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Stolen Art and National Security (Can) (Should) the U.S. Do More?

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STOLEN ART AND NATIONAL SECURITY (CAN) (SHOULD) THE U.S. DO MORE?

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INTRODUCTION

From the pharaohs' tombs in the Egyptian pyramids, which were completely sacked before Alexander the Great ever set eyes on them in 322 BCE,¹ to the seizure of over twenty percent of Europe's art by the Nazis in World War II,² artwork and cultural property's unique position in society have made these treasures highly susceptible to exploitation and theft. It is difficult to pigeonhole the exact role that art plays in society.³ Artworks, antiquities, and cultural property are all undeniably expensive; however, much of an artwork's subjective value is determined by its contribution to a society's cultural heritage and history.⁴

Countries are rightfully possessive of their respective cultural heritages, which include priceless works of art, artifacts, and antiquities. France, for example, has strict export control laws in place, only permitting certain works of national heritage to leave the country with the direct approval of the government, even in transactions between private parties.⁵ Globalization has led to the rise of an interconnected art market, and pieces are commonly bought and sold internationally.⁶ While quick communication and ease of

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1. Joshua J. Mark, *Tomb Robbing in Ancient Egypt*, ANCIENT HIST. ENCYCLOPEDIA (July 17, 2017), <https://www.ancient.eu/article/1095/tomb-robbing-in-ancient-egypt/>.

2. Greg Bradsher, *Documenting Nazi Plunder of European Art*, NAT'L ARCHIVES (Nov. 1997), <https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html> (last reviewed Aug. 15, 2016); see also NICHOLAS M. O'DONNELL, A TRAGIC FATE (2017) (discussing Nazi-looted art from a historical perspective before examining the legal and ethical implications of the plunder and the restitution claims still at issue).

3. See Susanne K. Langer, *Cultural Importance of Arts*, 1 J. AESTHETIC EDUC. 5, 5 (1996) ("Art is, indeed, the spearhead of human development, social and individual.").

4. See generally Erwin Dekker, *Two Approaches to Study the Value of Art and Culture, and the Emergence of a Third*, 39 J. CULTURAL ECON. 309 (Nov. 2015) (detailing the complexities and intricacies involved in accurately valuating artworks in the field of cultural economics).

5. Line-Alexa Glotin et al., *Art Law in France*, LEXOLOGY (Mar. 13, 2019), <https://www.lexology.com/library/detail.aspx?g=3c8ee44d-e472-4622-b28c-4980b4fe1223> (describing how the Ministry of Culture may classify a work as a "national treasure" in order to ensure it will permanently reside within France).

6. See Tess Davis et al., *Culture Under Threat: Recommendations for the U.S. Government*, 1 ANTIQUITIES COALITION TASK FORCE 1, 8 (Apr. 2016), <https://taskforce.theantiquitiescoalition.org/wp->

transportation has facilitated legal transactions, globalization has also encouraged the proliferation of black markets for stolen artworks.⁷

After weapons and drugs, art is the third highest-grossing illegal market in the world.⁸ The art market is the perfect place for laundering and hiding money; transactions are private, prices are speculative, and border authorities who inspect a piece of art rarely know its actual value.⁹ As other sectors have become highly regulated through international cooperation and tougher law-enforcement efforts, art has emerged as an increasingly attractive vehicle; “the more tightly the international financial sector is regulated, the more funds flow into the art world.”¹⁰

The protection and return of stolen artwork to the rightful owners, including governments when national patrimonial treasures are stolen, is a relatively new phenomenon on the international stage.¹¹ Repatriating stolen artwork for national security reasons in the U.S.—with the intention of promoting cooperative diplomatic relations, preventing financing for non-state terrorist groups, and curtailing money laundering designed to bypass U.S. sanctions—is an even newer practice.¹² Although the U.S. has lagged behind other countries in recognizing artwork as an important national security issue,¹³ the U.S. Immigration and Customs Enforcement’s current policy reflects the developing framework for repatriating stolen artwork in the U.S: “[r]eturning a nation’s looted cultural heritage or stolen artwork, promotes goodwill with foreign governments and citizens, while significantly protecting the world’s cultural heritage and knowledge of past

content/uploads/2015/01/Task-Force-Report-April-2016-Complete-Report.pdf. [hereinafter ANTIQUITIES COALITION TASK FORCE].

7. *Id.*

8. See Kris Hollington, *After Drugs and Guns, Art Theft Is the Biggest Criminal Enterprise in the World*, NEWSWEEK (July 22, 2014, 10:09 AM ET), <https://www.newsweek.com/2014/07/18/after-drugs-and-guns-art-theft-biggest-criminal-enterprise-world-260386.html> (discussing how “the amount of criminal income generated by art crime each year is thought to be \$6–8 billion, according to the FBI”).

9. See Samuel Rubenfield, *Art World’s Response to Money-Laundering Concerns Draws Critics*, WALL ST. J. (Feb. 27, 2017, 11:03 AM ET), https://www.wsj.com/articles/BL-252B-12248?mod=article_inline.

10. *Id.*

11. United Nations Educational, Scientific and Cultural Organization, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Nov. 14, 1970, 823 U.N.T.S. 231.

12. See generally Nikita Lalwani, *State of Art: How Cultural Property Became a National-Security Priority*, 130 YALE L.J.F. 78 (July 19, 2020), <https://www.yalelawjournal.org/forum/state-of-the-art-how-cultural-property-became-a-national-security-priority> (examining the influence of events such as past looting in Afghanistan and Iraq and terrorist financing in the Middle East on the evolving classification of stolen art as a U.S. national security concern).

13. See *id.* at 79 (“For much of the twentieth century, the United States was relatively uninterested in repatriating stolen cultural property, thanks in part to a powerful coalition of art collectors, museums, and numismatists who preferred an unregulated art market.”).

civilizations.”¹⁴

The U.S.’s position regarding stolen artworks has evolved from relative indifference to active protection.¹⁵ While the protection of stolen artwork and cultural property is now an important national security concern for the U.S. government, it still remains an unappreciated and under-recognized issue, especially considering the unique role that art plays in society. Therefore, this paper examines the evolution of the United States’ current legal framework for protecting and returning stolen art and cultural property to determine whether the U.S. can, and should, do more to protect art in the interest of national security.

This paper is divided into four main sections. Section I first explores the history and development of the treatment of art and cultural property in national security, before presenting a summary of the current legal landscape regarding this issue. Section II highlights recent examples of the influence and importance of stolen artwork in national security, including the seizure of stolen Nazi artwork after World War II, the repatriation of Iraqi artwork and antiquities to address national security concerns, and the exploitation of artwork by terrorist organizations such as ISIS who have used the sale of art and antiquities to finance their operations. Section III analyzes the current framework to determine whether the U.S. can, and should, develop a more robust framework for art in national security. Section IV concludes the analysis presented in the paper.

I. HOW STOLEN ARTWORK BECAME A NATIONAL SECURITY LAW CONCERN

Appropriating a conquered society’s art began as a normal practice of warfare and only recently turned into an issue relevant to national security. “The world’s museums are filled with objects lifted during conflicts from the Romans on.”¹⁶ However, attitudes and global norms have shifted, so countries now routinely demand (successfully and unsuccessfully) the return of cultural artifacts and art native to their land.¹⁷ There are countless

14. *What We Do: Cultural Property, Art and Antiquities Investigations*, U.S. IMMIGRATION & CUSTOMS ENF’T, <https://www.ice.gov/cultural-art-investigations> (last updated Oct. 15, 2020).

15. See Lalwani, *supra* note 12, at 79.

16. Paige Tenkhoff, *Artistic Justice: How the Executive Branch Can Facilitate Nazi-Looted Art Restitution*, 73 VAND. L. REV. 569, 569 (2020) (quoting Eric Gibson, *The Art of to Whom Art Belongs*, WALL ST. J. (July 16, 1999, 12:09 AM), <https://www.wsj.com/articles/SB932095815373557335>).

17. See Colin Woodard, *The War Over Plunder: Who Owns Art Stolen in War?*, MIL. HIST. Q. (2010), <https://www.historynet.com/the-war-over-plunder-who-owns-art-stolen-in-war.htm> (“Over the past two decades, globalization, changing attitudes, and the spread of both international law and civil lawsuits have emboldened aggrieved nations to demand the return of cultural property seized by enemy forces decades or even centuries ago, and a few holders of these spoils have complied. Five years ago,

diplomatic fights between countries asking for the repatriation of art and other cultural property looted centuries ago.¹⁸ This evolving view towards stolen art has slowly taken hold with international conventions and events, yet there are still major challenges, including in the U.S. Recently, the U.S. Immigration and Customs Enforcement Agency returned over 8,000 pieces of artwork and other cultural property to more than 30 countries between 2007 and 2018.¹⁹ This section explores how the U.S. moved from indifference to active participation in repatriating stolen artwork for national security concerns.

