

Heritage Contraband: Mapping US Policy to Combat International Illicit Trafficking of Cultural Property

CONTRABANDO DE PATRIMONIO: MAPEO DE LA POLÍTICA DE EE. UU. PARA COMBATIR EL TRÁFICO ILÍCITO INTERNACIONAL DE BIENES CULTURALES

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Abstract While the US has shown leadership in advocating for cultural heritage protection on the global stage since WWII, its hesitancy and delays in ratifying or implementing key conventions, along with repeated withdrawals from UNESCO, suggest otherwise regarding its commitment. 21st-century geopolitics have elevated the fight against illicit trafficking of cultural property, emphasizing not only the safeguarding of humanity's collective heritage but also the maintenance of international relations and national security for the US, which has led to policy responses. This research evaluates US policies aimed at countering international illicit trafficking of cultural property, highlighting the need for reassessment in light of new global dynamics and recent legislative changes. The variety in policy motivations and dynamics, influenced by global power balances and Indian relations, indicates that current policies to control international illicit trafficking of cultural property have significant gaps. Mapping these policies reveals inconsistencies and deficiencies in the US's efforts to combat this issue, underscoring the urgent need for improvements.

Keywords illicit trafficking of cultural property, 1954 Hague Convention for the Protection of Cultural Property, 1970 UNESCO Convention, Convention on Cultural Property Implementation Act, Safeguard Tribal Objects of Patrimony Act, US Cultural Heritage Policy.

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Resumen Aunque Estados Unidos ha mostrado liderazgo en la defensa de la protección del patrimonio cultural en el ámbito mundial desde la Segunda Guerra Mundial, su vacilación y los retrasos en la ratificación o implementación de convenciones clave, junto con las reiteradas retiradas de la UNESCO, sugieren lo contrario en cuanto a su compromiso. La geopolítica del siglo XXI ha elevado la lucha contra el tráfico ilícito de bienes culturales, destacando no solo la salvaguarda del patrimonio colectivo de la humanidad, sino también el mantenimiento de las relaciones internacionales y la seguridad nacional de Estados Unidos, lo que ha dado lugar a diversas respuestas políticas. Esta investigación evalúa las políticas estadounidenses dirigidas a contrarrestar el tráfico ilícito internacional de bienes culturales, subrayando la necesidad de una reevaluación a la luz de las nuevas

dinámicas globales y de los recientes cambios legislativos. La diversidad de motivaciones y dinámicas políticas, influenciadas por los equilibrios de poder globales y las relaciones con las comunidades indígenas, indica que las políticas actuales para controlar el tráfico ilícito internacional de bienes culturales presentan importantes vacíos. El mapeo de estas políticas revela inconsistencias y deficiencias en los esfuerzos de Estados Unidos para combatir este problema, lo que pone de manifiesto la urgente necesidad de mejoras.

Palabras clave tráfico ilícito de bienes culturales, Convención de La Haya de 1954 para la Protección de los Bienes Culturales, Convención de la UNESCO de 1970, Ley de Implementación de la Convención sobre Bienes Culturales, Ley de Salvaguarda de Objetos de Patrimonio Tribal, Política de Patrimonio Cultural de los Estados Unidos.

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1. INTRODUCTION

The illicit trafficking of cultural property has been a persistent problem throughout human history, often justified as a conqueror's right, which has now been reevaluated and necessitated political and humanitarian commitments, especially by possessing or market countries. The looting of cultural property by colonizers and war criminals, particularly by the Nazis and the Japanese Imperial government, has been systematic and on a massive scale, with ongoing negative political, social, and cultural impacts on indigenous people and the countries of origin. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) was proclaimed in response to the unprecedented large-scale systematic looting of cultural property during WWII. In the continued growth of the black market for art and antiquities and the need to expand the 1954 Convention and seek resolutions, the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) was established. The legal responses by the US have been reluctant and partial in adopting international conventions. The destruction and looting of cultural heritage during wars in Afghanistan and Iraq have reshaped the political landscape and created an urgent need for US policy responses. The severe destruction and looting in conflict regions have linked illicit trafficking of cultural heritage to activities such as money laundering, sanctions evasion, and terrorist financing. Countering the illicit trafficking of cultural property has now become a critical national security and defense issue (GAO, 2016). Responding to political pressures, the US has further developed policies aimed at combating international illicit trafficking of cultural property.

This research aims to evaluate US policies in countering international illicit trafficking. The Convention on Cultural Property Implementation Act of 1983 (CCPIA: P.L. 97-446, 19 U.S.C.), serving as the primary cultural heritage policy to combat international illicit trafficking of cultural property, should be reevaluated in light of the shifting international environment. Furthermore, recent policy developments, including the US ratification of the 1954 Hague Convention in 2009 and the enactment of the Safeguard Tribal Objects of Patrimony Act of 2021 (STOP, P.L. 117-258), necessitate policy assessment. The assessment should go beyond merely reviewing the policies that control the importation and exportation of cultural property, as they, including CCPIA, exhibit characteristics more aligned with public diplomacy. Therefore, mapping the US efforts to fight international illicit trafficking

of cultural property should consider the US position and its relationships with international laws and NGOs, particularly UNESCO. On the other hand, the recent domestic policy issues have played importantly for the exportation control. STOP utilizes domestic cultural resource management policies, necessitating an understanding of its strategies against domestic illicit trafficking of cultural property.

Given the expanded network and the increasingly complex nature of the illicit trafficking of cultural property, coupled with recent policy changes, a thorough assessment of US policy to combat this illicit trafficking is crucial to understanding its effectiveness and identifying areas for improvement. Due to the expanded network and the increasingly complex nature of illicit trafficking of cultural property, along with recent policy changes, a thorough assessment of US policy to combat this issue is crucial. This analysis is vital not only for understanding policy effectiveness but also for identifying areas requiring improvement. By adopting a comprehensive policy mapping approach, the goal is to evaluate historical performance and pinpoint deficiencies and ineffectiveness in addressing illicit trafficking of cultural property within the US.

