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Article

Published Version

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Koush, A. ORCID: <https://orcid.org/0000-0003-1163-0916> (2025) Illicit trafficking in cultural property as a human rights issue: sovereignty over cultural resources and the right to self-determination. Case study of Iraq. *International Journal of Cultural Property*, 32 (1). pp. 31-57. ISSN 1465-7317 doi: 10.1017/s0940739125000025 Available at <https://centaur.reading.ac.uk/127349/>

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To link to this article DOI: <http://dx.doi.org/10.1017/s0940739125000025>

Publisher: Cambridge University Press (CUP)

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ARTICLE

## Illicit trafficking in cultural property as a human rights issue: Sovereignty over cultural resources and the right to self-determination. Case study of Iraq

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### Abstract

Adopting a human rights-based approach, this paper scrutinizes the treatment of illicit trafficking in cultural property as a human rights issue. The study focuses on the Iraqi contribution to the international agenda, revealing that Iraq co-sponsored at least 13 UN resolutions on the restitution of illegally expropriated cultural property, actively contributing to the negotiation of others, along with submitting its legal opinions on the drafts of relevant international documents, starting from as early as 1936 to culminate with the calls to stop cultural plunder feeding Western markets since the 1990s. Centering the Iraqi voices and adopting a critical decolonial rights-based perspective, the study showcases how illicit trade in cultural property clearly emerges as a violation of a state's permanent sovereignty over its wealth and resources, negatively impacting its ability to guarantee the right to pursue economic, social, and cultural development for its people, as well as to freely dispose of their resources, the key components of the right to self-determination.

**Keywords:** illicit trafficking in cultural property; human rights; sovereignty; self-determination; decolonization; cultural resources; cultural heritage; Iraq

### Introduction: From colonialism to trafficking: The contested heritage

Recent decades have witnessed massive attacks on cultural heritage all over the world, with illicit trafficking in cultural property<sup>1</sup> continuing unabated in all archaeologically-rich areas responding to an insatiable market demand.<sup>2</sup> In Iraq, cultural heritage has undergone unprecedented attacks since the imposition of an international embargo in 1990 and the 2003 US-led invasion.<sup>3</sup> Intentional destruction, the plundering of museums' collections, the burning of archives and libraries, the murder of academics and archaeologists, industrial-scale looting of archaeological sites, and its culmination with the IS (Islamic State) institutionalized excavation in territories under its control, along with cultural genocide of ethnic

<sup>1</sup> The terms “illicit trafficking in cultural property” and “illicit antiquities trafficking” are used interchangeably here.

<sup>2</sup> Davis and Mackenzie 2014; Huffer et al. 2015; Stone 2015; Abungu 2016; Brodie and Sabrine 2018; Taha 2020; Kothari 2021; Puskas 2022; Smith 2022; Koush 2024b; Munawar 2024.

<sup>3</sup> Matthews et al. 2019.

minorities, heavily impacted the Iraqi society.<sup>4</sup> These tragic events and their social and cultural consequences were defined as a “catastrophe,”<sup>5</sup> the “end of Iraq,”<sup>6</sup> and “cultural cleansing,”<sup>7</sup> all underlining the irreversible loss of cultural resources and intangible cultural memory. Overall, hundreds of thousands of artifacts and manuscripts are estimated to have disappeared.<sup>8</sup> According to other estimates, about 400,000 to 600,000 artifacts were removed from Iraqi grounds between 2003 and 2005 alone, which is three to four times the number of artifacts gathered from excavations since the 1920s by the National Museum of Iraq.<sup>9</sup> These estimates, however, can only allude to the real dimensions of looting that has occurred in the last three decades in Iraq.

Yet, there was a Planet B. The 1990s were baptized in high-end US art market environments as a Golden Age for collecting Mesopotamian antiquities.<sup>10</sup> In 2007, a small Proto-Elamite Mesopotamian lion statue sold for \$57 million at Sotheby’s New York, followed by media enthusiasm urging investors to dive into this promising investment where “even a small antiquity could bring huge profits.”<sup>11</sup> Having witnessed the IS atrocities condemned by UN resolutions,<sup>12</sup> an Assyrian relief from the Ashurnasirpal II Palace in Nimrud, heavily looted by IS in 2014, was sold at Christie’s by the Virginia Theological Seminary for \$31 million in 2018.<sup>13</sup> The initial price estimate more than tripled, setting a world price record for Assyrian art, with the buyer remaining anonymous.<sup>14</sup> “Auction houses ask us to prove that the artifacts are Iraqi, even though everyone knows they are Iraqi, but items from illegal digging are undocumented,” commented Muthanna Abed Dawed, a former head of the Iraqi Antiquities Recovery Department who attempted to stop the sale, claiming that the relief was illegally excavated in Iraq in the 1970s.<sup>15</sup> Indeed, despite the documented provenance dating the presence of the relief in the USA from 1859,<sup>16</sup> the sale raised serious ethical concerns among Iraqi scholars and activists. Not only the IS destruction of Nimrud was believed to have pushed up the market price of the relief, such a profitable sale was also seen as encouraging further looting throughout the Middle East.<sup>17</sup> “The Virginia Theological Seminary has been incredibly insensitive to the suffering of the Iraqi people who have endured horrendous violence and seen their heritage obliterated under IS, including the demolition of the Assyrian palace at Nimrud, from which this relief was originally taken. The seminary profited directly from the suffering and loss that we have endured, the utter callousness of the sale is astounding,” stressed Zainab Bahrani, a Columbia University Professor of Ancient Near Eastern Art and Archaeology and Senior Advisor to Iraq’s Ministry of Culture in 2004.<sup>18</sup> With decolonization activists protesting outside the auction house, the sale was seen as just “another way to sustain, reproduce and support a long history of western colonial plunder, looting and stealing epitomized by the US-led invasion of Iraq. Our

<sup>4</sup> Bahrani 2003; Fales 2004; Baker, Ismael, and Ismael 2010; Brusasco 2013; Westcott 2020.

<sup>5</sup> Emberling and Hanson 2008.

<sup>6</sup> Galbraith 2007.

<sup>7</sup> Baker, Ismael, and Ismael 2010.

<sup>8</sup> Kathem, Robson, and Tahan 2022.

<sup>9</sup> Mazza 2017.

<sup>10</sup> Gibson 2008.

<sup>11</sup> Gibson 2008: 18.

<sup>12</sup> S/RES/2199, 2015; S/RES/2253, 2015; S/RES/2347, 2017.

<sup>13</sup> Lazarus 2018.

<sup>14</sup> Christie’s 2018; Lazarus 2018.

<sup>15</sup> Christie’s 2018; Lazarus 2018; Westcott 2019.

<sup>16</sup> Christie’s 2018.

<sup>17</sup> Small 2018; Biblical Archaeological Society 2019.

<sup>18</sup> Small 2018.

memory is not for sale, cultural heritage is not a commodity,”<sup>19</sup> declared Iraqi scholars Zahra Ali, Associate Professor at Rutgers University in Newark, and Amnah Almukhtar, PhD candidate in History at Columbia University in New York, USA.

The above examples clearly illustrate the existence of a net contrast between the immeasurable catastrophe unfolding around cultural heritage in Iraq and contemporary high-profile investment-oriented market practices surrounding that same heritage in the Western hemisphere. The roots of this contrast lead to the depredation of cultural wealth by colonialism and empire replicated through the illicit antiquities trade. The latter operates by the same uneven benefit arrangements, granting cultural, natural, and economic enrichment to dominant powers at the expense of the subjugated ones.<sup>20</sup> A collective restitution of all cultural artifacts looted in colonial times might be unmanageable and unattainable by any nation<sup>21</sup> and is not being advocated for here. Instead, this paper focuses on the contemporary antiquities trade, flourishing at the expense of archaeologically-rich source countries, often former colonies undergoing conflict, instability, poverty, and terrorist and criminal group activity.<sup>22</sup>

Experts repeatedly stress a multiplicity of social, cultural, and criminological harms endured by source states through looting that go much beyond mere material despoliation by impacting their identity and instantiating a flagrant international disregard for their laws and institutions.<sup>23</sup> Addressing antiquities trafficking debates, source countries have emphasized the sacred links between people, territory, and heritage since the 1960s,<sup>24</sup> yet the reference to the Universal Declaration of Human Rights in the 1970 UNESCO Convention was removed in the drafting phase.<sup>25</sup> While the rights-based approaches to cultural heritage are being increasingly engaged within academia and world heritage policy fields,<sup>26</sup> little scrutiny is dedicated to the human rights implications of looting and trafficking in cultural property. Given this, experts have recently been advocating for a renewed injection of human rights ethos into the debate,<sup>27</sup> which in substance would be nothing but a decolonial return to the original treatment of the illicit antiquities trade as a human rights issue.

