that activists say prevents Jewish artifacts from leaving the country*, JTA, Feb. 22, 2018, <https://www.jta.org/2018/02/22/news-opinion/united-states/us-agrees-to-libyan-request-that-activists-say-prevents-ancient-jewish-artifacts-from-leaving-the-country>; Josefin Dolsten, *US accused of allowing Libya to keep seized Jewish property*, Times of Israel, Feb. 23, 2018, <https://www.timesofisrael.com/us-accused-of-allowing-libya-to-keep-seized-jewish-property/>.

<sup>79</sup> JTA, *Why Jews From Libya Are Worried About the Fate of the Country’s Jewish Artifacts*, Haaretz (Jly 26, 2017), <https://www.haaretz.com/archaeology/MAGAZINE-why-jews-from-libya-are-worried-about-the-fate-of-the-countrys-jewish-artifacts-1.5435143>

<sup>80</sup> *Jewish Communities of the World* at 101 (Anthony Lerman, ed. 1989).

<sup>81</sup> David Matas, *Aftershock: Anti-Zionism & Anti-Semitism* 162 (2005); See also James Kirchick, *The Right to Return*, Tablet Magazine, Sept. 2, 2011, <http://www.tabletmag.com/jewish-news-and-politics/76721/right-of-return>.

<sup>82</sup> A 1957 law prohibited anyone in Libya from contracting with anyone in Israel. A 1958 law dissolved the Jewish Community Council. A 1961 Law provided that only Libyan citizens could transfer real property—and only six Jews have been identified for being granted Libyan citizenship. Law No. 6 of 1961 Concerning the Sequestration of the Properties of Some Israelites” (enacted on March 21, 1961): “All property and possession in Libya belonging to bodies or individuals residing in Israel or belonging to her by reason of their nationality or working on her [Israel’s] account are placed under sequestration.” Michael Fischbach, *Jewish Property Claims Against Arab Countries* 74-75 (2010).

of any individual residing or affiliating with Israel, but the law made basically no distinction between Jews and Israelis.<sup>83</sup> After the conclusion of the Arab-Israeli War in June 1967, the majority of the remaining Jews in Libya fled, mostly to Italy, only permitted to take their personal effects and approximately \$56, the standard amount permitted to any Libyan traveler under the country's currency laws.<sup>84</sup>

Even preceding passage of the Libyan antiquities law in 1983, in 1972, the Libyan government ordered roadwork to be done through Tripoli's Jewish cemetery.<sup>85</sup> A shopping mall, the Bourge Al Fatah, was constructed on top of a Tripoli cemetery, and in Benghazi, bones from a Jewish cemetery tossed aside or boxed and warehoused.<sup>86</sup> By 1987, former Libyan Jews claimed that 72 synagogues and schools had passed out of Jewish hands in Libya.<sup>87</sup>

In recent years, exiled Jews have attempted to reclaim the millions of dollars' worth of assets confiscated by Colonel Muammar Gaddafi as the Libyan government attempted to ameliorate its past indiscretions.<sup>88</sup> But still today Jews attempting to reenter the country are reportedly (and repeatedly) denied visas to enter (and therefore access cultural property once belonging to their communities).<sup>89</sup>

## EGYPT

The Egyptian government has pursued a bifurcated path with respect to Jewish and Christian minority heritage. On the one hand, Egyptian Christians face periodic violence, damage and destruction of Church property and ongoing discrimination in daily life. Egypt's once vibrant Jewish community has been reduced to a few dozen elderly residents and access to Jewish records held by the Egyptian government is a serious continuing problem. On the other hand, Egypt has spent considerable sums to restore badly dilapidated Jewish properties that no

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<sup>83</sup> Michael Fischbach, *Jewish Property Claims Against Arab Countries* 75 (2010). However, Jews were later allowed to expatriate £L300 (\$840).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 78.

<sup>86</sup> Personal communication, email describing seeing "big boxes of Jewish bones taken from the Jewish cemetery" in Benghazi, from David Gerbi to Kate Fitz Gibbon, July 18, 2017.