This Section offers a historical and legal overview of how the national security framework for protecting art developed. Section I is arranged chronologically and describes watershed moments where the egregious theft and exploitation of artworks and cultural property spurred change to the U.S.'s treatment of these stolen works for national security reasons. This Section begins with a review of the international conventions and evolving norms that eventually helped sway change in the U.S. before examining crucial U.S. legal developments.

Global Transition from Looting to Repatriation

In the twentieth century, customary practices regarding various wartime activities, including the looting of art, began evolving in a series of international treaties and conventions.²⁰ Between the Hague Conventions of 1899 and 1954, there was a customary law gray period where “state practice was evolving, and by World War I it would certainly have been acknowledged by all parties in a conflict that there was no legal basis to seize cultural property [including artworks].”²¹ However, this evolving norm was

Japan returned a Korean monument on the centennial of its theft during the Russo-Japanese War; three years before that, Italy returned a 3,000-year-old obelisk taken during Mussolini's invasion of Ethiopia.”).

18. See *id.* (describing Czech unsuccessfully asking Swedes for art and cultural property stolen in the 30 Years War from Prague in the seventeenth century).

19. Press Release, U.S. Immigration & Customs Enf't, ICE Returns Thousands of Ancient Artifacts Seized from Hobby Lobby to Iraq (May 2, 2018), <https://www.ice.gov/news/releases/ice-returns-thousands-ancient-artifacts-seized-hobby-lobby-iraq> (“including paintings from France, Germany, Poland and Austria, 15th-18th century manuscripts from Italy and Peru, cultural artifacts from China, Cambodia, and two Baatar dinosaur fossils to Mongolia, antiquities and Saddam Hussein-era objects returned to Iraq, ancient artifacts, including a mummy's hand, to Egypt, and most recently royal seals valued at \$1,500,000 to the Republic of Korea. . . .”).

20. See Erik Nemeth, *Cultural Security: The Evolving Role of Art in International Security*, 19 *TERRORISM & POL. VIOLENCE* 1, 3–4 (Feb. 2007) (outlining the historical development of international treaties protecting art and cultural property).

21. Woodard, *supra* note 17 (quoting Fred Borch, regimental historian and archivist at the U.S. Army Judge Advocate General's Corps Legal Center and School in Charlottesville, Virginia, “[b]ut until 1954, there's no international convention under which to seek remedy, so it's all custom and state practice.”).

not firmly adopted, and the destruction that occurred in World War II and described later in this Paper demonstrates the lack of uniformity or enforceability. The Hague Convention of 1954 was one international turning point addressing the enormous destruction and looting of cultural property seen in World War II.²² Although the U.S. was not a signatory to the Hague Convention of 1954 until 2009, this Convention set the scene for subsequent international developments and U.S. action in the latter half of the twentieth century.²³

Among other articles, the 1954 Hague Convention compelled the signatory countries to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”²⁴ The 1954 Hague Convention was a relatively weak treaty with no actual enforceability and had “seemingly little effect in protecting cultural property in subsequent armed conflicts such as in Vietnam, the Russian occupation of Afghanistan, and the Iraqi invasion of Kuwait.”²⁵ However, the 1954 Hague Convention laid the foundation for the subsequent Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1970.²⁶

The 1970 UNESCO Convention was a “landmark international agreement restricting trade in archaeological, ethnological, and cultural materials”²⁷ that “expanded on the 1954 Hague Convention to prevent the unauthorized transport of cultural property independent of armed conflict.”²⁸ Multiple developments in the post-World War II era culminated in widespread international support for the UNESCO Convention. First, the demand of the international art market for works of art, including archaeological objects, had expanded as the wealth of western countries in Europe and North America grew post-war.²⁹ Second, advances in archaeological sciences and methods meant that ancient artifacts and older artworks were

22. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention].

23. See Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, UNESCO, <https://pax.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha> (listing state parties to the Convention).

24. 1954 Hague Convention, *supra* note 22, art. 4.

25. Nemeth, *supra* note 20, at 6.

26. *Id.* at 11.

27. Lalwani, *supra* note 12, at 80.

28. Nemeth, *supra* note 20, at 11.

29. Patty Gerstenblith, *Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations*, in THE ROUTLEDGE COMPANION TO CULTURAL PROPERTY 70, 70–71 (Jane Anderson & Haidy Geismar eds., 2017).

even more important to understanding the past.³⁰ Looters did not only steal an object of cultural importance and economic significance, but they also eliminated any chance of a society learning more about the context, history, and site from that object.³¹ Third, with the dissolution of colonialism in developing countries, new countries wanted to conserve and protect what remained of their heritage.³² These factors, in conjunction with the recent memory of the Nazi's widespread looting, sparked international support for the UNESCO Convention. Even though the road in the U.S. to domestic implementation of the UNESCO Convention through legislation was long and difficult, this UNESCO Convention was highly influential in laying the foundation for a U.S legal structure to protect and repatriate stolen art for national security concerns.³³

One of the most relevant provisions of the UNESCO Convention is Article 9, which declares any State Party to the 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.”³⁴

Article 9 is significant in the U.S.'s domestic implementation of the treaty.³⁵ Article 9 means other countries must make a request if their property is in danger specifically under this article to trigger most U.S. protections for looted artworks and cultural property.³⁶

U.S. Domestic Implementation of the UNESCO Convention

Along with China, the U.K., and France, the U.S. was one of the last parties to sign the UNESCO Convention; this record is unsurprising considering these four countries have the largest markets of stolen art.³⁷ Even

30. *Id.* at 71.

31. *Id.*

32. *Id.*

33. Lalwani, *supra* note 12, at 80.

34. United Nations Educational, Scientific and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

35. *See* Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. § 2602 (2006).

36. *See* § 2602(a)(1).

37. Lalwani, *supra* note 12, at 84 (“By contrast, some of the first countries to implement the treaty were those that had long histories of theft and looting, such as Cambodia (the seventh country to join),

after receiving approval from the Senate to ratify the treaty in 1972, the U.S. took over a decade to pass domestic legislation officially implementing the treaty.³⁸ The U.S. had declared one reservation and six “understandings” to the convention, one of which stated the U.S. viewed the Convention as merely executory in nature.³⁹ Legislation to implement this Convention domestically was continuously proposed and passed in the House of Representatives throughout the 1970s; however, it was “held hostage” in the Senate mainly due to the efforts of one senator, the late Senator Daniel Patrick Moynihan.⁴⁰ Senator Moynihan had two reasons to block and lobby against the implementation of the Convention.⁴¹ First, he was personally involved in the collection of antiquities and did not want to introduce more regulation in this area.⁴² Second, he represented New York, the heart of the U.S.’s legal and black-market art worlds.⁴³ Eventually, in 1983, Congress finally implemented the treaty by passing the Convention on Cultural Property Implementation Act (CCPIA or CPIA).⁴⁴

One of the express goals of the CPIA, as stated by the State Department and reaffirmed by the Senate Finance Committee in 1982, was foreign relations:

“The legislation is important to our foreign relations, including our international cultural relations. The expanding worldwide trade in objects of archaeological and ethnological interest has led to wholesale depredations in some countries, resulting in the mutilation of ceremonial centers and archaeological complexes of ancient civilizations and the removal of stone sculptures and reliefs. In addition, art objects have been stolen in increasing quantities from museums, churches, and collections. The governments which have been victimized have been disturbed at the outflow of these objects to foreign lands, and the appearance in the United States of objects has often given rise to outcries and urgent requests for return by other countries. *The United States considers that on grounds of principle, good foreign relations, and concern for the*

Libya (the tenth), Iraq (the twelfth), Egypt (the fifteenth), and Syria (the twenty-second).”).

38. See Gerstenblith, *supra* note 29, at 71 (illustrating how there was resistance from art dealers in the U.S. worried implementing this treaty would hurt the U.S. art market and push buyers and sellers out to European and Asian markets).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601–13 (2006).

preservation of the cultural heritage of mankind, it should render assistance in these situations.⁴⁵

Among other provisions, the CPIA outlines three approaches for how the U.S. may restrict importations on cultural property and artworks from other countries.⁴⁶ The first approach is through bilateral and multilateral agreements.⁴⁷ The President may enter into a bilateral agreement with a State Party or multilateral agreement (whether or not a State Party) to apply import restrictions after a request is made by a State Party under Article 9 of the 1970 UNESCO Convention.⁴⁸ The second approach is through emergency action.⁴⁹ If the President determines there are artifacts and artwork in jeopardy from pillage, then the President may apply import restrictions without a formal treaty if the State Party has made a request.⁵⁰ The third approach outright bans stolen cultural property from being imported into the U.S.⁵¹ However, this section narrowly defines cultural property as inventory that has been documented in a museum, religious or secular public monument, or similar institution of any State Party.⁵²

Proponents for protecting artworks and cultural property were disappointed with how weak the CPIA appears in comparison to other signatories' domestic implementation.⁵³ For example, other countries had enacted sweeping bans against any and all suspicious imports from other countries.⁵⁴ On the other hand, the U.S. put the burden of notice on other countries by requiring them to ask for assistance directly if the "cultural patrimony of the [other] State Party is in jeopardy from the pillage."⁵⁵ The number of bilateral treaties due to the CPIA between the U.S. and other countries has been increasing faster in recent years.⁵⁶ However, "despite the fact that it has been more than three decades since Congress passed the law, only twenty countries currently have these bilateral agreements with the United States—accounting for less than fifteen percent of the state parties to the UNESCO Convention."⁵⁷ The import restrictions established in these

45. S. Rep. No. 97-564, at 3 (1982), <https://eca.state.gov/files/bureau/97-564.pdf> (emphasis added).

46. 19 U.S.C. §§ 2601–13.

