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THE NEED FOR A UNITED STATES NATIONAL ANTIQUITIES DATABASE: A VALUABLE SUGGESTION FROM THE NICOSIA CONVENTION

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THE NEED FOR A UNITED STATES NATIONAL ANTIQUITIES DATABASE:
A VALUABLE SUGGESTION FROM THE NICOSIA CONVENTION

Dea Sula*

ABSTRACT

Antiquities trafficking is an international cultural and security risk due to the involvement of organized crime. The Nicosia Convention proposes utilization of shared national databases cataloging antiquities as a method to combat the antiquities black market. The United States should adopt this database recommendation. A comprehensive database of antiquities in the U.S. is technically feasible. Further, a database would strengthen American criminal law by creating evidence that a buyer could have notice and knowledge of the status of a trafficked antiquity, the lack of which currently incentivizes authorities to use civil forfeiture actions instead of criminal prosecution. Implementing an antiquities database would help the United States combat the antiquities black market and protect good faith market participants, strengthening the legal market and helping the United States achieve broader policy goals.

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INTRODUCTION

The looting and trafficking of antiquities are international problems requiring international action. Objects are sourced and trafficked by organized crime syndicates linked to arms dealing, terrorism, insurgency, and slavery.¹ Antiquities are often looted from impoverished and war-torn “source countries,” transported to other countries for document laundering, and are finally sold to buyers and dealers in “market countries.”² The antiquities trade, including legitimate channels, is difficult to regulate for many reasons, such as the general secrecy and the wealth involved within the art market.³ The internet greatly changed the landscape of trafficking by expanding market reach and strengthening communication channels between purchasers and looters.⁴ The black market presents a cultural threat and security risk. The international community must create novel solutions when the traffickers can use the internet, legal loopholes, and a lack of international cooperation to hide from detection.

National security concerns grounded in terrorism spurred legislative and executive efforts to confront the trafficking of antiquities in the United States.⁵ For example, the terrorist group the Islamic State of Iraq and Syria (ISIS) participated in widespread looting and trafficking of Syrian and Iraqi cultural property for funding purposes.⁶ Some of these antiquities were sold to U.S. buyers, which in high profile cases were forfeited and repatriated, emphasizing the potential national security risk present with the sale of looted antiquities as well as the risk to antiquities buyers.⁷

Current U.S. law concerning antiquities trafficking is predominantly based on civil forfeiture.⁸ In contrast, the Council of Europe has taken a different approach through the Convention on Offenses Relating to Cultural Property (Nicosia Convention),⁹ which is the first international convention that uses a comprehensive criminal law focus in combating antiquities trafficking.¹⁰ Building on prior international treaty suggestions, the

¹ Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 *IND. L. REV.* 601, 603 (2012).

² *Id.* at 606.

³ For a more in-depth reasoning on the difficulties of regulating the antiquities black market, see Derek Fincham, *The Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction*, 37 *CARDOZO ARTS & ENT. L.J.* 299, 304 (2019).

⁴ Tom Mashberg, *Social networks: The new El Dorado for traffickers*, *THE UNESCO COURIER*, Oct.-Dec. 2020, at 21.

⁵ Nikita Lalwani, *State of the Art: How Cultural Property Became a National-Security Priority*, 130 *YALE L.J. F.* 78, 79-80 (2020).

⁶ Alderman, *supra* note 1, at 610.

⁷ There have been several civil forfeiture cases brought against items bought for the Museum of the Bible owned by the Green Family who also own the crafts retail store chain Hobby Lobby. After the civil forfeiture actions, Hobby Lobby Stores Inc. sued auction house Christies for breach of contract. To read the complaint for one of the civil forfeiture actions see Verified Complaint at 2, *United States v. One Cuneiform Tablet Known as the “Gilgamesh Dream Tablet,”* No. 20-2222 (E.D.N.Y. May 18, 2020), available at: <https://www.justice.gov/usao-edny/press-release/file/1277316/download> [<https://perma.cc/4VUD-5ADJ>].

⁸ Fincham, *supra* note 3, at 307.

⁹ Council of Europe Convention on Offences Relating to Cultural Property, May 19, 2017, C.E.T.S. No. 221 (hereinafter “Nicosia Convention”), available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/221>.

¹⁰ Fincham, *supra* note 3, at 321.

utilization of technology and inter-state cooperation to combat trafficking could increase the Convention's effectiveness.¹¹ Signing parties are encouraged to develop national databases of cultural objects which are shared for international notice and cooperation through information sharing.¹² The Convention aims to address the practice of using the internet for trafficking antiquities through monitoring mechanisms recognizing internet based black-market utilization.¹³ While the effects are yet to be seen due to limited ratification, the Convention provides practical guidelines for the United States to follow without adopting the Convention itself.

A database of known legal and stolen antiquities in the United States is both feasible and would achieve many of the goals of the Nicosia Convention without great change to the current U.S. legal framework. First, the project is technically possible as shown by other existing databases. Second, a database would strengthen and support law enforcement use of criminal prosecution without necessarily changing the preexisting laws and would also protect good faith antiquities market participants. Third, a database would allow for a large flow of information internationally, supporting the global fight against antiquities trafficking and supporting the main goals of the Nicosia Convention without further implementation of the treaty. A database of this kind would be a major step to alleviating many of the problems the Convention aims to do in a less obtrusive way to American Law.

This comment will first discuss the historical background of international agreements created to combat antiquities trafficking. Second, there is an overview of the current state of U.S. law concerning trafficked antiquities and will outline the internet and database articles in the Council of Europe's Nicosia Convention. Finally, it will be proposed that the U.S. should adopt the database concept presented in the Nicosia Convention. A database is feasible and would strengthen preexisting American law. By adopting a technology-based approach, the United States may be more proactive in disrupting the black market and will help other policy goals of preventing the funding of organized crime.