<sup>87</sup> *Id.* at 78.

<sup>88</sup> Inigo Gilmore, *Libyan Jews claim £100m for seized wealth*, The Telegraph, Jan. 11, 2004, <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/1451413/Libyan-Jews-claim-100m-for-seized-wealth.html>.

<sup>89</sup> James Kirchick, *The Right to Return*, Tablet Magazine, Sept. 2, 2011, <http://www.tabletmag.com/jewish-news-and-politics/76721/right-of-return>.



longer serve a religious function because there are so few Jews remaining in Egypt. The most striking example of this is the restoration of the original Maimonides Yeshivah dating to the 12<sup>th</sup> century and the adjacent Rav Moshe Synagogue, known as the Maimonides synagogue, a 19<sup>th</sup> century building on a site in Cairo that has belonged to the Jewish community since the 10<sup>th</sup> century. The reopening of the beautifully restored synagogue was, however, marred by cancellation of further celebrations by the then Director of the Supreme Council of Antiquities, Zahi Hawass, who stated that Jews were drinking wine and dancing inappropriately.<sup>90</sup>

The better-known urban Jewish sites have for the most part been protected and guarded in recent decades under the auspices of the Egyptian government. They are designated by the Supreme Council of Antiquities as "protected" under Egyptian law. While the local Jewish communities' ownership of the buildings is recognized, it is not known what will happen when the last of Egypt's Jews has died, nor what will be the fate of the records of the community. The Egyptian government has said it will digitize the records in the Jewish Library of Cairo, but in 2016, the Cairo Post reported that Jewish community's leader, Magda Haroun, had called on the government to scan the records, saying the records were not properly stored and that she feared continuing neglect.<sup>91</sup> Haroun had asked the Biblioteca Alexandria to digitize the records but it had declined, saying the request needed to come from the Ministry of Antiquities.<sup>92</sup>

In July 2017, another major restoration project was announced; the Egyptian government stated in February 2018 that it has expended approximately \$5 million dollars US to restore the Eliahu Hanavi Synagogue in Alexandria.<sup>93</sup>

Jewish cemeteries outside the city centers have fared far worse. The Bassatine Cemetery in Cairo, one of the oldest cemeteries in Egypt, is in very bad condition, drenched in sewage water and filled with

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<sup>90</sup> Now That Jews are Gone, Egypt Says it will Restore Sites, <https://culturalpropertynews.org/now-that-jews-are-gone-egypt-says-it-will-restore-sites/>

<sup>91</sup> Samir Samir, Jews of Egyptian descent petition Sisi to digitize records, Cairo Post, 2/21/2016, <https://nbcnews.com/2016/02/21/jews-of-egyptian-descent-petition-sisi-to-digitize-identity-records/>

<sup>92</sup> 124 News, "Egypt's Jewish Literary Heritage in danger of being forgotten," 12/20/2015, <https://www.i24news.tv/en/news/international/middle-east/97298-151229-egypt-s-jewish-literary-heritage-in-danger-of-being-forgotten>. When asked about the books in the Jewish Library's future, Mohamed Abdel-Latif, head of Islamic, Coptic and Jewish Antiquities Section of the Ministry of Antiquities, said that "The body authorized to be responsible for Jewish books and manuscripts is the Ministry of Culture." Culture minister, Helmy al-Namnam then stated that "there is nothing called 'Jewish books in Egypt,' the books scientifically should be classified as Arabic, Persian, Turkish, etc."

<sup>93</sup> 25% of restoration of Alexandria Eliyahu Hanavi Synagogue completed, Al-Masry Al-Youm, Egypt Independent, <http://www.egyptindependent.com/25-of-restoration-of-alexandria-eliyahu-hanavi-synagogue-completed/>

trash.<sup>94</sup> As is all too common in Egypt, where unguarded historic and archaeological sites are taken over by squatters or illegally built over, some 25,000 people now reside in unauthorized housing built atop sections of the cemetery.