47. § 2602(a).

48. *Id.*

49. § 2603(b).

50. *Id.*

51. § 2607.

52. *Id.*

53. See Lalwani, *supra* note 12, at 81 (explaining how proponents wanted a stronger law).

54. *Id.*

55. § 2602(a)(1)(A).

56. U.S. DEP'T OF STATE: BUREAU OF EDUC. & CULTURAL AFFAIRS, CULTURAL PROPERTY AGREEMENTS, <https://app.box.com/s/hvzq1u7s0uyedszsbck9ltiurgjfn5e/file/335001553866> (last updated Sept. 29, 2020) [hereinafter CULTURAL PROPERTY AGREEMENTS].

57. Lalwani, *supra* note 12, at 81; see also CULTURAL PROPERTY AGREEMENTS, *supra* note 56

bilateral treaties are designed to reduce the incentive for pillage and looting by eliminating the U.S. market from the demand chain.⁵⁸ The State Department promotes these bilateral treaties because “U.S. efforts to protect and preserve cultural heritage through cultural property agreements promote stability, economic development, and good governance in other countries. These agreements fight terrorist financing from antiquities trafficking, combat transnational crime, and strengthen international law enforcement cooperation.”⁵⁹ The CPIA establishes the foundation for the current legal framework regarding the U.S.’s protection of cultural property for national security concerns. However, the CPIA is the beginning, not the end, of the U.S.’s forays into this arena.

How Stolen Art Is a National Security Concern

A Senate Report on the CPIA demonstrates one of the many connections between art and national security: “[b]ecause the United States is a principal market for articles of archaeological or ethnological interest and of art objects, the discovery here of stolen or illegally exported artifacts in some cases severely strains our relations with the countries of origin, which often include close allies.”⁶⁰ From Congress’s declared reasons behind implementing the CPIA in 1982 to formal declarations by the government and State Department in 2017 that “stemming the looting of antiquities bolsters U.S. national security,” national security concerns have remained intertwined with the protection of cultural property and the return of stolen artworks in the U.S.⁶¹

There are countless governmental organizations and departments working to prevent the sale and facilitate the return of looted art: the Executive and Legislative branches, the State Department, the Treasury Department, Department of Homeland Security (HSI), and Immigrations and Customs Enforcement (ICE), and the Federal Bureau of Investigations (FBI), to name a few. Listed below are several examples of the role of stolen art and antiquities in national security concerns across multiple branches of government. First, although the President officially implements the bilateral agreements and has the authority to make the determinations listed in the

(“Cultural property agreements are in force with Belize, Bolivia, Bulgaria, Cambodia, China, Colombia, Cyprus, Egypt, El Salvador, Greece, Guatemala, Honduras, Italy, Libya, Mali, Nicaragua, and Peru. Emergency import restrictions have been imposed on archaeological and ethnological materials from Iraq and Syria.”).

58. See CULTURAL PROPERTY AGREEMENTS, *supra* note 56.

59. *Id.*

60. S. Rep. No. 97-564, at 3 (1982), <https://eca.state.gov/files/bureau/97-564.pdf>.

61. Lalwani, *supra* note 12, at 97.

CPIA, a considerable amount of the President's authority has been conveyed to the Secretary of State.⁶² The State Department has a sub-committee called the Cultural Property Advisory Committee (CPAC) composed of well-known archeologists and art experts who help assess the necessary determinations under the CPIA and give their recommendations to the State Department.⁶³ The State Department also runs a program, the Ambassadors Fund for Cultural Preservation, to support projects aimed at preserving cultural heritage in less developed countries, including historic buildings, archeological sites, paintings, and other forms of traditional cultural expression and art.⁶⁴ Congress established this program in 2000 because “[c]ultural preservation offers an opportunity to show a different American face to other countries. By taking a leading role in efforts to preserve cultural heritage, we show our respect for other cultures.”⁶⁵ The U.S. thus preserves cultural heritage to include returning looted artifacts from developing countries that appear in American markets.

Additionally, Congress has actually bypassed the CPIA legislation twice in order to directly address stolen art in pertinent conflicts (Iraq in 2004 and Syria in 2016).⁶⁶ Congress has also passed various statutes addressing stolen Nazi Art such as the Holocaust Expropriated Art Recovery (HEAR) Act of 2016.⁶⁷ The State Department has been involved with the return of Nazi-looted art through a set of principles developed at various conferences, which are often spearheaded by the U.S.⁶⁸ Moreover, HSI and ICE have a particular investigations team, the “Cultural Property, Art and Antiquities Investigations” geared at seizing and returning looted artworks and artifacts crossing U.S. borders.⁶⁹

More recently, in November 2020, the Department of Treasury's Office of Foreign Assets Control (OFAC) issued an advisory to art galleries,

62. CULTURAL PROPERTY AGREEMENTS, *supra* note 56.

63. *Ambassadors Fund for Cultural Preservation: Making Determinations*, U.S. DEP'T OF STATE: BUREAU OF EDUC. & CULTURAL AFFAIRS, <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/making-determinations> (last visited Dec. 1, 2020) (discussing how CPAC makes its recommendations).

64. *Ambassadors Fund for Cultural Preservation: About AFCP*, U.S. DEP'T OF STATE: BUREAU OF EDUC. & CULTURAL AFFAIRS, <https://eca.state.gov/cultural-heritage-center/ambassadors-fund-cultural-preservation> (last visited Dec. 1, 2020).

65. U.S. DEP'T OF STATE, FACT SHEET: U.S. AMBASSADORS FUND FOR CULTURAL PRESERVATION (Oct. 19, 2018) (quoting the 106th Congress), <https://app.box.com/s/hvzq1u7s0uyedszsbck9ltiurgjfn5e/file/335018584032>.

66. See Lalwani, *supra* note 12, at 81–82 (explaining how “the looting of the Iraq Museum struck a particular nerve in Congress thanks to reports that American soldiers had done nothing as thieves ransacked the museum”).

67. Holocaust Expropriated Art Recovery Act of 2016, Pub L. No. 114-308, 130 Stat. 1524.

68. See O'Donnell, *supra* note 2, at 49–50 (listing the Washington Principles).

69. *What We Do: Cultural Property, Art and Antiquities Investigations*, U.S. IMMIGRATION & CUSTOMS ENF'T, <https://www.ice.gov/cultural-art-investigations> (last updated Oct. 15, 2020).

museums, private collectors, auction companies, agents and brokers due to a concern that the vulnerabilities in the art market could be exploited by bad actors in order to evade U.S. sanctions and access the American financial system.⁷⁰ Furthermore, the House of Representatives responded to ISIS's widespread destruction, looting, and exploitation of Middle Eastern cultural property by declaring the protection of stolen art and cultural property a national security issue.⁷¹

The above illustrations demonstrate how stolen art has become a significant concern for the national security apparatus across the U.S. government. The concept of national security has rapidly evolved in the U.S. since the mid-twentieth century to arguably cover “a range of threats, including nonstate actors and nonmilitary and nonhuman threats, such as economic crises, cybersecurity, infectious disease, climate change, transnational crime, and corruption.”⁷² In regard to art and cultural property, there are multiple motivations underlying why stolen art has evolved into a U.S. national security issue. Enforcing sanctions on bad state actors, maintaining good foreign relations with American allies, preventing the rise of antagonistic non-state actors' finances, and bolstering the U.S.'s international image are all reasons for seizing and repatriating stolen art. These motivations directly encompass national security concerns.

II. EXAMPLES OF REPATRIATED ARTWORK FOR NATIONAL SECURITY REASONS

This Section discusses three in-depth examples of the U.S. addressing stolen art through a national security lens. The first example, the treatment and seizure of Nazi stolen art, represents a pivotal moment in the U.S. government's changing viewpoint of stolen art as a national security concern. The art stolen by the Nazis opened the eyes of the U.S. government

70. Mengqi Sun, *Treasury Department Warns Art Market Against Sanctions Risks*, WALL ST. J. (Nov. 2, 2020, 5:52 PM ET), https://www.wsj.com/articles/treasury-department-warns-art-market-against-sanctions-risks-11604357530?mod=hp_minor_pos10 (illustrating how the “mobility, concealability, and subjective value of artwork further exacerbate its vulnerability to sanctions evasion,” and how “high-value artwork could be used by blacklisted individuals or entities to access American financial system, against U.S. sanctions rules”).