Building upon the previous albeit limited research, this paper adopts a human rights-based approach following a hybrid methodology. A legal analysis of primary and secondary sources is complemented by a historical scrutiny of the treatment of archaeological heritage in Iraq, as opposed to the self-serving appropriation attitudes of the market-state powers. Unpacking the Iraqi contribution to the international agenda, the study reveals that Iraq co-sponsored at least 13 UN resolutions on the restitution of illegally expropriated cultural property, actively contributing to the negotiation of others along with submitting its legal opinions on the drafts of relevant international documents starting from as early as 1936, to culminate with calls to stop cultural plunder feeding western markets since the 1990s. Centering the Iraqi voices and adopting a critical decolonial rights-based perspective, this study showcases how antiquities trafficking and trade clearly emerge as a violation of a state’s permanent sovereignty over its wealth and resources, negatively impacting its ability

<sup>19</sup> Small 2018.

<sup>20</sup> Yates, Mackenzie, and Smith 2017; Mackenzie, Hübschle, and Yates 2020; Moorkens 2023.

<sup>21</sup> Nicolini 2020.

<sup>22</sup> Danti 2015; Westcott 2020; Almohamad 2021; Puskás 2022; FATF 2023.

<sup>23</sup> Brodie 2020.

<sup>24</sup> Prott 2011; Labadie 2021.

<sup>25</sup> UNESCO Doc. SHC/MD/3 1970; Mackenzie and Yates 2017; Jakubowski 2024.

<sup>26</sup> Blake 2011; Blake 2015; Palmero Fernández 2019; Matthews et al. 2020; Bille Larsen 2022; Vrdoljak, Jakubowski, and Chechi 2024.

<sup>27</sup> Lopez 2012; Vrdoljak 2012; Koush 2017; Mackenzie and Yates 2017; Matthews et al. 2017; Koush and D’Auria 2024.

to guarantee the right to pursue economic, social, and cultural development for its people, and freely dispose of their resources, the key components of the right to self-determination.

### Cultural heritage and human rights: Mutual cross-fertilization

The strengthening of the link between human rights and cultural heritage is a relatively recent phenomenon.<sup>28</sup> The two fields of legislation have historically developed along parallel, non-intersecting binaries: cultural heritage law has extensively grown since the institution of UNESCO with the adoption of a series of soft and hard law instruments,<sup>29</sup> not necessarily considering the protection of cultural heritage as a precondition of human rights advancement.<sup>30</sup> Instead, despite the recognition that culture is the essence of being human,<sup>31</sup> for decades cultural rights have been considered an underdeveloped “left-over” category within the human rights family.<sup>32</sup> With very few legal provisions, its analysis and reconstruction have occupied a minuscule space in the vast human rights literature,<sup>33</sup> with references to human rights in cultural heritage discourse being much more frequent than vice versa.<sup>34</sup> In legal terms, the relationship between cultural heritage and human rights is a complex and challenging one that ideally can be mutually reinforcing, while in some instances, human rights can be instrumentalized to pursue heritage goals or even enter into tension with the latter, for example, in urban development issues<sup>35</sup> or within universalizing norms versus local rules discourses.<sup>36</sup> Within the recently growing academic engagement,<sup>37</sup> some authors argue that elevating conflicts around cultural heritage to the level of human rights might not prove strategically useful and achievable, while other basic concerns of the 1948 Universal Declaration of Human Rights remain unfulfilled.<sup>38</sup> Numerous other experts highlight that the human dimension is intrinsic to cultural heritage, deprived of which it becomes hollowed,<sup>39</sup> therefore cultural heritage protection cannot be treated in isolation from human rights.<sup>40</sup> While no explicit rights to cultural heritage are included in international human rights treaties, the protection and promotion of cultural heritage is seen as a precondition for the enjoyment of several human rights norms.<sup>41</sup> Legal scholars underscore the importance of the shift in international law from the protection of cultural heritage as such to its protection as a value for human dignity and cultural identity of peoples and individuals,<sup>42</sup> obliging the states to respect, protect, promote, and fulfill human rights to cultural heritage.<sup>43</sup>

Following the worldwide unprecedented attacks on cultural heritage in recent decades and the launch of a new humanism vision by UNESCO,<sup>44</sup> the relevance of the human rights

<sup>28</sup> Symonides 1998; Vrdoljak 2014; Donders 2020; Renold and Chechi 2022.

<sup>29</sup> Francioni 2008.

<sup>30</sup> Donders 2020.

<sup>31</sup> UNESCO 1970.

<sup>32</sup> Symonides 1998; Francioni 2008; Meskell 2010; Vrdoljak 2012; Carril 2013.

<sup>33</sup> Francioni 2008.

<sup>34</sup> Mackenzie and Yates 2017.

<sup>35</sup> Durbach and Lixinski 2017.

<sup>36</sup> Ekern and Larsen 2023.

<sup>37</sup> Donders 2020.

<sup>38</sup> Meskell 2010.

<sup>39</sup> Francioni 2011; Durbach and Lixinski 2017.

<sup>40</sup> Symonides 1998; Francioni 2004; Renold and Chechi 2022; Koush and D'Auria 2024.

<sup>41</sup> Donders 2020.

<sup>42</sup> Francioni 2008; Donders 2020; Renold and Chechi 2022.

<sup>43</sup> Donders 2020.

<sup>44</sup> Bokova 2010.

framework for heritage protection and the promotion of effective cultural policies has been further reinforced.<sup>45</sup> Recognizing that cultural heritage is an important component of the cultural identity of communities, groups, and individuals,<sup>46</sup> the mutual cross-fertilization of the two domains arises in relation to Indigenous peoples' rights, the impact of economic development on cultural heritage, intellectual property rights, the safeguarding of cultural diversity, intentional destruction, and war damage.<sup>47</sup> Most recent cultural heritage instruments, among which the Convention for the Safeguarding of the Intangible Cultural Heritage<sup>48</sup> and the Declaration on the Intentional Destruction of Cultural Heritage,<sup>49</sup> contain preambular references to human rights, impacting the reading of the respective norms within the substantive texts in light of these references.

In parallel, while human rights serve as a justification for protecting cultural heritage,<sup>50</sup> cultural rights are gradually becoming an important area of human rights discussion.<sup>51</sup> The issue of General Comment No. 21 on "The right of everyone to take part in cultural life" by the United Nations Committee on Economic, Social and Cultural Rights<sup>52</sup> was an important step in determining the content of cultural rights and providing states with guidelines on their respective obligations.<sup>53</sup> The appointment of the United Nations Independent Expert (further Special Rapporteur) on Cultural Rights in 2009 further reaffirmed that "cultural rights are an integral part of human rights, which are universal, indivisible, interrelated and interdependent."<sup>54</sup> The destruction of and damage to tangible and intangible cultural heritage; the protection of heritage in times of military conflict, looting, smuggling, theft, and illicit trafficking; and the protection of cultural rights defenders finally entered into the UN Human Rights Council agenda.<sup>55</sup> Affirming that cultural heritage is important not only in itself but also in relation to its human dimension, the preservation of cultural heritage was recognized as a human rights issue.<sup>56</sup> A joint statement brought by the coalition of 145 states in 2014 condemned the intentional destruction and looting of cultural heritage, highlighting the link of these activities to terrorism financing and their impact on cultural rights.<sup>57</sup> The statement laid the basis of the UN Resolution 33/20,<sup>58</sup> while the Special Rapporteur Karima Bennoune called upon states to treat offenses against cultural heritage as violations of human rights and to develop new holistic rights-based approaches to its protection.<sup>59</sup> However, much ambiguity and unresolved questions still remain in the framing of connections between heritage and human rights, especially in adopting rights-based approaches in heritage work,<sup>60</sup> which requires further structural interdisciplinary engagement. In line with the call to action of the Special Rapporteur, this study scrutinizes the treatment of illicit trade in cultural property as a human rights issue, its impact on the state's sovereignty, the

<sup>45</sup> Vrdoljak 2014.

<sup>46</sup> 2003 UNESCO Declaration on the Intentional Destruction of Cultural Heritage.

<sup>47</sup> Silverman and Ruggles 2007; Vrdoljak 2012; Mackenzie and Yates 2017.