While reluctant to engage directly with Israel on heritage matters, the Egyptian government has been willing to discuss funding from American Jewish groups to restore and maintain Jewish heritage in Egypt and the tiny remaining Cairo community has received some American support.<sup>95</sup>

In January 2018, the U.S. called on Egyptian President Sisi to continue efforts to promote diversity and to remedy relations with Egyptian Coptic Christian groups.<sup>96</sup> Many Christian sites in Egypt have been severely damaged in the civil instability of the last decade. The Egyptian army has also been culpable. An Egyptian archaeological group reported in 2011 that the 5th century St. Bishoy monastery had been attacked by army forces in the Wadi Natrun, and at the Monastery of St. Makarios of Alexandria in Wadi el-Rayyan, in the Faiyum, a monk was killed and 10 injured.<sup>97</sup>

While officially, the value of Pharaonic, Islamic, Coptic, Christian, and Jewish heritage is acknowledged, there is little other public evidence that the Egyptian government recognizes the longstanding role of the Jewish population in Egypt. For example, when the National Museum of Egyptian Civilization partially opened in Cairo in 2017, it was reported that no Jewish items were placed on display.<sup>98</sup>

Under the Egyptian Law on the Protection of Antiquities, known as Law No. 117, enacted August 6, 1983, all antiquities are deemed “public property” and possession of such antiquities is prohibited, with the exception of antiquities whose ownership was already

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<sup>94</sup> Sarah El Deeb, Egyptian Jewish leader buried in cemetery she tried to restore, Times of Israel, 4/19/2013, <https://www.timesofisrael.com/egyptian-jewish-leader-buried-in-cemetery-she-tirelessly-tried-to-restore/>

<sup>95</sup> Jacob Wirtschafter, Egypt plans to restore Alexandria synagogue in bid to promote diversity, USA Today, July 27, 2017, <https://www.usatoday.com/story/news/world/2017/07/27/egypt-plans-restore-alexandria-synagogue-bid-promote-diversity/517356001/>. The efforts were speculated to be part of Egyptian President Abdel-Fattah el-Sissi’s attempts to ameliorate and promote the public understanding of “diversity” after a series of bombings in minority communities carried out by the Islamic State.

<sup>96</sup> Remarks by Vice President Mike Pence to Members of the Press Before Departing Cairo, Egypt, 1/20/2018, <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-mike-pence-members-press-departing-cairo-egypt/>

<sup>97</sup> The Looting in Egypt has Increased, ECHO, 3/18/2011, <http://www.e-c-h-o.org/news/increasedlooting.htm>

<sup>98</sup> Emmanuel Parisse, Egypt’s last Jews aim to keep heritage alive, The Times of Israel, Mar. 26, 2017, [https://www.timesofisrael.com/egypts-last-jews-aim-to-keep-alive-heritage/;](https://www.timesofisrael.com/egypts-last-jews-aim-to-keep-alive-heritage/)

established when the law came into effect in 1983.<sup>99</sup> An “antiquity” under the Egyptian law includes any movable or immovable property that is “a product of any of the various civilizations or any of the arts, sciences, literatures, and religions of the successive historical periods” from prehistory until “one hundred years before the present.”<sup>100</sup>

A Memorandum of Understanding between the United States and Egypt entered into effect on November 30, 2016.<sup>101</sup> The MOU’s attendant Designated List of protected cultural objects includes “scrolls, books, manuscripts, and documents, including religious, ceremonial, literary, and administrative texts. Scripts include hieroglyphic, hieratic, Aramaic, Hebrew, Greek, Latin, Coptic and Arabic.”<sup>102</sup> Writings on a variety of materials, from wood to metal and stone that contain such languages are also protected.<sup>103</sup> It should be noted that only Islam and Christianity are mentioned by name on the designated list’s protected objects. Nonetheless, virtually all objects of Egyptian cultural heritage dating from the Predynastic period (5,200 B.C.) through 1517 A.D are included.<sup>104</sup>

