

THE LAWYERS'
COMMITTEE FOR
CULTURAL
HERITAGE
PRESERVATION

October 15, 2019

Cultural Property Advisory Committee
U.S. Department of State
2200 C Street N.W.
Washington, D.C. 20522

Re: United States-Republic of Yemen Memorandum of Understanding & United States-Kingdom of Morocco Memorandum of Understanding

Dear Committee Members:

As Executive Director, I submit this letter in behalf of the Lawyers' Committee for Cultural Heritage Preservation ("LCCHP") in support of both the Republic of Yemen and the Kingdom of Morocco's request to enter into a Memorandum of Understanding (hereinafter "MOU") with the United States relating to imposing import restrictions on archeological and ethnological materials. The implementation of import restrictions requested under Art. 9 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter "The 1970 UNESCO Convention"),¹ will, in concert with actions taken by other market nations, substantially work to deter the serious looting afflicting both the Republic of Yemen and the Kingdom of Morocco, for which no less drastic remedies are available.² The LCCHP thus urges the Cultural Property Advisory Committee (the "Committee") to recommend entering into these MOUs with both the Republic of Yemen and the Kingdom of Morocco.

The LCCHP is a not-for-profit organization that fosters the stewardship of the objects, places, and traditions that define us as societies, nations, civilizations, and as human beings. We are lawyers, legal scholars, and law enforcement agents – as well as anthropologists, archaeologists, architects,

¹ Nov. 14, 1970, 823 U.N.T.S. 231 (1972), 10 I.L.M. 289 (1971).

² See 19 U.S.C. §§ 2601 *et seq.* The United States' ratification of the 1970 UNESCO Convention, the Convention on Cultural Property Implementation Act (CPIA), authorizes entering into such MOUs, so long as the President determines the cultural patrimony of the State Party is in jeopardy of pillage; the State Party has taken measures to protect their cultural patrimony; the implementation of regulations, in connection with similar regulations implemented by other nations would benefit in deterring the pillage where there is no less drastic remedy; and such restrictions in the particular circumstances are consistent with general interest of the international community in the interchange of cultural property.

art historians, students, and others – who champion preservation through the justice system. Our efforts promote cultural heritage preservation through legal education and advocacy, and we thus below discuss the relevant foreign and international law that may be relevant to your findings with respect to the third determination outlined in the Cultural Property Implementation Act (“CPIA”).

A. Yemen’s Domestic Patrimony Laws

Yemen has an established history and interest in protecting its cultural patrimony. Below I address domestic legal protections that the Republic of Yemen has taken to protect this cultural heritage.

As described in the U.S. State Department’s public summary,³ Law No. 21 of 1994 on Antiquities, as amended by Law No. 8 of 1997 (the “Antiquities Law”), is the primary law governing the protection of the Republic of Yemen’s archeological and ethnographic materials. This law provides definitions of which materials qualify as “archaeological”, thus vesting ownership to the State. It addresses permissions and obligations for archaeological work and provides penalties for the illicit trade of cultural material. Law No. 16 of 2013 on the Preservation of Historical Cities, Regions, Historical Monuments and Urban Heritage complements the Antiquities Law by providing a framework for protecting historic cities and cultural landscapes. It seeks to address the legal requirements UNESCO has set for Yemen concerning its heritage sites, strengthens penalties for violations, and provides enforcement mechanisms.

However, given the current conflict—from the civil war between the Houthi militias and the internationally recognized Hadi government to ongoing terror attacks attributed to AQAP across Southern Yemen—these existing domestic legal protections are insufficient to aid in the protection of Yemeni cultural heritage without assistance from the international community, as exemplified by attacks and pillage of museums and collections across Yemen, such as the Aden National Museum, the Taiz National Museum, and the National Museum of Zinjibar.⁴

B. Morocco’s Domestic Patrimony Laws

The Kingdom of Morocco has an established history and interest in protecting its cultural patrimony. Recently, the government has actively sought the repatriation and conservation of archaeological and ethnological materials and cultural sites as exemplified by the recent effort to recover 35,000 archaeological items illegally exported.⁵ Through these efforts, the country has

³ Public Summary Request by the Republic of Yemen to the Government of the United States of America for Imposing Import Restrictions to Protect its Cultural Patrimony under Article 9 of the 1970 Convention, available here: https://eca.state.gov/files/bureau/yemen_public_summary_final.pdf.