<sup>48</sup> 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.

<sup>49</sup> 2003 UNESCO Declaration on the Intentional Destruction of Cultural Heritage.

<sup>50</sup> Blake 2015.

<sup>51</sup> Caust 2019.

<sup>52</sup> ECOSOC 2008.

<sup>53</sup> Carril 2013.

<sup>54</sup> A/HRC/10/L.26, 2009.

<sup>55</sup> Bennoune 2016.

<sup>56</sup> A/HR/C/17/38, 2011.

<sup>57</sup> OHCHR 2016.

<sup>58</sup> A/HRC/RES/33/20, 2016

<sup>59</sup> A/HRC/31, 2016.

<sup>60</sup> Bille Larsen 2022.

resulting implications for the right to self-determination, and further focuses on the case study of Iraq.

### Illicit trafficking in cultural property and human rights

Illicit trafficking and trade in cultural property negatively impact all source countries, both in peace and conflict times, causing a multiplicity of social, cultural, criminological, and legislative harms<sup>61</sup> through the illegal extraction of cultural resources belonging to their communities of origin, represented by the state. Stratified archaeological knowledge is erased through clandestine excavation, while artifacts themselves are muted and anonymized and praised for their aesthetic and market value while completely detached from their contexts of origin. In these countries, strict state-vesting legislation usually prohibits unauthorized excavation, commercialization, and export of archaeological heritage, discovered and undiscovered, granting its legal title exclusively to the state,<sup>62</sup> meaning that an illegally excavated object leaves the country with a criminal record of offenses such as theft, counterfeiting, illegal export, fraud, corruption, and smuggling.<sup>63</sup> Penalties for offenses against cultural heritage may amount to up to 15 years or even life imprisonment in Iraq<sup>64</sup> or 16 years in Italy,<sup>65</sup> to cite just a few examples.

However, a strong gap exists in the perception of the antiquities trade in source countries and market or transit ones, all exercising their full sovereignty to legislate. Illegally obtained objects easily enter demand-triggering market locations to be merchandised within legal frameworks favoring the property rights of good-faith purchasers.<sup>66</sup> The latter defend their “right” to acquire and own the culture of others, strengthened by narratives of justification, salvage, and denial coined by powerful lobbies.<sup>67</sup> This perception gap between source and market countries led to the vicious circle of illicit antiquities trafficking. Widely recognized as a form of transnational organized crime,<sup>68</sup> even where single participants may have no knowledge of the other trafficking nodes,<sup>69</sup> exploited by terrorist groups as a profitable resource,<sup>70</sup> implicated in money laundering, financial crime schemes, drugs, and arms trafficking,<sup>71</sup> illicit antiquities trade is generally not treated as a serious crime on legislative and political levels in market states. Despite aiming to change the existing gap, international legislation is deemed inconsistent by specialized law enforcement<sup>72</sup> and unable to tackle the effective dimensions of the illicit trade, enduring over fifty years after the adoption of the UNESCO 1970 Convention, the most widespread international instrument.<sup>73</sup> By contrast, the scale and severity of antiquities trafficking are constantly increasing due to plummeting

<sup>61</sup> Brodie 2020.

<sup>62</sup> Kersel 2010; Koush 2024b.

<sup>63</sup> Mackenzie et al. 2020; Fobbe and Koush 2021; Brodie et al. 2022.

<sup>64</sup> L.55 2002, Law 55 for the Antiquities & Heritage of Iraq.

<sup>65</sup> LEGGE n.22, 2022.

<sup>66</sup> Mackenzie 2014.

<sup>67</sup> Brodie 2015; Mackenzie and Yates 2016.

<sup>68</sup> Campbell 2013; Davis and Mackenzie 2014; Hardy 2015; Brodie 2019; Mackenzie et al. 2020; UNODC 2020; Koush 2024b.

<sup>69</sup> Campbell 2013.

<sup>70</sup> Bogdanos 2005; Danti 2015; Keller 2015; Howard et al. 2016; Westcott 2020; Almohamad 2021; Puskás 2022; FATF 2023.

<sup>71</sup> Purkey 2010; Proulx 2011; Yates 2014; Hufnagel and King 2020.

<sup>72</sup> Koush 2024b.

<sup>73</sup> Vrdoljak 2010; Brodie et al. 2022.

prices and growing demand in the market side, facilitated by overall economic depression, ongoing conflicts, and lack of stability in source locations.<sup>74</sup>

### ***Illicit trafficking in cultural property as a human rights issue: Back to the origins***

The “drive to phrase cultural issues as human rights issues” originated mainly from source countries, often post-colonial states rich in archaeological heritage, threatened first by colonial depredation and further by antiquities trafficking.<sup>75</sup> Former colonies have repeatedly stressed the sacred links between people, territory, and heritage since the 1960s,<sup>76</sup> calling for the injection of demands about culture into human rights instruments perceived to have stronger and more non-derogable protection in comparison to culture-related ones.<sup>77</sup> Significantly, in an attempt to concretize the duty of states to protect cultural property on their territory as a way to realize and advance cultural human rights,<sup>78</sup> the initial drafts of the 1970 UNESCO Convention did contain a reference to Article 27 of the Universal Declaration of Human Rights on the right to take part in cultural life.<sup>79</sup> Yet, this implicit reference to the human rights dimension of the illicit antiquities trade was removed under US pressure, to be substituted by a clearly pro-trade internationalist preamble defending the right to purchase and own culture, supported by other pro-trade downplaying amendments.<sup>80</sup> Indeed, within the universalism versus particularism debate,<sup>81</sup> the defenders of “cultural internationalism” endorse the universal cultural heritage approach in the “it belongs to all of us” version, with the resulting right to ownership of cultural property to be better cared for by Western elites,<sup>82</sup> alluding to colonial resource exploitation in the reinvented world of cultural appreciation and financial investment<sup>83</sup> and hindering restitution efforts by source states.<sup>84</sup> The latter, by contrast, striving to stop the plunder of their heritage and promote regulation of the market, are negatively viewed as retentionists going against cultural dissemination, education, and international cooperation.<sup>85</sup>

Thus, while the post-1970 Convention years saw an incremental growth of looting all over the world,<sup>86</sup> the 1976 Algiers Universal Declaration of the Rights of Peoples explicitly affirmed the *right of a people to have access to and enjoyment of its own artistic, historical, and cultural wealth* within a specific section dedicated to the Right to Culture, a significant achievement in itself within a human rights document.<sup>87</sup> The formulation of this right was stimulated by the necessity to support the restitution of cultural objects illegally extracted and exported from post-colonial states to their present locations, refusing to recognize and enforce export prohibitions of the state of origin. At the same time, the right to culture was expected to prevent ongoing despoliation of cultural sites in source countries and traffic in their movables,<sup>88</sup> implicitly connecting colonial depredation with the contemporary illicit

<sup>74</sup> Barker 2018; Brodie et al 2022.

<sup>75</sup> Prott 1985: 16; Said 2003; Hamilakis 2009.

<sup>76</sup> Prott 2011; Labadie 2021.

<sup>77</sup> Prott 1985.

<sup>78</sup> Jakubowski 2024.

<sup>79</sup> UNESCO oc. SHC/MD/3, 1970.

<sup>80</sup> UNESCO Doc. SHC/MD/3 1970; Mackenzie and Yates 2017.

<sup>81</sup> Mackenzie and Yates 2017.

<sup>82</sup> Merryman 2007; Munawar 2022.

<sup>83</sup> Mackenzie and Yates 2017.

<sup>84</sup> Adewumi 2015.

<sup>85</sup> Merryman 2007.

<sup>86</sup> Shyllon 2020; Oosterman 2024.

<sup>87</sup> 1976 Algier's Charter, or Algiers Universal Declaration of the Rights of Peoples.

<sup>88</sup> Prott 1985.

trade. Tellingly, yet not surprisingly, this right has hardly ever been mentioned in connection to the fight against illicit antiquities trafficking, along with the original human rights reference in the 1970 Convention.