2. US ENGAGEMENT WITH INTERNATIONAL LAWS

During the mid and late-20th century, the US exhibited a contradictory stance on the protection of world heritage. On one hand, it played a crucial role in the establishment of UNESCO and the formulation of major international conventions aimed at safeguarding cultural and natural heritage of the world. However, on the other hand, the US approach to ratifying these conventions has been marked by limitations and delays. Additionally, its membership in UNESCO was withdrawn twice, first in 1984 and then again in 2017, reflecting its shifting positioning in response to international political dynamics. Despite its historical inconsistency in committing to global heritage conservation, recent developments indicate a renewed interest in participating in international efforts in protecting world heritage.

2.1. Ratification of 1970 UNESCO Convention

CCPIA was enacted to implement the 1970 UNESCO Convention. The Convention is an international treaty that aims to protect the cultural heritage of nations by regulating the import, export, and transfer of cultural artifacts and objects. It requires participating countries to take measures to prevent the looting, theft, and illegal removal of cultural artifacts from their territories (UNESCO, n.d.). Additionally, it promotes international cooperation and collaboration among member states to facilitate the restitution of stolen or illegally acquired cultural property to its countries of origin. The US played a pivotal role in influencing the finalization of the Convention, but its policy enactment to implement the convention was delayed for over a decade. Despite encountering delays, the US was the first major market country to ratify it, marking a significant milestone in cultural heritage protection. Since then, other market countries have also recognized the importance of addressing legal and ethical

issues surrounding cultural property transactions. France ratified the convention in 1997, the UK in 2002, and Germany in 2007.

Nevertheless, CCPIA falls far short of fully implementing the 1970 Convention. In the policy discussion, the Senate (1982) expressed concern about the US being a major market for archaeological, ethnological, and art objects. “The preservation of the cultural heritage of mankind” was deemed essential for promoting “good foreign relations,” as allowing the stolen or valuable cultural property to be imported into the US would damage relations with the source countries, which often include “close allies” (S. Rpt. No. 97-564, 1982, p. 3). Initially, there was a push for a comprehensive ban on the importation of illegally exported cultural property in international trade. The final version of the act underwent significant dilution compared to the versions discussed in the 1970s, despite the advocacy of various stakeholders, including the Department of State, for the protection and return of illegally imported cultural property, emphasizing it as the moral obligation of the US. The discourse on policy involved a multitude of stakeholders, yet a consensus on adopting cultural property importation restrictions remained elusive, consequently impeding the policymaking process needed to effectively implement the 1970 Convention (Lalwani, 2020). In the end, with heavy lobbying by art dealers, numismatists, and antiquities dealers, a compromise was reached, described by Mark Feldman, Assistant and Deputy Legal Adviser, as “a grand bargain” (Feldman, 2014; Gutchen, 1982; Lalwani, 2020).

2.2. Ratification of 1954 Hague Convention

The US ratified the 1954 Convention on March 12, 2009, signifying its formal commitment to the Convention’s principles and goals, and recognizing the importance of safeguarding cultural heritage during armed conflict. Although the importance of heritage conservation in securing international leadership and national security has grown, the US’s ratification of the 1954 Hague Convention was discussed five decades after the Convention’s establishment and five years after its rejoining of UNESCO. This delay was seen as ironic and even a moral or diplomatic shortcoming, given the instrumental role of the US in the Convention’s development and its influence on international treaties and foreign policies in this domain (Colwell-Chanthaphonh and Piper, 2001). As an international treaty aimed at safeguarding cultural heritage during times of war, the Convention establishes rules and guidelines to prevent the destruction, looting, and misuse of cultural property, and encourages international cooperation for its protection and preservation. Congress acknowledged the need for its ratification for national security and defense, in order to work effectively with its allies and to maintain the US leadership in the promotion and protection of cultural property (S. Rpt. No. 110-26, 2008). This ratification holds particular significance due to the country’s consistent military presence and involvement in numerous conflicts and interventions worldwide.

While the ratification has symbolic value, affirming US support for international efforts to protect cultural property and collaborate with other signatory states, its tangible impact is limited, as it did not lead to significant policy changes. The US military accepted the principles of the 1954 Hague Convention and has incorporated them into the Department of Defense Law of War Manual, yet a public policy to guide the implementation of the Convention is absent. Furthermore, the US did not accede to the First Protocol and Second

Protocol of the Convention. The First Protocol was adopted with the 1954 Hague Convention to safeguard cultural property during occupation by prohibiting exportation, requiring its return, prohibiting retention, and providing fair compensation for any sale. The Second Protocol was added in 1999 to enhance and reinforce its implementation. In contrast, the UK ratified the Convention and acceded to its first and second protocols in 2017. Critically, there has been no subsequent policy to implement the 1954 Convention, as it was ratified under the premise that no further legislative action would be necessary, ironically using the absence of required subsequent policy changes as a justification for its approval. The partial ratification, as well as the lack of follow-up measures, have undermined the implementation and practical impact of the convention, making the ratification more symbolic than substantive.

2.3. Reentries into UNESCO

Historically, the US's membership in UNESCO has been a contentious political issue, with the country having withdrawn and subsequently rejoined the organization. Despite its historic role as one of the original members of UNESCO in 1946, the US withdrew its membership in 1984. President Clinton had strongly recommended that the Bush administration rejoin UNESCO and ratify the 1954 Hague Convention, but these recommendations were initially overlooked until circumstances changed (CRS, 2003). In the need to restore political credibility and international cooperation for heritage conservation in the Middle East conflicts, the US has made deliberate commitments to actively participate in international collaborations in this regard and rejoined UNESCO in 2003. The Bush administration claimed it as the nation's "commitment to human dignity," fostering international cooperation for the protection of world heritage, and urging UNESCO to play a crucial role in combating terrorism and contributing to global safety and security (Bush 2002). As the US pays the largest membership fees, accounting for 22% of the UNESCO budget (CRS, 2003), this decision was not merely a political gesture but also entailed substantial financial contributions. Rejoining required the overdue and full-year payment of \$71 million and a one-time payment to the UNESCO Working Capital Fund of \$5.5 million, which was well supported by national and international constituencies.