⁴ “The Illicit Trade in Conflict Antiquities: Report from the Republic of Yemen” (Mar. 2019), accessible at https://issuu.com/theantiquitiescoalition4/docs/yemen_conflict_antiquities_english.

⁵ See Announcement by the The Ministry of Culture and Communication - Department of Culture, Heritage: The Ministry of Culture in the process of recovering 35,000 archeological items Culture and Media, available at <http://www.mincom.gov.ma/patrimoine-le-ministere-de-la-culture-en-passe-de-recuperer-35-000-pieces->

actively worked to implement the 1970 UNESCO Convention in addition to national patrimony laws. Below I address domestic legal protections that the Kingdom of Morocco has established to protect their cultural heritage.

Moroccan legislation seeks to protect movable objects such as “documents, archives, and manuscripts whose archaeological, historic, scientific, artistic, aesthetic or traditional aspects are of national or universal value[.]” through the imposition of registry requirements and export restrictions.⁶ The Law requires the registration of “[i]tems that are, by nature or by attribution, immovable, together with movable items, the conservation of which is of particular relevance to the art, history or culture of Morocco, may be listed or classified.”⁷

Given this, the Law provides that “[a] classified movable item may not be exported. However, authorizations for temporary export may be granted, especially on the occasion of exhibitions or for purposes of study abroad.⁸ Additionally, “[i]t is forbidden to export, without permission, all or any part of the materials obtained from the demolition of listed or declassified immovable properties.”⁹ Although the domestic law seeks to impose sanctions and penalties for violation of these laws, the government must still rely on the international cooperation in the implementation of the 1970 UNESCO convention obligations to protect their national cultural heritage.

C. Foreign and International Legal Framework

Given this expressed effort on the part of both Yemen and Morocco, it is necessary to address the foreign and international legal framework which, in conjunction with U.S. import restrictions, seeks to deter pillage and trafficking of the Republic of Yemen’s cultural patrimony. The third determination of the CPIA considers the substantial benefit that U.S. import restrictions, either alone or in concert with actions taken by other market nations, would provide in deterring such pillage, considering similar efforts by other nations functioning towards a goal of restricting international trade.

Market nations, like the U.S., occupy a unique position in their ability to safeguard cultural resources through import restrictions. The prohibition of illicit archaeological materials entering our borders aids in the deterrence of looting, by clearly establishing that stolen artifacts will be seized upon discovery. This is greatly perpetuated by the continued growth of international treaties that call for the prevention of illicit trade in cultural objects. These treaties continue to gain States

archeologiques-culture-et-media/; *See also* Minister of Culture and Communication stresses the importance of combining efforts to protect and value the African cultural heritage common, available at <http://www.mincom.gov.ma/le-ministre-de-la-culture-et-de-la-communication-insiste-sur-limportance-de-conjuguer-les-efforts-pour-protoger-et-valoriser-lheritage-culturel-africain-commun/>.

⁶ *See* Law 19-05, Art. 1 Concerning Preservation of Historic Monuments and Sites, Inscriptions, and Art Objects and Antiquities (2006) (hereinafter “Law 19-05”).

⁷ *See* Law 22-80, Art. 1 Concerning the Conservation of Historic Monuments and Sites, Inscriptions, Art Objects and Antiquities (1980) (Hereinafter “Law 22-80”).

⁸ Law 22-80, Arts. 31 and 45.

⁹ *Id.* at Art. 59.

Parties, including several significant market nations in recent years. Enforcement of such international treaties on an international basis promotes the effectiveness of the import restrictions in the MOU.