71. See *Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Antiquities by ISIS: Hearing Before the Task Force to Investigate Terrorism Financing of the H. Comm on Fin. Serv.*, 114th Cong. (2017) (statement of Representative Robert Pittenger, North Carolina, Vice Chairman); see also Dexter Fergie, *The Strange Career of 'National Security'*, ATLANTIC (Sept. 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/the-strange-career-of-national-security/598048/> (discussing the history of the term “national security” in American discourse during World War II and how the term took on a greater and greater role through the Cold War and after 9/11).

72. J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1024 (2020).

to the role of artwork and cultural property. Even though the repatriation of art stolen by the Nazis to its rightful previous owners remains an ongoing issue, the second example, the U.S. treatment of Middle Eastern art looted in and after the Gulf War, is a more modern issue. Comparing the U.S. policy treatment of Nazi and Middle Eastern art demonstrates the evolution in U.S. attitudes towards stolen art. The third example then illustrates a slightly different angle by discussing the U.S.'s response to ISIS utilizing money from the sales of pilfered artworks to finance its attacks and operations. These three examples depict the evolution of how stolen art became a national security concern in the U.S.

A. STOLEN NAZI ART

“The Nazis weren’t simply out to enrich themselves. Their looting was part of the Final Solution. They wanted to eradicate a race by extinguishing its culture as well as its people. This gives these works of art a unique resonance . . . The objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice.”⁷³

During World War II, the Nazis looted around 600,000 paintings from Jews, and at least 100,000 of these pieces are still missing.⁷⁴ This accounts for approximately twenty percent of all European art in existence at the time;⁷⁵ this plunder has been called the “greatest art heist” and an “aesthetic cleansing” of Europe.⁷⁶ Hitler had specific plans to open a “Führermuseum” in Austria displaying both acceptable German art and the stolen “degenerate art.”⁷⁷ There was a specific Nazi unit, the “Kunstschutz,” tasked only with acquiring prominent pieces of art and other cultural property from any country with a Nazi presence.⁷⁸ Returning these stolen paintings to the rightful owners or heirs of deceased owners is an ongoing issue in the U.S., Europe, and internationally, over seventy years after the end of the war.

73. Tenkhoff, *supra* note 16.

74. Stuart E. Eizenstat, *Art Stolen by the Nazis Is Still Missing. Here's How We Can Recover It*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html.

75. Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 243, 244 (2006).

76. Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Mar. 19, 2014), <https://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>.

77. Michael J. Birkkrant, *The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-Looted Art*, 18 WASH. U. GLOBAL STUD. L. REV. 213, 214 (2019).

78. *Id.* at 215.

*Washington Principles on Nazi-Confiscated Art*⁷⁹

Between World War II and the 1998 Washington Conference, Holocaust survivors attempted to find and sue to recover their rightful property; however, the legal apparatus was very rigid with strict statutes of limitations, issues of proof, and exactly what knowledge new owners (who may have been several times removed from the Nazis) had or should have had about the transaction.⁸⁰ Even after an important and successful win in a claim of restitution by a Belgium Holocaust survivor in the well-known and hard-fought *Menzel* case in 1969, the floodgates of claims did not open.⁸¹ The burdens for victims were often insurmountable.⁸² In the mid-1990s, articles and books containing “fantastical” ideas about looted art conspiracies renewed public interest, and this movement led to actual change.⁸³

In 1998, the U.S. Department of State hosted the “Washington Conference on Holocaust-Era Assets.”⁸⁴ At this conference, over forty-four countries⁸⁵ committed to the Washington Principles “for identifying, publishing and ultimately restoring the looted art.”⁸⁶ The countries agreed to eleven “non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.”⁸⁷ Underlying all of these principles was the simple and straightforward notion that “cultural property wrongfully taken from its rightful owners should be returned.”⁸⁸ Among other provisions, these principles endorsed efforts to identify confiscated art and reconstitute the art through a central registry and a dispute system.⁸⁹ The Washington Principles

79. O'DONNELL, *supra* note 2, at 49–50 (listing the Washington Principles).

80. Isaac Kaplan, *3 Cases That Explain Why Restituting Nazi-Looted Art Is So Difficult*, ARTSY (July 5, 2017, 4:30 PM ET), <https://www.artsy.net/article/artsy-editorial-3-cases-explain-restituting-nazi-looted-art-difficult>; *see also* O'DONNELL, *supra* note 2, at 21.

81. *See* O'DONNELL, *supra* note 2, at 21.

82. Kaye, *supra* note 75, at 252.

83. O'DONNELL, *supra* note 2, at 29.

84. *Id.*

85. Although led by the U.S., the countries included a reunified Germany, Switzerland (which controversially laundered money for the Nazis), and Russia. *Id.* at 42–44.

86. Eizenstat, *supra* note 74.

87. U.S. DEP'T OF STATE: OFFICE OF THE SPECIAL ENVOY FOR HOLOCAUST ISSUES, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>.

88. Kaye, *supra* note 75, at 244.

89. *See* U.S. DEP'T OF STATE: OFFICE OF THE SPECIAL ENVOY FOR HOLOCAUST ISSUES, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> (listing the Washington Principles released in 1998).

were basically moral principles, and they received bipartisan support and exerted some force in demonstrating the U.S.'s commitment to protect art abroad.⁹⁰

In 2009, forty-six countries, again led by the U.S., met in Prague to issue the Terezin Declaration where they “agreed to extend the Washington Principles to include ‘public and private institutions’ and broaden the meaning of confiscated art to include ‘forced sales and sales under duress’ for Jewish families desperately needing money to escape Nazi Germany.”⁹¹

As virtuous and promising as the Washington Principles appear on paper, they have not always been the most effective at returning Nazi-looted art to the rightful owners as hoped.⁹² For example, the statute of limitations in most countries bars rightful owners from even initiating a cause of action since the looting occurred pre-1945.⁹³ Statutes of limitations also vary country-by-country, so the Washington Principles have evidently not promoted uniformity amongst the signatory countries.⁹⁴ Although this issue was finally addressed by the U.S. Congress in the HEAR Act described later in this Section, victims are still often barred by these threshold matters of statute of limitations and other burdens of proof.

Unfortunately, most of the countries present at both the Washington Principles and Terezin Declaration are still not particularly committed to these non-binding principles.⁹⁵ Some major countries have not even actively investigated, located, or restituted suspicious transactions involving art stolen by the Nazis.⁹⁶ Countries who were definitely impacted by the Nazis’ looting: Hungary, Italy, Russia, Poland, and Spain have been named as the least participatory and compliant with the Washington Principles.⁹⁷ Some countries like Italy started off well in the early 2000s but petered out, while

90. See Eizenstat, *supra* note 74 (“Fortunately, the Washington Principles continue to exert a moral force.”).

91. *Id.*

92. Sarah Cascone, *It’s Been 20 Years Since the Creation of the ‘Washington Principles’ to Return Nazi-Looted Art. But How Effective Have They Been?*, ARTNET NEWS (Nov. 27, 2018), <https://news.artnet.com/art-world/washington-principles-nazi-looted-art-agreement-turns-20-1403614>.

93. Birnkrant, *supra* note 77, at 218.

94. *Id.* at 220 (describing how in “Poland, a country where 90% of the Jewish population was murdered during the Holocaust, the government recently gave individuals with claims to art in the city of Warsaw just six months to come forward, or else risk forfeiting their property to the city. . .”).

95. *Id.* at 246 (“In contrast, former Nazi territories in Europe such as Germany and Poland have signed non-binding accords, such as the Terezin Declaration, yet failed to meaningfully modify their laws to ease the process of filing claims for repatriation of looted art.”).

96. See *id.* at 220.

97. See William D. Cohan, *Five Countries Slow to Address Nazi-Looted Art, U.S. Expert Says*, N.Y. TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html>; see also Cascone, *supra* note 92 (examining how Italy has not implemented the Washington Principles).

others like Spain took no steps at all.⁹⁸ Additionally, twenty years after the declaration of the Washington Principles, only five countries—the United Kingdom, the Netherlands, Austria, Germany, and France—had established specific panels to rule on disputed artworks.⁹⁹

However, the Washington Principles still represent a significant movement, nationally and internationally, and they are still referenced and cited in Congressional reports, statutes, and State Department reports.¹⁰⁰ The principles have also influenced museums and art dealers who are the major facilitators in most transactions, which is important when legal art transactions are confidential and private.¹⁰¹ Sotheby's and Christie's (two giant international art houses) have full-time staff "to implement the Washington Principles, and both auction houses decline to deal in art with suspicious Holocaust-era histories."¹⁰² The Washington Principles and subsequent declarations and steps by the U.S. demonstrate the U.S.'s commitment to returning Nazi art.¹⁰³ The Washington Principles may only be non-binding moral aspirations, but they represent a critical step in the evolution of the treatment of stolen art in the U.S.'s national security apparatus.