Following the acceptance of Palestine as a member state in 2011, both the US and Israel halted their financial contributions to UNESCO. Subsequently, in 2017, the Trump administration decided to withdraw US membership, citing concerns of anti-Israeli bias. Rejoining UNESCO was indeed part of the Biden administration's broader foreign policy agenda, aligning with Biden's commitment to strengthen multilateralism and reengage with international organizations. The US officially rejoined UNESCO in 2023, as a response to China's increasing influence on the global stage (Helmre, 2023). While the overwhelming majority of member states welcomed the US rejoining UNESCO, their responses were influenced by varying geopolitical factors. China, by then the largest financial contributor to UNESCO in the absence of the US, along with other countries with politically strained relationships with the US, including Russia, North Korea, the Palestinians, Iran, and Syria, voted against the readmission of the US. As a condition for readmission, the US would need to repay approximately \$619 million in unpaid dues. The repeated instances of withdrawal and rejoining of UNESCO by the US signify that the conservation of cultural property is predominantly viewed as both

a foreign relations and public diplomacy matter, indicating the complex interplay between cultural heritage preservation and the broader geopolitical context.

3. US POLICIES TO COMBAT ILLICIT INTERNATIONAL TRAFFICKING OF CULTURAL PROPERTY

3.1. Policy Development on Importation of Illegally Exported Cultural Property

The interest in pre-Columbian art surged in the 1950s, which led to increased targeted looting of archaeological sites in Central and Latin America and the influx of stolen cultural property into the US (McAlee, 1981). Since the policy to implement the US ratification of the 1970 UNESCO Convention, CCPIA, was enacted in 1983, there was few policies to counter these issues. Despite the source countries' effort to make legislation on protecting their antiquities, stressing their values as cultural patrimony, their implementation faced obstacles due to unclear or inadequate policies and the lack of funding and trained personnel (Gutchen, 1982). Even when there was a treaty, such as the Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties (United States-Mexico Treaty) that was exchanged and brought into force in 1971, interpretation and enforcement were challenging (Gutchen, 1982). The Pre-Columbian Monumental and Architectural Sculpture and Murals Statute (19 U.S.C. §§ 2091-95) was enacted in 1972, prohibiting the unlawful import, export, transportation, sale, purchase, or receipt of pre-Columbian artifacts. The statute's scope is limited to "pre-Columbian monumental or architectural sculpture or murals" from the pre-Columbian Indian cultures of Mexico, Central America, South America, and the Caribbean Islands. It only covers parts of immovable tangible heritage and does not include movable archaeological or historical artifacts. As a customs law, the statute imposes civil penalties in the form of seizure and forfeiture of artifacts found to be in violation of the law, which proves ineffective in regulating the illicit trafficking of antiquities from the Americas (Gutchen, 1982; McAlee, 1981).

The US implementation of the 1970 UNESCO Convention has been primarily carried out through CCPIA, which has imposed restrictions on the importation of cultural property at risk of pillage, theft, or illicit trading. Despite its critical role as a legal framework for the US to facilitate the recovery and return of such objects through international cooperation, the policy design of CCPIA contained inherent limitations that hindered its effectiveness from the outset. The challenge to balance diverse stakeholder interests resulted in the partial implementation of the 1970 UNESCO Convention. Section 308 of CCPIA implements Article 7(b)(i) of the 1970 Convention and declares the importation of stolen cultural property that is "documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party" into the US as illegal. However, to balance the interests of bona fide purchasers, CCPIA excludes the implementation of Article 7(b)(ii) of the 1970 Convention (S. Rpt. No. 97-564, 1982). Article 7(b)(ii) instructs appropriate steps to recover

and return any cultural property imported after the entry into force of this Convention and requires that an offer of just compensation be made by the State Party requesting its return.

CCPIA heavily relies on bilateral agreements with other countries, which creates a lengthy and ineffective bureaucratic process (Lalwani, 2020). The law does not allow import controls to be established unilaterally, and it can only be initiated by a request from a State Party. The President can enter a bilateral or multilateral agreement to restrict the importation of archaeological or ethnological materials at risk of pillage from the State Party of the 1970 Convention, as the law empowers the President to secure international cooperation and ensure that importation restrictions align with global efforts. Therefore, the process of implementing importation controls—from the State Party's request and review by the Cultural Property Advisory Committee, which convenes roughly three times a year, to the publication in the Federal Register—can be quite protracted. In addition, the import restriction is for a limited time period, initially for 5 years, which can be renewable for another 5 years after review. The policy has demonstrated limited effectiveness, as evidenced by the significant time gap between its enactment and the establishment of the first bilateral agreement with El Salvador in 1995. Although additional agreements were made with Canada, Guatemala, Mali, and Peru in 1997, the total number of bilateral agreements reached only twenty by 2019 (Lalwani, 2020).