In order to determine the potential substantial benefit, it is necessary to look to the “concerted international effort” undertaken to protect the Republic of Yemen and the Kingdom of Morocco’s cultural patrimony. Regarding the actions of other market nations, the Senate Report that accompanied the enactment of the CPIA noted that identifying which countries have a “significant import trade” may be a function of “type and historic trading patterns,” as well as the monetary value of the imports.¹⁰ The CPIA emphasizes that, in order to be considered part of a “concerted international effort,” the measures employed by other nations need only be “similar,” so long as they function toward the same goal of restricting illicit trade. The CPIA explicitly includes the actions of nations that are not party to the 1970 UNESCO Convention, further signaling that the third statutory determination does not require any specific type of import restrictions. This point is reiterated in the Senate Report: “the formula measuring the presence and worth of a ‘concerted international effort’ [need] not be so mechanical as to preclude the conclusion of agreements under Section 203(a) where the purposes of the legislation nevertheless would be served by doing so.”¹¹ There is, therefore, a significant degree of flexibility in the consideration of measures used by nations that serve the purpose of protecting cultural heritage.

Internationally, regionally, and nationally, countries are consistently making considerable efforts to regulate the illicit international trade of cultural objects. Internationally, these efforts are spearheaded by the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the “1995 UNIDROIT Convention”)¹².

The Republic of Yemen signed the 1970 UNESCO Convention on March 6, 2019 and the Kingdom of Morocco signed on February 3, 2003, as part of the global effort to prevent the illicit trade of cultural objects.¹³ Currently, there are 140 Member states, 23 of which have joined in the last decade.¹⁴ The U.S. was the first major market country to become a State Party in 1983. Other market nations subsequently ratified the Convention: France (1987); China (1989); Japan (2002); United Kingdom (2002); Sweden (2003); Denmark (2003); Switzerland (2003); Germany (2007); and Austria (2015).¹⁵ The steady rate at which market nations have accepted the Convention indicates the international community’s respect for cultural patrimony and the shared responsibility of protecting the world’s cultural heritage.

¹⁰ S. REP. NO. 97-564, at 6 (1982).

¹¹ *Id.* at 7.

¹² UNIDROIT, Convention on Stolen or Illegally Exported Cultural Objects, 34 I.L.M. 1322 (June 24, 1995)

¹³ The current list of State Parties to the UNESCO Convention is available at <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (last visited Jul. 1, 2019).

¹⁴ *Id.* Since 2010 21 countries have joined: Haiti, Equatorial Guinea, Kazakhstan, Palestine, Eswatini, Lesotho, Myanmar, Bahrain, Chile, Luxembourg, Austria, Lao People’s Democratic Republic, Ghana, Benin, Botswana, Monaco, United Arab Emirates, Ethiopia, Djibouti, Togo, Latvia, and Yemen.

¹⁵ The only remaining European country not yet a party is Ireland (as of Jul. 1 2019).

Many of the signatories, unlike the United States, consider the 1970 UNESCO Convention to be effective within their territories without enactment of implementing legislation.¹⁶ Others, including Australia and Canada have implemented domestic sanctions for the import of illegally exported cultural materials from any other States Parties.¹⁷ Nations in both of these categories have, therefore, already implemented restrictions that are similar to, and in fact much broader than, the import restrictions imposed by the United States under these proposed MOUs pursuant to the CPIA.

For example, the European Union has made a considerable effort to strictly implement the guidelines of the 1970 UNESCO Convention. On April 17, 2019, the European Parliament, which is the EU's legislative branch, passed the binding and self-executing Regulation 2019/880 regarding the treatment of non-EU goods entering the customs territory of the EU.¹⁸ This Regulation was automatically and uniformly applied in its entirety by all 28 Member States as of June 27, 2019. Regulation 880 creates uniform rules for the import of cultural property into the EU from non union states, seeking to reduce trafficking in cultural goods, combat terrorism financing and protect cultural heritage, especially archaeological objects in source countries affected by armed conflict. The Regulation does so by (1) establishing a common definition for cultural goods at import; (2) ensuring importers exercise diligence when buying cultural goods from third countries; (3) determining standardized information to certify the goods are legal; and (4) promoting the active involvement of stakeholders in protecting cultural heritage. This EU regulation, among other regional efforts, indicates the international response to the problem of the looting of archaeological sites has strengthened and will continue to do so.