Congressional Actions

During the same year of the meeting that resulted in the Washington Principles, Congress passed the Holocaust Victims Redress Act in 1998.¹⁰⁴ Title II of this act addressed works of art and concluded:

"It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public

98. Cohan, *supra* note 97.

99. Cascone, *supra* note 92.

100. U.S. DEP'T OF STATE, SPECIAL BRIEFING: BRIEFING WITH SPECIAL ENVOY FOR HOLOCAUST ISSUES CHERRIE DANIELS AND SPECIAL ENVOY TO MONITOR AND COMBAT ANTI-SEMITISM ELAN CARR ON THE PUBLIC RELEASE OF THE JUST ACT REPORT (July 29, 2020), <https://2017-2021.state.gov/briefing-with-special-envoy-for-holocaust-issues-cherrie-daniels-and-special-envoy-to-monitor-and-combat-anti-semitism-elan-carr-on-the-public-release-of-the-just-act-report/index.html> [hereinafter U.S. DEP'T OF STATE, SPECIAL BRIEFING].

101. Eizenstat, *supra* note 74 ("During the past 20 years, galleries, dealers and museums began researching paintings that had passed through European hands between 1933 and 1945 to spot suspicious gaps in their provenance or chain of ownership. With the Internet, suspected Nazi-looted art is increasingly being posted on websites. Almost 30,000 works from their collections have been posted by 179 members of the American Alliance of Museums on a portal, a single point of contact for potential claimants to find their Nazi-looted art.")

102. *Id.*

103. *Id.*

104. Holocaust Victims Redress Act of 1998, Pub. L. No. 105-158, 112 Stat. 15.

property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.”¹⁰⁵

This was the first Congressional recognition of the artworks stolen by the Nazis, yet this was not Congress’s final foray.

In 2016, Congress passed the HEAR Act (Holocaust Expropriate Art Recovery Act) – a bipartisan bill with much support.¹⁰⁶ HEAR extended the statute of limitations to *six years* after a claimant’s actual discovery of “(1) the identity and location of the artwork or other property, and (2) a possessory interest in the artwork or property.”¹⁰⁷ The HEAR Act was monumental and made the U.S. the most favorable jurisdiction for survivors and their heirs out of the forty-four countries who signed onto the Washington Principles, though the cost of filing a lawsuit in the U.S. can still be prohibitive.¹⁰⁸ In 2017, Congress acted again by passing the Justice for Uncompensated Survivors Today Act (JUST Act), which requires the State Department to report the restitution records and efforts of the forty-seven countries that signed the Terezin Declaration to Congress.¹⁰⁹

In addition to Congress, the U.S. executive branch and embassies diplomatically engage on the international stage in the attempt to increase restitutions of stolen art. In November 2018, one thousand representatives from more than ten countries met in Berlin to measure progress after twenty years and chart a road map for additional steps.¹¹⁰ President Trump sent Special Envoy for Holocaust Issues Thomas Yazdgerdi and Stuart E. Eizenstat to recommit to the international endeavors to return artwork stolen by the Nazis.¹¹¹

The State Department continues to collect data and release yearly reports on the restitution records of other countries, as required by the JUST Act.¹¹² In the 2020 release of the report, Mike Pompeo promised, “As Secretary of State, I will continue to prioritize this effort.”¹¹³ This most recent

105. *Id.*

106. O’DONNELL, *supra* note 2, at 348–50.

107. Holocaust Expropriate Art Recovery Act of 2016, Pub L. No. 114-308, 130 Stat. 1524.

108. Catherine Hickley, *Washington Principles: The Restitution of Nazi-Looted Art Is Still A Work in Progress, 20 Years On*, ART NEWSPAPER (Nov. 26, 2018, 9:47 GMT), <https://www.theartnewspaper.com/news/restitution-of-nazi-looted-art-a-work-in-progress>.

109. Justice for Uncompensated Survivors Today (JUST) Act of 2017 Pub. L. No. 115-171, 132 Stat. 1288; *see also* U.S. DEP’T OF STATE, SPECIAL BRIEFING, *supra* note 100 (describing a brief history of the JUST Act before it was passed with overwhelming bipartisan support in 2017 and signed into law by President Trump in May of 2018).

110. Eizenstat, *supra* note 74.

111. *Id.*

112. U.S. DEP’T OF STATE, SPECIAL BRIEFING, *supra* note 100.

113. *Id.*

2020 report emphasized how “United States citizens are directly impacted by the efforts of the countries covered in this report with respect to their Terezin Declaration commitments.”¹¹⁴ These branches of the U.S. government are working in concert to address the restitution and repatriation of Nazi-looted artwork. Returning Nazi artwork is a lifetime and multi-generational pursuit for many U.S. citizens.¹¹⁵ Even those who are not directly involved as Holocaust survivors or the heirs of survivors are outraged when the Nazi’s art heist remains unaddressed.

The U.S. led the charge on implementing the Washington principles and persuading other countries to follow those principles. Additionally, the U.S. seizes stolen art in part to prevent money laundering, which facilitates more threatening crimes. If the U.S. fails to engage in efforts to reconstitute stolen art on American soil, then the U.S. will lose credibility on the international stage and become a haven for stolen art, both of which negatively impact the U.S.’s national security. “As US officials put it, thousands of American soldiers had given their lives to make sure all of Hitler’s depredations were undone. Not returning the art was like helping the Nazis.”¹¹⁶

B. IRAQI ART AND ANTIQUITIES

The 2003 Looting of Iraq

“Seventeen years after it was stolen [from the Iraqi National Museum in 2003], archaeologist McGuire Gibson still checks eBay for a 4,000-year-old stone cylinder seal that he excavated in Iraq in the 1970s.”¹¹⁷ During the 2003 invasion of Iraq, massive looting took place in museums, ancient libraries, and abandoned archaeological dig locations throughout the country, but the most publicized looting occurred in Baghdad.¹¹⁸ After the fighting ceased, the U.S. Marine Corps worked in tandem with the director of the Iraq Museum to determine that approximately 10,000 and 15,000 items were looted from the National Museum of Iraq in Baghdad.¹¹⁹

114. See *id.* (emphasizing how the United States has the second-largest population of Holocaust survivors in the world and is also home to many heirs of Holocaust victims).

115. See Michael Hill, *Jewish Family’s Painting Looted by Nazis in 1933 Is Returned*, ASSOCIATED PRESS (Oct. 15, 2020), <https://apnews.com/article/new-york-museums-albany-painting-377f76d519391ad1dae6ef879454db5>.

116. Hollington, *supra* note 8.

117. Jane Araf, *In Iraq, Authorities Continue to Fight Uphill Battle against Antiquities Plunder*, NPR (Aug. 20, 2020, 11:09 AM ET), <https://www.npr.org/2020/08/20/886540260/in-iraq-authorities-continue-to-fight-uphill-battle-against-antiquities-plunder>.

118. *Id.*

119. William Harms, *Archaeologists Review Loss of Valuable Artifacts One Year After Looting*, U. CHI. CHRON. (Apr. 15, 2004), <http://chronicle.uchicago.edu/040415/oi.shtml> (noting how original inaccurate estimates guessed the looting was closer to 170,000 pieces).

“Archaeologists in the United States consider the National Museum of Antiquities, thoroughly sacked, to be among the 10 most important museums in the world. It was to Mesopotamian art what the Louvre is to Western painting. It maintained a collection of international antiquities dating back some 5,000 years. Needless to say, many Arab countries and civilians are taking its destruction personally.”¹²⁰

Additionally, many archeological dig sites were also looted, and unknown items were stolen from the ground before they were recorded for posterity.¹²¹ The massive looting drew international attention and outrage against the U.S., especially since there were reports of U.S. soldiers who watched, yet did not prevent, the looting of the Iraq National Museum.¹²² There were claims of specific U.S. patrols watching impassively as looters carried away artifacts and artwork; however, these claims have been disputed by military commanders who stated there were snipers in and around the museum.¹²³ Additionally, commanders argued troops could not start arresting looters before armed resistance in Baghdad was quashed.¹²⁴

However, critics continued to blame the U.S. by arguing this looting was foreseeable and preventable.¹²⁵ The U.N. Security Council convened a meeting to pass Security Council Resolution 1483, “which requires all members of the United Nations to prevent trade in cultural materials illegally removed from museums and other locations in Iraq.”¹²⁶ In response to the international backlash, multiple branches of the U.S. government began working on finding and repatriating the looted art to repair the U.S.’s image and promote better relations with Iraq and other Middle Eastern countries, who were outraged by the looting of their ancient civilizations.