Within the Indigenous rights domain, the 1990 Native American Graves Protection and Repatriation Act (NAGPRA), enacted by the USA, was also animated by the human rights objectives criminalizing the trafficking of Indian cultural property and establishing guidelines for its repatriation.<sup>89</sup> Yet, its interpretation by the US courts within traditional property models often resulted in the deprivation of the Indigenous peoples' right to control their own tangible and intangible property and the inability to exercise other human rights.<sup>90</sup> While the recent 2021 Safeguard Tribal Objects of Patrimony Act increases federal penalties and prohibits the export of Native American cultural items outside the USA,<sup>91</sup> experts call on countries to embrace a principle of mutual respect and deference to the laws of sovereign Native American nations in recognizing what is rightfully theirs, which no one has a right to sell or give away,<sup>92</sup> underlining once again the human rights dimension of the issue. While the 2007 UN Declaration on the Rights of Indigenous Peoples also recognizes a right to maintain and protect the past, present, and future manifestations of their cultures, including artifacts,<sup>93</sup> the rights of Indigenous peoples reportedly continue to be left behind,<sup>94</sup> with attempts at the repatriation of sacred artifacts and human remains, often meeting resistance on national and international levels.<sup>95</sup>

Thus, despite a persistent concern for the protection of cultural resources from illicit trafficking within a human rights domain promoted by archaeologically-rich countries or communities, the complexity of the issue received little attention from international lawyers.<sup>96</sup> The third-generation solidarity rights movement<sup>97</sup> advocated for the proclamation of the right to cultural heritage necessary for "renewing and reinvigorating the global project of human rights,"<sup>98</sup> yet the third-generation rights remain underdeveloped and debated,<sup>99</sup> along with a human rights approach to illicit trade in cultural property.<sup>100</sup>

Moreover, arguments sustaining the human rights of subsistence diggers have been raised, defending their moral right to loot<sup>101</sup> in the absence of a viable economic alternative to access their rights to clean water, food, and medicine.<sup>102</sup> In line with the latter, some ethnographies of looting support the argument that the consumption of the past should not be limited only to official archaeology, allowing the space also for unofficial engagement through looting.<sup>103</sup> The term "looter" itself is perceived as problematic by some ethnographers due to its negative connotations, prioritizing the integrity of the archaeological record above the perceived needs of local communities of looters.<sup>104</sup> However, not based on notions of restorative or economic justice but instead on reconsiderations of archaeology's

<sup>89</sup> NAGPRA 1990.

<sup>90</sup> Riley 2002.

<sup>91</sup> S.1471 2021.

<sup>92</sup> Fonseca 2022.

<sup>93</sup> Articles 11 and 12 of the UNDRIP 2007.

<sup>94</sup> OHCHR 2024.

<sup>95</sup> Carroll 2019; Fonseca 2022.

<sup>96</sup> Prott 1985.

<sup>97</sup> Alston 1982.

<sup>98</sup> Sharp 2015.

<sup>99</sup> Freedman 2014.

<sup>100</sup> Lopez 2012.

<sup>101</sup> Hardy 2003.

<sup>102</sup> Hardy 2015.

<sup>103</sup> Hollowell 2006; Antoniadou 2009; Al-Houdalieh 2012; Barker 2018.

<sup>104</sup> Antoniadou 2009; Field et al 2016; Barker 2018.

scholarly goals within broader politico-economic conditions,<sup>105</sup> such narratives align rather with the pro-market discourses around global resource-extractive trades, implying that purchases in rich countries provide an income for the residents of the poorer source countries.<sup>106</sup> While looting may indeed constitute a source of immediate short-term income for on-the-ground diggers, it is estimated that they receive a minuscule share, sometimes no more than 1% of the final sale price of the artifacts on the international market.<sup>107</sup> The rest of the share goes to intermediaries, international traffickers, and dealers who are hardly benefitting starving local communities neither contributing to their development.<sup>108</sup> Therefore, in no way can subsistence digging be seen as an equitable long-term solution to economic deprivation.<sup>109</sup> Instead, Brodie argues for economic justice based on sustainable and viable economic alternatives focused on tourism, paid loans, and other secondary products related to archaeological sites and cultural heritage rather than on looting, feeding the burgeoning market for illicit antiquities.<sup>110</sup>

Thus, while scholars argue that the Preamble to the 1970 Convention should be read today as supporting the realization of the right to access to and enjoyment of one's cultural heritage and that of other people,<sup>111</sup> limited scrutiny is drawn to the human rights implications arising from looting, trafficking, and trade in cultural objects. Several experts have indeed advocated for a renewed injection of human rights ethos into the debates surrounding the contemporary antiquities trade.<sup>112</sup> Vrdoljak underlines that the cross-fertilization between human rights and cultural heritage law in the field of movable heritage has the potential to improve both the access to justice for rights-holders and the effectiveness of legal protection of cultural objects.<sup>113</sup> Mackenzie et al. suggest the development of an alternative frame of reference, including human rights, global justice, and communal ownership of heritage,<sup>114</sup> while Lopez's legal analysis seeks to establish the foundations for identifying a source nation's right to possess its cultural heritage as a fundamental norm of customary international law.<sup>115</sup>

Building upon the previous research, this study analyzes the implications of illicit trafficking in cultural property for the exercise of the state's permanent sovereignty over its wealth and resources and the right to self-determination of its people. It further applies a critical decolonial perspective,<sup>116</sup> focusing on the case study of Iraq, one of the most looting-affected countries with a long history of colonial depredation, and voicing its contribution to the international agenda on the fight against illicit trafficking in cultural property.

### ***Sovereignty over cultural resources and right to self-determination***

According to Common Article 1 of the International Covenant on Civil and Political Rights<sup>117</sup> and International Covenant on Economic, Social and Cultural Rights,<sup>118</sup> the right to self-

<sup>105</sup> Barker 2018.

<sup>106</sup> Mackenzie 2005.

<sup>107</sup> Brodie 1998; Brodie 2010; Brodie and Contreras 2012.

<sup>108</sup> Mackenzie et al 2020.

<sup>109</sup> Brodie 2010.

<sup>110</sup> Brodie 2010; Brodie and Contreras 2012.

<sup>111</sup> Jakubowski 2024.

<sup>112</sup> Lopez 2012; Vrdoljak 2012; Koush 2017; Mackenzie and Yates 2017; Koush and D'Auria 2024.

<sup>113</sup> Vrdoljak 2012.

<sup>114</sup> Mackenzie, Brodie, Yates, and Tsirogiannis 2020.

<sup>115</sup> Lopez 2012.

<sup>116</sup> Kathem & Kareem Ali 2021; Jedlicki 2022; Larkin & Rudolf, 2023.

<sup>117</sup> 1966 International Covenant on Civil and Political Rights, ICCPR.

<sup>118</sup> 1966 International Covenant on Economic, Social and Cultural Rights, ICESCR.

determination encompasses the freedom of all peoples to pursue economic, social, and cultural development, along with the right to freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation.<sup>119</sup> The interrelatedness between the right to self-determination and illicit antiquities trade is normally articulated through its cultural development component, while states imposing export controls on cultural goods are seen as determining what is in the interests of society within territorial boundaries.<sup>120</sup>

Permanent sovereignty over natural resources is enshrined in numerous resolutions and several declarations, among which the 1962 Declaration on Permanent Sovereignty over Natural Resources,<sup>121</sup> the 1974 Declaration on the Establishment of a New International Economic Order,<sup>122</sup> and in Article 2 of the 1974 Charter of Economic Rights and Duties of States.<sup>123</sup> Specifically, the latter declares that “every State has and shall freely exercise full permanent sovereignty, including possession, use, and disposal, over all its **wealth**, natural resources and economic activities.”<sup>124</sup> The GA resolution 1515 also reiterates the sovereign right of every state to dispose of its wealth and natural resources in conformity with the rights and duties of states under international law.<sup>125</sup> While the mention of “permanent sovereignty” over resources was not included in Common Article 1 of ICCPR and ICESCR due to controversial opinions between states, the article does refer to a people’s right to freely dispose of their natural wealth and resources, enshrining it within the right of self-determination.<sup>126</sup>

Archaeological heritage represents the rightful wealth and a precious cultural resource for source countries. Cultural heritage sites, both temples, other built structures, and antiquities deposits, are increasingly considered not only as repositories of human-made objects but an integral part of the landscape and natural environment comparable to other natural resource deposits like fossil fuels or gemstones.<sup>127</sup> In this regard, their illegal extraction involves equally environmentally destructive practices, with satellite imagery of looted areas being telling enough to consider looting a form of environmental crime in itself.<sup>128</sup> Moreover, archaeological heritage provides a basis not only for cultural identity but also for the tourism industry, museums, and site infrastructure, as well as the overall tissue of society that can refer to shared values and history contained therein. Therefore, international trafficking markets in looted cultural heritage, similar to those of poached wildlife, serve the needs of neocolonial hegemony in resource extraction from developing countries, marginalizing and misrepresenting the interests of local communities living with or near the heritage in question.<sup>129</sup> Illegal excavation, looting, pillage, exploitation, trafficking, and trade in cultural and archaeological resources infringe upon the principle of permanent sovereignty of the state over its wealth and resources, even where such acts are committed by that state’s citizens. Indeed, the sovereignty of the state over its resources being permanent and indivisible, the state has the right to regulate such resources and related activities under its own jurisdiction by its own laws and may order the nationalization of those resources, which is the case of cultural heritage laws in the overwhelming majority of archaeologically-rich source countries. The state may also prohibit their

<sup>119</sup> ICCPR 1966; ICESCR 1966.

