

7-26-2017

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Recommended Citation

Claire Stephens, *Blood Antiquities: Preserving Syria's Heritage*, 92 Chi.-Kent L. Rev. 353 (2017).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol92/iss1/13>

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BLOOD ANTIQUITIES: PRESERVING SYRIA'S HERITAGE

CLAIRE STEPHENS*

INTRODUCTION

In 2010, the Arab Spring swept a wave of violence across North Africa and the Middle East, and in the ensuing years, the region became engulfed in the worst humanitarian crisis since World War II. In Syria alone, eight million people have been displaced, 250,000 have been killed,¹ and the human suffering has been immeasurable. These assaults on human life have been accompanied by the tragic destruction of cultural property and the looting of archaeological sites, which has erased thousands of years of history and heritage. The importance of preserving Syria's cultural heritage cannot be understated, even in light of the country's humanitarian needs. The destruction of monuments is being used as propaganda for the Islamic State of Iraq and Syria's (ISIS) extremist ideology and the looting of heritage sites has become a fundraising tool for the group's violent *jihad*.

The large-scale looting of archaeological sites in Syria has brought the devastating effects of the international market in looted antiquities into stark relief. The United States has begun to address this issue by passing the Protect and Preserve International Cultural Property Act, legislation that restricts the import of Syrian cultural property into the United States. While domestic law has continued to evolve in an effort to protect cultural heritage, several obstacles to effective regulation of the antiquities market persist.

This Note will first explain the circumstances and consequences of the ongoing conflict in Syria and how ISIS is exploiting Syria's cultural property to fund their *jihad*. It then holds market countries, particularly the United States, accountable to reduce looting by decreasing demand for Syrian antiquities. Part II and III examine the international and domestic laws that regulate movable cultural property, and identi-

* J.D. Candidate, Chicago-Kent College of Law, December 2016. The author would like to thank Professor Sarah Harding for her invaluable comments and insights.

1. *Syria Crisis*, INT'L COMMITTEE OF THE RED CROSS, <https://www.icrc.org/en/where-we-work/middle-east/syria> (last visited September 7, 2016).

fies the challenges in applying these laws to the current conflict in Syria. Finally, Part IV asserts that domestic law is ineffectively implemented, and proposes that technology such as soil analysis will help to successfully identify illicit cultural property at the U.S. border, preventing its import. Further, amending the Racketeering Influenced and Corrupt Organizations Act (“RICO”) to include cultural property crimes will facilitate the successful prosecution of entire trafficking networks and deter participation in the market.

I. THE ISLAMIC STATE AND LOOTING IN SYRIA

A. Syria and the Rise of the Islamic State

The present day Syrian Arab Republic is located in what was known in ancient times as Greater Syria.² Lying in a fertile oasis, Greater Syria attracted a diverse range of peoples over the centuries, providing a home to some of the world’s oldest, continuously inhabited cities in the world.³ Modern Syria became an independent State in 1946,⁴ and has since been largely marred by political instability.⁵

In 2010, the Arab Spring erupted in Tunisia, eventually spreading to Egypt, and by March 2011, it reached Syria. When democratic protests against President Bashar al-Assad spread across Syria, the government responded with force, leading to a full-blown civil war.⁶ ISIS exploited this political unrest as an opportunity to exert its own power in the region, and swiftly took control of significant parts of Syria.⁷ The United Nations (UN) and a handful of countries, including the United States, have classified ISIS as a terrorist organization.⁸

A major factor contributing to ISIS’ swift rise to power was its ability to organize. Once ISIS has conquered a territory, the group institutes a governing structure to rule, making it extremely effective at

2. THOMAS COLLELO, LIBRARY OF CONGRESS, SYRIA: A COUNTRY STUDY 16 (3rd ed. 1988).

3. *Id.*

4. CONGRESSIONAL QUARTERLY, INC., THE MIDDLE EAST 225 (7th ed. 1990).

5. See generally *Syria Timeline: A Chronology of Key Events*, BBC (May 6, 2016), <http://www.bbc.com/news/world-middle-east-14703995>.

6. *Syria: The Story of the Conflict*, BBC (Mar. 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868>.

7. *Id.* For an account of ISIS’ rise to power, see *Islamic State: A Chronology of Key Developments*, DEUTSCHE WELLE (Sept. 14, 2014), <http://www.dw.com/en/islamic-state-a-chronology-of-key-developments/a-17920159>.

8. *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited June 17, 2016).

controlling seized territory.⁹ ISIS supports its growing infrastructure through independent financing. Control of oil resources is the group's main source of income.¹⁰ However, air strikes on oil-related infrastructure are believed to have diminished this revenue.¹¹ Reduced oil revenues, along with the freeze on U.S. bank accounts and false charities that fund ISIS, has increased ISIS' dependence on other sources of income.¹² As a result, the group has increasingly turned to the illicit sale of cultural property to fund its war machine.¹³

B. Trafficking Cultural Property in Syria

While ISIS' use of antiquities to fund their militia may have begun as opportunistic theft, it has evolved into an organized, transnational business that is financing terrorism.¹⁴ As part of its governing body, ISIS instituted the "Diwan al-Rikaz" to oversee its resources.¹⁵ Within the Diwan al-Rikaz, a distinct department was established to supervise the excavation, theft, and sale of antiquities.¹⁶ This enables ISIS to sys-

9. Nick Thompson, Richard Greene & Sarah-Grace Mankarious, *ISIS: Everything You Need to Know about the Rise of the Militant Grp*, CNN (Feb. 10, 2015), <http://www.cnn.com/2015/01/14/world/isis-everything-you-need-to-know/>.

10. In 2014, the U.S. Treasury estimated that the sale of crude oil yielded ISIS several million dollars per week.

What is the Islamic State?, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-29052144>.

11. Brigadier Gen. Russell Howard, Jonathan Prohov & Marc Elliott, *Digging in & Trafficking Out*, CTC SENTINEL, Feb. 2015, at 14, 16, <https://www.ctc.usma.edu/v2/wp-content/uploads/2015/02/CTCSentinel-Vol8Issue21.pdf>.

12. Heather Pringle, *ISIS Cashing in on Looted Antiquities to Fuel Iraq Insurgency*, NAT'L GEOGRAPHIC (June 27, 2014), <http://news.nationalgeographic.com/news/2014/06/140626-isis-insurgents-syria-iraq-looting-antiquities-archaeology/>.

13. Howard, *supra* note 11, at 14. Reports suggest antiquities may be ISIS' second largest commercial activity after oil. Duncan Mavin, *Calculating the Revenue from Antiquities to Islamic State*, WALL ST. J. (Feb. 11, 2015), <http://www.wsj.com/articles/calculating-the-revenue-from-antiquities-to-islamic-state-1423657578>.

14. Joe Parkinson, Ayla Abnayrak & Duncan Mavin, *Syrian 'Monuments Men' Race to Protect Antiquities as Looting Bankrolls Terror*, WALL ST. J., Feb. 10, 2015, <http://www.wsj.com/articles/syrian-monuments-men-race-to-protect-antiquities-as-looting-bankrolls-terror-1423615241>. See ANTIQUITIES COALITION, #CULTUREUNDERTHREAT: RECOMMENDATIONS FOR THE U.S. GOV'T 10 (Apr. 2016),

<http://taskforce.theantiquitiescoalition.org/wp-content/uploads/2015/01/Task-Force-Report-April-2016-Complete-Report.pdf>. Satellite imagery shows once pristine areas of Syria areas riddled with looter pits. Forty-two percent of the 3,000 looted sites are heavily pillaged in ISIS-controlled areas, suggesting "state" sanctioned operations. *Id.*

15. Loveday Morris, *Islamic State Isn't Just Destroying Ancient Artifacts – it's Selling Them*, WASH. POST (June 8, 2015), https://www.washingtonpost.com/world/middle_east/islamic-state-isnt-just-destroying-ancient-artifacts—its-selling-them/2015/06/08/ca5ea964-08a2-11e5-951e-8e15090d64ae_story.html.

16. *Id.*

tematically engage in the antiquities trade, not only by passively taxing the sale of antiquities and the traffickers who move looted artifacts through their territory, but also by actively facilitating looting and directly selling artifacts.¹⁷ Individuals seeking to earn a living through looting must obtain a license for excavation from the *Diwan al-Rikaz* and receive permission from ISIS inspectors who monitor the artifacts that are found, collecting a twenty percent tax on the proceeds of the looting.¹⁸ Other reports reveal that in Manbij, a Syrian town near Aleppo, ISIS opened an office to exclusively monitor looting activities and provide a market for shovels, metal detectors, and other equipment used for digging.¹⁹ The local *emir* employs civilian looters for 700 Syrian pounds per day and then collects the unearthed antiquities to sell to smugglers.²⁰ Once the sales are completed, dealers are given safe passage to move the antiquities through ISIS-controlled territory.²¹ The items are then trafficked through well-established and centuries-old smuggling routes mainly across Jordan, Turkey, and Lebanon.²²

Though it is generally agreed that ISIS profits from antiquities, there is much dispute over how much the group is pocketing.²³ ISIS is involved only in the early stages of the trade. Its profits are limited to the initial sale,²⁴ and the price paid for antiquities at their source is much less compared to their value in transit and upon reaching destination markets.²⁵ As a result, ISIS' profits are substantially less than the item's sale price in western markets, but the group profits regardless of what happens to the items during transit and upon reaching the market.

17. Andrew Keller, Deputy Assistant Sec'y for Counter Threat Fin. & Sanctions, Bureau of Eco. & Bus. Aff., Remarks at Metro. Museum of Art (Sept. 29, 2015), available at <http://www.state.gov/e/eb/rls/rm/2015/247610.htm>.

18. *Id.*; Morris, *supra* note 15.