I. HISTORICAL BACKGROUND OF THE DEVELOPMENT OF METHODS FOR ANTIQUITIES PROTECTION

A. *International Agreements*

The concepts of looting, trafficking and cultural property evolved alongside the development of wartime international law.¹⁴ Prior to the twentieth century, there was no concept of protecting cultural property as taking "booty" in the course of conflict was

¹¹ Explanatory Report to the Council of Europe Convention on Offences Relating to Cultural Property, May 19, 2017, C.E.T.S. No. 221, art.1, ¶ 13, (hereinafter "Explanatory Report to the Nicosia Convention") available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/221>.

¹² See Nicosia Convention, *supra* note, at 9.

¹³ See Nicosia Convention, *supra* note, at 9.

¹⁴ Most countries through their domestic laws vest ownership over all the antiquities within their country. Vesting creates specific ownership rights that are impacted following litigation of subsequent theft and trafficking of antiquities. See *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979)(explaining that vesting allows a country to claim ownership of an object if stolen and brought to the U.S.).

seen as an established war prize.¹⁵ Laws concerning looting evolved in conjunction with laws to curb wartime violence towards civilians.¹⁶ The international perspective changed due to the widespread destruction that occurred during the Second World War.¹⁷ Following World War II, the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict initiated a uniform protocol for war time actions towards cultural heritage.¹⁸ The Convention was the first to define cultural property and have an explicit goal to protect it.¹⁹ The protection of cultural heritage in times of conflict was the predominant focus of the Convention.²⁰

Peacetime cultural property protection originated from the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.²¹ The Convention aimed to protect cultural property through a framework built around prevention, restitution, and international cooperation.²² The treaty presented regulating measures for the global antiquities market, such as taking inventory of objects and monitoring trade.²³ The data could then be shared between states to foster international cooperation.²⁴ Internationally sharing recorded data on antiquities was the initial stage of a database structure.²⁵

Building on the UNESCO Convention, The International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects of 1995, proposed legal standards for holding purchasers of looted antiquities accountable based on an available register of stolen items.²⁶

¹⁵ For further information on the historical development from the ancient legal perspective on booty to the modern day concept of looting, see Anthi Helleni Poulos, *The 1954 Hague Convention for The Protection of Cultural Property in the Event of Armed Conflict: an Historical Analysis*, 28 INT'L J. LEGAL INFO. 1, (2000).

¹⁶ Juliana V. Campagna, *War or Peace: It is Time for the United States to Ratify the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts*, 17 FLA. J. INT'L L. 271 (2005).

¹⁷ Christa L. Kirby, *Stolen Cultural Property: Available Museum Responses to an International Dilemma*, 104 DICK. L. REV. 729, 734 (2000).

¹⁸ *Id.*

¹⁹ See Convention for Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

²⁰ *Id.*

²¹ See Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer or Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 23.

²² See UNESCO, About 1790 Convention, UNESCO, available at: <https://en.unesco.org/fighttrafficking/1970#:~:text=The%20UNESCO%201970%20Convention,illicit%20trafficking%20of%20cultural%20property>.

²³ *Id.*

²⁴ *Id.*

²⁵ The internet had been “invented” by the 1970s but was still in early development. It wasn’t until later in the 20th century did the “world wide web” develop into what we now understand it to be. See *A Short History of the Internet*, Science and Media Museum, (Dec. 3, 2020), available at: <https://www.scienceandmediamuseum.org.uk/objects-and-stories/short-history-internet#how-is-the-world-wide-web-different-from-the-internet>.

²⁶ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (Hereinafter UNIDROIT Convention).

The Convention recommends:

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.²⁷

The drafters of the Convention could not predict the extent of growth in internet technology, but the Convention's focus on due diligence via object registers is an idea that can be implemented even more thoroughly by utilizing current technology.²⁸

The internet has increased the ease and scope of trafficking looted antiquities and therefore requires a new law enforcement approach.²⁹ Now, anyone with internet access can participate in the black market.³⁰ For instance, a looter can use social media to communicate directly with potential purchasers who may live all over the world.³¹ While social media sites have reacted, such as Facebook ending the sale of antiques on the platform, the issues exacerbated by the internet remain.³² Since the laws regarding looting were created prior to the rise of the internet, there is a gap in the law that has yet to be closed.

B. Recent Conflicts and National Security Concerns

In the last few decades there have been several terrorist groups and conflicts that have increased national security awareness concerning trafficked antiquities. The Taliban's cultural and archeological destruction including the looting of the Baghdad Museum in Iraq brought international attention to cultural destruction.³³ Later, ISIS partially financed their terrorist activities by creating an internal department dedicated to

²⁷ *Id.* art. 4, at ¶ 4.

²⁸ Registers are acknowledged in the preamble, *see* UNIDROIT Convention, *supra* note 26.

²⁹ Sellers and buyers can utilize a variety of websites, including eBay, Invaluable, Catawiki, and GoAntiques. Although these websites prohibit the sale of stolen or illegal objects, the sheer volume of objects and sales make thorough investigation difficult if not impossible. *See* Mashberg, *supra* note 4, at 21.

³⁰ Social media has "lowered the barriers to entry to the marketplace," which means that where access to the Black Market was reserved to a select few, anyone can now freely access it. *See* Mashberg, *supra* note 4, at 21.

³¹ Over the course of the Covid 19 pandemic, researchers were able to observe a resurgence in the sale of illegal objects through social media. *See* Agnès Bardou, *50 Years of the Fight Against the Illicit Trafficking of Cultural Goods*, *The UNESCO Courier*, (2024), at 4, 6.