Within that MOU, the Egyptian Government promised to “endeavor to build fruitful relationships with Egyptian civil society groups concerned with protecting and preserving Egypt’s cultural heritage as represented in the Designated List.”<sup>105</sup> The Designated List of protected cultural property specifically notes that “such items often constitute the very essence of a society and convey important information concerning a people’s origin, history, and traditional setting.”<sup>106</sup>

The fact that official Egyptian policy sometimes conflicts with actual government actions raises concern, since, as Magda Haroun, the leader of the Cairo Jewish community and one of the half-dozen remaining elderly Jewish women there asked, “[a]ccording to the stories, Jews lived in

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<sup>99</sup> Egyptian Law on the Protection of Antiquities, Law No. 117, art. 6 (1983).

<sup>100</sup> However, the definition of “antiquity” also includes more recent objects that fits these categories even if it does not fall within that timeframe, “where the Prime Minister so decides.” *Id.* at art. 1.; art. 2.

<sup>101</sup> Memorandum of Understanding Between the Government of the United States of American and the Government of the Arab Republic of Egypt Concerning the Imposition of Import Restrictions on Categories of Archaeological Material of the Arab Republic of Egypt, Nov. 30, 2016.

<sup>102</sup> 81 Fed. Reg at 87,809, sec. X. “Coptic Paintings” and mosaics that contain “religious images and scenes of Biblical events” are also protected. Sec. XI (F); Sec. XII.

<sup>103</sup> *Id.* at XIII.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at Art. II (3).

<sup>106</sup> Import Restrictions Imposed on Certain Archaeological Material From Egypt, 81 Fed. Reg. 87,805 (Dec. 6th 2016) (to be codified at 19 C.F.R. pt.12).

Egypt since the pharaohs. Do you want to make centuries of history vanish?”<sup>107</sup> Also problematic, according to Haroun, is “the failure [of the Egyptian government] to draw a distinction between Judaism as a religion and the Israeli state.”<sup>108</sup> Haroun herself long maintained a register of Jewish sites and antiquities to be safeguarded. However, although a vocal advocate of their preservation for the Jewish community,<sup>109</sup> as a practical matter, they should be used. A synagogue in Heliopolis was recently used for a photography exhibition and performance by a Sufi group.<sup>110</sup> Drop of Milk, a nonprofit organization organized in part by Haroun, was involved. Drop of Milk was founded with the specific intention of restoring Jewish buildings for alternative uses, including general usage arts and community centers.<sup>111</sup> Drop of Milk has received funding from The American Research Center in Egypt.

A key remaining challenge is the difficulty of access to the communal Jewish registers now held at the Egyptian National Archives under the Ministry of Culture. Some Jewish organizations have raised concerns about documentary materials needed for ongoing religious practices or for academic usage. The Nebi Daniel Association<sup>112</sup> has sought permission to make an electronic copy of the communal registers that can be deposited abroad. While the Egyptian Minister of Culture does not currently object to a digital copy being made, the permission of the Foreign Minister to transfer it abroad has not been forthcoming. On June 26, 2000, Nabil Fahmy<sup>113</sup> denied the request of a Brooklyn-based organization to transfer Jewish records (then held by the Jewish communities of Cairo and Alexandria) to New York because “these artifacts are in the possession of the Jewish Temples in Egypt while the remaining are in the possession of the Egyptian Jewish Community and expressly stating that those objects are registered as Egyptian Antiquities and are therefore subject to Egypt’s cultural property laws prohibiting export of such objects (and therefore the Egyptian government’s ownership.)”<sup>114</sup> It is problematic

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<sup>107</sup> Fatima Mohie-Eldin, *Egypt’s Jewish Community Struggles to Retain Its Cultural Heritage*, Muftah, Apr. 21, 2017, <https://muftah.org/egypts-jewish-community-struggles-retain-cultural-heritage/#.WqchopPwa2w>.