19. Howard, *supra* note 11, at 15, 17.

20. *Id.* at 20.

21. *Id.* at 15; Mavin, *supra* note 13.

22. Howard, *supra* note 11, at 15. Simon Cox, *The Men Who Smuggle the Loot that Funds IS*, BBC (Feb. 17, 2015), <http://www.bbc.com/news/magazine-31485439>.

23. Fiona Rose-Greenland, *Inside ISIS' Looted Antiquities Trade*, THE CONVERSATION (May 30, 2016), <https://theconversation.com/inside-isis-looted-antiquities-trade-59287>.

24. Parkinson, *supra* note 14.

25. Neil Brodie, *Syria & its Regional Neighbors: A Case of Cultural Prop. Prot. Failure?*, 22 INT'L J. CULTURAL PROP. 317, 325 (2015). One expert estimates that "[o]n the dollar, the local person gets 50 cents, the runner gets 74 cents, the first importer gets \$1.50, next gets \$2.50, then . . . the dealer in the U.S. . . . sell[s] [it] for \$100." Abby Seiff, *Looted Beauty Bolstered by A Growing Body of Int'l & Domestic Law, More Countries Are Successfully Gaining the Return of Looted Cultural Treasures*, ABA J., July 2014, at 32, 4. For a detailed explanation, see Patty Gerstenblith, *Controlling the Int'l Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 180-81 (2007).

Estimates of ISIS' profits have ranged from four million to seven billion dollars, however recent reports have criticized higher estimates as inflated.²⁶ The first direct evidence of ISIS' involvement in the trade was discovered in June 2014 when Iraqi intelligence officers raided the safe house of an ISIS commander and seized over 160 computer flash drives containing financial records detailing illicit antiquities trafficking among ISIS' key financial transactions.²⁷ More direct evidence of this revenue source was acquired in May 2015, when U.S. Special Forces raided the compound of Abu Sayyaf, ISIS' Chief Financial Officer, and found additional financial documents alongside antiquities.²⁸ Information recovered in the Abu Sayyaf raid puts estimates of ISIS' annual earnings from the antiquities trade at \$5 million annually.²⁹ This is a huge divergence from estimates of several billion dollars, but is nevertheless a substantial amount of money, considering that it only took approximately \$10,000 to leave 130 dead in the November 2015 Paris attacks.³⁰

Purchasers of Syrian antiquities range from locals in Turkish and Lebanese markets to investors and collectors in the West, China, and the Persian Gulf.³¹ The United States is the world's largest antiquities market, accounting for forty-three percent of the global trade.³² Further, the United States experienced an increase in the number and value of imported Syrian antiquities that directly correlates with the breakdown in Syrian law.³³ U.S. government data shows that the value

26. *Owning Global Heritage: A Look into the Antiquities Market*, WBEZ 91.5 CHI. (May 17, 2016), <https://www.wbez.org/shows/worldview/owning-global-heritage-a-look-into-the-antiquities-market/32cdf586-036a-4941-b52e-16442006a9ad>.

27. Martin Chulov, *How an Arrest in Iraq Revealed ISIS's \$2bn Jihadist Network*, THE GUARDIAN (June 15, 2014), <http://www.theguardian.com/world/2014/jun/15/iraq-isis-arrest-jihadists-wealth-power>.

28. *ISIL Leader's Loot*, U.S. DEP'T OF STATE, <https://eca.state.gov/cultural-heritage-center/iraq-cultural-heritage-initiative/isil-leaders-loot> (last visited September 8, 2016).

29. *Following the Money: Examining Current Terrorist Financing Trends and the Threat to the Homeland*, ANTIQUITIES COALITION, <https://theantiquitiescoalition.org/blog-posts/following-the-money-examining-current-terrorist-financing-trends-and-the-threat-to-the-homeland/> (last visited June 17, 2016). This evidence is corroborated by MANTIS (Modeling the Antiquities Trade in Iraq and Syria), a University of Chicago research team. *Inside ISIS' Looted Antiquities Trade*, *supra* note 23.

30. *Inside ISIS' Looted Antiquities Trade*, *supra* note 23.

31. *Id.*

32. #CULTUREUNDERTHREAT, *supra* note 14, at 2; *Testimony before the Counterterrorism & Intelligence Subcomm. of the H. Comm. on Homeland Sec.: Following the Money: Examining Current Terrorist*

Financing Trends and the Threat to the Homeland, 114th Cong. (2016) (testimony of Deborah Lehr, Founder & Chairman, the Antiquities Coalition).

33. Morris, *supra* note 15.

of declared antiquities imported from Syria into the United States jumped from \$2.2 million in 2009 to \$11 million in 2013, though it is thought that the value of undeclared pieces significantly increases this number.³⁴ These figures leave little doubt that U.S. buyers are purchasing smuggled Syrian artifacts, likely looted by or with the support of ISIS.

C. The Antiquities Trade

The art and antiquities trade is believed to be the world's third largest illicit market, reaching an estimated value of six billion dollars per year.³⁵ However, controlling the illicit trade of antiquities is often more difficult than it is for other black markets. Unlike goods that are *prima facie* illegal, such as drugs or endangered species or other goods easily identifiable as unlawful, recognizing an antiquity as stolen is complex and difficult even for art experts and archaeologists.³⁶ Laws that regulate the trade of antiquities label an antiquity as illegal based on its provenance (the history of ownership of an object) and provenience (information about the circumstances in which an antiquity was excavated including its country of origin and the date that it was found).³⁷ However, when an antiquity is illegally obtained, it often moves into a "legal" market by receiving a false provenance and provenience.³⁸ It is relatively easy for looters, traffickers, and buyers in bad faith to evade detection and punishment by falsifying an object's history.³⁹ Meanwhile, it is very difficult for genuine good faith buyers

34. Parkinson, *supra* note 14. Dan Duray, *US Senate Blocks the Import of Art and Artefacts from Syria*, THE ART NEWSPAPER (Apr. 14, 2016), <http://theartnewspaper.com/news/us-senate-blocks-the-import-of-art-and-artefacts-from-syria/>.

35. Howard, *supra* note 11, at 14. Comparatively, the trade of illegal arms is valued at \$60 billion per year and the illegal trade of drugs at \$320 billion per year. ORGANIZATION OF AMERICAN STATES, THE DRUG PROBLEM IN THE AMERICAS: STUDIES, 5; Anup Shah, *Arms Trade – A Major Cause of Suffering*, GLOBAL ISSUES (June 30, 2013), <http://www.globalissues.org/issue/73/arms-trade-a-major-cause-of-suffering>.

36. See *U.S. v. Mask of Ka Nefer-Nefer*, No. 4:11-CV-504-HEA, 2012 WL 1094652 (E.D. Mo. 2012) (explaining that an antiquity is not contraband per se unlike illegal drugs "as [artifacts] may be lawfully owned and become contraband only based on a connection with a criminal act.>").

37. Leila Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 FORDHAM INT'L PROP. MEDIA & ENT. L.J. 729, 746 (2014).

38. UN OFF. ON DRUGS & CRIME, PROTECTION AGAINST TRAFFICKING IN CULTURAL PROPERTY, EG.1/2009/CRP.1 (2009).

39. See *U.S. v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997) (buyer's agent successfully imported a stolen Italian gold Phiale from Switzerland by identifying the nation of origin as Switzerland, not Italy, to prevent suspicion, and underreported the item's value by \$1 million. Customs agents did not discover violation, Italian officials learned of the phiale when the collector displayed it).

to acquire information about the provenance of an object, and often impossible to receive reliable information about provenience.⁴⁰

The illegal trade of antiquities creates enduring, irreversible harm in two primary ways. First, the illicit antiquities trade encourages the looting of unexcavated archaeological sites, which destroys the opportunity to learn from a site and its buried remains. Careful archaeological excavation and record keeping provides a context—an association between the objects and the features of the surrounding material—to the items found at the site. From this context, the archaeological record of a site, and eventually human history, may be reconstructed.⁴¹ Looting destroys this contextual information and irreparably damages the ability to understand human cultural evolution.⁴² Stratigraphic excavation is key to understanding the past, and ISIS is destroying that by taking part in and facilitating looting.

Second, the illicit antiquities trade facilitates and finances terrorism. The link between terrorism and antiquities smuggling is undeniable.⁴³ ISIS exploits the vast quantities of antiquities buried in Syria to finance its *jihad*. Antiquities looted from conflict zones have been dubbed “blood antiquities,” named for their role in financing the displacement, brutal abuse, and murder of thousands of civilians.⁴⁴ This alone makes it imperative that the United States prevents ISIS from profiting from the domestic import of Syrian antiquities.

The illegal trade in cultural objects is a persistent global problem that is motivated by profit. Accordingly, it follows the basic economic laws of supply and demand. Demand for antiquities drives the search for supply to satisfy the market and is thereby responsible for the loot-

40. Antiquities are often given nebulous provenances such as “from a private Swiss collection” or “by inheritance.” Tom Mueller, *How Tomb Raiders Are Stealing Our History*, NAT’L GEOGRAPHIC (June 2016), <http://www.nationalgeographic.com/magazine/2016/06/looting-ancient-blood-antiquities/>. Estimates of only ten to twenty percent of antiquities on the market have sufficient provenance to not raise legal issues; *Controlling the International Market in Antiquities*, *supra* note 25, at 178. However, prudent buyers can take steps such as search through the International Foundation for Art Research (IFAR) to identify whether the item is listed as stolen. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 283 (7th Cir. 1990).

41. *Controlling the Int’l Market in Antiquities*, *supra* note 25 at 174.

42. See *id.* for a complete discussion on how looting impairs the ability to understand an archaeological site.

43. Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime & the Illicit Antiquities Trade*, 45 IND. L. REV. 601, 609–11 (2012).