³² *Id.*

³³ *See* Lalwani, *supra* note 5 (explaining how national security concerns are a key driver of current cultural protection discussion and policy).

the trafficking and sale of antiquities.³⁴ The sale of looted antiquities was potentially the second largest source of funding after oil sales for ISIS.³⁵

The widespread destruction and financing spurred an international response. This included UN Security Council Resolution 2199, which specifically prohibits the trade of illegally removed cultural property from Syria post-2011 and Iraq post-1990.³⁶ Furthermore, the U.S. reacted by passing legislation such as the Emergency Protection for Iraqi Cultural Antiquities Act, banning the importation of cultural property illegally removed from Iraq after August 1990.³⁷ The Protect and Preserve International Cultural Property Act passed in 2016 acted in the same way towards trafficked Syrian cultural property.³⁸ The concern and response to ISIS's looting demonstrates there is a will to combat antiquities trafficking, especially in a national security context.

II. LEGAL OVERVIEW

A. *The Nicosia Convention by the Council of Europe*

Based on the concerns surrounding protection of cultural property, organized crime financing, and the online black market, the Nicosia Convention was initiated.³⁹ Due to a lack of standardization and cooperation between countries, traffickers and looters can find gaps and loopholes between different countries' legal systems to avoid detection and more easily move antiquities.⁴⁰ The European Committee on Crime Problems (CDPC) analyzed current legislation and created the new standards in the Convention that would fill the gaps traffickers utilize.⁴¹ The Nicosia Convention is novel due to its specific focus on a criminal law framework regarding antiquities. The goal of the criminal framework is to increase the stakes for traffickers by introducing and increasing the punishment for trafficking, which would in effect be a deterrent, and increase the chances of detection if more countries have access to information on trafficked items. The drafters attempted to address each part of the trafficking process: the looting, the trafficking, document falsification, and the sale and purchasing.⁴² Further, the Convention suggests how authorities should respond to these actions in a preventive and punitive way.⁴³

³⁴ See Lalwani, *supra* note 5.

³⁵ Heather Pringle, *ISIS Cashing in on Looted Antiquities to Fuel Iraq Insurgency*, National Geographic, (June 27, 2014), available at: <https://www.nationalgeographic.com/history/article/140626-isis-insurgents-syria-iraq-looting-antiquities-archaeology>

³⁶ See S.C. Res. 2199, ¶ 17 (Feb. 12, 2015).

³⁷ Emergency Protection for Iraqi Cultural Antiquities Act, Pub. L. No. 108-429, §§ 3001-3003, 118 Stat. 2599 (2004).

³⁸ Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, 130 Stat. 369 (2016).

³⁹ See Explanatory Report to the Nicosia Convention, *supra* note 11.

⁴⁰ See Explanatory Report to the Nicosia Convention, *supra* note 11, ch.2, ¶ 31.

⁴¹ See Explanatory Report to the Nicosia Convention, *supra* note 11, ch.1, ¶ 9.

⁴² See Nicosia Convention, *supra* note 9.

⁴³ See Nicosia Convention, *supra* note 9.

The Convention's chapters detail different aspects of its substantive law, reasoning or legal implementation, followed by an explanatory report from the drafters.⁴⁴ The Convention's preamble lays out the drafters' general reasoning for the Convention: cultural property is an important aspect of a people's culture, and the looting or trafficking of that property should be treated as a crime.⁴⁵ Since these "offenses related to cultural property are leading to the destruction of the world's cultural heritage" an international response is required.⁴⁶

The Convention has a large focus on international cooperation and utilizing technology to mirror the development of the antiquities black market. In Article 20 signing states are encouraged to "establish or develop inventories or databases of its cultural property."⁴⁷ Further, in Article 21, states, at the international level, are encouraged to promote the exchange of information with other states on seized items and to:

contribute to international data collection on trafficking of movable cultural property by sharing or interconnecting national inventories or databases on cultural property that has been the subject of an offense defined by this Convention, and/or contributing to international inventories or databases, such as the Interpol database on stolen works of art.⁴⁸

A goal of the articles is to increase international information sharing.⁴⁹ Greater information sharing is part of creating higher due care and due diligence standards for antiquities market participants.⁵⁰ Signing Parties should:

introduce due diligence provisions for art and antiquity dealers, auction houses and others involved in the trade in cultural property, and introduce an obligation to establish records of their transactions. These records should be made available to the competent authorities in accordance with domestic law.⁵¹

Article 20 encourages a database that would be available to relevant policing authorities. This combination of increasing information sharing nationally and internationally with a heightened standard for industry participants is a strong base for the criminal law aspects of the treaty.

⁴⁴ See Nicosia Convention, *supra* note 9.

⁴⁵ See Nicosia Convention, *supra* note 9 at Preamble.

⁴⁶ See Explanatory Report to the Nicosia Convention, *supra* note 11, ch.2, ¶ 14.

⁴⁷ Nicosia Convention, *supra* note 9, art. 20(a).

⁴⁸ Nicosia Convention, *supra* note 9, art. 21.

⁴⁹ Explanatory Report to the Nicosia Convention, *supra* note 11.

⁵⁰ Nicosia Convention, *supra* note 9, art. 20(c).

⁵¹ Nicosia Convention, *supra* note 9, art. 20(c).