<sup>108</sup> *New head of Egyptian Jewish community: Zionism is racism*, Times of Israel, July 18, 2013, <https://www.timesofisrael.com/new-head-of-egyptian-jewish-community-zionism-is-racism/>.

<sup>109</sup> Niveen Gnoheim, *Magda Haroun: The Egyptian Jewish Community’s Vibrant Past and Macabre Present*, Cairo Scene (Feb. 4, 2016), <http://www.cairoscene.com/In-Depth/Magda-Haroun-Egypt-Jewish-Community-s-Vibrant-Past-and-Macabre-Present>.

<sup>110</sup> The Heliopolis Heritage Photography Exhibition and Performance by Saleeb Soufi group, December 9, 2017.

<sup>111</sup> Wirtschafter, *supra* note 93.

<sup>112</sup> Nebi Daniel Association, <http://www.nebidaniel.org/registres.php?lang=en>

<sup>113</sup> Fahmy was Egyptian ambassador to the United States from 1999 to 2008. He served as Egypt’s Minister of Foreign Affairs from 2013 to 2014.

<sup>114</sup> While the Ben Ezra Synagogue in the area of Fustat was renovated decades ago (with a U.S. family foundation funding) and is regularly open to visitors, and specific projects have been liberally funded by the Egyptian government, other sites are inaccessible to tourists and plans for building a museum of Egyptian Jewish heritage in a synagogue with outside funds have not been approved by the Egyptian government. See also: Letter from Nabil

that the government denies full access to archives that may be necessary to trace family origins and connections.

Only twelve synagogues remain in Cairo, many having deteriorated. While the Egyptian government has a far better record of preservation and restoration of Jewish synagogues than other Middle Eastern nations by according them antiquity status, anti-Zionism and anti-Semitic sentiment pervades the socio-political atmosphere, especially with the ongoing warfare in the Sinai Peninsula. Although the Egyptian government has vowed to protect Egypt's Jewish monuments, there is not a consistent policy that ensures their protection.<sup>115</sup> The power imbalance at least is clear: at this point, it is estimated that there are less than twenty Jews left in Egypt,<sup>116</sup> all elderly women. Six women, all over the age of sixty, comprise Cairo's entire Jewish population, with Magda Haroun the youngest.<sup>117</sup> Without a clear commitment to facilitate actual access to the heritage of minority communities, the Egyptian government cannot be held to have satisfied the Congressionally mandated conditions for an MOU.

## SYRIA

Under Syrian Law, "all movable and immovable antiquities, and antiquities regions in the Syrian Arab Republic are public properties of the state," excluding those immovable antiquities with proper registration and documentation.<sup>118</sup> "Antiquities" includes all movable and immovable properties dating back to "at least two hundred Christian years or two hundred and six Hejira years."<sup>119</sup>

On May 9, 2016, the "Protect and Preserve International Cultural Property Act,"<sup>120</sup> was introduced in the House of Representatives. According to its text, the bill was designed to "protect and preserve international cultural property at risk due to political instability, armed conflict, or natural or other disasters, and for other purposes" and specifically to permit the

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Fahmy to Rabbi Shimon Haj Allouf, June 26, 2000, [http://www.hsje.org/library/correspondence/Mubarak/ambassador\\_reply62600.pdf](http://www.hsje.org/library/correspondence/Mubarak/ambassador_reply62600.pdf).

<sup>115</sup> *Id.*

<sup>116</sup> Emmanuel Parisse, Egypt's last Jews aim to keep heritage alive, *The Times of Israel*, Mar. 26, 2017, <https://www.timesofisrael.com/egypts-last-jews-aim-to-keep-alive-heritage/>; *Muslims in Egypt are trying to preserve its Jewish heritage*, *The Economist*, Sept. 9, 2017, <https://www.economist.com/news/middle-east-and-africa/21728590-egypts-leaders-have-increased-their-outreach-shrinking-jewish>.