<sup>120</sup> Vrdoljak 2012.

<sup>121</sup> RES/1803, 1962.

<sup>122</sup> RES/3201, 1974.

<sup>123</sup> UNGA 1974; Visser 1988; Saul, Kinley, and Mowbray 2016.

<sup>124</sup> RES/3281, 1974.

<sup>125</sup> UNGA Res. 1515, 1960.

<sup>126</sup> Saul, Kinley, and Mowbray 2016.

<sup>127</sup> Mackenzie, Hübschle, and Yates 2020.

<sup>128</sup> Mackenzie, Hübschle, and Yates 2020.

<sup>129</sup> Mackenzie, Hübschle, and Yates 2020: 3.

exploitation by private individuals or lay down the conditions under which exploitation by private individuals may be permitted.<sup>130</sup> In this context, phenomena like looting and trafficking in cultural resources directly implicate the ability of the state to guarantee the right to freely dispose of resources and pursue economic, social, and cultural development for its people, embodied within the right to self-determination, by virtue of which permanent sovereignty over resources is vested in peoples themselves with the state and its competent organs acting in the name of the people.<sup>131</sup>

Moreover, the right to development as such is also inherently related to the right to self-determination, which is recognized not only in the wording of Common Article 1 of the ICCPR and ICESCR but also in the 1986 Declaration of the Right to Development.<sup>132</sup> Article 1 underlines that the human right to development implies the full realization of the right of peoples to self-determination, which includes the exercise of the right to full sovereignty over all their natural wealth and resources.<sup>133</sup> Importantly, while self-determination is characterized as a group right, the right to development has both collective and individual aspects, with individuals being at the core of this right. Within this human-centered vision of development regarding also the resources, the state acts as a vehicle for the development of population and individuals.<sup>134</sup> Therefore, looting and the associated illegal trade also infringe on the right to development as a source state becomes unable to guarantee to its people, both collectively and individually, the right to full sovereignty over their wealth and resources and especially the knowledge contained therein, the driver of true development.

### **Centering the Iraqi voices: Cultural resources in modern Iraq**

To illustrate the above argumentation within a critical decolonial perspective, the case study of Iraq is scrutinized here, focusing on the gradual and progressive affirmation of sovereignty over cultural resources by the state since its independence from the British Mandate in 1932 in response to the outright prior despoliation. Specific attention is given to the Iraqi contribution to the international agenda on the fight against illicit antiquities trafficking and restitution of illegally expropriated cultural property, proving them to be originally treated as a sovereignty and self-determination issue within an overall human rights dimension.

#### ***“Irritating occupiers” and “spoils of war”: Nineteenth-century Mesopotamia and the British mandate***

The land of Mesopotamia, modern-day Iraq, attracted the attention of the West in the nineteenth century when it was part of the decaying Ottoman Empire.<sup>135</sup> The archaeology of Mesopotamia, the Cradle of Civilization, the Garden of Eden, the land of the Prophet Abraham, and Babylon were treated as an international matter, with Westerners assuming to be its true heirs, fully entitled to help themselves to its historical remains.<sup>136</sup> The scramble for colonies brought a parallel scramble for antiquities fueled by the competition of European national museums and the private thirst for collecting.<sup>137</sup> In legislative terms,

<sup>130</sup> United Nations 1981, para. 468.

<sup>131</sup> United Nations 1981, para. 466.

<sup>132</sup> RES/41/128, 1986; Saul, Kinley, and Mowbray 2016.

<sup>133</sup> RES/41/128, 1986.

<sup>134</sup> Saul, Kinley, and Mowbray 2016.

<sup>135</sup> Vrdoljak 2009.

<sup>136</sup> Bahrani 1998; Meskell 2002.

<sup>137</sup> Bernhardsson 2006.

an official permit was needed to conduct archaeological excavations, with authorities and locals looking suspiciously at the Europeans, fearing that they were searching for treasures or trying to find proof to take possession of the land.<sup>138</sup> Increasing looting of archaeological material<sup>139</sup> and Schliemann's removal of gold artifacts from Troy in 1872 confirmed these suspicions and led to the enactment of the first Ottoman antiquities law in 1874, providing for the controlled division of archaeological finds, the obligation to send important artifacts to Istanbul, and the establishment of the school for archaeologists and museum curators.<sup>140</sup> The 1884 amendment of the Antiquities Act established national patrimony over all artifacts in the Ottoman Empire,<sup>141</sup> providing for excavated material to either remain on the spot as state property or be transported to the Istanbul Museum,<sup>142</sup> with unauthorized export or removal forbidden by law in 1906.<sup>143</sup> In line with the legislation, museums created in the late Ottoman Empire also reveal the process of affirming possession of heritage and demonstrating how the many pieces of that may fit together in the function of political resistance to European imperialism.<sup>144</sup>

A net contrast in the perception of history in the Western and Arab Islamic worlds was also evident. While the main preoccupation of the West was historical artifacts, Islamic historians concentrated largely on the human element, cultural and economic conditions, local manners, and customs rather than on artifacts, with a clear perception of the historical continuity and succession of epochs of which they were an integral part.<sup>145</sup> Moreover, the narratives of discontinuity between the pre-Islamic and post-Mohammed history of the country were built to cut out the local population,<sup>146</sup> perceived as redundant and "irritating occupiers" of the land, passive and unenlightened "opposites of their own best selves" who had nothing to do with their own past and were not to obstruct the exploration and exploitation of resources, both natural and cultural.<sup>147</sup> Yet, separating the Iraqis from their Mesopotamian past is like claiming that Italians are only rightful descendants of their Christian Catholic past but not of their Roman or Etruscan history. Moreover, one should not forget that agricultural peasantry in that period in any country of Europe would demonstrate a similar passive attitude towards the "ruins": how would 19th-century British peasants react to someone removing ancient artifacts close to their village? A role-changing game would prove useful in rendering justice and objectivity, as ignorance of uneducated layers of society cannot be taken as an indicator of the value assigned to the matter by the state through legislation and does not give any right to an external power to appropriate its resources.

By the end of the First World War, the British Empire acquired full political and military control of Mesopotamia with the establishment of the British Mandate in 1921,<sup>148</sup> allowing for unlimited access to its natural and cultural resources. With local citizens treated essentially as "spoils of war," the Mandate was perceived by Iraqis as a new name for the old-style colonialism. "Yet Iraq was not a land without a people," and early revolts testified

<sup>138</sup> Larsen 1996.

<sup>139</sup> Kersel 2010.

<sup>140</sup> Bernhardsson 2006.

<sup>141</sup> Kersel 2006.

<sup>142</sup> Bernhardsson 2006.

<sup>143</sup> Shaw 2003.

<sup>144</sup> Shaw 2003.

<sup>145</sup> Bernhardsson 2006.

<sup>146</sup> Bahrani 2010.

<sup>147</sup> Bernhardsson 2006: 16.

<sup>148</sup> Dodge 2006.

to the beginning of Iraqi nationalism with diverse segments of society united against the common cause of foreign domination.<sup>149</sup>

In this context, archaeology was an area of exclusive political and administrative interest for the British, comparable only to the oil industry, with the Iraqis excluded from any decision-making,<sup>150</sup> similar to neighboring Iran, where the French had an even more extractive agreement with the Shah over Iran's archaeology in 1895-1927.<sup>151</sup> Mesopotamian archaeological heritage was deemed to belong rather to museums and markets in London or New York than to Baghdad. The 1924 Antiquities Law was designed by Gertrude Bell to guarantee the Western institutions "a long-lasting and ample grazing at the green pastures of Iraqi archaeological sites,"<sup>152</sup> entitled to a representative share of the whole result of excavations with a free export permit.<sup>153</sup> Indeed, the law differed significantly from national ownership laws enacted in other countries like Italy or Greece at that time that declared their inalienable right to their national patrimonies,<sup>154</sup> but such legislation was deemed by the British archaeological establishment to be too parochial, short-sighted, and ill-conceived for Iraq.<sup>155</sup> Yet, Bell's law was perceived by Iraqi politicians as the legitimization of plunder, and the resistance to such exploitative treatment continued after it was passed,<sup>156</sup> showcasing an early plea of Iraqis for control over their own resources.