There have been six ratifications since the opening of Nicosia Treaty signing in 2017.⁵² While the treaty is open for signature from any country in the world, most of the ratifications are from “source” countries where antiquities are often looted and trafficked, including Cyprus, Greece, Italy, and the observer state Mexico.⁵³ The United States has an observer status to the Council of Europe, but American ratification of the Convention is unlikely.⁵⁴ While the treaty came into force in 2022, there have not been ten ratifications required to trigger the Committee of the Parties that would act as the monitoring mechanism for the Convention.⁵⁵ Ratifying countries may implement the Nicosia Convention principles in their own domestic laws even if the Convention fails to achieve the required amount of ratifications, but estimates about what may be enacted is speculative. The actual effects of the agreement are yet to be seen due to a lack of ratification and implementation.

B. U.S. Treaty Participation

The U.S. has adopted aspects from but has never fully ratified an international treaty concerning looted antiquities. For example, the U.S. signed but did not ratify the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.⁵⁶ However, U.S. soldiers have followed those protocols since their creation.⁵⁷ In 1972 the Senate ratified the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.⁵⁸ The Convention was classified as executory, requiring enacted domestic legislation to go into effect.⁵⁹ In 1982, the Convention on Cultural Property Implementation Act (CPIA) was signed into law and implemented two provisions of the 1970 UNESCO Convention, Article 7(b) and Article 9.⁶⁰

U.S. law 19 U.S.C. § 2607 Article 7(b) prevents the importation of a documented item of cultural property that was stolen after the implementation of the CPIA or the entry into force of the Convention for the state party the item was stolen from.⁶¹ While states could have initiated a private action to regain stolen property, this provision allowed the U.S. to seize the stolen property at the border.⁶² To seize and forfeit property, the government must prove an item was stolen after both (1) the U.S. and the country of

⁵² For a list of signing and ratifying parties, see Council of Europe Portal, *Chart of Signatures and Ratifications of Treaty*, Council of Europe (Aug. 18, 2021), available at:

<https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyid=221>.

⁵³ *Id.*

⁵⁴ For more information on U.S. observer status on the council of Europe, see Council of Europe, *United States // Observer*, (last accessed Aug. 18, 2023), available at: <https://www.coe.int/en/web/portal/united-states>.

⁵⁵ Nicosia Convention, *supra* note 9, at ch.5, art. 22 ¶ 2.

⁵⁶ For arguments on why the United States should ratify the Convention, see Juliana V. Campagna, *supra* note 16.

⁵⁷ See discussion in Hays Parks. (1998). *Protection of Cultural Property from the Effects of War*, *The Law of Cultural Property and the Natural Heritage*, Ch. 3 (M.Phelan, G. Edson & Mayfield eds., 1998).

⁵⁸ See Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (1993).

⁵⁹ Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 U.S.A. BULL. & J. FED. L. & PRAC. & Prac. 5, 9 (Mar. 2016).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

origin became parties to the Convention and (2) the item was from a documented collection.⁶³

Article 9 was the second article from the 1970 UNESCO Convention implemented into American law. Section 19 U.S.C. § 2602 allows the President, on behalf of the United States, to enter into bilateral or multilateral agreements with other state parties to impose import restrictions specifically for archeological and ethnological materials.⁶⁴ The CPIA offers a definition section for what items fall into archeological and ethnological materials.⁶⁵ The bilateral agreements need not be ratified by the Senate to go into effect.⁶⁶ To initiate a bilateral treaty, a country that is a party must first request one using diplomatic channels.⁶⁷ Subsequently, the Cultural Property Committee evaluates the requests and makes recommendations to the President.⁶⁸ If the conditions of the CPIA are met, negotiations to finalize the treaty begin.⁶⁹ These agreements last five years and can be renewed indefinitely.⁷⁰ Currently, there are 26 active and in force bilateral agreements.⁷¹

There are procedural criticisms of the process. A treaty can take extended amounts of time to draft and go into effect,⁷² and is generally a very slow process.⁷³ Some consider certain aspects of the application requirements to be designed to slow down the process at the behest of collectors.⁷⁴ A suggestion to improve the process is to streamline the application.⁷⁵ While the CPIA itself may not be the strongest tool against traffickers, it is supplemented by other laws that have more severe penalties.

C. Other Legal Methods to Combat Trafficking in the U.S.

Besides the CPIA, the main methods the U.S. government uses to combat antiquities trafficking are customs laws, civil forfeiture, and criminal prosecution. Most of the statutes surrounding trafficked antiquities work together. Often multiple statutes can be used to achieve the government's goals, whether that is forfeiture alone or a combination with prosecution.⁷⁶ There is no centralized authority investigating antiquities trafficking, rather various agencies take part in investigation and enforcement

⁶³ *Id.* at 10.

⁶⁴ *Id.*

⁶⁵ See 19 U.S.C. §§ 2601-2613.

⁶⁶ 19 U.S.C. § 2601.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ In the duration of a treaty negotiation, the U.S. has the authority to unilaterally act if emergency conditions (also defined within the CIAP) require it. See 19 U.S.C. § 2601.

⁷⁰ *Id.*

⁷¹ There are expired agreements that have not been renewed, such as with Canada and Nicaragua. Emergency designations are currently in place for Afghanistan, Iraq, Syria, and Yemen alongside other country specific legislation. See Bureau of Ed. & Cultural Affs., *Current Agreements and Import Restrictions*, Bureau of Ed. & Cultural Affs. (last accessed at Aug. 18, 2023), available at:

<https://eca.state.gov/cultural-heritage-center/cultural-property/current-agreements-and-import-restrictions>.

⁷² *Id.*

⁷³ Claire Stephens, *Blood Antiquities: Preserving Syria's Heritage*, 92 CHI.-KENT L. REV. 353, 368 (2017).

⁷⁴ Lalwani, *supra* note 5, at 88.

⁷⁵ See Lalwani, *supra* note 5, at 88.