Other countries, like the United States, that require legislation to implement UNESCO regulations, have stated that, in enforcing import restrictions, they will apply the country of origin's law in determining whether the importation of certain objects is illegal. Many States Parties have adopted specific laws and regulations for the protection of cultural heritage, with specialized units in the fight against illicit trafficking in cultural property (Argentina, France, Honduras, Serbia). For example, the United Kingdom has criminalized knowingly "dealing in tainted cultural objects," defined as objects whose "removal or excavation constitutes an offence" in the nation of origin.¹⁹ Under UK law, the offense of dealing in tainted cultural objects covers artifacts from Italy,

¹⁶ See Reports on the measures taken for the implementation of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, available at <https://unesdoc.unesco.org/ark:/48223/pf0000234942>.

¹⁷ See, e.g., Canada Cultural Property Export and Import Act, R.S.C., 1985, c. C-51, § 37; Australia Protection of Movable Cultural Heritage Act 1986. These restrictions are much broader because they apply to all illegally exported cultural materials and are not restricted to specifically designated categories of archaeological and ethnological materials.

¹⁸ Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0880&from=EN>.

¹⁹ Dealing in Cultural Objects (Offences) Act 2003, Ch. 27, Sections 1 and 2(2), available at <http://www.legislation.gov.uk/ukpga/2003/27/contents>. The statute refers to objects removed from "a building or structure of historical, architectural or archaeological interest" or from an excavation either in the United Kingdom or in a foreign country. Section 2(3)(a).

including the import or export of such objects.²⁰ Similarly, Germany's implementing legislation forbids the import of any illegally exported cultural object from a State Party that has been individually classified in an accessible inventory by the country of origin either one year prior to removal or within one year of the time when the country of origin gains knowledge of the excavation,²¹ showing a concerted international effort to prevent the illegal import of cultural objects under the 1970 UNESCO Convention.

The 1995 UNIDROIT Convention reinforces the 1970 UNESCO Convention's focus on the law of the exporting country. The 1995 UNIDROIT Convention requires States Parties to create private rights of action for the recovery of stolen and illegally exported cultural objects, and identifies in Article 3(2) all illegally excavated archaeological objects as stolen property when consistent with the law in the country of origin. This Convention has 46 contracting parties applying minimal legal rules on the restitution and return of cultural objects compatible with the 1970 UNESCO Convention.

By applying the domestic law of the exporting country to actions in the destination country, the 1995 UNIDROIT Convention creates a potentially powerful deterrent to the trade of archaeological materials in other State Parties, particularly when there is strong evidence that looting, or pillage has occurred. The United States has ratified the 1970 UNESCO Convention, but not the 1995 UNIDROIT Convention. However, the 1995 UNIDROIT Convention represents an example of "similar" measures taken by other countries to protect the cultural objects at issue, as required under the CPIA ratified by large market countries such as China.

Additionally, the CPIA provides for the imposition of restrictions in the event that a market country is not implementing similar restrictions. The exception in the statute permits the President to "enter into an agreement if he determines that a nation individually having a significant import trade in such material is not implementing, or is not likely to implement, similar restrictions, but--
(A) such restrictions are not essential to deter a serious situation of pillage, and
(B) the application of the import restrictions . . . in concert with similar restrictions implemented, or to be implemented, by other nations (whether or not State Parties) individually having a significant import trade in such material would be of substantial benefit in deterring a serious situation of pillage."²²

According to this exception, even if another nation with a significant import trade is not taking similar actions, then the U.S. may impose its own import restrictions if those restrictions would still be of substantial benefit in deterring the pillage. That said, as shown above, other market nations *are* taking actions that are not only similar, but stronger to those to be imposed under the requested MOU.