44. Mark Vlasic, *Islamic State Sells ‘Blood Antiquities’ from Iraq & Syria to Raise Money*, WASH. POST (Sept. 14, 2014), https://www.washingtonpost.com/opinions/islamic-state-sells-blood-antiquities-from-iraq-and-syria-to-raise-money/2014/09/14/49663c98-3a7e-11e4-9c9f-ebb47272e40e_story.html.

ing of archaeological sites, the illegal export of antiquities, the irreparable destruction of the archaeological record, and ISIS' financial growth. Prohibiting looting at sites is an important objective, but effective regulation must focus on imposing penalties on sellers and purchasers in market countries to reduce demand.⁴⁵ Imposing stricter market regulations increases the risks involved for all parties engaged in illegal trading, and thereby reduces the demand for looted antiquities, effectively reducing the looting itself.⁴⁶ As the world's leader in demand for antiquities, the United States has the opportunity and the responsibility to lead the fight against the illicit antiquities trade and reduce the market for illicit antiquities by disincentivizing demand.

II. INTERNATIONAL LAWS

In antiquity, the pillage of cultural property went hand-in-hand with the conquest of new territory. Empires like Rome acquired huge troves of art from defeated peoples, and viewed such bounties as a legitimate aspect of war.⁴⁷ This practice continued unabated until the end of the Napoleonic Wars, when the first considerable repatriation of artworks occurred after the Duke of Wellington required France to return much of its plundered art, clearly denouncing the principle "to the victor go the spoils."⁴⁸ However, it was not until the twentieth century that the idea of protecting cultural property formally arose when newly independent states began to seek the return of their cultural property that was stolen by former colonizing states.⁴⁹ In 1907, The Hague Convention on Respecting the Laws and Customs of War on Land (1907 Hague) became the first large international treaty addressing these concerns. Although neither the United States nor Syria ratified the 1907 Hague, both countries signed onto subsequent international treaties. Three sets of regulations govern Syria's cultural property under international law: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the

45. Advocates for free international trade of antiquities dispute this. James Cuno, president and CEO of the J. Paul Getty Trust, posed the question: "[w]ould you agree never to negotiate with terrorists, even if negotiating might save hostages?" Adding, "[s]imply not taking part in a market doesn't make the market go away." Mueller, *supra* note 40.

46. For a full discussion, see Simon Mackenzie, *Dig a Bit Deeper: Law, Regulation & the Illicit Antiquities Market*, 45 BRIT. J. CRIMINOLOGY 249, 251 (2005).

47. Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare & the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 250 (2006).

48. *Id.* at 253.

49. *Id.* at 252-53.

1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, and the UN Security Council Resolution 2199.

*A. 1954 Hague Convention for the Protection of Cultural Property
in the Event of Armed Conflict*

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague) was the first international treaty to focus directly on the protection of cultural property.⁵⁰ The Hague begins by noting that “the preservation of the cultural heritage is of great importance for all peoples of the world and . . . should receive international protection”⁵¹ State Parties are obligated to “safeguard . . . and respect” cultural property⁵² during times of peace and in the event of international and non-international armed conflicts.⁵³

Article 4 sets out State Parties’ core responsibilities to respect cultural property during armed conflict.⁵⁴ Notably, Article 4(3) requires States “to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or . . . acts of vandalism directed against, cultural property,” and to “refrain from requisitioning moveable cultural property situated in the territory of another High Contracting Party.”⁵⁵ While this provision clearly requires the Syrian military to refrain from looting, it is disputed whether it requires State Parties to prevent others, such as rebel forces, ISIS, or civilian looters, from committing Article 4(3) violations.⁵⁶ The first sentence of Article 4(3) appears unqualified

50. Convention on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. [hereinafter *The Hague*], http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html.

51. *Id.* art. 2.

52. The Hague defines “cultural property” as: “movable or immovable property of great importance to the cultural heritage of every people, such as . . . monuments; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives” *Id.* art. 1(a).

53. *Id.* art. 18, 19. A state must safeguard its own cultural property during peacetime by protecting it from “the foreseeable effects of an armed conflict,” and during conflict, must respect its own cultural property and that of other nations. *Id.* art. 3–5.

54. Art. 4(1)–(3) of the Hague are recognized as customary international law applicable to non-international armed conflict. Prosecutor v. Tadić; Case No. IT-94-1-I, Decision on Deference Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

55. The Hague, *supra* note 50, art. 4(3).

56. See Roger O’Keefe, *Protection of Cultural Property*, THE HANDBOOK OF INT’L HUMANITARIAN LAW 433, 465 (Dieter Fleck ed., 2d ed. 2008) (concluding that article 4(3) extends to both the

by requiring Parties to stop “any form of theft,” arguably applying to Syrian military forces and as well as belligerent and civilian looters.⁵⁷ However, the second sentence of Article 4(3), in addition to the other provisions of Article 4, require parties to “refrain” from looting, clearly constraining the State Party’s military conduct.⁵⁸ Gerstenblith argues that this language, in combination with the context of the Hague’s drafting following World War II, when cultural looting was carried out by the military and not by local populations,⁵⁹ establishes that Article 4 requires nations to restrain only their own military forces from looting.⁶⁰ Even so, the extensive looting occurring in Syria, including at the hands of the Syrian military, makes Article 4 prohibitions relevant to the current Syrian conflict.

However, application of any relevant articles to the Syrian conflict is severely limited, as the Hague does not provide an efficient mechanism to hold individuals accountable for violations of the treaty. Article 28 instructs states to “take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose . . . sanctions upon those persons . . . who commit or order to be committed a breach” of the treaty,⁶¹ thereby assigning states the responsibility to regulate the protection of their own cultural property within their domestic law.⁶² However, the Hague does not set forth any precise criminal offenses that constitute a breach of the Hague, which helps explain why Article 28 has never served as a basis for prosecution.⁶³ Syria is unlikely to be the first to prosecute looting pursuant to the Hague, particularly considering the state’s own involvement in looting.

Although Syria ratified the Hague in 1958 and the United States ratified it in 2009, it is unlikely to provide any legal force in the Syrian

armed forces and local population). However, Gerstenblith disagrees: “The invading military clearly has an obligation to prevent such actions by its own forces, but the convention does not impose an absolute obligation to control the actions of the local population” Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 677, 693 (2009).

57. The Hague, *supra* note 48, art. 4(3).

58. *From Bamiyan to Baghdad*, *supra* note 47, at 309.

59. *Id.*

60. *Id.* at 310.

61. The Hague, *supra* note 48, art. 28.

62. *See id.*

63. Louise Arimatsu & Mohbuba Choudhury, *Protecting Cultural Property in Non-Int’l Armed Conflicts: Syria & Iraq*, 91 INT’L L. STUD. 641, 685 (2015). *See* The Hague, *supra* note 48, art. 28.

conflict.⁶⁴ Article 4(3) of the Hague explicitly prohibits the industrial-scale pillaging of Syrian archeological sites and museums that is occurring at the hands of ISIS, the rebels (the Free Syrian Army), and Assad's forces;⁶⁵ it further requires the United States to refrain from acquiring Syrian cultural property when it is "situated in the territory of another" State Party. Thus, once an item has been exported from Syria, this provision arguably does not prohibit the United States from acquiring Syrian cultural property. Further, while Syria established domestic criminal penalties pursuant to Article 28 for those who smuggle, illegally excavate, or trade in antiquities,⁶⁶ Syrian officials are unlikely to prosecute such violations. In light of the Hague's lack of precise criminal offenses, the Hague's history of never serving as a basis for prosecution, the civil unrest occurring in Syria, and the fact that all parties to the conflict, including the Syrian military, have violated Article 4(3), violations are likely to go unpunished. Without a threat of criminal liability, individuals remain undeterred from looting archaeological sites across Syria and purchasing looted items. As a result, the Hague fails to provide any sufficient remedy for the destruction of Syria's cultural property.

The First Protocol (Protocol I) of the Hague was drafted alongside the Hague Convention and exclusively regulates the movement and treatment of movable cultural objects during armed conflict.⁶⁷ Notably, it requires the occupier to "undertake to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property."⁶⁸ It further dictates that any cultural objects removed during occupation must be returned at the end of occupation.⁶⁹ Protocol I became binding law on Syria when Syria ratified it in 1958, but the United States never signed it.⁷⁰

64. See *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention*, UN EDU., SCI., & CULTURAL ORG., <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha> (last visited June 20, 2016).

65. The Hague, *supra* note 48, art. 4(3).

66. Antiquities Law, Leg. Decree N. 222, art. 5 (1963) (Syria).

67. Protocol for the Protection of Cultural Property in the Event of Armed Conflict, ¶ I-III, May 14, 1954, 249 U.N.T.S. 240, available at http://portal.unesco.org/en/ev.php-URL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter Protocol I].

68. *Id.* at ¶ I(1).

69. *Id.* at ¶ I(3).

70. See Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, UN EDU., SCI. & CULTURAL ORG., <http://www.unesco.org/eri/la/convention.asp?KO=15391&language=E&order=alpha> (last visited June 17, 2016).

The Second Protocol (Protocol II) of the Hague was finalized in 1999 and entered into force in March 2004.⁷¹ It is intended to strengthen and clarify the provisions of the Hague in light of the unsuccessful attempts to protect cultural monuments during the Balkan Wars.⁷² Protocol II establishes a far more detailed framework and addressed the shortcomings in Article 28 of the Hague by setting forth a list of specific criminal violations that may serve as a basis for prosecution.⁷³ Notably, it makes “theft, pillage or misappropriation” of cultural property a “serious violation”⁷⁴ and establishes criminal responsibility for such serious violations by requiring each State Party to enact domestic law criminalizing serious breaches.⁷⁵ Further, the Hague does not regulate the export of cultural property, but Protocol II plugs that loophole by requiring states to adopt domestic measures to suppress “any illicit export . . . of cultural property from occupied territory in violation of the [Hague].”⁷⁶

The United States never signed Protocol II, and Syria signed but never ratified it.⁷⁷ Accordingly, pursuant to Protocol II, Syria is required, though not bound, to prevent cultural property from being exported from its territory during the present armed conflict.⁷⁸ However, because the United States never signed Protocol I, it is not required to return cultural property that is exported from Syria.

71. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769, www.unesco.org/cuture/laws/hague/html_eng/protocol2.shtml [hereinafter Protocol II].

72. See Jan Hladik, *Diplomatic Conference on the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, Netherlands (March 15–26, 1999)*, 8 INT’L J. CULTURAL PROP. 526 (1999).

73. Protocol II, *supra* note 69, art. 15(1).

74. *Id.* art. 15(1)(e).

75. *Id.* art. 15(2); Arimatsu, *supra* note 61, at 685.

76. Protocol II, *supra* note 69, art. 21.

77. Second Protocol to the Hague Convention of 1954 for the Prot. of Cultural Prop. in the Event of Armed Conflict, March 26, 1999, UN EDU., SCI. & CULTURAL ORG., <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E&order=alpha>. For arguments in favor of U.S. ratification of Protocol II see *Prot. Cultural Heritage in Armed Conflict*, *supra* note 86, at 706–07.

78. Signing Protocol II creates a requirement, but in order to be bound by Protocol II, Syria must ratify the Protocol.

B. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property

In an effort to curb the illicit trade in cultural property, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (“1970 Convention”)⁷⁹ established an international legal scheme that grants recovery rights for smuggled and stolen cultural property.⁸⁰ It is the primary legal instrument used to address the pillaging of archaeological sites and the illicit cultural property trade.

The 1970 Convention acts only as a set of guidelines, however, and is not self-executing. Thus, it does not exert any legal authority over the United States or Syria, but requires individual State Parties to implement complying domestic laws.⁸¹ Syria accepted the 1970 Convention, but never ratified it.⁸² The United States ratified the 1970 Convention in 1972, and in 1983, Congress enacted implementing legislation.⁸³ The United States adopted only two provisions of the 1970 Convention: Article 7(b)(i) and Article 9.⁸⁴ The former prohibits the import of cultural property stolen from a museum or public institution, while Article 9 provides a mechanism for State Parties to assist each other in cases of archaeological and ethnological pillage.⁸⁵ The United State’s implementing legislation, the Convention on Cultural Property Implementation Act, is discussed below.

79. Convention on the Means of Prohibiting & Preventing the Illicit Import, Export, & Transfer of Ownership of Cultural Prop., Nov. 14, 1970, 823 U.N.T.S. 231, <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/> [hereinafter 1970 Convention].

80. Cultural property is defined as: “property which . . . is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” *Id.* art. 1.

81. The U.S. required Congress to enact legislation by which the convention would be implemented into domestic law in order to have domestic legal effect. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES & MATERIALS 622–23 (3rd ed. 2012).

82. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export & Transfer of Ownership of Cultural Property*, UN EDU., SCI. & CULTURAL ORG., <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha> (last visited June 17, 2016).

83. *Id.* See 19 U.S.C. §§ 2601–13 (2012).

84. *From Bamiyan to Baghdad*, *supra* note 48, at 319. See 19 U.S.C. §§ 2601–13 (2012).

85. 1970 Convention, *supra* note 79, art. 7(b)(i), 9.

C. UN Security Council Resolution 2199

In February 2015, the UN Security Council adopted Resolution 2199, a binding resolution that threatens sanctions against countries and individuals that help ISIS profit from trading oil, antiquities, or hostages.⁸⁶ Resolution 2199 notes that ISIS is generating income by engaging, whether directly or indirectly, in the looting and smuggling of cultural heritage in Syria, which is being used to support ISIS' recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks.⁸⁷ Thus, Resolution 2199 recognizes "the importance of the role that financial sanctions play in disrupting ISI[S]."⁸⁸

Resolution 2199 prohibits cross-border trade on cultural materials illegally removed from Syria after March 15, 2011, and requires Member States to adopt laws and regulations that criminalize any participation in financing, planning, preparation or perpetration of terrorist acts or in supporting such acts.⁸⁹ While Resolution 2199 requires the Security Council to debate whether any violations have occurred and what punitive measures to order, it does not spell out specific penalties for those found guilty of aiding ISIS.⁹⁰

Similar to the 1970 Convention, Resolution 2199 sets forth guidelines but is not self-executing.⁹¹ It requires Member States to implement domestic law that takes steps to "prevent the trade in . . . Syrian cultural property . . . illegally removed from . . . Syria since 15 March 2011, including by prohibiting cross-border trade in such items."⁹² The United States Congress passed the Protect and Preserve International Cultural Property Act in May 2016, bringing the country into compliance with Resolution 2199.

The Hague, the 1970 Convention, and Resolution 2199 set forth international guidelines that help facilitate the return and the restitution of Syrian antiquities. Although this is a very important goal—the value of which should not be undermined—these regulations do little to address the two most damaging aspects of the illegal antiquities trade: the destruction of contextual information and financing of ter-

86. S.C. Res. 2199, (Feb. 12, 2015).

87. *Id.* ¶16.

88. *Id.*

89. *Id.* ¶17.

90. *See id.*

91. *See id.*

92. *Id.* ¶17.

rorist organizations. Further, international regulations do not place a burden on Western countries heavy enough to prevent the purchase of illegal antiquities. Stronger regulations aimed at eliminating Western demand for Syrian antiquities is essential to disrupt the market and prevent ongoing looting.

III. DOMESTIC LAW

Three bodies of U.S. domestic law regulate the importation and illegal purchase of Syrian antiquities: the Convention on Cultural Property Implementation Act, the National Stolen Property Act, and the Protect and Preserve International Cultural Property Act. In addition, it may be possible to hold U.S. purchasers of illegal Syrian antiquities liable under 18 U.S.C. § 2339A, Providing Material Support to Terrorists.⁹³

A. Cultural Property Implementation Act

In 1972, the U.S. Senate provided unanimous consent to ratify the 1970 Convention. It was not until 1983, however, that Congress enacted the Convention on Cultural Property Implementation Act (“CPIA”), putting the 1970 Convention into effect in the United States.⁹⁴ The CPIA prevents the import of specific cultural material that is in “jeopardy from . . . pillage” when “less drastic remedies are not available” or the pillage is of “crisis proportions.”⁹⁵ Whatever value or use the CPIA might have,⁹⁶ its protections are not applicable to Syrian cultural property.

The CPIA implemented only Article 7(b)(i) and Article 9 of the 1970 Convention, making the U.S. implementation much narrower than the international law.⁹⁷ Article 7(b)(i) of the 1970 Convention is

93. 18 U.S.C. § 2339A (2009); 31 C.F.R. § 576.208 (2010).

94. 19 U.S.C. §§ 2601–13. The CPIA’s purpose is to “promot[e] U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that not only are of importance to the nations whence they originate, but also to greater international understanding of our common heritage.” S. Rep. No. 97-564, at 1 (1982).

95. 19 U.S.C. § 2602 (1983).

96. *See, e.g.,* Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep’t of Homeland Sec., 801 F. Supp. 2d 383, 409 (D. Md. 2011), *aff’d*, 698 F.3d 171 (4th Cir. 2012) (holding that the Government did not exceed its authority in seizing ancient Cypriot and Chinese coins in accordance with CPIA import restrictions); *U.S. v. Eighteenth Century Peruvian Oil on Canvas Painting of Doble Trinidad*, 597 F. Supp. 2d 618, 625 (E.D. Va. 2009) (holding that the Government showed that paintings, which claimant imported to United States from Bolivia, were properly subject to forfeiture under the CPIA).

97. ART, CULTURAL HERITAGE, AND THE LAW, *supra* note 80, at 623.

implemented in 19 U.S.C. § 2607,⁹⁸ prohibiting individuals to import into the U.S. any stolen cultural property that has been documented in the inventory of a museum or religious or secular public institution in another State Party.⁹⁹ Article 9 of 1970 Convention was implemented in sections 2602 and 2603. Section 2602 permits the President to “enter into a bilateral agreement with the State Party to apply . . . import restrictions . . . to the archaeological or ethnological material of the State Party.”¹⁰⁰ Under section 2603, “if the President determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party, the President may apply . . . import restrictions . . . with respect to such material.”¹⁰¹ In order to initiate a bilateral agreement or an emergency action, a State Party must request such an agreement with the United States.¹⁰²

Currently, Syria does not have a bilateral agreement or emergency action with the United States for the protection of its cultural property.¹⁰³ Although Syria accepted the 1970 Convention and has the legal ability to request a bilateral agreement or an emergency action, it is unlikely to do so. All parties to the Syrian conflict—including the Syrian military—financially benefit from the export of Syria’s cultural property into the United States. Thus, it is not in Syria’s self-interest to request the United States to implement CPIA import restrictions on Syrian cultural property, rendering it very unlikely that they will.

Even if Syria is capable and willing to request a bilateral agreement or emergency action with the United States, import restrictions will likely be insufficient to properly regulate Syrian cultural property. A bilateral agreement may take years to implement, and while such an agreement is being negotiated, Syrian cultural property may continue

98. *Id.* at 625–26.

99. 19 U.S.C. § 2607. “State Party” is defined as “any nation which has ratified, accepted, or acceded to the [1970] Convention.” *Id.* § 2601(9).

100. *Id.* § 2602(a)(2)(A).