Due to this “wanton and preventable destruction,” the chairman of

120. Meghan O’Rourke, *Raiders of the Lost Ark*, SLATE (Apr. 17, 2003), <https://slate.com/culture/2003/04/the-looting-of-baghdad-s-art.html>.

121. Harms, *supra* note 119.

122. Lalwani, *supra* note 12, at 82.

123. Susannah Rutherglen, *The Sack of Baghdad: The U.S. Invasion of Iraq Has Turned Cultural Icons into Loot and Archaeological Sites into Ruins*, 75 AM. SCHOLAR, no. 3, 33, at 34 (2006).

124. Paul Martin, Ed Vulliamy & Gaby Hinsliff, *US Army Was Told to Protect Looted Museum*, GUARDIAN (Apr. 20, 2003, 12:10 AM ET), <https://www.theguardian.com/world/2003/apr/20/internationaleducationnews.iraq> (describing how the “US military argues that its primary job in the first few days was to quell armed resistance in Baghdad, and that it could not tackle looters until it had finished fighting a war . . .”).

125. Paul Richard, *Bush Panel Members Quit Over Looting*, WASH. POST (Apr. 17, 2003), <https://www.washingtonpost.com/archive/lifestyle/2003/04/17/bush-panel-members-quit-over-looting/c3f51fcc-6e8b-40e1-a3ab-f99b6b70da30/>.

126. Press Release, Archaeological Inst. Am., Emergency Protection for Iraqi Cultural Antiquities Act Passes (Nov. 1, 2004), <https://www.archaeological.org/emergency-protection-for-iraqi-cultural-antiquities-act-passes/>.

President Bush's Advisory Committee on Cultural Property resigned, noting "while our military forces have displayed extraordinary precision and restraint in deploying arms – and apparently in securing the Oil Ministry and oil fields – they have been nothing short of impotent in failing to attend to the protection of [Iraq's] cultural heritage."¹²⁷ The Defense Secretary Donald H. Rumsfeld announced he was discussing potential ways to find and return the looted artwork with President Bush and Secretary of State Colin Powell, which included searches at Iraq's borders.¹²⁸ Additionally, the FBI opened an investigation and sent a team to Iraq to help recover the antiquities. This 2003 investigation led to the formation of the official FBI's art and crime team in 2004, since the U.S. government realized it needed a formal, specialized team to investigate stolen and looted art.¹²⁹

The U.S.'s Response

Congress needed to act quickly to find and repatriate the art in order to repair the U.S.'s image abroad and alleviate the international outrage.¹³⁰ Congress passed an emergency declaration to bypass the requirements of the CPIA (the Convention on Cultural Property Implementation Act).¹³¹ The Emergency Protection for Iraqi Cultural Antiquities Act of 2004 authorized the implementation of emergency import restrictions for any Iraqi archaeological or ethnological objects regardless of whether Iraq was a State Party under the CPIA.¹³² When Senator Grassley introduced the bill, he stated:

"I believe it is very important that we in Congress remain mindful of the need to take steps to protect Iraq's cultural heritage. Our bill will ensure that going forward we continue to adhere to the full spirit of Resolution 1483 and avoid any break in the protections afforded to Iraqi antiquities. Our bill also provides an important signal of our commitment to preserving Iraq's resources for the benefit of the Iraqi

127. Richard, *supra* note 125.

128. Donald Rumsfeld, U.S. Def. Sec'y, Addressing Reporters at Pentagon (Apr. 15, 2003, 1:33 PM ET) (transcript available at CNN), <http://transcripts.cnn.com/TRANSCRIPTS/030415/se.08.html>.

129. *Iraq Antiquities Returned*, FBI NEWS (July 7, 2011), https://www.fbi.gov/news/stories/artifacts_070711/iraqi-antiquities-returned (revealing the FBI realized it "needed a group of agents who were specially trained in the area of stolen and looted art").

130. Martin Bailey, *International Outrage as Iraq's National Museum is Sacked by Civilians*, ART NEWSPAPER (Apr. 30, 2003, 23:00 GT), <https://www.theartnewspaper.com/archive/international-outrage-as-great-museum-is-sacked>.

131. *See* Emergency Protection for Iraqi Cultural Antiquities Act of 2004, Pub. L. No. 108-429, 118 Stat. 2599.

132. *Id.*

people.”¹³³

Evidently, the preservation of Iraq’s artwork and artifacts became, and remains, an important goal for Congress.

The U.S. Department of State relied on the Emergency Act of 2004 to allow the Department of Homeland Security to impose import restrictions “to any cultural property of Iraq, including objects of ceramic, stone, metal, glass, ivory, bone, shell, stucco, painting, textile, paper, parchment, leather, wood, and other items of archaeological, historical, cultural, rare scientific, or religious importance illegally removed from Iraq.”¹³⁴ The U.S. actively continues to find, protect, and repatriate Iraqi art and artifacts. Since 2008, the U.S. has repatriated over 1,200 items back to Iraq, including the Head of Assyrian King Sargon II, a limestone fragmentary head of Lamassu, and the winged bull from the Palace of Sargon II.¹³⁵ Furthermore, in 2009, the U.S. Department of State helped create the Iraqi Institute for the Conservation of Antiquities and Heritage in Erbil, Iraq to aid in the preservation of Iraqi art and cultural property.¹³⁶ The U.S. also forewarned domestic museums and art dealers about illegal Iraq artworks and artifacts potentially entering the market.¹³⁷

In 2004, Congress passed a statute creating the Cultural Antiquities Task Force (CATF).¹³⁸ CATF is part of the Department of State and includes partnerships with the Department of Justice, Interpol-US National Central Bureau, the Federal Bureau of Investigation, and the Department of Homeland Security.¹³⁹ CATF’s common mission is to combat illegal trafficking of art and antiquities through international cooperation and effective law enforcement.¹⁴⁰ CATF teaches law enforcement and customs

133. Press Release, Archaeological Inst. of Am., Emergency Protection for Iraqi Cultural Antiquities Act Passes (Nov. 1, 2004), <https://www.archaeological.org/emergency-protection-for-iraqi-cultural-antiquities-act-passes/>.

134. Press Release, U.S. Dep’t of State, United States Imposes Import Restrictions to Protect the Cultural Heritage of Iraq (Apr. 30, 2008), <https://2001-2009.state.gov/r/pa/prs/ps/2008/apr/104224.htm>.

135. Press Release, U.S. Immigration & Customs Enf’t, ICE Returns Thousands of Ancient Artifacts Seized from Hobby Lobby to Iraq (May 2, 2018), <https://www.ice.gov/news/releases/ice-returns-thousands-ancient-artifacts-seized-hobby-lobby-iraq>.

136. Lalwani, *supra* note 12, at 93.

137. See Araf, *supra* note 117 (explaining how “[a]uction houses Christie’s and Sotheby’s say they have policies to prevent the sale of looted antiquities . . .”).

138. *About CATF*, U.S. DEP’T OF STATE: BUREAU OF EDUC. & CULTURAL AFFAIRS, <https://eca.state.gov/cultural-heritage-center/cultural-antiquities-task-force> (last visited Dec. 1, 2020).

139. FED. PRESERVATION INST., CULTURAL ANTIQUITIES TASK FORCE (Nov. 17, 2004), <https://www.nps.gov/fpi/Documents/Cultural%20Antiquities.pdf> [hereinafter FED. PRESERVATION INST.] (“Among [the Cultural Antiquities Taskforce’s] objectives is the requirement to provide leadership in international cultural heritage protection.”).

140. U.S. DEP’T OF STATE: BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS, CULTURAL ANTIQUITIES TASK FORCE, https://eca.state.gov/files/bureau/catf_fact_sheet.pdf (last visited Dec. 1, 2020).

officials how to recognize suspicious art, trains embassy staff to be sensitive to local antiquities, art, and cultural property, and supports local governments and museums globally in protecting and repatriating art.¹⁴¹

In 2020, the U.S. government remains criticized and blamed domestically and internationally for failing to protect the Baghdad Museum from looting in 2003.¹⁴² The U.S. continues to find and repatriate artwork to restore its diplomatic relationship with Iraq and its reputation internationally. This highly publicized looting where U.S. soldiers seemingly watched thousands of artifacts disappear seriously damaged the U.S.'s reputation and strategic position in the Middle East. However, the U.S.–Iraq relationship is slowly healing with the ongoing repatriation of stolen goods seized by U.S. authorities. As the Iraqi Ambassador to the U.S. stated, “[a]s Iraq works to “reconstruct our country and our heritage . . . We are grateful for the cooperation from the American authorities.”¹⁴³ Protecting and returning looted Iraqi art evolved into an important national security issue prioritized by the U.S. Congress, the Executive branch, the State Department, and the FBI.