⁷⁶ Judith Benderson, *Introduction*, 64 U.S. BULL. & J. FED. L. & PRAC. 1, 2 (Mar. 2016).

of the laws surrounding cultural property, such as the FBI, Homeland Security, the State Department, the Department of Justice, and others.⁷⁷

Custom laws are one method of seizing imported items. Statute 19 U.S.C. § 1595(a) allows the forfeiture of “merchandise introduced or attempted to be introduced to the United States contrary to law.”⁷⁸ If an object is stolen and imported into the U.S., then it would be introduced contrary to law and could be forfeited.⁷⁹ The National Stolen Property Act, 18 U.S.C. § 2314, makes it illegal to knowingly import objects stolen in another country, and can be forfeited.⁸⁰ Objects can also be seized if they are introduced in violation of other customs regulations.⁸¹ Unfortunately, custom enforcement resources are already spread thin combating drug trafficking and money laundering, which leaves inadequate resources to fully combat antiquities trafficking.⁸²

The government uses civil forfeiture as the predominant way to seize trafficked antiquities.⁸³ Civil forfeiture occurs when the government initiates a proceeding naming a particular property as the defendant instead of an individual.⁸⁴ This method has a lower burden of proof than what is required in criminal prosecutions.⁸⁵ Some critics say civil forfeiture allows the government to circumvent the higher standards required for criminal convictions.⁸⁶ Others argue the lowered bar for civil forfeiture discourages prosecutors from attempting to hold individuals accountable.⁸⁷ Therefore, since individuals could continue trafficking without the fear of criminal prosecution, civil forfeiture lacks the deterrence that would discourage repetition of trafficking since the reward outweighs the risk.⁸⁸ A trafficker could assume losing items to civil forfeiture was part of the “cost of doing business” and would simply continue doing so.⁸⁹

Criminal prosecution is guided by the Cultural Heritage Resource Crimes Sentencing Guideline, 18 U.S.C. Appx. § 2B1.5.⁹⁰ The item in question must meet the

⁷⁷ *Id.*

⁷⁸ 19 U.S.C. § 1595(a).

⁷⁹ For a case example of 19 U.S.C. § 1595(a) being utilized, see *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367 (S.D. Fla. 2003) (where a moon rock which had been gifted to the government of Honduras and was illegally stolen and brought into the U.S.).

⁸⁰ 18 U.S.C. § 2314.

⁸¹ See *United States v. An Antique Platter of Gold*, 84 F.3d 131 (2d Cir. 1999) (where forfeiture was appropriate due to false statements regarding the country of origin of the platter).

⁸² James A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, 5 VILL. JEFFREY S. MOORAD SPORTS & ENT. L. J. 19, 20 (1998).

⁸³ See Fincham, *supra* note 3, at 307.

⁸⁴ Jennifer A. Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSANT'L L. 1199, 1222 (2005).

⁸⁵ *Id.* at 1223.

⁸⁶ Opponents of civil forfeiture argue that since property can be seized on mere suspicion and the owner must “prove” the object’s innocence, the individuals involved lack the protectional safeguards that criminal forfeiture defendants have during the prosecution process. See Roger Pilon and Trevor Burrus, *Civil Forfeiture Reform*, CATO HANDBOOK FOR POLICYMAKERS (2022), available at: <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/civil-asset-forfeiture-reform>.

⁸⁷ See Fincham, *supra* note 3, at 308.

⁸⁸ See Fincham, *supra* note 3, at 309.

⁸⁹ See Fincham, *supra* note 3, at 309.

⁹⁰ See Gerstenblith, *supra* note 59, at 16.

definition of a cultural heritage resource.⁹¹ The offense level is dependent on the presence of additional factors including the type and location of the object and the pattern of behavior from the perpetrator.⁹² Knowledge of a looted antiquities status and intent to purchase or sell a looted antiquity are the most difficult elements to establish in a criminal prosecution, and may encourage prosecutors to instead turn to civil forfeiture.⁹³ The higher burden makes civil forfeiture more attractive to prosecutors in comparison.⁹⁴

III. IMPLEMENTATION OF THE NICOSIA CONVENTION DATABASE SUGGESTION IN THE U.S.

Current U.S. law and the Nicosia Convention differ on several points. While American ratification of the Convention is unlikely to occur for several reasons, the database proposal should be implemented in the United States. By adopting this approach, the government could tackle antiquities trafficking in a more efficient way. The data needed for a database already exists in the art world as most players keep digitized catalogs for their own purposes, so the government initiative would be a compilation project rather than a data gathering one. The creation of a database could achieve similar outcomes as the Convention without an overhaul of the current U.S. system and would in fact strengthen the current framework.

The project would be logistically and technologically possible to make. There would be major benefits for each interest group in the art market, increasing the ability for purchasers to protect themselves while giving prosecutors an ability to establish criminal liability more readily and use existing criminal law more effectively. A database would also strengthen the United States' ability to combat domestic and global antiquities trafficking activity.

A. Existing Art World Databases

Database use is not a new concept in the art world. Cataloging, which has transformed into digital databases, is a longstanding practice for public and private art

⁹¹ See Gerstenblith, *supra* note 59, at 16.

⁹² “This definition includes: archaeological resources under the Archaeological Resources Protection Act; cultural items under the Native American Graves Protection and Repatriation Act; designated ethnological material under the Convention on Cultural Property Implementation Act; historic property or historic resources under the National Historic Preservation Act, 16 U.S.C. § 470w(5); commemorative work; and objects of cultural heritage, as defined in the Theft of Major Artwork Act, 18 U.S.C. § 668(a)(2).” See Gerstenblith, *supra* note 59 at 16.

⁹³ Fincham, *supra* note 3, at 308.