Particularly, CCPIA's inability to respond to critical situations was proven when it failed to address the emergencies following the destruction and looting of cultural heritage in Afghanistan and Iraq, which not only endangered humankind's heritage but also raised issues in US national security and international politics. In response to the 2003 looting of Iraq's cultural property, the Emergency Protection for Iraqi Cultural Antiquities Act of 2004 (Iraqi Cultural Antiquities Act, Pub. L. 108-429) and Executive Order 13350 (§ 4, 69 Fed. Reg. 46,055, 46,056) amended CCPIA to streamline the bureaucratic process. The severe pillaging of the National Museum and other key cultural institutions, including the Iraq National Library and Archives, a Koran Library, the Museum of Fine Art in Baghdad, and the Mosul Museum, shocked the international community. The US faced considerable criticism for its role in these incidents and was politically liable for the conservation of cultural property in Iraq, necessitating actions in foreign policy and cultural diplomacy (Forrest, 2010; Luke and Kersel, 2013; Rush, 2010). In the absence of a formal government, importation request by Iraq, a state party of the 1970 UNESCO Convention, or bilateral agreement were unfeasible. Additionally, a substantial portion of looted objects from cultural institutions and illegally excavated archaeological resources were predominantly undocumented or not inventoried. The inability to amend CCPIA to establish a more comprehensive importation policy to combat illicit trafficking of cultural property required another temporary modification of CCPIA for an additional emergency situation in Syria, the Protect and Preserve International Cultural Property Act of 2016 (PPICPA, P.L. 114-151). The US has treated the issues of international illicit trafficking of cultural property largely separately from the cultural resources management policies, falling under the domain of public diplomacy and international relations, as seen in the policy discussion and policy making related international laws.

CCPIA is based on Western museological practices and requires collection documentation for the seizure and return of requested cultural patrimony. At the same time, the act significantly alleviates cultural institutions' responsibilities in international repatriation efforts, respecting the ownership rights of US cultural institutions over foreign cultural patrimony. Section 312 of the act exempts from seizure and return any archaeological or

ethnological material or article of cultural property that is imported into the US for temporary exhibition or display, if they are protected under the protection of immunity from judicial seizure or if it was purchased in good faith and has been held for more than three consecutive years by a recognized museum, religious or secular monument, or similar institution. Aimed at “balancing” the interests of diverse stakeholders in the early 1980s and two decades later, CCPIA resulted in having little impact on US cultural institutions, such as museums, that hold cultural property requested by or stolen from State Parties. There was an attempt, H.R. 2009, to provide greater protection on a permanent basis and to improve the equity and effectiveness of CCPIA in the policy discussion for the Iraqi Cultural Antiquities Act 2003. However, S. 2191, which was tailored as a temporary solution for the specific situation in Iraq, once again sparked discussions among stakeholders, was supported not only by art dealers and collectors but also by museum organizations including the American Alliance of Museums (AAM) and the Association of Art Museum Directors (AAMD) (Borke, 2003). As a result, the Iraqi Cultural Antiquities Act remained to remove bureaucratic hurdles for narrowly targeting Iraqi cultural property temporarily, and CCPIA missed the opportunity to enhance its policy impact.

3.2. Policy Development on Exportation of Illegally Trafficked Cultural Property

Historically, cultural heritage policies in the US have primarily centered around antiquities and archaeological resources, such as the Antiquities Act of 1906 (Pub. L. 59–209, 34 Stat. 225) and the Archaeological Resources Protection Act of 1979 (ARPA, Pub. L. 96–95, §1, 93 Stat. 721), found on federally controlled lands and Indian lands, aiming to prevent unauthorized excavation and illicit trafficking of these resources. Due to the principles of federalism, federal policies in cultural resources management have been heavily decentralized, upholding the property ownership and rights of state and local governments, as well as private parties. Policies to recognize the rightful ownership of tribal cultural property did not appear until the late 20th century, including the National Museum of the American Indian Act of 1989 (NMAIA, Pub. L. 101–18) and the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA, Pub. L. 101–601, 25 U.S.C. 3001 et seq., 104 Stat. 3048). These policies primarily target the domestic illicit trafficking of archaeological resources and tribal cultural property and generally lack an international dimension (US Committee on Indian Affairs 2021).

ARPA revised the Antiquities Act and enhanced its permit system to protect archaeological resources on public and Indian lands. ARPA contains provisions that prohibit “trafficking in interstate or foreign commerce in archaeological resources the excavation, removal, sale, purchase, exchange, transportation or receipt of which was wrongful under State or local law (ARPA §470ee. (c)).” Despite its geographical confinement, the act covers trafficking in archaeological resources that have been excavated or removed in violation of not only federal laws, but also local and state laws, which enables federal control over activities related to archaeological resources located on state-owned and privately-owned lands, as seen in the case *US v. Gerber* (999 F. 2d 1112, 1993). Although the act may apply to foreign

commerce, it has not proven effective in combating the illicit trafficking of archaeological resources across borders.

NAGPRA similarly aims for its policy impact to extend beyond federal and tribal lands to encompass wider geographical parameters. NAGPRA established a process for federal agencies and museums, including state agencies and federal funding-received institutions, to return Native American cultural items to lineal descendants of federally recognized Indian tribes, affiliated Indian tribes, and Native Hawaiian organizations. While NAGPRA does not address the illicit trafficking of tribal cultural items, Section 1170 in Title 18 of the US Code (18 U.S.C. 1170(a), Chapter 53) supplements NAGPRA. The Code details the penalties associated with illegal trafficking—specifically “knowingly sells, purchases, uses for profit, or transports for sale or profit”—of Native American human remains and cultural items. Despite its attempt to regulate illicit trafficking of Indigenous cultural property, the geographical constraint of NAGPRA remains pressing issues. NAGPRA is only applicable to federal lands, which excludes territories such as Puerto Rico, Guam, and the Virgin Islands, where ARPA is enforced. NAGPRA primarily targets domestic repatriation and regulates illicit trafficking of defined Native American cultural items and, in principle, does not support international repatriation efforts (DOI 2021). Not specifically addressing the protection of cultural items from international illicit trafficking, it neither covers their illegal exportation to foreign countries nor provides a legal basis for their repatriation.