### **"Descendants of Babylon": Affirming sovereignty over cultural resources in 1932-1990**

The use of archaeology within a political agenda in modern Iraq for the purposes of nation-building, identity-creation, and social cohesion is widely covered in the literature, mostly in reference to the Ba'athist regime.<sup>157</sup> Yet, its roots are much deeper and go back to the origins of the independent nation. Thus, even though the Iraqi resistance did not manage to block the British antiquities legislation scheme, the British could not stop the Iraqis in the irreversible process of gaining control over the nation's archaeology, identity, and history – its cultural resources and wealth. With independence from the British Mandate in 1932, archaeological heritage became the first target of the newly born state as an instrument of self-determination through the revendication of sovereignty over cultural resources, both in terms of material artifacts and intangible knowledge contained therein and the pursuit of cultural development through targeted education and heritage politics. Gradually passing from being manual labor for foreign excavation missions to organizing Iraqi archaeological missions, resisting Western division schemes, and instilling archaeology into the educational system – were all progressive steps in the Iraqi sovereignty-building process.<sup>158</sup>

Bernhardsson illustrates how, in the early 1930s, the voices of Iraqis started to be heard: several anonymous articles appeared in local newspapers highlighting the plunder caused by Western archaeologists and demanding the government to take efficient steps towards the protection and supervision of archaeological sites.<sup>159</sup> In 1933, an article in *al-Ahali* criticized the apathetic attitude of Iraqi politicians: "may we throw a glance at our small museum and compare its contents with the objects unearthed in this country which has

<sup>149</sup> Bernhardsson 2006: 102.

<sup>150</sup> Bernhardsson 2006: 113.

<sup>151</sup> Matthews and Nashli 2022.

<sup>152</sup> Bernhardsson 2006: 113.

<sup>153</sup> Desplat 2017.

<sup>154</sup> Graham 1987.

<sup>155</sup> Bernhardsson 2006.

<sup>156</sup> Kersel 2010.

<sup>157</sup> Pettengill 2012; Brusasco 2022.

<sup>158</sup> Bernhardsson 2006.

<sup>159</sup> Bernhardsson 2006.

found their way into the museums which have been sending excavation mission into this country and find out whether our share has been a fair one or otherwise?"<sup>160</sup> The author of the article used a possessive pronoun "our" clearly emphasizing that despite universal appeal and relevance, historical artifacts should be regarded as resources of a sovereign nation where they are found benefiting its people. The article further underlines that "science does not require actual possession of antiquities and the originals must remain the property of the museum of the country" instead of flowing to foreign museums and dealers.<sup>161</sup> In another article, the 1924 Antiquities Law was suggested to be abolished and substituted by a new act repudiating the principle of sharing antiquities with archaeological missions and prohibiting their trade and export.

This bottom-up pressure resulted in the Government deciding to introduce legislative changes, which were met with powerful resistance, this time on behalf of British archaeologists, politicians, and institutions, that managed to delay its issue by several years. Unwilling to give up their dominance over Iraqi cultural resources, they lobbied their respective governments, intimating that restrictions on archaeological expeditions would be detrimental to the Iraqi economy.<sup>162</sup> Despite this post-colonial resistance, the 1936 Iraqi Antiquities Law completely changed the rules of the game, entrusting national ownership of all archaeological objects to the state. As a reward, excavators were granted (firstly) the right to make castings of antiquities found by them, (secondly) half of the duplicate antiquities, and (thirdly) certain antiquities already in the possession of the Iraqi government.<sup>163</sup> Restoring justice, the new law "did not deprive foreign archaeological expeditions of their rights, but protected the intrinsic and natural rights of Iraq of its relics," emphasized the *al-Akhbar* newspaper.<sup>164</sup> This early focus on the human rights dimension in (re)gaining independence and sovereignty over the state's archaeological wealth is outspoken and re-echoes the spirit of the *right of a people to have access to and enjoyment of its own artistic, historical and cultural wealth* of the 1976 Algiers Declaration, as well as the human rights reference in the draft 1970 UNESCO Convention.

Thus, the period between 1932 and 1990 saw a gradual process of Iraqi state-building, sovereignty, independence, prosperity, and cultural development, culminating in the Golden Age of Iraqi archaeology. An exercise of full control and sovereignty over natural resources, with the oil industry nationalized in 1972 and exports reaching over 98%, went hand in hand with the affirmation of sovereignty over cultural resources.<sup>165</sup> State-vesting legislation guaranteeing only government-sanctioned Iraqi and international archaeological excavations, a total prohibition of trade and export of antiquities introduced in 1974–1975, strict criminal punishments for pillaging archaeological sites or any other damage with penalties up to 15 years of imprisonment, powerful Directorates of Antiquities with generous government financing, guardianship and protection of archaeological sites, an articulated museum network all over the country, free high-quality educational system, a capillary heritage education contributing to the awareness of the Iraqi society about the value of their rich archaeological heritage – are some of the milestones of that process.<sup>166</sup> Moreover, archaeology was perceived as an educational and cultural element of social,

<sup>160</sup> *Al-Ahali*, or *The People*, a newspaper of the political party Jama'at al-Ahali, founded by Iraqi students at the American University in Beirut in the late 1920s vigorously opposing the Mandate government, a popular forum for progressive and liberal ideas advocating for Iraqi uniqueness, and its political and economic independence.

<sup>161</sup> Bernhardsson 2006: 171.

<sup>162</sup> Bernhardsson 2006: 180.

<sup>163</sup> Art. 49, 1936 Iraqi Antiquities Law.

<sup>164</sup> Bernhardsson 2006: 197.

<sup>165</sup> Brown 1979; Gibson 2008; Hussein and Khalid 2018.

<sup>166</sup> Hussein and Khalid 2018; Koush 2024a.

ethnic, and religious cohesion among numerous societal groups in Iraq.<sup>167</sup> The pre-Islamic Mesopotamian past being a common ancestry for all of them, an ethnic-free zone, its use and enhancement contributed towards the idea of oneness of the Iraqi, an explicit Iraqiness: nobody could own Mesopotamian heritage, and therefore everybody could own it.<sup>168</sup>

This progressive becoming, belonging and owning one's own culture, history, and heritage, free from foreign dominance, developed into one of the most successful and functioning cultural heritage protection schemes, rendering Iraq a Cultural Lighthouse of the Middle East.<sup>169</sup> A natural consequence of such an all-rounded system of heritage protection was that, prior to the First Gulf War and imposition of international sanctions in 1990, there was virtually no illegal digging and trafficking in Mesopotamian antiquities, with only occasional looting registered. Such activities were also deterred by severe penalties for infringement of antiquities laws in the context of the overall well-being of the population not interested in transforming their cultural heritage into an illegal source of revenue. Even where it occurred, such instances were immediately suppressed by the system.<sup>170</sup> The 1990s saw a boom in illegal digging and trade in Iraqi antiquities for the first time in more than fifty years, a boom that would seem minor, however, compared to its expanded scale after the 2003 US/UK-led invasion<sup>171</sup> and further under the IS.<sup>172</sup>

### Contribution to the international agenda in the fight against illicit trade in cultural property

To better illustrate the original pursuit of the human-centered vision of cultural heritage as a sovereignty and self-determination issue in Iraq, we now turn to the contribution of Iraq to the international heritage protection agenda. Thus, in 1936, in its official response to the draft International Convention for the Protection of National Historic or Artistic Treasures,<sup>173</sup> the Government of Iraq lobbied for the adoption of the principle that "every historic or artistic treasure not accompanied by an exportation certificate issued officially for leaving the country should be considered as stolen and therefore ought to be restored to the country of origin."<sup>174</sup> By contrast, the draft Convention suggested to cooperate in the repatriation of stolen objects, which have previously been advertised in an official magazine published by the International Museums Office.<sup>175</sup> Such a regime was seen inappropriate for a country like Iraq, "rich in historic[al] treasures," where illegal excavations are undertaken by private persons, "stolen objects are not registered by the authorities concerned," and, therefore, "advertising in the magazine would hardly yield satisfactory results, also due to the personal efforts of smugglers to avoid any identification for business purposes."<sup>176</sup> Three drafts of the convention were issued, meeting the overall approval of the states and ignoring the recommendation of Iraq.<sup>177</sup> While governments of the Netherlands, Switzerland, the

<sup>167</sup> Brusasco 2013.