⁹⁴ Failed prosecution attempts can also discourage further attempts because of resource and time investments. For example, in 2008, a five-year criminal investigation into multiple museums and dealers involving multiple agencies and undercover agents resulted in zero prosecutions after the death of a cooperating witness. See Fincham, *supra* note 3, at 313. See also Jason Felch & Mike Boehm, *Federal Probe of Stolen Art Goes National*, L.A. Times (Jan. 29, 2008), available at: <http://articles.latimes.com/2008/jan/29/local/me-museum29> [<https://perma.cc/K2EZ-V8HT>].

world participants.⁹⁵ Databases hold large amount of information, including provenance, photographs, and other identification information.⁹⁶

Auction houses, museums, collectors, and most other entities in the art ecosystem have long used catalogs to index inventory for sale and identification purposes. Early catalogs came into existence with public museums, such as the Louvre's first catalog created in 1793.⁹⁷ Many of the largest museum institutions have public databases of their collections. Private auction houses use their catalogs as a historical record of what works passed through the auction house. There are a variety of subscription access databases for current catalog information.⁹⁸ Private collections employ catalogs and databases for record keeping and for tax purposes.⁹⁹ Catalogs are the main way to organize a set of items with important information and are therefore a fundamental practice in the art market. Due to the rise of the internet and the efficiency of digital catalogs, most institutions have digitized their collections into online databases.

There is a variety in the types of databases available. For instance, there are government-created databases for cultural heritage. An example being the National Archeological Database, containing a range of information based on excavation sites, reports, federal permits, and maps.¹⁰⁰ There are public access databases from museums such as the Metropolitan Museum of Art and the Smithsonian used as an educational and organizational tool.¹⁰¹ Private galleries and auction houses utilize catalogs for advertising and business purposes.

In a criminal context, using digital databases for lost and looted work is not unheard of either. Interpol has an established database in accordance with the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.¹⁰² It has over 50,000 items and 134 contributing countries.¹⁰³ The International Council of Museums

⁹⁵ For an example of the history of catalog use in American exhibitions, see Steven Lubar, *A brief hist. of Am. museum catalogs to 1860*, March 27, 2017, available at: <https://lubar.medium.com/cataloging-history-eac876941db6>.

⁹⁶ Provenance is the history of ownership of an object is one of the three main elements of establishing authenticity. *Provenance*, Merriam-Webster, available at: <https://www.merriam-webster.com/dictionary/provenance>.

⁹⁷ Lubar, *supra* note 95.

⁹⁸ There are many subscription-based catalogs created for auction purposes. See generally, Library of Congress, *Research Guides*, Libr. of Cong. (last accessed Aug. 18, 2023), available at: <https://guides.loc.gov/art-auction-catalogs/subscription-databases>.

⁹⁹ For further tax information of the purchasing of art, see Alina Livneva, *Art And Taxation For The Global Collector* (Nov.16, 2018), available at: <https://www.virtosuart.com/blog/art-and-taxation-for-the-global-collector>. For other general benefits, see Art Collection, *The Benefits of Cataloging Your Art Collection Online*, Art Collection (May 13, 2020), available at: <https://artcollection.io/blog/benefits-of-catalogin>.

¹⁰⁰ Nat'l Archeology Database, *The Past Has Layers*, NPS, available at: <https://www.nps.gov/archeology/tools/nadb.htm>.

¹⁰¹ See The Met Museum, *The Met Collection Art Database*, available at: <https://www.metmuseum.org/art/the-collection>. See also,

Smithsonian Inventory Catalog, *Women in World War I, Smithsonian American Art museum Arts Inventories Catalog*, Smithsonian, available at: <https://www.si.edu/spotlight/women-in-wwi/smithsonian-american-art-museum-arts-inventories-catalog>

¹⁰² See Interpol, *Stolen Works of Art Database*, Interpol, available at:

<https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database>.

¹⁰³ *Id.*

(ICOM) publishes red lists of at-risk, but not stolen, cultural objects.¹⁰⁴ The Art Loss Register is the largest private international database for stolen art with over 700,000 objects, and runs the Cultural Heritage At Risk Database for proactively registering items.¹⁰⁵

These examples demonstrate the possibility and variety in databases, such as data for positively identified pieces, identified stolen objects, at risk objects, and more. There is room to be creative with what information is gathered and can be proactive in nature. Overall, databases are flexible because the format of inserted material is based on the needs and wants of the creator. A database for antiquities in the United States is not an unrealistic project since databases are flexible, already used in a governmental and monitoring capacity, and the data is already separately compiled.

B. The Creation of a Comprehensive U.S. Antiquities Database of Known Legal and Known Looted Antiquities

1. Collection and Content

A United States national antiquities database should be as comprehensive as possible. This would include known legally sold antiquities, antiquities with a suspicious or ambiguous status, and known stolen or looted antiquities. There may be some variety in data collected by parties but there must be a baseline minimal amount of information required. This would include the name or descriptor of the object, high quality photographs if available, origin, provenance (path of sale), physical description such as material and size, and current location or ownership. All documentation available on an antiquity, such as sale contracts, insurance, and import and export certificates should also be collected.¹⁰⁶ For the database to be an effective tool, as much information and documentation must be collected and imputed as possible.

Additionally, to make the system secure, a process for collection and verification must be established. Owners should not be allowed to personally change or edit information, so a communication system between database personnel and owners must be created for the effective flow of information.

2. Mechanics

This comment will not attempt to fully explain how such an antiquities database system might operate, but a database of this kind is not purely theoretical. Technical

¹⁰⁴ International Council of Museums, *Red Lists*, International Council of Museums, available at: <https://icom.museum/en/red-lists/>.