STOP was enacted as a policy response to the sales of American Indian cultural property in foreign markets, exported in violation of federal laws, and thereby underscoring the absence of legal mechanisms governing the exportation of such cultural assets (US Committee on Indian Affairs, 2021). Tribal initiatives aimed at international repatriation draw attention to the presence of illegally obtained Native American cultural artifacts in Europe, particularly in the UK, France, and Germany, and have advocated for repatriation to the tribes, in accordance with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the 1954 Hague Convention, and the 1970 UNESCO Convention (GAO, 2018; AAIA, 2014). The act aims to control the export and facilitate the international repatriation of cultural items protected by NAGPRA and archaeological resources protected by ARPA in order to support for international repatriation endeavors. The act establishes an export certification system and confirms the President’s authority to request agreements or provisional measures from foreign nations to protect American cultural heritage.

STOP represents a significant milestone as the first federal policy to proscribe the exportation of cultural property. Until its enactment, the US had no policy in place to regulate the exportation of cultural property. US cultural property policies contrast with those of many other countries, where antiquities laws emphasize centralized management approaches that often include strong regulatory provisions prohibiting or regulating the exportation of antiquities to safeguard national heritage and prevent illegal trafficking of cultural property. US common law and national policy, relying on traditional concepts of property ownership rights and charity, have regulated the international trade of artworks but have failed to prevent or prohibit the trade of artworks illicitly exported from the US (Folkinshteyn, 2007). This limited nationalistic protection of its own art and cultural property is largely due to the US’ historical role as the largest importer of artworks (Folkinshteyn, 2007). As the world’s largest market for art and antiquities, the US has predominantly focused on importation restrictions in its policy debates and development for regulating international illicit trafficking of cultural

property, a stance primarily represented by CCIPA. STOP was enacted expediently, driven by strong bipartisan support, effective advocacy from Indigenous communities, and a pressing need to enhance the protection of cultural heritage. Successful repatriation efforts of qualifying cultural property under STOP likely depend on diplomatic tools, particularly bilateral agreements—similar to those under CCPIA—as well as voluntary return initiatives for enforcement. Nonetheless, the act offers the legal basis necessary to facilitate international repatriation.

4. US POLICY LIMITATIONS TO FIGHT ILLICIT INTERNATIONAL TRAFFICKING OF CULTURAL PROPERTY

4.1. Limited Regulatory Power for Illicit Trafficking of Cultural Property

US policies aimed at combating the illicit trafficking of cultural property have lacked substantial enforcement and effectiveness. Criminal convictions under the Antiquities Act were initially punishable by fines up to \$500, imprisonment for no more than 90 days, or both. Despite the 1987 penalty increase to a maximum fine of \$5,000 per individual, six months' imprisonment, or both, the Act's regulatory power remained negligible, yielding only 18 convictions over three decades (BLM, n.d.). Under ARPA, penalties for violations involve fines and imprisonment. A first-time offender faces fines up to \$10,000 and/or up to one year in prison. If the value of the archaeological resources and the cost of their restoration exceed \$500, penalties increase to fines up to \$20,000 and/or up to two years in prison. For subsequent violations, the penalties escalate to fines up to \$100,000 and/or imprisonment for up to five years. The criminal and civil penalties under NAGPRA (18 U.S.C. §1170) are imposed for violations involving Native American human remains and cultural items. For first-time offenses, the penalties include fines, imprisonment for up to one year and one day, or both. For second or subsequent offenses, the penalties significantly escalate to fines and imprisonment for up to ten years.

CCPIA (§ 2612, § 2609) itself primarily provides mechanisms for import restrictions and seizure of illicitly imported cultural property, but it does not specify criminal penalties directly within its text for violations. The actual criminal penalties for smuggling items protected under CCPIA are typically pursued in conjunction with other federal laws, including customs and smuggling statutes, to enforce its provisions. In the case of *United States v. Original Manuscript Dated November 19, 1778*, No. 96 CIV. 6221 (LAP) (S.D.N.Y. Feb. 22, 1999) (1999 WL 97894), the US government successfully obtained the civil forfeiture of a historical manuscript previously missing from the Mexican National Archives, under CCPIA. No criminal penalties such as fines or imprisonment were imposed, underscoring the focus on recovering cultural property rather than penalizing the possessor. In contrast, *United States v. Perez* (07-CR-499 C.D. Cal. 2007) involved the fraudulent sale of a pre-Hispanic ceramic bowl illegally imported from El Salvador in violation of US import restrictions under CCPIA, with criminal penalties applied under the anti-smuggling statute, 18 U.S.C. § 545.

Customs enforcement has filled the gap in CCPIA's effectiveness by addressing the illicit importation of cultural property beyond the scope of CCPIA and responding to urgent situations involving at-risk cultural property in the absence of bilateral agreements or formal requests. For example, US Customs seized three Pre-Columbian artworks that art dealer David Bernstein had consigned to Sotheby's for auction. This was not a case under CCPIA; instead, the seizure was based on customs law violations. Later, in *In re Search Warrant Executed Feb. 1, 1995, No. M 18-65* (S.D.N.Y. July 7, 1995), the US District Court for the Southern District of New York rejected Bernstein's motion for recovery. 18 U.S.C. § 545 provides the legal basis for criminal charges, including significant fines and imprisonment, for illegally importing goods into the United States, encompassing cultural property covered by CCPIA. The USA PATRIOT Improvement and Reauthorization Act of 2005 (P.L. 109–177) increased to 20 years in federal prison from previous 5 years, in addition to fines and the forfeiture of any smuggled merchandise to the United States government. The lack of direct enforcement mechanisms necessitates reliance on broader legal frameworks, making it more challenging to impose criminal penalties and effectively enforce CCPIA.