<sup>168</sup> Bernhardsson 2006.

<sup>169</sup> Fales 2004.

<sup>170</sup> Fales 2004; Gibson 2008; Vrdoljak 2009; Hardy 2015; Hussein and Khalid 2018; Koush 2024a.

<sup>171</sup> Fales 2004; Gibson 2008.

<sup>172</sup> Westcott 2020.

<sup>173</sup> League of Nations, draft International Convention for the Protection of National Historic or Artistic Treasures, 1936.

<sup>174</sup> "Draft Convention Relating to the Repatriation of Objects of Artistic, Historical or Scientific Interest Which Have Been Lost or Stolen or Unlawfully Alienated or Exported - Correspondence with the Government of Iraq - Delegation of Iraq to the League of Nations - File R4031/5b/18949/7888," 1936.

<sup>175</sup> League of Nations 1936.

<sup>176</sup> See *supra* note 202.

<sup>177</sup> Vrdoljak 2009.

USA, and the UK “considered that they could not bind themselves by agreements of this nature,”<sup>178</sup> the principle of protecting artifacts belonging to a national registry was developed in the 1970 UNESCO Convention.

Further, in submitting its comments to the preliminary draft of the UNESCO 1970 Convention,<sup>179</sup> the Iraqi Government suggested several amendments and recommendations, among which the additions to the wording of Article 4 defining which categories shall form part of the cultural heritage of each state for the purposes of convention. Thus, it suggested amending commas (a) and (b) of the Article, adding an explicit reference “with full sovereignty of the country of origin of such property” to the respective listed categories reading as follows:<sup>180</sup>

*The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:*

- (a) *Cultural property acquired by archaeological, ethnological or natural sciences mission, with the consent of the national competent authorities **with full sovereignty of the country of origin of such property** (emphasis added);*
- (b) *Cultural property acquired by a State or one of its nationals, with the consent of the national competent national authorities **with full sovereignty of the country of origin of that property** (emphasis added).*

The suggestion was not followed, and the final version of the Convention does not bear any reference to the principle of sovereignty of states over their resources, nor to human rights in general, as already mentioned above. The Iraqi contribution, however, succinctly testifies to the attempt of the Iraqi government to attract international attention to the sovereignty of source states and their peoples over archaeological heritage within their territories.

Starting in 1972, a series of UN General Assembly resolutions were adopted regarding the protection and return of cultural property as part of the preservation and development of cultural values,<sup>181</sup> among which resolution 3187,<sup>182</sup> resolution 3391,<sup>183</sup> and resolution 3140<sup>184</sup> related specifically to the restitution of works of art to countries who were victims of expropriation. Yet, by 1977, as noted by several states, regrettably, no progress was observed in implementing them<sup>185</sup> as most countries holding illegally expropriated objects “have not yet heeded these appeals,” as underlined by Iraq.<sup>186</sup> Therefore, in the same year, Iraq, together with Burundi, the Central African Empire, Congo, Egypt, Mauritania, Upper Volta, and Zaire, co-sponsored resolution 32/18 on the restitution of works of art to countries who were victims of expropriation<sup>187</sup> as a concerted call for the return of cultural objects removed during colonial occupation.<sup>188</sup> Crucial is the understanding of the legal grounds on which Iraq based its claims. First, the return of cultural artifacts was seen as an

<sup>178</sup> See *supra* notes 202, 203.

<sup>179</sup> UNESCO Doc. CL/2041, 1969.

<sup>180</sup> UNESCO Doc. SHC/MD/3, 1970.

<sup>181</sup> UNESCO 2021.

<sup>182</sup> A/RES/3187, 1973.

<sup>183</sup> A/RES/3391, 1975.

<sup>184</sup> A/RES/31/40, 1976.

<sup>185</sup> A/32/PV.66, 1977.

<sup>186</sup> A/32/PV.65, 1977.

<sup>187</sup> A/RES/32/18, 1977.

<sup>188</sup> Vrdoljak 2009.

extension of Iraq's sovereignty over its territory and resources, "the very essence of the historical heritage of peoples and countries and an integral part of their natural surroundings." Secondly, cultural heritage protection and preservation were perceived as part of the right to determine the course of their cultural development intrinsically enshrined in the Iraqi people's right to self-determination. Third, Iraq rejected the Western argument about the inability of developing countries to protect and safeguard their cultural heritage "based on an unwillingness to recognize the competence of the experts in this field in developing countries." The Iraqi delegation stressed how national cultural history is inculcated to the general public in Iraq through a network of regional museums and its educational system: "a single visit to various monuments and museums in Iraq would serve to refute the letter and spirit of that argument." Finally, the restitution of cultural artifacts was deemed vital by Iraq for the establishment of deep and solid ties of friendship among peoples and the strengthening of international solidarity and understanding.<sup>189</sup>

These grounds manifest a clear intent of Iraq as a source country that had suffered from despoliation of its heritage to treat its illegal exportation as an issue of sovereignty and human rights. On that occasion, Iraq also circulated the "List of the most significant Iraqi works of art in various museums located very far from the country where those works of art originated," for which it was requesting the return.<sup>190</sup> The list included a total of 62 objects, with 9 of them from American museums, 10 from the Berlin Museum, 18 from the Louvre, 14 from the British Museum, 1 object respectively from Italy, Istanbul, and Denmark, 4 from the Museum of West Berlin, and 4 from Jerusalem Museum in the Occupied Territories, with specifications and details provided for each object. The status of repatriation of the listed objects would require additional research, along with the contributions to the discussion by other source states.

Further, Iraq co-sponsored a series of subsequent UN resolutions on the same topic, including resolution 3436,<sup>191</sup> resolutions 35/127<sup>192</sup> and 35/128,<sup>193</sup> resolution 36/64,<sup>194</sup> and resolution 38/34,<sup>195</sup> all of which underline the persistence of the illicit traffic in cultural property, impoverishing the cultural heritage of all peoples.

Besides, while Iraq was not acting as a co-sponsor of resolution 40/19,<sup>196</sup> it actively contributed to the discussion of the draft, regretting that "no real progress has been made, no genuine response has been elicited on the return of that property to its original owners, no effective measures have been taken and no real effort has been made by the United Nations in this extremely important and vital field."<sup>197</sup> Moreover, the Iraqi delegation wished "to reaffirm once again the right of peoples to preserve their national and cultural heritage, which is expressed above all in artifacts and historical treasures, the work of many generations. The recovery of those artifacts is an important and vital aspect of the **sovereignty of the State and its control over its resources.**"<sup>198</sup> Once again, the eloquent clarity of the Iraqi delegation speaks for itself, underlining the key role of national treasures for the sovereignty of the state and the right to self-determination of its people. Overall, all the speeches delivered by Iraq during plenary meeting sessions on this topic are characterized

<sup>189</sup> A/32/PV.65, 1977.

<sup>190</sup> A/32/399, 1977.

<sup>191</sup> A/RES/34/64, 1979.

<sup>192</sup> A/RES/35/127, 1980.

<sup>193</sup> A/RES/35/128, 1980.

<sup>194</sup> A/RES/34/64, 1979.

<sup>195</sup> A/RES/38/34, 1983.

<sup>196</sup> A/RES/40/19, 1985.

<sup>197</sup> A/40/PV.87, 1985.