¹⁰⁵ The Art Loss Register, *The Cultural Heritage At Risk Database (CHARD)*, The Art Loss Register, available at: <https://www.artloss.com/chard/#:~:text=Since%201990%2C%20the%20Art%20Loss,consisting%20of%20over%20700%2C000%20items.>

¹⁰⁶ Documentation is already highly important in art sales, so collection of this information for a database is not unreasonable. For example, certificates of authenticity (CoAs) are already an industry standard. See Visual Artists Association, *Why Every Artist Needs a Certificate of Authenticity*, available at: <https://visual-artists.org/resources/certificate-of-authenticity-template/#:~:text=A%20certificate%20of%20authenticity%20is%20basically%20a%20professional%20sales%20receipt,has%20been%20created%20by%20you.>

considerations are an important part of actual implementation of such a system.¹⁰⁷ There is the technical capability to create the size of the database required. Existing art databases provide insight that the information connected to antiquities does translate into a database structure, including sale and ownership information, physical information, photographs, and current location. These databases are not extremely large, but they hold complex information along with photographs. The Interpol register is an example of a database analogous to the one proposed for the United States. On a larger level, massive projects, such as the Allen Brain Atlas, demonstrate that vast amounts of data can be stored in a database.¹⁰⁸ While the proposed database would be larger than the traditional art catalog and smaller than the scientific compilations, these examples demonstrate the feasibility of the project.

3. Practical Issues

Beyond the mechanics of creating a large database, there are other practical considerations such as the cost, time, and resources necessary for the project. Spending must be determined by Congress.¹⁰⁹ In addition, Congress would have to add or modify laws to mandate party participation in the database, otherwise, the effectiveness would be limited. The time to gather the data required would be extensive. Privacy concerns as confidentiality and secrecy are important aspects of the art market, so there would very likely be pushback to the database.¹¹⁰

It is not clear if the database would have the support necessary to receive funding. Congress has been motivated to address trafficking and looting issues, especially as a national security concern.¹¹¹ It would also have to be decided if one of the many agencies that deal with trafficked antiquities would spearhead the project or if it would be more productive to create a centralized cultural authority as recommended by the Convention.¹¹² Further considerations regarding resource and personnel utilization would have to be addressed. These and many more issues remain.

There is also the consideration of adding legal weight to the database. If it is optional, then the database lacks a sufficient basis to be used as evidence in litigation. Without enforceability, there would be only an educational or research worth in the project. While noble, there would be no impetus for funding necessary to create the database. Congress would need to pass a regulation requiring that all collections, private and public, must be uploaded for the database to be as strong as possible.

The timeline to make such a database would have to be considered prior to the start of the project. Although most of the data already exists in catalog compilations, it

¹⁰⁷ Adam Levine, *A Global Database of Antiquities: Some Thoughts on Structure and Implementation*, 9 *Archaeologies: J. OF THE WORLD ARCHAEOLOGICAL CONG.*, 252, 256 (2013).

¹⁰⁸ *Id.* at 252.

¹⁰⁹ CONG. RSCH. SERV., INTRODUCTION TO THE FEDERAL BUDGET PROCESS (2023) (Explaining that Congress must appropriate the use of money through the “power of the purse.”).

¹¹⁰ Graham Bowley & William K. Rashbaum, *Has the Art Market Become an Unwitting Partner in Crime?*, N.Y. TIMES (Feb. 19, 2017), available at: (<https://www.nytimes.com/2017/02/19/arts/design/has-the-art-market-become-an-unwitting-partner-in-crime.html>).

¹¹¹ See Lalwani, *supra* note 5.

¹¹² See Nicosia Convention, *supra* note 9, Ch. 4, art. 20, ¶ d.

would still take a long period to compile and fact check all the information. There would have to be an appropriate procedure for private collectors to upload their information. This time frame, and the time it would take to create the foundation of the database, would likely be considerable and is a major factor for implementation.

Next is the issue of public accessibility. If the access is too limited, it leaves room to argue against its effectiveness, but market participants would still expect a certain level of privacy. Large market participants, museums, dealers, collectors, and buyers would need access to make the database relevant and effective. Source countries would also need access to cross check and investigate potentially trafficked antiquities. Further, the database could be a research and public education tool, but again runs into privacy concerns. Interpol has found a medium between security and public accessibility by requiring a registration process, presenting a possible template for an American antiquities database.¹¹³

Privacy concerns are a foundational aspect of a database that would have to be determined prior to creation. A free access database would be the most effective way to disseminate information since more people could access the information, but larger issues may make a free access approach less attractive, such as private owners who would want to limit certain forms of information from becoming public knowledge. More clarification on the amount of detail would be required. Lawmakers would have to do a balancing test between the benefits of public access and the privacy rights of private art market participants. Further research and planning may reveal the best approach if a database project were to go ahead. Dealing with these issues would be a foundational step prior to forming the database that would greatly impact the outcome of the project.

C. The Benefits and Reasoning as To Why a Database Should Be Created

1. An Antiquities Database Would Strengthen Current American Criminal Law, Aid Law Enforcement, and Protect Good Faith Buyers.

A database would allow for a stronger application of criminal law penalties while protecting good faith acquisition because notice, knowledge, and due diligence would be easier to establish. This would increase the speed of identification of a looted and trafficked antiquity since it would be registered within a certain time of purchase.¹¹⁴ In addition, this would also lessen the chance of decades passing between the time of the looting and national requests for return of the looted objects.¹¹⁵

U.S. law enforcement monitoring antiquities trafficking is spread out across a variety of agencies with different functions.¹¹⁶ Rather than creating a new centralized

¹¹³ See Interpol, *supra* note 102.

¹¹⁴ Another question for the legislature or the agency given authority over the database is how much time to allow for uploading information. It may be a good approach to have both sellers and buyers register once they have control of an antiquity.