In contrast, STOP is clear and intentional about penalties. One purpose of STOP was to increase the maximum penalty for violating NAGPRA, raising the upper limit of punitive sanctions for a second or subsequent violation from 5 years to 10 years, or both. While STOP introduces stronger measures compared to previously existing laws, the penalties may still not be sufficiently severe to effectively deter international illicit trafficking, highlighting the need for further enhancements in penalties and enforcement mechanisms. Despite both criminal penalties and civil fines under ARPA and the civil penalties under NAGPRA, the regulatory power of these acts has been criticized for being insufficiently stringent, and enforcement remains challenging, resulting in a limited number of prosecutions and the complexity of prosecuting cultural property crimes.

Due to the limitations of the regulatory power of the policies to fight international illicit trafficking of cultural property, the National Stolen Property Act of 1934 (NSPA, 18 U.S.C. §§ 2314 et seq.) has gained growing importance for cases involving illegally taken cultural property. NSPA covers goods, wares, merchandise, securities, or money valued at \$5,000 or more, which have been stolen, converted, or taken by fraud, and then transported, transmitted, or transferred in interstate or foreign commerce. It also encompasses situations where illegally transported items are concealed in storage or when someone receives, stores, or conceals an object knowing it was stolen or unlawfully obtained. Under the U.S. Code Title 18—Crimes and Criminal Procedure Sections 2314 and 2315, the penalties for violation also include fines or imprisonment up to ten years, or both.

Its jurisdiction extends to trafficking in the US and applies to property stolen domestically or abroad (Gibbon, 2018). NSPA was applied in cases, *United States v. Hollinshead* (495 F.2d 1154 (9th Cir. 1974)), involving the transportation and conspiracy to transport stolen goods from Guatemala, and *United States v. McClain* (51 F.2d 52, (5th Cir. 1977), 545 F.2d 988 (5th Cir. 1977), 593 F.2d 658 (5th Cir. 1979), cert. denied, 44 U.S. 918 (1979)), involving the transportation and conspiracy to transport stolen goods from Mexico. In the McClain case, as the majority of the artifacts were movable items like ceramic dishes, pots, or figurines, they fell outside the scope of the 1972 Pre-Columbian Statute. NSPA acknowledged foreign patrimony laws and provided a legitimate means to

recognize stolen property and protect cultural property against the demands of the art market (Gutchen, 1982).

However, the Court of Appeals later reversed the McClain case ruling regarding the violation of NSPA while upholding the defendants' conspiracy conviction. The McClain case highlighted the challenges in applying NSPA to cultural property taken in violation of a foreign found-in-the-ground law (Goldberg, 2006). Found-in-the-ground laws, which are regulations adopted by archaeologically rich nations to assert national ownership over all cultural property discovered within their territories, conflict with US common law and constitutional policies supporting private property rights and fair trade. This emphasizes the need for a distinct regulatory policy for the importation of cultural property, respecting source countries' and cultural bearers' ownership of their cultural heritage, ensuring it is not dependent on NSPA.

4.2. Limited Scope of Cultural Property Covered in US Policy

4.2.1. *Challenges of Terminology*

The term "cultural property" is "the conceptual framework for considering the protection of cultural objects, places and practices," and the association of this term with legal rights and property value can lead to confusion regarding the nature of cultural objects (Forrest 2010, 24). The 1954 Convention defined cultural property as "movable or immovable property of great importance to the cultural heritage," including architecture, art or historical monuments, archaeological sites, buildings of historical or artistic interest, and various objects of artistic, historical, or archaeological significance. The definition urges the protection of cultural property as well as buildings and organizations that safeguard cultural property as integral components of cultural property. Building upon this, the 1970 UNESCO Convention further defines cultural property as property designated by each state as significant for archaeology, prehistory, history, literature, art, or science. It encompasses a wide range of categories such as rare collections, historical artifacts, archaeological discoveries, dismembered monuments, antiquities over a hundred years old, ethnological objects, artistic works, rare manuscripts and books, stamps, archives, old furniture, and musical instruments. These categories encompass items of religious, secular, historical, scientific, and artistic importance, all of which are protected under the conventions. The 1970 Convention places additional emphasis on international cooperation and the restitution of stolen or illegally exported cultural property (UNESCO, n.d.). Both conventions stress the prevention and preparation for safeguarding the broad scope of heritage resources in peacetime, especially with the passage of the Second Protocol of the 1954 Convention.

The definition of cultural property used in the 1954 Convention has also led to confusion in implementing the Convention. In reviewing the definition of cultural property, O'Keefe (1999) pointed out the vagueness surrounding the nature and extent of the terminology "cultural property," which rendered it ineffective as a humanitarian law; however, the discussion over the definition was rarely raised. The use of terminology has shifted towards the term "cultural heritage," but challenges in defining and distinguishing terms such as "cultural property," "cultural heritage," "patrimony," or "antiquities" persist (Forrest, 2010). The use of the term "cultural heritage" raises questions about the possibility of excluding or separating

natural heritage. The increasing significance of intangible cultural heritage adds another layer of complexity to the task of defining cultural property and countering its illicit trade (Borelli & Lenzerini, 2012). This discussion, which demands the clarification and expansion of terminologies, is also crucial for improving US policies. The term “cultural property” is used in CCPIA but not in STOP; however, both CCPIA and STOP cover a subset of the broader cultural property defined in the 1954 and 1970 conventions.