²⁰ Section 4 of the Act gives British Customs the "necessary powers of enforcement where an offence involves the importation or exportation of a tainted cultural object."

²¹ Law for the Prevention of Export of Cultural Property, Jul. 8, 2007, BGBI. I p. 1754. Amended May 18, 2007, BGBI. I p. 757 (F.R.G.).

²² 19 U.S.C. § 2603(c)(2).

D. Existing Bilateral Agreements Compared to The Republic of Yemen's Request

The United States has entered into MOUs with other Middle East and African countries in similar circumstances to Yemen such as those with Iraq in the case of armed conflict, as well as Libya and Mali in the cases of civil war and terrorism.²³ The U.S. imposed emergency import restrictions regarding Iraqi archaeological and ethnological material in both 2004 and 2008 while the country was besieged by armed conflict and terrorist attacks, including by Al-Qaeda in Iraq (“AQI”), an Al-Qaeda affiliate with similarities to AQAP.²⁴ More recently, the United States entered into an MOU with Libya in 2018, Libya, like Yemen, continues to suffer from a violent civil war in which two factions fight each other directly and through militant proxies for legitimacy. Libya further parallels that of Yemen as political and armed infighting has provided an opportunity for terrorist organizations to gain ground and execute attacks, from Ansar al-Sharia to the Islamic State.²⁵ The precedent of U.S. protections for cultural heritage threatened by civil war and terrorism is long-standing as exemplified by the 1997 MOU with Mali. Mali, like Yemen and Libya, was riddled with civil war, armed conflict, and terrorist activity that threatened its rich cultural heritage, including attacks by Islamic militias against religious and historic monuments in the ancient city of Timbuktu, Mali that were later prosecuted by the International Criminal Court.

Like Iraq, Libya, and Mali, Yemen's population includes ethnic and religious minorities, including its Yemeni-Jewish population. These MOUs impose restriction on the importation of cultural property as defined in the 1970 UNESCO Convention,²⁶ that is, “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to” specifically outlined categories. Yemen's primary law governing the protection of archaeological and ethnological materials, Law No. 21 of 1994 on Antiquities, specifically designates cultural property with respect to archaeological objects as “any movable or immovable material left by civilizations of the past or by preceding generations of Yemen, which was fabricated, produced, constructed, carved, or written more than 200 years ago[,]”²⁷ thus protecting the full spectrum of Yemeni heritage.

²³ See for example, Libya (2018), Egypt (2016), Syria (2016), Iraq (2008), Colombia (2006), and Cambodia (2003).

²⁴ See Congressional report regarding Al Qaeda in Iraq: Assessment and Outside Links, available at <https://fas.org/sgp/crs/terror/RL32217.pdf>.

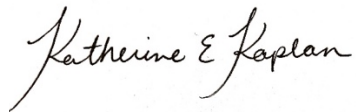
²⁵ Council on Foreign Relations Global Conflict Tracker: Civil War in Libya available at <https://www.cfr.org/interactive/global-conflict-tracker/conflict/civil-war-libya> (last visited Oct. 15 2019).

²⁶ 19 U.S.C. § 2601(6).

²⁷ Law No. 21 of 1994 on Antiquities. Available at https://en.unesco.org/sites/default/files/yemen_lawantiquities1997_engtof.pdf.

Given this legal and factual landscape, the efforts of both the Republic of Yemen and the Kingdom of Morocco, of the international community, and of individual nations to prevent serious situations of pillage, the LCCHP asks that the Cultural Property Advisory Committee recommend the implementation of a bilateral MOUs between the United States and the Republic of Yemen as well as the United States and the Kingdom of Morocco.

Sincerely,

A handwritten signature in cursive script that reads "Katherine E. Kaplan".

Katherine Kaplan
Executive Director
The Lawyers' Committee for Cultural Heritage Preservation