C. ISIS AS AN ART DEALER

ISIS's Exploitation of Art and Antiquities

“While not as lucrative as oil or extortion, Iraqi officials believe that ISIS could be generating as much as \$100 million from the sale and trafficking of antiquities alone.”¹⁴⁴ Unlike other terrorist organizations, which normally rely on donations to carry out attacks and operations, ISIS (Islamic State of Iraq and Syria) was more self-sufficient by utilizing revenue derived from the exploitation of resources under its control, including art and antiquities.¹⁴⁵ Intelligence officers estimate ISIS's second-largest source of finance after oil was looting and trading in stolen antiquities and artwork.¹⁴⁶

141. FED. PRESERVATION INST., *supra* note 139.

142. *See* Araf, *supra* note 117.

143. *Iraq Antiquities Returned*, FBI NEWS (July 7, 2011), https://www.fbi.gov/news/stories/artifacts_070711/iraqi-antiquities-returned.

144. *Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Antiquities by ISIS: Hearing Before the Task Force to Investigate Terrorism Financing of the H. Comm on Fin. Serv.*, 114th Cong. (2017) (statement of Representative Michael G. Fitzpatrick, Pennsylvania, Chairman).

145. Andrew Keller, Deputy Assistant Sec'y for Counter Threat Fin. and Sanctions, Bureau of Econ. and Bus. Aff., Address at Metropolitan Museum of Art (Sept. 29, 2015) (transcript available at U.S. Dept. State), <https://2009-2017.state.gov/e/eb/rls/rm/2015/247610.htm>.

146. Duncan Mavin, *Calculating the Revenue from Antiquities to Islamic State*, WALL ST. J. (Feb. 11, 2015, 7:26 AM ET), <https://www.wsj.com/articles/calculating-the-revenue-from-antiquities-to-islamic-state-1423657578>.

The process of how ISIS transported looted artwork to buyers was just as important to the U.S. as the amount of profit gained in the sales.¹⁴⁷ Policymakers and intelligence officials needed to understand the processes in order to cut off ISIS's financial stream and protect the stolen art and antiquities.¹⁴⁸

ISIS's wide-spread looting in and around the area it controlled was an institutionalized process.¹⁴⁹ At its peak, ISIS actually maintained an intricate organizational structure, which contained the Antiquities Division of the Islamic State's Department of Natural Resources.¹⁵⁰ This division issued dig permits for unearthed artifacts for a price, imposed a twenty percent tax on the profit of every sale of looted artworks and antiquities, and transported the pieces out of ISIS's area, often rerouting through Turkey and selling the artwork online.¹⁵¹ Facilitated by Facebook groups and other online platforms, where more than one-third of all artifacts advertised came from conflict zones, ISIS disguised the origins of looted artifacts and artwork to sell the pieces in Western markets.¹⁵² Mostly Western collectors paid generously for irreplaceable "blood antiquities"¹⁵³ such as paintings, sculptures, Roman mosaics and Egyptian sarcophagi.¹⁵⁴ Once ISIS began losing access to oil reserves, the importance of selling the looted art and antiquities intensified.¹⁵⁵ The paintings stolen by the Nazis and antiquities looted in Iraq spurred U.S. attention and action and represented an important, yet less transparent, connection between stolen art and national security. However, ISIS systematically looting and selling art in its "territory" to finance terrorist operations against the U.S. and American allies was an

147. Fiona Rose-Greenland, *How Much Money Has ISIS Made Selling Antiquities? More Than Enough to Fund Its Attacks.*, WASH. POST (June 3, 2016, 6:45 AM ET), <https://www.washingtonpost.com/posteverything/wp/2016/06/03/how-much-money-has-isis-made-selling-antiquities-more-than-enough-to-fund-its-attacks/>.

148. *Id.*

149. Katie A. Paul, *How Daesh Turns Illicit Digs into Dollars*, ANTIQUITIES COALITION (Nov. 8, 2016), <https://theantiquitiescoalition.org/how-daesh-turns-illicit-digs-into-dollars/>.

150. Jenna Scatena, *Facebook's Looted-Artifact Problem*, ATLANTIC (July 31, 2020), <https://www.theatlantic.com/technology/archive/2020/07/archaeologists-defied-isis-then-they-took-facebook/614674/>; see also Lalwani, *supra* note 12, at 95 (illustrating how ISIS's illicit operation was woven into the fabric of its growing bureaucracy).

151. Rose-Greenland, *supra* note 147.

152. Scatena, *supra* note 150.

153. See ANTIQUITIES COALITION TASK FORCE, *supra* note 6, at 8 ("Like 'blood diamonds' in Africa or 'blood timber' in Southeast Asia, conflict antiquities are cultural objects that are looted from archaeological sites (or stolen from collections such as museums) in conflict zones and then trafficked by organized groups to either finance hostilities or exploit them for personal gain. In recent decades, they have helped to arm such groups as Al-Qaeda, the Taliban, and the Khmer Rouge. Since war is an expensive business, this international trade is booming.")

154. Daniel Kees, *ISIS the Art Dealer*, REG. REV. (Apr. 13, 2020), <https://www.theregreview.org/2020/04/13/kees-isis-art-dealer/>.

155. *Id.*

undeniably direct connection that compelled the U.S. government to treat stolen art as an even more hostile national security concern.¹⁵⁶

U.S.'s National Security Concerns

The U.S.'s first step was to seize any looted artwork already sold in American art markets:

“As early as August 2015, the Federal Bureau of Investigation (FBI) warned art collectors and dealers that stolen artifacts [from ISIS] were entering the U.S. marketplace. The FBI cautioned that buying looted items from ISIS—or helping cover up these sales—could result in prosecution under a federal law that criminalizes providing “material support or resources” to terrorists. Violations could result in a fine, imprisonment up to 15 years, or both.”¹⁵⁷

Then, Congress became involved as well. A House of Representatives Hearing in 2016 on Cultural Genocide: Countering the Plunder and Sale of Priceless Cultural Antiquities by ISIS discussed how “[e]vidence that ISIS has sanctioned the looting and sale of antiquities to generate revenue for terrorism is a game-changer. It compels us to think about the ownership of art, the responsibility of the art trade and collectors, and the role of the Federal Government differently than ever before.”¹⁵⁸ In 2016, Congress passed a statute called the Protect and Preserve International Cultural Property Act. Similar to the 2004 Iraqi Cultural Antiquities Act, the 2016 Act bypassed the CPIA requirements and stated that the President “shall apply specified import restrictions with respect to any archaeological or ethnological material of Syria.”¹⁵⁹

Additionally, this act prompted the President to create an “interagency coordinating committee to coordinate and advance executive branch efforts to protect and preserve international cultural property at risk from political instability, armed conflict, or natural or other disasters.”¹⁶⁰ This led to the creation of the Cultural Heritage Coordinating Committee (CHCC), which

156. Lalwani, *supra* note 12, at 94.

157. Kees, *supra* note 154.

158. *Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Antiquities by ISIS: Hearing Before the Task Force to Investigate Terrorism Financing of the H. Comm on Fin. Serv.*, 114th Cong. (2017) (statement of Robert M. Edsel, Founder and Chairman, Monument Men Foundation for the Preservation of Art).

159. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, 130 Stat. 369 (2016).

160. Pub. L. No. 114-151, 130 Stat. 369 (2016).

consists of twelve U.S. government interagency partners including the Department of State, the Department of Defense, the Department of Homeland Security, the Department of the Interior, the Department of Justice, the Department of the Treasury, the National Endowment for the Arts, the National Endowment for the Humanities, the Smithsonian Institution, and the Institute of Museum and Library Services, and the National Archives and Records Administration.¹⁶¹ The Smithsonian staff trained Syrians how to protect museums from bombings with sandbags.¹⁶²

“According to our Government’s National Security Strategy, it is the objective of the United States to degrade and defeat ISIS. While this Administration’s overall strategy remains questionable, both parties can agree that preventing the flow of dollars to fund ISIS and its caliphate must remain a top priority of our government.”¹⁶³

The connection between stolen art and national securities is clearest when considering that ISIS accomplishes two goals through looting and selling art. First, ISIS evidently raises money to finance terrorist operations; at one point, ISIS was the richest terrorist group in the Middle East and did not depend on foreign funds.¹⁶⁴ It is difficult to calculate ISIS’s exact profit from stolen art and antiquities, but profit is estimated to be a few hundred million dollars.¹⁶⁵ The November 2015 Paris attacks had only cost approximately ten thousand dollars, so ISIS definitely raised more than ample funds from looting artwork to carry out deadly terrorist attacks and gain territory in the Middle East.¹⁶⁶ Second, by looting and selling art internationally, ISIS erases the culture and history of the people they overtake.¹⁶⁷ ISIS aims to create a new world, and disposing of artwork obliterates a society’s history, culture, and religion. While illicit black-market trade in stolen artwork is one serious threat to security, looting artworks and cultural property also “often goes hand in hand with cultural cleansing, the deliberate and systematic destruction of a targeted group and

161. Lalwani, *supra* note 12, at 96; see also *Cultural Heritage Coordinating Committee*, U.S. DEP’T OF STATE: BUREAU OF EDUC. & CULTURAL AFFAIRS, <https://eca.state.gov/cultural-heritage-center/cultural-heritage-coordinating-committee> (last visited Dec. 1, 2020).

162. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-673, *CULTURAL PROPERTY: PROTECTION OF IRAQI AND SYRIAN ANTIQUITIES* 28 (Aug. 2016), <https://www.gao.gov/assets/680/679061.pdf>.

163. *Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Antiquities by ISIS: Hearing Before the Task Force to Investigate Terrorism Financing of the H. Comm on Fin. Serv.*, 114th Cong. (2017) (statement of Representative Jeb Hensarling, Texas, Chairman).

164. Robert Windrem, *ISIS Is the World’s Richest Terror Group, But Spending Money Fast*, NBC NEWS (Mar. 20, 2015, 11:17 AM ET), <https://www.cnbc.com/2015/03/20/isis-the-worlds-richest-terror-group-is-spending-money-fast.html>.

165. Rose-Greenland, *supra* note 147.

166. *Id.*

167. ANTIQUITIES COALITION TASK FORCE, *supra* note 6, at 8.

their heritage.”¹⁶⁸ The U.S. took ISIS’s looting and selling of art and antiquities as a serious national security concern because “[w]hen you observe that stolen cultural heritage is funding ISIS, and that these terrorists could kill more Americans based on the money they have, then all of a sudden it becomes something we need to pay more attention to.”¹⁶⁹

III. (CAN) (SHOULD) THE U.S. DO MORE TO PROTECT ART?

The above three examples illustrate how the U.S. has evolved from indifference to active participation in protecting and repatriating stolen art for national security reasons.¹⁷⁰ However, there are some issues in the U.S.’s approach to protecting art. This Section describes how the U.S. might better protect stolen art.

Stolen art is treated as a national security issue and is alleviated with similar techniques to other national security problems, such as sanctions to prevent black market sales, bilateral treaties regarding cultural property protection between the U.S. and other countries, seizures of illicitly traded art, and repatriations of stolen art discovered in U.S. markets. “Deterring the looting of cultural heritage can block a key source of funding for terrorists, clean up the global art market, and provide an easy way for the United States to establish or maintain friendly relations with other countries.”¹⁷¹ There are advantages for treating stolen art as a national security priority. Making an issue a national security priority can lend advocates greater credibility and spur bipartisan support—and stolen art offers a case in point. For example, the HEAR bill for Holocaust-era art was supported by Senator Cruz (R) and Senator Schumer (D) and signed by President Obama (D) in 2016.¹⁷² Additionally, both Congressional statutes bypassing the CPIA concerning Iraq in 2004 and Syria in 2016 received overwhelming bipartisan support. Finally, even though they may have disagreed on methods, both parties could agree that preventing the flow of finances to ISIS was a top governmental priority.¹⁷³

However, there is some ambiguity for exactly where stolen art falls in the national security apparatus of the U.S. government. “At present, it is

168. *Id.*

169. Lalwani, *supra* note 12, at 79 (quoting Mark v. Vlastic, a Georgetown Law professor and a producer of a television show following an antiquities expert and art thief).

170. *Id.*

171. *Id.* at 107.

172. O’DONNELL, *supra* note 2, at 346.

173. See *Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Antiquities by ISIS: Hearing Before the Task Force to Investigate Terrorism Financing of the H. Comm. on Fin. Serv.*, 114th Cong. (2017).

unclear who in the U.S. Government is even responsible for countering antiquities trafficking. Reform can only come about by declaring this issue a national security priority. The U.S. Government must designate a lead organization and provide adequate authorization and resources.”¹⁷⁴ The U.S.’s response to stolen artwork and cultural property is decentralized and “implemented on an ad hoc basis, with several agencies involved but no single agency coordinating the efforts.”¹⁷⁵ One problem with the national security governmental system in the U.S., revealed in light of the 9/11 attacks, was the lack of information-sharing between various U.S. national security agencies.¹⁷⁶ This parallels the problem affecting the protection of stolen art.

As the three examples in Section II demonstrate, there is an abundance of governmental agencies and organizations involved in the protection of stolen art. From the CTAF, which itself is formed of twelve different agencies, to the State Department, Treasury Department, FBI, and ICE, the process for protecting stolen art appears cumbersome and convoluted. This does not even take into account Congress and the Presidents’ forays into this area during certain extreme exploitations of looted art. Protecting one piece of looted art involves the interplay of multiple agencies. This can be an advantage since issues with national security implications are prioritized and often receive more resources.¹⁷⁷ However, too many resources can lead to overlapping bureaucratic inefficiencies and redundancies.

The U.S. also needs to adapt to meet new threats to looted art in the global market. In a few short decades, the art market has evolved from brick-and-mortar auction houses to online bidding websites.¹⁷⁸ “Once an antiquity is out of a conflict zone, it can reach market hubs like London, New York, or Tokyo in a matter of days if not hours.”¹⁷⁹ In 2020, the COVID-19 Pandemic spurred an increase of Facebook Group and online transactions of looted antiquities and artwork, over eighty percent of which are stolen or fake.¹⁸⁰ Stolen artwork often hides other serious crimes, such as organized illegal activities, money laundering, and terrorist activities.¹⁸¹ It is imperative

174. *Id.* (statement of Yaya J. Fanusie, Director of Analysis, Center on Sanctions and Illicit Finance, Foundation for Defense of Democracies).

175. ANTIQUITIES COALITION TASK FORCE, *supra* note 6, at 20.

176. Lois M. Davis et al., *Long-Term Effects of Law Enforcement’s Post-9/11 Focus on Counterterrorism and Homeland Security*, NAT’L INST. JUST. (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/232791.pdf> (research report submitted to the U.S. Department of Justice but not yet published by the Department).

177. *See* Lalwani, *supra* note 12, at 100.

178. ANTIQUITIES COALITION TASK FORCE, *supra* note 6, at 8 (demonstrating “the internet—which now makes up 7% of global art sales by value—has made it easier to buy and sell pieces than ever”).

179. *Id.*

180. Araf, *supra* note 117.

181. Rubenfield, *supra* note 9.

for the U.S.'s national security structure to adapt to counter novel technological methods of selling stolen art in order to fully protect art and other cultural property. The U.S. can counteract these additional national security threats that arise from stolen art by seizing stolen art, protecting vulnerable artwork, and repatriating looted art.

The U.S. needs to remain nimble and adaptable to tackle threats to artwork and cultural property, prevent the sale of "blood antiquities," and appropriately seize and repatriate any looted artwork. An agent at the border must be well-trained and aware of how stolen art might appear and from where it may originate in order to actually prevent the art from entering U.S. black markets. One potential solution for better protecting stolen art is the creation of a specific national security agency dealing solely with stolen art. Having one agency would slash cross-agency miscommunications, reduce bureaucratic inefficiencies, and promote increased flexibility in operations. However, this is an improbable goal and would basically necessitate an overhaul and a reshuffling of the treatment of stolen art for national security purposes. Therefore, the U.S. should strive for an attainable goal: a more streamlined and effective process eliminating unnecessary cross-agency overlaps to increase the U.S.'s flexibility and promptness in protecting, and subsequently repatriating, stolen art.

IV. CONCLUSION

"If we want to curry favor and do ambassadorial work in building up the esteem of the United States in the eyes of the world, showing respect for cultural treasures of other countries, which is the hallmark policy of President Roosevelt and General Eisenhower during World War II, will do more than all of the foreign aid we are giving away."¹⁸²

From prioritizing the return of Nazi-looted art to Holocaust survivors, to seizing and returning stolen art and antiquities from the Iraqi National Museum, to declaring ISIS's exploitation of Middle Eastern art a national security issue, the U.S. has evolved to embrace the protection and repatriation of stolen art for the previously discussed national security reasons. The U.S. has the ability to more effectively prevent the sale of illegally obtained art in American and international black markets by streamlining the process and reducing bureaucratic overlaps. Americans tend

182. *Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Antiquities by ISIS: Hearing Before the Task Force to Investigate Terrorism Financing of the H. Comm on Fin. Serv.*, 114th Cong. (2017) (statement of Robert M. Edsel, Founder and Chairman, Monuments Men Foundation for the Preservation of Art).

to underestimate the significance of art to people; “[t]he currency that connects people around the world are cultural treasures: sports; music; works of art. We don’t necessarily look at the world that way here [in the U.S.]. It is not wrong; we are just a much younger country.”¹⁸³ If the U.S. government decides to take further steps to protect stolen art, the U.S. will enjoy stronger diplomatic relations with countries who struggle to possess their own patrimonial cultural treasures, will enable more effective enforcement of sanctions against enemies, will prevent terrorist finances from growing, and will maintain an enhanced international image as a protector of cultural heritage.

183. *Id.*