<sup>117</sup> *Id.*

<sup>118</sup> Antiquities Law, Legislative Decree no. 222, art. 4 (1963) (Syria).

<sup>119</sup> Like the Egyptian law, the Antiquities authority may include as antiquities belonging to a later date if they "possess historical, artistic, or national characteristics." *Id.* at art. 1.

<sup>120</sup> Pub. L. No. 114-151, 130 Stat. 369 (2016).

President to impose emergency import restrictions and emergency protection for Syrian cultural property.

The legislation thereby avoided the necessity of first receiving a request from Syria per the requirements of the CPIA,<sup>121</sup> the UNESCO Convention or of having prior review from the Cultural Property Advisory Committee, effectively bypassing the minimal requirements of the CPIA that Syria protect its cultural property or meet other requirements of the CPIA.

When the Act became effective in August 2016, the Government Accountability Office (GAO) Report entitled “Cultural Property: Protection of Iraqi and Syrian Antiquities” included in its list of “cultural property” individual assets, as well as communal, religious, and cultural artifacts, including Torah scrolls, which had been forcibly left behind by Jews in both Iraq and Syria.<sup>122</sup>

The Syrian “Designated List” of archaeological and ethnological materials subject to the import restrictions included not only Byzantine and Early Islamic works, but also “[t]orahs and portions thereof: Scrolls bearing Hebrew writing in black ink, wound around two wooden rods, and originally housed in a cylindrical case” and “religious, ceremonial, literary, and administrative material, including but not limited to maps, archival materials, photographs, and other rare or important documentary or historical evidence.”<sup>123</sup> Also included are “Jewish paintings [which] may include iconography such as menorahs.”<sup>124</sup>

Like other Designated Lists, the list for Syrian artifacts recalls in its statement of purpose that the CPIA’s goal is to “promote U.S. leadership in achieving greater international cooperation toward preserving cultural treasures that are of importance to the nations from which they originate and greater international understanding of mankind’s common heritage.”<sup>125</sup>

There are clear issues in the Syrian legislation’s prioritization of State rights over human and community rights - issues that amount to a deliberate indifference to the historical facts of persecution of Syria’s Jews. In the 1940s, Syrian Jews faced violent anti-Zionist sentiment, resulting in the deaths of many Syrian Jewish citizens and destruction of Jewish synagogues and property. Even after many Jews left Syria for Israel, the Syrian government imposed 1960s

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<sup>121</sup> Pub. L. No. 114-151 specifically states that “the Government of Syria is incapable at the time a determination [sic] under such subparagraph is made, of fulfilling the requirements to request an agreement under section 303 of the Convention on Cultural Property Implementation Act (19 U.S.C 2602), including the requirements under subsection (a)(3) of that section.

<sup>122</sup> See e.g. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-873, CULTURAL PROPERTY: PROTECTION OF IRAQI AND SYRIAN ANTIQUITIES (2016).

<sup>123</sup> *Import Restrictions Imposed on Archaeological and Ethnological Material of Syria*, 19 C.F.R. 12 IX (A) & (B) (2016).

<sup>124</sup> *Id.* at X (A)(2).

<sup>125</sup> *Id.*

immigration bans, identification cards, curfews, prohibitions on movement, restrictions on children's schooling, ownership of phones or radio, and confiscation of the property of deceased Jews. Although the restrictions were relaxed in 1976, they were re-imposed in 1979.<sup>126</sup> Years later, although Jews were still ostensibly allowed to practice their religion and maintain their customs and allowed to travel for limited, temporary purposes, Jews were still subject to restrictions on the sale of property, identification cards, employment and marriage restrictions.<sup>127</sup>

Many cultural objects were secreted out of Syria in response to restrictions placed on the Jewish communities. The famed Aleppo Codex, widely regarded as the most accurate version of the Hebrew Bible, had been safeguarded in Syria for nearly six hundred years. But following the Anti-Jewish riots in 1947 in Syria, the Codex was hidden and eventually sent secretly to Israel, with some of its pages going missing along the way.<sup>128</sup>