4.2.2. *Archaeological Resources*

While CCPIA adopts the term “cultural property” outlined in Article 1 of the 1970 Convention, CCPIA’s scope has become restricted to the enforcement of Article 9 of the Convention, leading to an emphasis on archaeological or ethnological materials. The partial implementation of the convention has proven to be ineffective and has exposed its limitations, particularly during emergency situations involving the cultural property of Iraq and Syria. This remains true despite the activation of emergency measures and the utilization of presidential authority. Therefore, the Iraqi Cultural Antiquities Act increased the President’s authority to place the import restrictions and expanded the scope of qualified items to “cultural property of Iraq and other items of archaeological, historical, cultural, rare scientific, or religious importance illegally removed from the Iraq National Museum, the National Library of Iraq, and other locations in Iraq since the adoption of United Nations Security Council Resolution 661 of 1990.” Aiming for comprehensive import restrictions on archaeological and cultural materials, H.R. 2009 not only sought to make the qualifications for materials more inclusive and expand the criteria for archaeological material in response to the Iraqi cultural heritage crisis, but it also attempted to significantly improve CCPIA by proposing amendments to broaden the scope of qualified materials, eliminate state requests, expedite the process for emergency conditions, and extend the duration of regulatory agreements (Borke, 2003). The policy discussion for the act resisted H.R. 2009 and remained similar to that for CCPIA two decades ago, which facilitated the partial implementation of the 1970 convention.

The emphasis on archaeological and ethnographic resources within the control of cultural policy is also evident in the regulation of cultural property exportation by STOP, due to its base policies, ARPA and NAGPRA. It prohibits the exportation of illegally acquired cultural items as per NAGPRA and extends its purview to encompass archaeological resources, as delineated by ARPA. These cultural items include human remains, associated and unassociated funerary objects, and sacred objects. NAGPRA does not use terms, “antiquities” or “archaeological resources,” that ignored indigenous cultural sovereignty and sanctity, distinguishing cultural items from academic or legal classifications that historically treated them as research materials and economic resources rather than ancestral heritage. In addition, The use of such terms in the US policies has been criticized as problematic and has faced consistent challenges. The term “object of antiquities” in the Antiquities Act has made enforcing the law challenging, particularly in prosecuting violators, and has called into question the Act’s validity. This was evident in *United States v. Diaz* (499 F.2d 113 (9th Cir. 1974), rev’g 368 F. Supp. 856 (D. Ariz. 1973)), where the act was deemed unconstitutionally vague due to the unclear definitions of “ruin,” “monument,” and “objects of antiquity.” In an attempt to improve the previous act, ARPA defines “archaeological resource” (§470bb) as “any material remains of past human life or activities which are of archaeological interest” and include pottery, basketry, bottles,

weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. “Object of cultural heritage” in the 18 US Code § 668 is either over 100 years old and valued over \$5,000 or valued at least \$100,000, which is fit to the definition to archaeological resources” under ARPA. The Antiquities Act and ARPA are rooted in a Euro-North American, scientific understanding of archaeological resources, prioritizing Western legal and archaeological frameworks by defining “archaeological interest” through scientific inquiry and requiring excavation permits primarily for professional archaeologists conducting research for educational or preservation purposes (Watson et al., 2022).

4.2.3. *Intangible Cultural Heritage*

The Article 2(1) of the 2003 UNESCO Convention for the Safeguarding Intangible Cultural Heritage defined intangible cultural heritage (ICH), which includes the practices, knowledge, and expressions that communities recognize as part of their cultural heritage, emphasizing its critical importance for the continuation of people’s identity and promotion of cultural diversity and human creativity. The Convention is compatible with existing international human rights instruments and supports the mutual respect and cultural rights among communities in understanding the value of cultural property (Borelli & Lenzerini, 2012). Despite the evolving framework for the protection of cultural heritage in international law, consideration of ICH in addressing illicit trafficking of cultural property remains significantly restricted (Borelli & Lenzerini, 2012). Moreover, in the US, federal policy development aimed at safeguarding ICH has been a neglected area, historically dependent on a few folklife programs such as the Smithsonian Folklife Festival and the American Folklife Center (Lowthorp, 2010). US cultural heritage policies have focused on preserving tangible cultural heritage, and neither CCPIA nor STOP overtly incorporates ICH. NAGPRA similarly focuses on the repatriation of tangible cultural items while also incorporating tribal oral traditions and cultural knowledge as rationale and evidence for repatriation claims. The concept of cultural patrimony can be identified in the court interpretations of the Antiquities Act, as seen in the Diaz case (499 F.2d 113), which classified 3- to 4-year-old ceremonial masks as “objects of antiquity” due to their substantial religious significance to the Apache. However, neither the Antiquities Act nor ARPA considered the intangible values of tangible cultural heritage in their policies. In contrast, the cultural items under NAGPRA, emphasizing the cultural sovereignty of Indigenous peoples, included “sacred objects” to support traditional Native American religious practices by their present-day adherents and “cultural patrimony” to recognize ongoing historical, traditional, or cultural importance that is central to Native American groups or cultures (§3001). NAGPRA has intended to ensure the ownership, use, and continuity of cultural heritage, encompassing certain domains of ICH related to Indian heritage, such as social practices, rituals and festive events, and knowledge and practices concerning nature and the universe. ICH in addressing illicit international exportation under STOP remains highly limited, not only due to the constraints of ARPA and NAGPRA but also because of the absence of a comprehensive ICH policy in the US.

4.2.4. *Geoheritage*

Geoheritage is “globally, nationally, and statewide, to local features of geology, such as igneous, metamorphic, sedimentary, stratigraphic, structural, geochemical, mineralogic, paleontological, geomorphic, pedologic, and hydrologic attributes, at all scales that are intrinsically important sites, or culturally important sites” and offer insights into Earth’s formation, scientific history, and are valuable for research, teaching, or reference (Brocx, 2008 13). Historically, geological and paleontological resources have been managed under the umbrella of natural resources or natural heritage, focusing on their scientific and ecological values despite their cultural values. For example, the 1954 Hague Convention did not include them in defining cultural property. In contrast, the 1970 Convention (Article 1(a)) takes a more inclusive approach and included “rare collections and specimens of fauna, flora, minerals, anatomy, and objects of paleontological interest” in recognizing cultural property. The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (Article 2) contributed to the understanding of these resources as heritage by recognizing “natural heritage,” which includes physical and biological formations or groups, geological and physiographical formations, as well as natural sites. In recent decades, national governments have been reevaluating their policies in response to a growing understanding of the cultural, scientific, and economic values of these resources, as well as the increasing illegal activities associated with them. Countries including Brazil, People’s Republic of China, the Republic of Korea, have elevated their perspectives toward geological and paleontological resources as national cultural heritage or cultural patrimony, and have strengthened their legal instruments to regulate their exportation (Kuhn et al., 2022; Liston and You, 2015; CHA, 2021). In addition, a wide range of fossil varieties can function as cultural legacies and heritage, possessing considerable inherent worth from indigenous people’s perspective beyond their importance in Western scientific context (Kempf et al., 2023).