¹¹⁵ See *Republic of Turk. v. Christie's Inc.*, 17-cv-3086 (AJN) (S.D.N.Y. Sep. 7, 2021) (where a paleolithic statue from Turkey was on display for many years and Turkey was estopped by laches from bringing a restitution claim against Christie's).

¹¹⁶ Gerstenblith, *supra* note 59.

cultural heritage agency as suggested in the Convention, the sharing of information through a database would increase the impact of the resources agencies spend on their independent units since each individual unit could benefit from each other's research. The database would be a useful resource for government agencies, such as the IRS, as well as resolving other legal matters, such as probate and bankruptcy issues.

There would be many benefits to using a database in criminal and civil contexts. Buyers would have a defense if they could show that they found the object in the database and thought it was legally purchased. Buyers might also be inclined to research an antiquity's status if they could easily search for its documentation prior to their purchase. A database would also give a stronger defense against others claiming ownership if there was publicly accessible knowledge of who owned the object at a previous point.¹¹⁷

In criminal proceedings, a database would give prosecutors another line of attack if the object was not initially in the database, since it would indicate to the buyer that they needed to use more caution when proceeding with a purchase. A database would create evidence of notice of an object's status and create a strong indication of knowledge of an object being suspicious, which is a foundational step for establishing criminal liability. Therefore, prosecutors could be more confident in using criminal prosecution over civil forfeiture, ideally discouraging the traffickers from bringing objects to the U.S, undermining the black market.

There would likely be more political will to implement such a system that compliments, rather than replaces, the entire current regulatory structure. There is also likely to be more support for a database that offers benefits to all participants of the market. While larger legal change may be an end goal, a middle ground may be what is ultimately necessary.

2. International Benefits

An antiquities database would further the goals of both the U.S. and Nicosia Convention in stopping the illicit antiquities market. Further, sharing this information with other countries would close some loopholes traffickers have historically exploited and would increase national cooperation in combating international crime. Many databases are used internationally, Interpol being one of the best examples.¹¹⁸ By having an accessible, large amount of data for both known stolen and known legal antiquities, other nation's law enforcement could benefit from the data as well.

Looters and traffickers thrive due to a lack of information sharing when they cannot be tracked or regulated. They take advantage of information deficits, where an object can be looted without the source country knowing, eventually arriving in a destination country such as the U.S for sale.¹¹⁹ Even if the first two countries lack

¹¹⁷ A hypothetical situation would be if an object was stolen and party x brought an action against party y. It would be a very straightforward case if x could show 1) their registration when they got an object showing their ownership with documents and 2) it was flagged as stolen.

¹¹⁸ See Interpol, *supra* note 102.

¹¹⁹ This is the source country to market country process. For further information, see Zeynep Boz, *Fighting the Illicit Trafficking of Cultural Property*, A TOOLKIT FOR EUROPEAN JUDICIARY AND LAW ENF'T.

information or a system to house that information, the end location in the U.S. could be with a tool such as a database. If an object with a suspicious background were to be registered in the database to comply with regulations, it would become more apparent that there might be an issue, which could then be used to track what happened to the antiquity. While there would still be harm done by the looting and trafficking, it is still better to reconstitute the object rather than let it continue to be sold in the black market.

This system would also support the aims of the current U.S. treaty system by establishing that the U.S. is self-regulating on an issue that impacts other countries. It may even encourage more countries to attempt to create a treaty with the U.S. if they know that the regulatory system that supports the seizure and return of antiquities has been greatly strengthened via a database.¹²⁰ Further, it would reflect a strong intention to combat this issue, perhaps in contrast to some of the earlier methods that projected a hesitancy to seize and reconstitute black market antiquities.¹²¹

On a national security front, having a registration requirement would create a large roadblock for organized crime or terrorist groups attempting to profit from the black market in the United States. A database would lessen the chance that funds will flow to these groups from the antiquities black market and would prevent American purchases from intentionally or inadvertently financially supporting these groups.

In this way, a U.S. national database is an effective international tool for combatting antiquities trafficking and helping with international relations. The goal, as outlined in the Convention, would be for a larger interconnected database that multiple countries contribute to and access. While this would take time to develop, a large market nation such as the U.S. implementing such a database would be a significant first step and would likely encourage other nations to follow suit.

CONCLUSION

The looting and trafficking of antiquities harms society at large due to cultural loss and the funding of destructive groups. It is a problem that requires international cooperation and modern technology to combat due to the international nature of the crime and the movement of money involved. The Nicosia Convention, while not likely to become controlling law, can provide a framework for countries to adapt to their own legal systems.

The most applicable article from the Convention calls for a database system to be created and shared by signing parties. This type of database is feasible in the U.S. due to the information already existing for most if not all public and private actors in the art market and the existence of similar databases. A database would provide aid to existing law enforcement and foster international cooperation. A database would strengthen existing U.S. criminal penalties by creating stronger evidence of notice and knowledge which could encourage a greater frequency of criminal prosecutions without changing the law as it currently exists. This system would protect good faith buyers and market

¹²⁰ Going through the bureaucratic system of setting up a treaty may be worth it if a country can see that the U.S. is committed to overseeing the market within its borders.

¹²¹ Referencing the bureaucratic treaty system. See Lalwani, *supra* note 5.

participants because the database would provide a due diligence defense prior to purchase.

The database approach would strengthen the United States commitment to combating the antiquities black market and would emphasize to the international community that this is a significant American policy goal. It would benefit the treaty system already in place and would encourage more international cooperation on this issue.

While the Nicosia Convention provides an idealistic approach to combating antiquities trafficking, its database suggestion can be instructive in how the U.S. can approach a global issue with cultural and security ramifications.