101. Emergency conditions exists when: (1) a new material of importance for understanding the history of mankind is in jeopardy of pillage; (2) a material, identifiably from a site of high cultural significance, is in jeopardy of pillage which is, or threatens to be, of crisis proportions; or (3) a material is part of the remains of a culture or civilization, the record of which is in jeopardy from pillage . . . of crisis proportions. *Id.* § 2603(b).

102. *Id.* § 2602(a)(1); *Id.* § 2603(c)(1). Some argue that requesting a bilateral agreement imposes a burden on a state party to prepare a requests for import restrictions, but Gerstenblith notes that “some of the world’s poorest nations including Mali, Bolivia, El Salvador, and Guatemala have been successful in obtaining bilateral agreements with the U.S.” ART, CULTURAL HERITAGE, AND THE LAW, *supra* note 81, at 619.

103. *Cultural Prop. Prot., Bilateral Agreements*, BUREAU OF EDU. & CULTURAL AFFAIRS, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> (last visited June 20, 2016).

trickling into the United States. While an emergency action may provide quicker implementation, it has limited effect in the long run. An emergency action lasts only five years, and may be renewed only one time for a maximum of three additional years.¹⁰⁴ While ISIS quickly profits from looted antiquities by selling them to traffickers, trafficked antiquities often take years to reach western markets. In addition to the time it takes to funnel antiquities across countries and through trafficking rings, antiquities often sit in storage for years until a conflict is over and restrictions are lifted.¹⁰⁵ Dealers are often in no rush to sell the antiquities and can afford to wait a few years before putting them on the market.¹⁰⁶ Objects looted from Syria today will likely continue to trickle into the United States for much longer than the next eight years.

If the provisions of the CPIA were applicable to looted Syrian antiquities—which, as stated above, they are not—the Department of Homeland Security has the authority to seize and require forfeiture of such items.¹⁰⁷ However, U.S. border agents face many difficulties in doing so. Unlike drugs or arms, which are illicit on their face, looted antiquities laundered across trafficking networks may appear legal by the time they reach the U.S. border. Details about objects' provenance are notably lacking from most transactions in the antiquities market, making it impossible to tell whether objects were recently looted, or have been circulating in the market for many years.¹⁰⁸ Paper documentation rarely accompanies artifacts,¹⁰⁹ but even when it does, provenance can easily be falsified.¹¹⁰

Antiquities looted from the ground are particularly difficult to detect. By their very nature, they do not appear in any museum or exca-

104. ART, CULTURAL HERITAGE, AND THE LAW, *supra* note 81, at 632.

105. "ISIS is taking its cuts upfront, regardless of whether these objects are being sold directly onto the international market or are being warehoused in different parts of the world . . . awaiting a time when the world's attention is less focused on undocumented artifacts coming from the Middle East." Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Prop. or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 360 (2016); Michele Kunitz, *Switzerland & the Int'l Trade in Art & Antiquities*, 21 NW. J. INT'L L. & BUS. 535 (2001).

106. See *The Destruction of Cultural Heritage*, *supra* note 105, at 360.

107. "Any designated archaeological or ethnological material or article . . . which is imported to the United States in violation of §§ 2606 or 2607 shall be subject to seizure and forfeiture." 19 U.S.C. § 2609(a).

108. Mackenzie, *supra* note 48, at 255.

109. *Id.*

110. *Id.* See also *U.S. v. Schultz*, 333 F.3d 393 (2nd Cir. 2003) (involving defendants who forged a fake provenance for smuggled artifacts by inventing a fictional private English collection, preparing fake labels designed to look as though they had been printed in the 1920's, and affixing the labels to smuggled artifacts).

vation inventories before emerging onto the marketplace. Without such information, there is no reliable evidence when an object was removed and from what source country, making it very easy to forge, and very difficult to refute, a fabricated provenance.¹¹¹ The application of the CPIA is dependent upon an object's date of export and country of origin. Thus, forged documents can easily allow illegal antiquities to slip through the border without a Customs and Border Protection Officer (CBPO) noticing.

Even if actions pursuant to sections 2602, 2603, and 2607 were likely to succeed, they would provide only minimal relief. As a civil statute, the only remedy under the CPIA is forfeiture; the CPIA does not provide criminal penalties.¹¹² Absent criminal prosecution, a civil action is unlikely to deter buyers and sellers in the antiquities market. Seizure does not pose a tremendous financial loss to sellers, given the mark-ups in price that occur as material enters the destination market.¹¹³ Financial losses incurred through seizures and civil forfeitures are not so much a deterrent as a cost of doing business that can be factored into the pricing arrangement.¹¹⁴

B. The National Stolen Property Act

The National Stolen Property Act (NSPA) may provide more effective regulation of Syrian cultural property than the CPIA. The NSPA provides in pertinent part: "Whoever receives [or] possesses any goods . . . of the value of \$5,000 or more . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . [s]hall be fined under this title or imprisoned not more than ten years, or both."¹¹⁵ Stolen goods that are introduced into the United States are also subject to seizure and forfeiture pursuant to the U.S. Customs statute.¹¹⁶

111. John A. Cohan, *An Examination of Archaeological Ethics & the Repatriation Movement Respecting Cultural Prop.*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 7 (2004).

112. 19 U.S.C. §§ 2601–13. The CPIA is codified under Title 19 "Customs Duties" as an import law, rather than a criminal law codified under Title 18 "Crimes and Criminal Procedure."

113. See Brodie, *supra* note 25 and accompanying text.

114. Brodie, *supra* note 25, at 325–26.

115. 18 U.S.C. § 2315.

116. 19 U.S.C. § 1595a(c)(1)(A). Merchandise "stolen, smuggled, or clandestinely imported or introduced" pursuant to the NSPA has been found to bring this statute into effect. See *U.S. v. Mask of Ka Nefer-Nefer*, No. 4:11-CV-504-HEA, 2012 WL 1094652 (E.D. Mo. 2012); *U.S. v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1377–78, 1380–81 (S.D. Fla.

According to the NSPA, an object may be stolen when it is illegally taken from an institution,¹¹⁷ as well as when an object is illegally exported from a nation whose government has declared state ownership of the object.¹¹⁸ A body of federal case law, commonly referred to as the “*McClain* doctrine,” has upheld that an object is stolen when it is excavated and removed from a nation without the consent of the government and when that nation enacted a clear and unequivocal law vesting ownership of cultural property in that nation’s government.¹¹⁹ An object remains stolen property when it enters into the United States, subjecting the importer to criminal prosecution pursuant to the NSPA. This legal principle was first formulated in *U.S. v. McClain* when the Fifth Circuit affirmed the defendants’ convictions for dealing in pre-Columbian artifacts from Mexico in violation of the NSPA.¹²⁰ The Court found that the artifacts were “stolen” from Mexico when the artifacts were smuggled out of Mexico after Mexico passed a clear and unequivocal statute that established the government’s ownership of pre-Columbian artifacts.¹²¹ Three of the four defendants received prison sentences.¹²²

In *U.S. v. Schultz*, the Second Circuit adopted a holding similar to *McClain’s* and convicted a prominent New York antiquities dealer under the NSPA for conspiring to deal in antiquities stolen from Egypt.¹²³ The Court found that an ancient Egyptian sculpture was “stolen” when

2003) (forfeiture of a stolen moon rock given to Honduras); *U.S. v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997).

117. See *U.S. v. Davis*, 648 F.3d 84, 90, 98 (2nd Cir 2011) (finding that the NSPA was violated when a painting was stolen from a museum, transported to the U.S., and then sold to a buyer).

118. See *U.S. v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977).

119. At least three federal circuit courts have upheld the application of the NSPA to antiquities that are owned by a foreign country pursuant to that nation’s law, illegally removed from the foreign country, and imported into the U.S. See *U.S. v. Schultz*, 333 F.3d 393 (2nd Cir. 2003); *McClain*, 545 F.2d 988 (requiring foreign nations to “assert actual ownership” over property pursuant to a valid patrimony in order for the NSPA to apply); *U.S. v. Hollinshead*, 495 F.2d 1154, 1154 (9th Cir. 1974).

120. *McClain*, 593 F.2d 658, 672 (5th Cir. 1979).

121. On appeal after remand, the Fifth Circuit added a due process safeguard by holding that property claimed by virtue of national ownership laws is not stolen unless the relevant vesting law is clear enough for a U.S. citizen to understand. *McClain*, 593 F.2d at 671. *But see Schultz*, 333 F.3d at 411 (“[I]f a jury finds that a defendant knew all of the relevant facts, the defendant cannot then escape liability by contending that he did not know the law.”); *Hollinshead*, 495 F.2d at 1155–56 (“[a]ppellants’ knowledge of Guatemalan law is relevant only to the extent that it bears upon the issue of their knowledge that the stele was stolen.”).

122. Three defendants received three years in prison and one received a three-year suspended sentence. *U.S. Judge Criticizes Mexico in Allowing Sale of Artifacts*, TOLEDO BLADE, Aug. 14, 1975. <https://news.google.com/newspapers?nid=1350&dat=19750814&id=78d0AAAAIABJ&sjid=Nw1EAAAAIABJ&pg=6601,1158098&hl=en>.

123. 333 F.3d at 416.

it was smuggled out of Egypt after the enactment of Egypt's 1983 Antiquities Law, which declared all antiquities found in Egypt after 1983 to be the property of the Egyptian government.¹²⁴ Schultz was sentenced to thirty-three months in prison and fined \$50,000 for his role in the conspiracy.¹²⁵ Together, *McClain* and *Schultz* provide persuasive precedent for all jurisdictions applying the NSPA to looted antiquities.