However, while the Codex would technically fall under Syria's cultural property legislation, what has followed has been a debate about *community* ownership (not state ownership) of the sacred texts: the small, but vocal Aleppo Jewish community has claimed that the text should return to Syria—while others have worked with Israel to assist with the return the missing pages and complete the Codex,<sup>129</sup> where it now sits alongside the Dead Sea Scrolls at the Israel Museum in Jerusalem. Still, the Syrian government reportedly only became interested in the Codex's whereabouts after an American antiquities buyer offered \$20 million for the texts in the 1950s, causing the object's Jewish protectors to hide the object still deeper.<sup>130</sup>

More recently, between 1993 and 1995, nine leather-bound books, known as the "Crowns of Damascus," written in Spain and Italy between 700 and 1000 years ago, were secretly taken from Syria to the National Library of Israel, after having been guarded inside synagogues in Syria for years. Rabbi Avraham Hamra, who assisted the operation, has noted that the Syrian government would likely not seek the return of the books, and considered the bibles as "Syrian Jewish cultural property," belonging to the Syrian Jewish community.<sup>131</sup>

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<sup>126</sup> Lerman, *supra* note 80, at 153-54.

<sup>127</sup> *Encyclopedia of Human Rights at 1427* (Edward H. Lawson, Mary Lou Bertucci, ed. 1996)

<sup>128</sup> Ronen Bergman, *A High Holy Whodunit*, New York Times (July 23, 2012), <http://www.nytimes.com/2012/07/29/magazine/the-aleppo-codex-mystery.html>.

<sup>129</sup> From Maimonides to Brooklyn: the Mystery of the Aleppo Codex, JTA (Dec. 10, 2007), <https://www.jta.org/2007/12/10/archive/from-maimonides-to-brooklyn-the-mystery-of-the-aleppo-codex>.

<sup>130</sup> *Id.*

<sup>131</sup> Daniel Estrin, *In the beginning there was a dispute over Hebrew Bibles...there still is*, The Independent (Dec. 9, 2014), <http://www.independent.co.uk/news/world/middle-east/in-the-beginning-there-was-a-dispute-over-hebrew-biblesthere-still-is-9913609.html>. The reason for such subversive action was in part informed by travel restrictions the Syrian government placed on Jews and also "so as not to draw the ire of Syria, Israel's longtime foe.

The books were evidently written in Spain and Italy, which raises additional questions about whether Syria may even claim these books to be *Syrian* Jewish cultural property. However, after passage of the U.S. legislation, even if Syria did not dispute ownership of the texts, the United States Import Restrictions Imposed on Archaeological and Ethnological Material of Syria would nevertheless prohibit their import into the United States, based solely on the fact that the books fall within the broad category of “religious, ceremonial, literary, and administrative material, including but not limited to maps, archival materials, photographs, and other rare or important documentary or historical material” under the restrictions.<sup>132</sup>

### **TREATMENT OF RELIGIOUS MINORITIES HIGHLIGHTS SERIOUS FLAWS IN U.S. CULTURAL POLICY**

How do we reconcile the human right to “rights in property” with the enforcement of State ownership of all cultural property in countries like Syria, Iraq, Libya and Egypt, and where the very nature of state ownership deprives minority religious communities and individuals of not only their *own* property, but also their “cultural right” to access such property?

The countless human rights violations in countries that have been granted import restrictions – import restrictions that would reconstitute State-appropriated objects to persecuting States - are cause to reconsider current U.S. cultural policy. It is plain fact that MOUs issued under the CPIA have been interpreted over-broadly, challenging the good sense, ethical and moral standards, and the human rights obligations of the United States.

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<sup>132</sup> Import Restrictions Imposed on Archaeological and Ethnological Material of Syria, 81 Fed. Reg. 53,916 Aug. 15, 2016 (to be codified in 19 C.F.R. 12).