The US policy environment highlights that geoheritage is largely separate from cultural resources management and legal protection for cultural property. Cultural heritage policies, including the Antiquities Act, ARPA, National Historic Preservation Act, and NAGPRA, have provided little protection for geological and paleontological resources, which also applies to CCPIA and STOP. The Paleontological Resources Protection Act of 2009 (PRPA, 16 U.S.C. § 470aaa 1-11) was enacted to manage and protect paleontological resources on Federal land. PRPA aims at establishing a unified federal policy that safeguards scientifically valuable fossils on federal land, acknowledging their significance as part of America’s heritage and as irreplaceable resources, and emphasizing the necessity for improved management (S. Rpt. No. 108-93, 2003). PRPA (§ 6306) notably prohibits the exportation of paleontological resources. However, it does not address the regulation of the importation of paleontological resources, which has continued to rely on custom laws for enforcement, as seen in the case that US Immigration and Customs Enforcement (ICE) seized the fossilized remains of six species of dinosaur and repatriated them to Mongolia (DOJ, 2016). Also, focusing on paleontological resources, the act does not extend to regulate illicit importation or exportation of geoheritage.

4.2.5. *Art*

Lastly, international illicit trafficking of artworks, unless they present archaeological or ethnological interests, is not covered by any specific policies in the US and again depends on the National Stolen Property Act, other criminal codes, or customs law. For example, Section 668 of the 18 U.S. Code addresses the theft of major artwork and outlines offenses related to stealing or fraudulently obtaining objects of cultural heritage from a museum, as well as receiving, concealing, exhibiting, or disposing of such objects with knowledge of their stolen or fraudulently obtained status. Since its inception in 2004, the FBI (Federal Bureau of Investigation) Art Crime Team has focused on art theft and has recovered more than 20,000 items valued at over \$900 million (FBI, n.d.). Between 2007 and 2021, ICE (2021) returned over 12,000 objects, including artworks and archaeological resources, to more than 30 countries, with notable cases including the repatriation of a \$15 million Picasso painting to France in 2015, two Royal Seals from the Joseon Dynasty to the Republic of Korea, and 3,800 ancient artifacts to Iraq in 2018. Exceptionally, Nazi-looted art was discussed in the Washington Conference Principles on Nazi-Confiscated Art in 1998, which addressed the restitution of Jewish assets lost during the Holocaust era, including artworks, books, and archives, as well as insurance claims and other types of assets. It was discussed again in 2009 through the Terezin Declaration (DOS, 2004; n.d.). In both cases, the US led the discussions and garnered participation from over 40 countries respectively, but they remain non-binding international agreements. Additionally, the Holocaust Expropriated Art Recovery Act of 2016 (P. L. 114-308) facilitates the recovery of artworks and other cultural properties that were looted or misappropriated during the Holocaust for victims and their heirs. The policies related to Nazi-looted art focus primarily on the recovery of Jewish assets confiscated by the Nazis and do not serve as regulations for the broader issue of illicit art trafficking. Therefore, there is still a need for a policy specifically aimed at regulating international art trafficking.

5. CONCLUSION

Combating international illicit trafficking of cultural property is no longer solely about protecting a nation's own heritage but also about preserving global heritage within the framework of UNESCO. It is recognized as a humanitarian duty and a reflection of a nation's moral responsibility. Given the severity of illicit trafficking of cultural property as an organized international crime that threatens global peace and undermines US political stability in international communities, there is a pressing need for policy improvements to address this issue more effectively. While recent changes in US heritage policies clearly demonstrate an awareness of this challenge, reviewing heritage policies reveals significant limitations in US efforts to combat the illicit trafficking of international cultural property, exposing gaps in coverage and challenges posed by bureaucratic constraints. Recent policy developments have been temporary and limited in scope, failing to provide long-term or fundamental solutions to these challenges, despite the US being the world's largest art and antiquities market and facing threats in national security and public diplomacy.

Fundamentally, the most significant challenge is the lack of a strong US commitment to combating international illicit trafficking of cultural property, despite assigning increased responsibilities to federal agencies—including the Departments of Justice, State, and Interior—and the Smithsonian Institution (GAO, 2016). The pattern of reluctance and lack of comprehensiveness is consistently observable. The US has played a leading role in international discussions on safeguarding world heritage and has contributed to successful initiatives, such as establishing international conventions and shaping international organizations. However, its ratification of these agreements and domestic policies for implementing international laws have often been lacking, as evidenced by the absence of ratification of the 1954 Hague Convention. Policy implementation has also been significantly delayed or only partially executed, as exemplified by the enactment and modification of CCPIA. Moreover, US policies have primarily focused on controlling domestic illicit trafficking of archaeological resources, while CCPIA, weakened by lobbying efforts, has proven ineffective in addressing international illicit trafficking of cultural property. Although STOP represents a significant step by addressing, for the first time, the exportation and repatriation of archaeological and Indigenous cultural property as defined under ARPA and NAGPRA, it still reflects the characteristics and limitations of a domestically focused policy. A comprehensive policy addressing the trafficking of art, cultural and natural heritage, and intangible cultural heritage remains lacking, which highlights the need for a more unified and coordinated approach.

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