Schultz was prosecuted pursuant to the 1983 Egyptian Antiquities Law, which declares all antiquities, with limited exception, to be "public property" belonging to Egypt, and prohibits the ownership or transfer or such objects.¹²⁶ Syria enacted a similar Antiquities Law in 1963, declaring "[a]ll moveable and immovable antiquities . . . in the Syrian Arab Republic . . . public properties of the State."¹²⁷ Ownership of registered movable antiquities may be transferred only with the consent of an antiquities authority.¹²⁸ Given Syria's clear statement of national ownership of Syrian antiquities and prior internal enforcement of this law,¹²⁹ individuals who knowingly deal in, possess, or transport such objects over \$5,000 may be subject to criminal penalties pursuant to the NSPA.¹³⁰ The substantial penalties, including prison time, under the NSPA may serve as a deterrent to U.S. buyers who wish to trade in Syrian cultural property.

However, despite the few successful prosecutions of NSPA violations over the past forty years, it remains very difficult to prosecute an antiquities trafficker, seller, or purchaser under the NSPA. Perhaps the greatest hurdle for a prosecutor is proving that the defendant had knowledge that the item was stolen. Proving knowledge is difficult in most theft prosecutions, but is even more so in cases of undocumented antiquities. Unlike goods that are *prima facie* illegal, such as illegal drugs that are unlawful to possess, or endangered species that are readily identifiable as illegal, distinguishing a licit from an illicit cul-

124. *Id.*

125. Celestine Bohlen, *Antiquities Dealer Is Sentenced to Prison*, N.Y. TIMES (June 12, 2002), <http://www.nytimes.com/2002/06/12/arts/antiquities-dealer-is-sentenced-to-prison.html>.

126. Law No. 117 of 1983 (The Issuance of Antiquities' Protection Law), al-Jaridah al-Rasmiyah, vol. 32 bis 11 Aug., 1983 (Egypt).

127. The only exceptions to this rule apply to immovable antiquities; ownership of registered antiquities may only be transferred by "prior agreement with antiquities authorities." *See Leg. Decree N. 222, supra* note 66, art. 4, 34.

128. *Id.* art. 34.

129. *See* Ammar Abdulrahman, *The New Syrian Law on Antiquities*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD'S ARCHAEOLOGICAL HERITAGE* 111 (Neil Brodie et al., eds., 2001) (demonstrating steps taken by Syria to protect their cultural property).

130. *See Leg. Decree N. 222, supra* note 66; *U.S. v. Schultz*, 333 F.3d 393, 399 (2nd Cir. 2003); *U.S. v. McClain*, 545 F.2d 988, 992 (5th Cir. 1977).

tural object is very difficult.¹³¹ Accordingly, buyers have even greater difficulty knowing when an antiquity is illicit.

This issue is particularly relevant to Syrian antiquities. Syrian antiquities are unlikely to be shipped directly to the United States from Syria. Instead, traffickers launder Syrian antiquities across many borders, until they eventually reach Western markets. Forged documents and false provenance will likely list the item's origin as a nation without strong patrimony laws, and claim the item to have been on the market for many years.¹³² With a falsified provenance, dealers are able to turn illicit items into apparently licit ones, making it easy for market participants to claim ignorance that the object originated in Syria.¹³³ Without proving an individual's knowledge of the item's illicit nature, it is impossible to hold that individual liable under the NSPA.

The difficulty in establishing the required elements for a criminal prosecution has led to a number of cases involving looted antiquities being brought as civil forfeitures or private replevin claims instead.¹³⁴ Civil remedies provide some relief to a state wishing to repatriate an artifact, but as previously noted, civil penalties do not sufficiently punish and deter criminals.¹³⁵ Threat of an additional monetary penalty or a prison sentence serves as a more substantial deterrent.¹³⁶

C. Providing Material Support to Terrorists

Pursuant to 18 U.S.C. § 2339A, a substantial criminal deterrent may be possible by holding U.S. purchasers of Syrian antiquities directly accountable for providing material support to terrorists. In August 2015, the FBI released an alert that warned antiquities traders that antiquities "plundered by terrorist organizations such as ISIL are entering the marketplace."¹³⁷ The alert called on art and antiquities mar-

131. Leila Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 *FORDHAM INT'L PROP. MEDIA & ENT. L.J.* 729, 758 (2014). See *U.S. v. Mask of Ka Nefer-Nefer*, No. 4:11-CV-504-HEA, 2012 WL 1094652 (E.D. Mo. 2012).

132. *Schultz*, 333 F.3d at 396 (creating false provenances for antiquities dating back to the 1920's).

133. Conscious avoidance of information constitutes defendant's actual knowledge under the NSPA. See *id.* at 414; Stephen K. Urice, *Between Rocks & Hard Places: Unprovenanced Antiquities & the Nat'l Stolen Prop. Act*, 40 *N.M. L. REV.* 123, 161 (2010).

134. *Controlling the Int'l Market in Antiquities*, *supra* note 25, at 180.

135. See *supra* text accompanying notes 110–11.

136. See Brodie, *supra* note 25, at 328.

137. *ISIL Antiquities Trafficking*, (Aug. 25, 2015), <https://www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking/isil-antiquities-trafficking>.

ket leaders to aid in the effort to prevent the sale and import of artifacts from ISIS-controlled Syria and Iraq and warned that “[p]urchasing an object looted and/or sold by the Islamic State may provide financial support to a terrorist organization and could be prosecuted under 18 U.S.C. § 2339A.”¹³⁸ Section 2339A states that “[w]hoever provides material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation of” a terrorist act “shall be fined . . . or imprisoned not more than 15 years, or both.”¹³⁹ The mental state required by section 2339A extends to both the support itself, and to the underlying purposes for which the support is given.¹⁴⁰ As of yet, there have not been any prosecutions of antiquities buyers pursuant to section 2339A.

Although such prosecutions may be possible in the future, it will likely be very difficult to prosecute the buyer of a Syrian antiquity. The government must prove that a buyer had the specific knowledge or intent to provide money to ISIS through purchasing the antiquity, knowing or intending that the money would be used to carry out a terrorist act.¹⁴¹ ISIS’ involvement in the antiquities trade occurs only at the very beginning of the market. Once ISIS sells an antiquity to a trafficker, the object changes hands a number of times as it is transported through the market. By the time an antiquity reaches a U.S. buyer, it is difficult, if not impossible, for a typical buyer to trace the item back to the terrorist organization that originally sold it. This makes it incredibly difficult for the government to establish that a buyer knew he was providing money to ISIS by purchasing a Syrian antiquity, and that the buyer knew that the money would be used to carry out a terrorist act. Without being able to establish that a buyer had such knowledge, the government is unable to hold the individual accountable pursuant to section 2339A.

In the absence of an unlikely confession to authorities, the most likely way to establish a buyer’s knowledge is for law enforcement to investigate whether the buyer believed that his purchase funded terrorism.¹⁴² While possible, such investigations require a good deal of

138. *Id.* See also 18 U.S.C. § 2339A(a).

139. Material support includes: “any property, tangible or intangible, or service, including currency or monetary instruments . . .” 18 U.S.C. § 2339A(b)(1). See also 8 U.S.C. § 1189 (providing definition of a “terrorist organization”); 18 U.S.C. § 2339B(g).

140. *U.S. v. Stewart*, 590 F.3d 93, 113, n.18 (2nd Cir. 2009). See also 18 U.S.C. § 2339A(a).

141. *Id.*

142. See *U.S. v. Georgescu*, 148 F. Supp. 3d 319, 321 (S.D.N.Y. 2015) (indictment sufficiently alleged defendant’s intent to kill based on recorded conversation in which undercover agent

time and resources. Consequently, investigations would likely be few and would focus only on key participants in the market.

Despite the difficulty in prosecuting buyers of Syrian antiquities pursuant to section 2339A, it is possible that the threat of such prosecution may deter would-be buyers. The threat of longer prison sentences and higher fines than proscribed under the CPIA and the NSPA may reduce the number of buyers of Syrian antiquities. Further, the prospect of facing the stigma of being charged with funding terrorism may appeal to the morals of potential buyers. Museums in the United States, for instance, resisted adopting more ethical acquisition policies until several museums were forced to return pricey acquisitions to Italy after they were proven to be stolen.¹⁴³ This, in combination with the public shaming that these museums faced in the media, finally led to stricter acquisition guidelines.¹⁴⁴ While moral persuasion alone did not lead to a revised policy, it worked alongside punitive deterrents to achieve a more ethical practice.¹⁴⁵ Similarly, the public shame of being associated with terrorism along with the threat of a prison sentence and a hefty fine may deter would-be purchasers of Syrian antiquities.

D. Protect and Preserve International Cultural Property Act

In May 2016, the Protect and Preserve International Cultural Property Act (PPICP) was signed into law by President Obama.¹⁴⁶ Prior to the passage of the PPICP, the importation of Syrian cultural property fell through the cracks of U.S. domestic law and was largely unregulated. The PPICP attempts to address these shortcomings and brings the United States into compliance with the UN Security Council Resolution 2199 by preventing trade in Syrian cultural property and thereby denying funding to ISIS.¹⁴⁷

The main power granting provision of the PPICP is section 3. Section 3 acts as an extension of the CPIA by granting the President au-

explained he wanted to purchase weapons to kill Americans and defendant subsequently sold agent weapons). Additionally, a U.S. Immigration and Customs Enforcement investigation into the theft of an Egyptian sarcophagus yielded emails between a dealer and prospective clients that suggest the dealer knew the item was looted. The dealer remains a fugitive, but two others involved in the trade plead guilty to criminal charges. Mueller, *supra* note 40.

143. Brodie, *supra* note 25, at 327.

144. Brodie, *supra* note 25, at 327.

145. *Id.*

146. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, 130 Stat. 369, 370, 371, 372 (2016).