<sup>198</sup> A/40/PV.87, 1985.

by a profound human rights-based sentiment “from both aspects of ethics and principle, reflecting in an exceptional manner the close relationship that binds peoples to their cherished heritage and their cultural achievements over the ages, in addition to the fact that a people’s cultural heritage reaffirms important aspects of that people’s national identity and continuity.”<sup>199</sup> Throughout the 1990s, Iraq did not sponsor resolutions on the topic, which can be attributed to the difficult circumstances under the international embargo, “a brutal and immoral siege imposed on the Iraqi people with the aim of starving them.”<sup>200</sup> In 1991, indeed, while not sponsoring resolution 46/10,<sup>201</sup> Iraq delivered a powerful speech on the intrinsic links between cultural heritage and people where it belongs, their past and their future, underlining that:

*[E]ven under the exceptional circumstances which deprive our children of food and medicine, meaning nothing else but the intent to expose future Iraqi generations to extermination, our interest in this item at this session attests to our attachment to our eternal cultural heritage, the history which goes back for millennia, to the very roots of humanity’s history. Here it is necessary for me to stress one important thing: namely, that this is a question that relates to history. Objectively speaking, therefore, this is a question that relates to the future. It is not only a question of returning works of art or cultural property that were stolen or moved to another country under certain circumstances. Rather, it is a question of a national cause. It concerns the spirit of a people and the process whereby that people develop and create their national identity. Hence, what is at stake here is the historical fountainhead that enriches that people’s striving after progress and prosperity.”<sup>202</sup>*

The aggravation of looting in the 1990s was reflected in the 1997 Iraqi delegation speech in relation to resolution 52/24<sup>203</sup> stressing that “the problem has become increasingly serious in recent years because of the renewed growth in the illicit traffic in cultural property,” while:

*[D]ealers in the handful of industrialized countries have exploited the situation and appropriated this property, often as a reserve investment, to such an extent that trade in archaeological remains from developing countries has become an activity that is organized and led by companies and auction houses openly and with the knowledge of the Governments of the countries concerned. The illegal appropriation does not give those who hold these stolen objects any **rights**. All works of art, manuscripts or other archaeological or cultural relics embody the cultural heritage of a people, which has the **right** to be proud of and to attach special importance to these cultural objects that belong first and foremost to their creators, their artisans and their people. That is why the people are the legitimate owners (emphases added).<sup>204</sup>*

The above statement clearly showcases the Iraqi understanding of the main driver and destination of illicit antiquities from Iraq, namely the art market in Western industrialized countries, in sharp contrast to the unfolding humanitarian and cultural catastrophe at the source. Iraq appeared again among the co-sponsors of resolutions on the restitution of illegally expropriated cultural property only after 2001, promoting resolution 56/97,<sup>205</sup>

<sup>199</sup> A/46/PV.35, 1991.

<sup>200</sup> A/46/PV.35, 1991.

<sup>201</sup> A/RES/46/10, 1991.

<sup>202</sup> A/46/PV.35, 1991.

<sup>203</sup> A/RES/52/24, 1997.

<sup>204</sup> A/52/PV.55, 1997.

<sup>205</sup> A/RES/56/97, 2001.

resolution 61/52,<sup>206</sup> resolution 64/78,<sup>207</sup> resolution 67/80,<sup>208</sup> resolution 70/76,<sup>209</sup> along with Security Council resolutions 21/99<sup>210</sup> and 22/53.<sup>211</sup> Yet, no speeches were registered on behalf of Iraq after 1997.

Thus, the above examples transparently showcase, through the voice of Iraq, the awareness of source countries about the illicit trafficking flows' functioning and neo-colonial appropriation of their cultural heritage behind them, assigning the human rights dimension to the issue. The high-priority role of cultural heritage clearly emerges as a tool of sovereignty over cultural resources and the pursuit of cultural development, key elements of the right to self-determination. In this framework, a renewed human rights discourse appears to be a promising approach to opening up new frontiers in restitution claims.

### A (non)conclusion: Beyond Gilgamesh Dream Tablet

In 2021, the largest-ever repatriation of looted Iraqi antiquities welcomed over 17,000 artifacts in Baghdad, mainly cuneiform tablets and seals.<sup>212</sup> The artifacts were returned by the Museum of the Bible in Washington DC, founded and funded by the Christian evangelical Green family owning the Hobby Lobby store chain.<sup>213</sup> The symbol of the restitution, a 3,600-year-old Gilgamesh Dream Tablet containing a part of the Epic of Gilgamesh, is the oldest recognized epic poem written in the Akkadian language in cuneiform script.<sup>214</sup> The Tablet was sold to the Museum in 2014 for \$1.694.000 through a private sale by Christie's in London.<sup>215</sup> Other objects were smuggled from Iraq with falsified provenance through the United Arab Emirates and Israel.<sup>216</sup>

The restitution was righteously called "a major victory over those who mutilate heritage and then traffic it to finance violence and terrorism" by UNESCO Director-General Audrey Azoulay.<sup>217</sup> Yet, there are two aspects to emphasize. First, the sheer number of objects involved indicates that this is just the tip of the iceberg, only alluding to its real dimensions, based on the decades-long uncontrolled looting in Iraq, one of many source countries. Secondly, much less coverage was granted to the agreement proposed by the Museum to the Government of Iraq. In exchange for \$15 million for "strengthening Iraq's antiquities sector," the Iraqi Ministry of Culture, Tourism, and Antiquities was supposed to loan some items for up to five years renewably, including the Gilgamesh Dream Tablet (already seized by the US Government and not owned by the Museum at the time of the draft agreement); to allow MOTB to research and publish the antiquities in question; and most disturbingly never to sue neither the Museum nor its donors nor Hobby Lobby releasing them from "any and all demands, causes of action, liabilities, obligations, damages or claims of any kind whatsoever... which Iraq may have" against them.<sup>218</sup> Such immunity, "in return for a payment that, even if it goes to Iraq, is in no way commensurate with Iraq's losses," was perceived as "an

<sup>206</sup> A/RES/61/52, 2006.

<sup>207</sup> A/RES/64/78, 2009.

<sup>208</sup> A/RES/67/80, 2012.

<sup>209</sup> A/RES/70/76, 2015.

<sup>210</sup> S/RES/2199, 2015.

<sup>211</sup> S/RES/2253, 2015.

<sup>212</sup> Arraf 2021.

<sup>213</sup> Brodie 2020.

<sup>214</sup> BBC 2021.

<sup>215</sup> Brodie 2020; USA 2020.

<sup>216</sup> USA 2017.

<sup>217</sup> UN News 2021.

<sup>218</sup> Moss 2020.

attempt to bully Iraq into surrendering its legal rights”<sup>219</sup> to its cultural resources. The Museum was “not able to finalize the desired agreement,” as its bluntly neocolonial, “exploitative and degrading” tone was strongly opposed by Iraqi experts, calling Iraq not to “disgrace its dignity and exploit its heritage for a compensation at the expense of peoples heritage,”<sup>220</sup> which was rejected by the Iraqi Ministry of Culture.<sup>221</sup>

Adopting a human rights-based approach, this paper showcases the original treatment of illicit trafficking in cultural property as a human rights issue. Focusing on the Iraqi contribution to the international agenda, the study reveals that Iraq co-sponsored at least 13 UN resolutions on the restitution of illegally expropriated cultural property, actively contributing to the negotiation of others, along with submitting its legal opinions on the drafts of relevant international documents starting from as early as 1936 to culminate with the calls to stop cultural plunder feeding western markets since the 1990s. Centering Iraqi voices and adopting a critical decolonial rights-based perspective, the study showcases how illicit antiquities trade clearly emerges as a violation of a state’s permanent sovereignty over its wealth and resources, negatively impacting its ability to guarantee the right to pursue economic, social, and cultural development to its people and freely dispose of their resources, the key components of the right to self-determination. While Iraq has just embarked on Retrieve Diplomacy, aiming to reclaim Iraqi artifacts subject to systematic theft and targeted acts of terrorism over the decades,<sup>222</sup> further research is necessary to expose, both empirically and juridically, other human rights implications of the illicit trade in cultural property. “This is not just about thousands of tablets coming back to Iraq again — it is about the Iraqi people, restoring not just the tablets, but the confidence of the Iraqi people by enhancing and supporting the Iraqi identity in these difficult times.”<sup>223</sup>

**Acknowledgments.** I am deeply grateful to Professor Roger Matthews and Dr Saeed Bagheri for their insightful guidance in my research work. My special thanks are also reserved to Sabrina Ferrazzi for her constructive feedback on the draft of the paper. As importantly, I express my deep gratitude to Guido Guarducci and Stefano Valentini, Co-Directors of CAMNES Center for Ancient Mediterranean and Near Eastern Studies in Florence for financially supporting this research.

**Funding.** This work was in part supported by the CAMNES Center for Ancient Mediterranean and Near Eastern Studies, Florence, Italy.

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<sup>219</sup> Moss 2020.

<sup>220</sup> Taha 2020; Thompson 2021.

<sup>221</sup> Thompson 2021.

<sup>222</sup> Ministry of Foreign Affairs of the Republic of Iraq 2024.

<sup>223</sup> Iraqi Minister of Culture Hassan Nadhem in Arraf 2021.

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**Cite this article:** Koush, Alesia. 2025. "Illicit trafficking in cultural property as a human rights issue: Sovereignty over cultural resources and the right to self-determination. Case study of Iraq." *International Journal of Cultural Property* 32, no. 1: 31–57. <https://doi.org/10.1017/S0940739125000025>