147. See S.C. Res. 2199.

thority under section 2603 to “impose import restrictions set forth in [section 2606]”¹⁴⁸ on Syrian “cultural property that is unlawfully removed from Syria on or after March 15, 2011.”¹⁴⁹ Pursuant to section 2606, “[n]o designated archaeological or ethnological material that is exported from the State Party after the [emergency restriction is implemented] may be imported into the United States.”¹⁵⁰

In essence, the PPICP extends the CPIA to Syrian cultural property by permitting import restrictions on Syrian cultural property “without regard to whether Syria” ratified, accepted, or acceded to the UNESCO Convention and notwithstanding section 2603(b) and 2603(c) limitations.¹⁵¹ Most notably, section 2603(c)(1) renders the CPIA inapplicable to Syrian cultural property as Syria must request an emergency implementation of import restrictions.¹⁵² The PPICP permits import restrictions pursuant to section 2603 by removing that limitation.

Import restrictions are subject to very limited exception. Section 3(c)(2) permits the President to waive the import restrictions if the owner of the material “has requested that such material be temporarily located in the United States for protection purposes; or if no owner . . . can reasonably be identified . . . for purposes of protecting and preserving such material, the material should be temporarily located in the United States.”¹⁵³ The temporary nature of the import is emphasized by section 3(c)(2)(B), as “[s]uch material shall be returned to the owner . . . when requested.”¹⁵⁴ Because the President may only waive import restrictions for protection purposes on a temporary basis, purchasing Syrian cultural property removed from Syria on or after March 15, 2011 is prohibited without exception. Section 3(c)(2)(3) also requires that, if the President grants such a waiver, “the specified archaeological or ethnological material of Syria that is the subject of such waiver shall be placed in the temporary custody of the United States Government or cultural or educational institution within the

148. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, §3(a), 130 Stat. 369, 370, 371, 372 (2016).

149. *Id.* § 3(d)(2). The PPICP defines “cultural property” pursuant to 19 U.S.C. § 2601 (2016).

150. 19 U.S.C. § 2606(a).

151. *See Id.* § 2603(b)–(c); Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, §3(a)(2), 130 Stat. 369, 370, 371, 372 (2016).

152. *See* 19 U.S.C. § 2603(c)(1); *supra* note 101 and accompanying text.

153. Protect and Preserve International Cultural Property Act, Pub. L. No. 114-151, §3(c)(2), 130 Stat. 369, 370, 371, 372 (2016).

154. *Id.* § 3(c)(2)(B).

United States.”¹⁵⁵ Thus, a private individual may never possess cultural property removed from Syria on or after March 15, 2011.

Section 3 of the PPICP provides significant progress in closing the U.S. market for Syrian cultural property. However, numerous loopholes continue to exist that enable illicit Syrian artifacts to enter into the U.S. First, the applicability of the PPICP depends upon the date of export and country of origin: an object must be “removed from Syria on or after March 15, 2011” in order to be seized by a CBPO.¹⁵⁶ However, by altering an antiquity’s date of export and country of origin, it is possible for market participants to evade a customs seizure.¹⁵⁷ Thus, falsified documents allow illegal antiquities to easily slip through the border.

Further, importers are required to provide very little evidence that an item was lawfully exported. Under section 2606, no designated archaeological or ethnological material removed from Syria on or after March 15, 2011 may be imported into the United States unless Syria issues a certification that verifies the export was not in violation of Syrian law.¹⁵⁸ However, if the importer or consignee has no such documentation, the importer must provide only “satisfactory evidence” that an antiquity is not Syrian. Alternatively, the importer must provide that it was exported from Syria “not less than ten years before” entry into the United States, and that the importer did not acquire an interest in the item “more than one year before [its] date of entry,” or satisfactory evidence that the material was exported from Syria on or before March 15, 2011.¹⁵⁹ Such “satisfactory evidence” is fulfilled by providing only “one or more declarations under oath” attesting to these assertions.¹⁶⁰ Additionally, the consignor must provide “a statement . . . which states the date, or, if not known, his belief, that the material was exported from [Syria] not less than ten years before the date of entry into the U.S. and the reasons on which the statement is based.”¹⁶¹ To provide satisfactory evidence the material was exported from Syria on or before March 15, 2011, the consignor must provide “a statement . . . which states the date . . . that the material was exported from [Syria] on or before [March 15, 2011], and the reasons on which

155. *Id.* § 3(c)(2)(3).

156. *See id.* § 3(d)(2).

157. *See Cohan, supra* note 110.

158. 19 U.S.C. § 2606(a).

159. *Id.* § 2606(b)(2)(A)–(B).

160. *Id.* § 2606(c)(1)(A)(i–ii).

161. *Id.* § 2606(c)(1)(B).

the statement is based.”¹⁶² If such satisfactory evidence is not provided, the CBPO “shall refuse to release the material from customs custody until such documentation is provided or it will be seized and forfeited.”¹⁶³

Providing satisfactory evidence is unlikely to be difficult. To avoid forfeiture, the importer and consignor must make little more than a sworn statement that the item does not violate the PPICP.¹⁶⁴ Both the importer and consignor have a pecuniary interest in the item, increasing the probability that they will make false statements to customs officials to avoid forfeiture. The low burden of evidence under section 2606 further encourages individuals to falsify an item’s documents to avoid forfeiture.

Additionally, the PPICP’s only remedy is civil forfeiture; it does not provide criminal penalties.¹⁶⁵ As a previously noted, without criminal prosecution, a law such as the PPICP is unlikely to deter those who wish to import Syrian antiquities.¹⁶⁶

Section 2606 provides an additional loophole that may permit illicit Syrian antiquities to enter the United States: import restrictions apply only to material “designat[ed] . . . under [§ 2604]” that are exported from the State Party.¹⁶⁷ Thus, although not explicitly stated, the PPICP requires “the Secretary . . . [to] promulgate . . . a list of the archaeological or ethnological material of the State Party covered by the agreement or by such action.”¹⁶⁸ The list of materials must be “sufficiently specific and precise.”¹⁶⁹ While a broad list that denies import to all Syrian cultural property exported from Syria after March 15, 2011 ensures that no archaeological or ethnological material is overlooked, a specific list does the opposite. Enumerating a list of specific types of Syrian cultural property that is covered by the PPICP emergency import restriction creates the opportunity for whole categories of cultural property to be excluded from import restrictions, despite being illegally exported from Syria after March 15, 2011.

Furthermore, section 3(b)(2)(A) requires restrictions to terminate “5 years after the date on which the President determines that neither

162. *Id.* § 2606(c)(2)(A–B).

163. *Id.* § 2606(b).

164. *See* 19 U.S.C. § 2606(c).

165. H.R. 1493, sec. 1–4.

166. *See supra* text accompanying notes 25, 112.

167. 19 U.S.C. § 2606(a).

168. *Id.* § 2604.

169. *Id.*

of the conditions specified in [section 3(b)(1)(B)] are met.”¹⁷⁰ Five years is likely not long enough to prevent Syrian antiquities looted during the present conflict from entering the United States. Trafficked antiquities can take years to reach western markets. As previously stated, dealers often wait patiently for import restrictions to lift before importing formally regulated material.¹⁷¹ Objects looted from Syria today will likely continue to trickle into the United States for much longer than five years following the conflict.

A major limiting factor of the PPICP is that section 3 applies only to Syrian antiquities.¹⁷² While the President may institute import restrictions pursuant to the CPIA, such restrictions must be initiated at the request of another state.¹⁷³ In the event of a similar future conflict, where a state is incapable or unwilling to request import restrictions on their cultural property, the CPIA will again be rendered inapplicable and the United States will have to pass yet another law to regulate the import of cultural property from that state.¹⁷⁴ However, implementing a law takes time. An early version of the PPICP was introduced in November 2014,¹⁷⁵ and the final version did not become law until May 2016.¹⁷⁶ It took over a year to implement import restrictions on Syrian cultural property, during which time the U.S. market remained open to these items. Thus, while a bill is pending, cultural property from any state in a situation similar to Syria may continue to be imported into the United States and may continue to finance terrorism.

170. H.R. 1493, sec. 3(b)(2)(A); *Id.* § 2601.

171. *See supra* note 104 and accompanying text.

172. *See* H.R. 1493, sec. 3; 19 U.S.C. § 2601; Brodie, *supra* note 25, at 322–23 (noting that country specific emergency actions fail partly because “targeting of international assistance at cultural heritage protection in one country leaves the cultural heritage of other countries vulnerable”). The 2003 emergency action that devoted attention and resources to Iraq left other countries open to looting. Syria was offered no assistance despite its growing vulnerability. The same can be said today for Lebanon, Yemen, Jordan, Egypt and perhaps Iran and Turkey. *Id.*

173. *See* 19 U.S.C. §§ 2602(c)(1), 2603(c)(1).

174. By way of example, the Iraqi cultural heritage crisis’ preceding the Syrian conflict prompted the imposition of emergency import restriction on Iraqi cultural property pursuant to the CPIA. These restrictions have since expired, but cultural property for which “a reasonable suspicion exists” that said property was illegally removed from Iraq since August 1990 remains subject to Office of Foreign Assets Control sanctions under the Iraq Stabilization and Insurgency Sanctions Regulations. 31 C.F.R. § 576.208. Neither restriction is applicable to Syrian cultural property.

175. Protect and Preserve International Cultural Property Act, H.R. 5703, 113th Congress (2014).

176. Protect and Preserve International Cultural Property Act, H.R. 1493, 114th Congress (2016).

Although sections 2 and 4 of the PPICP may extend to non-Syrian cultural property, these sections do not enable import restrictions.¹⁷⁷ Section 2 of the PPICP calls for the President to establish an inter-agency committee to “coordinate the efforts of the executive branch to protect and preserve international cultural property at risk from political instability, armed conflict, or natural or other disasters.”¹⁷⁸ The committee has broad authority over issues including, but not limited to, the Syrian conflict. While the committee may provide supportive assessments to create future law to protect cultural property at risk, section 2 does not grant the committee any legal power to prevent the import of non-Syrian cultural property at risk. Section 4 requires the President to report on “measures to dismantle international networks that traffic illegally in cultural property” and “action undertaken to ensure the consistent and effective application of law in cases relating to illegal trade and trafficking in cultural property,” but does not grant the President additional power to prevent the import of non-Syrian cultural property at risk.¹⁷⁹

The PPICP provides significant progress in the effort to close the U.S. market to Syrian cultural property. However, there remain loopholes that enable illicit Syrian artifacts to enter into the United States, namely the ease with which artifacts are able to slip across U.S. borders utilizing false documentation. In addition, the lack of criminal penalties minimizes the law’s deterrent effect. Although these disadvantages may easily overshadow the law’s developments, there are steps that the United States can take to ensure that the PPICP, along with the CPIA, NPSA, and section 2339A, are effectively implemented.

IV. CRITIQUE OF DOMESTIC LAW

The PPICP, CPIA, NSPA, and section 2339A lay the groundwork for effectively regulating the U.S. market for illicit Syrian antiquities. However, the United States currently struggles to coordinate these trade regulations with law enforcement and prosecution, rendering the laws ineffective. To remedy this, the United States must increase its use of investigative technology such as soil analysis to successfully identify illicit cultural property at the border. Further, amending the Racketeering Influenced and Corrupt Organizations Act to include cultural

177. H.R. 1493, sec. 2, 4; 19 U.S.C. § 2601.

178. *Id.*, sec. 2; 19 U.S.C. § 2601.

179. *Id.* at sec. 4(2)(A),(E).

property crimes will facilitate the successful prosecution of entire trafficking networks and deter participation in the market.

A. Effective Regulation at the Border

In many instances, U.S. Customs and Border Protection (“CBP”) stands as the last and best check on the antiquities market.¹⁸⁰ CBP is given great power in their role to prohibit smuggling, and police the entry of goods by fraud and false statements.¹⁸¹ Under the NSPA and the PPICP, CBP is authorized to seize and forfeit Syrian cultural property at the border or within the United States when cultural property is imported in violation of these laws. In spite of the substantial power these laws provide, however, CBPOs have limited practical effect on the illicit antiquities market.

The quantity of items imported into the United States greatly diminishes CBP’s ability to effectively control the illicit antiquities trade. Incapable of inspecting every shipping container, CBP officers open only a small fraction of imports. Whereas CBPOs are able to seek out drugs with drug sniffing dogs and at a single glance can identify a drug as contraband, the same is not true for illicit antiquities.¹⁸² Shipments with import documents falsified to avoid detection for a PPICP violation will not raise a red flag and will likely go uninspected, allowing illicit Syrian antiquities to slip easily through customs.

Even if a CBPO opened every shipment of antiquities, he would likely be unable to identify a falsely stated provenience on an import document. It is often difficult even for art experts and archaeologists to identify on the spot an item’s country of origin, and nearly impossible to identify how long the item has been on the market, making it impractical to believe that a CBPO, with no expert knowledge of antiquities, is able to do so.¹⁸³ The minimal evidence that importers are required to produce to prove an item is licit makes it further difficult to

180. See *Trafficking of Cultural Objects*, WORLD CUSTOMS ORG., <http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/trafficking-of-cultural-objects.aspx> (last visited June 19, 2016). “[I]t is widely recogni[z]ed that international borders still offer the best opportunity to intercept stolen cultural artefacts, and to that end Customs plays a fundamental role in the fight against the unauthori[z]ed export of cultural items.” *Id.*

181. See 18 U.S.C. §§ 545, 1001, 1497, 1453, 815 (2007).

182. Smugglers also hide antiquities in shipments of other goods such as furniture. Unless a shipping container is opened, CBPOs would never know the container contained antiquities. Mueller, *supra* note 40.

183. CBPOs likely do not have the expertise to know the stylistic differences to distinguish, for example, an ancient Syrian pot from a Roman one.

establish whether an item is legal or illegal.¹⁸⁴ A CBPO cannot seize an item pursuant to the PPICP without establishing the item was exported from Syria after March 15, 2011, and does not have reason to suspect a criminal theft pursuant to the NSPA without identifying the item as exported from Syria after 1963. Thus, it is necessary for a CBPO to identify an item's country of origin and date of export in order to effectively implement the laws.

Currently, CBPOs lack the necessary knowledge and tools to authenticate antiquities that cross into the U.S., limiting their impact on the trade. However, providing CBPOs with specialized training and tools to spot illicit antiquities will support effective implementation of cultural property laws.¹⁸⁵ Increased CBPO training has been proposed in the *Prevent Trafficking in Cultural Property Act*, which was introduced in May 2015. The bill has not yet passed the House, but it is an important and much-needed law. Notably, it seeks to ensure that all CBP and Immigration and Customs Enforcement (ICE) personnel "receive sufficient training in relevant cultural property laws; the identification of cultural property from regions that are at great risk of looting and trafficking; and methods of interdiction and investigative techniques related to illegal trade in cultural property."¹⁸⁶ This law must be passed to effectively prevent Syrian antiquities from being bought and sold in the U.S.

Further, the import and export of cultural property should be limited to designated ports to facilitate effective monitoring of cultural property entering the United States by concentrating efforts and resources to fewer locations. This will enable a specialized group of CBPOs with adequate training and knowledge of cultural property to monitor the trade.¹⁸⁷

Although these measures will help, technological innovations provide the key to fast and effective import regulation. In particular, a system of forensic soil analysis that matches soil on imported antiquities to soil samples taken from around the globe will enable CBPOs to pinpoint an object's country of origin. Aggregating this information

184. See *supra* notes 158–60 and accompanying text.

185. Patrick O'Keefe, *The Use of Criminal Offences in UNESCO Countries: Australia, Canada, & the USA*, 6 ART, ANTIQUITY & L. 19, 34 (2001).

186. Prevent Trafficking in Cultural Property Act, H.R. 2285, 114th Cong. §. 4(3)(A–C) (2015).

187. See 16 U.S.C. § 1538(f). Such a measure has been taken to better regulate the wildlife trade.

with satellite imagery of looters' pits may also identify precisely when the item was looted.¹⁸⁸

Soil is similar to DNA in that each area, or each person in the context of DNA, has its own unique composition.¹⁸⁹ Soil is composed of varying combinations of vegetation, flora and fauna, microbes, and minerals, which even small traces of soil contain.¹⁹⁰ By analyzing the soil found on an antiquity and comparing its composition to a database of soil samples, it may be possible to match an object to its exact origin. Antiquities are typically not fully cleaned until they reach their final destination, making it possible for CBP to perform soil tests on antiquities imported into the U.S.¹⁹¹ Doing so will efficiently establish an object's true country of origin and prevent importers from evading forfeiture through falsified import documents.¹⁹²

Soil analysis that identifies an object's exact origin, aggregated with satellite imagery that identifies when a looter pit appeared in that spot, may establish the date that the item was looted. This will allow CBP to identify, for instance, if a Syrian antiquity was exported on or after March 15, 2011. Accordingly, soil analysis may be an essential tool to enable CBPOs to effectively prevent the import of Syrian antiquities. In addition, soil analysis may mitigate some of the damage caused by looting by providing archaeologists with some of an object's contextual information and potentially identifying objects that were looted together.

Although developing soil analysis technology, establishing a database of soil samples, and running soil tests on imported antiquities will be expensive, it is a worthy investment for law enforcement. Soil analysis is not only an efficient way to identify illicit objects, it may also

188. See *TED Prize Goes to Archaeologist Who Combats Looting with Satellite Technology*, N.Y. TIMES Nov. 8, 2015, http://www.nytimes.com/2015/11/09/arts/international/ted-grant-goes-to-archaeologist-who-combats-looting-with-satellite-technology.html?_r=1. In 2015, TED granted Dr. Sarah Parcak funding to further her work in tracking the looting of archeological sites using satellite imagery. While the nature of the project is to track looting, Dr. Parcak has recognized that it may be possible to eventually use soil analysis to match a looted item with its location of excavation.

189. See Timor Tusray, *Unearthing the Evidence: How Soil Analysis will Revolutionize the National Stolen Properties Act*, CTR. FOR ART LAW (Dec. 18, 2015), <https://itsartlaw.com/author/timurtusray1/>.

190. See *id.* Tusray provides a more detailed description of soil analysis and its application to protecting cultural heritage.

191. *Id.*

192. *Id.* Although critics may suggest that soil analysis will prompt smugglers to clean objects prior to entering the U.S., soil technology is able to analyze even trace amounts of soil that are not visible to the human eye. *Id.*

provide essential evidence to prosecute entire trafficking networks. Soil analysis has been used by law enforcement in investigating ivory trafficking, where multiple soil types found on a single tusk allowed officials to not only trace a tusk back to its original herd, but aggregating soil samples from multiple tusks also allowed officials to identify common trafficking routes.¹⁹³ Similarly, antiquities are stored in various spots as they are trafficked across borders; law enforcement may likewise use soil samples to identify common routes used to traffic cultural property from Syria to the United States. Routes used to smuggle cultural property across borders are also used to smuggle drugs and weapons.¹⁹⁴ Thus, soil analysis may provide valuable insight into contraband trafficking as well.

The use of soil analysis to identify illicit antiquities may also prove difficult, as a sufficient database of soil samples from around the globe is necessary to match cultural property with its location of origin. Establishing a sufficient database may be easy and done relatively quickly, though. Databases of soil types already exist, including Middle Eastern soil samples.¹⁹⁵ Furthermore, there are individuals working worldwide to prevent cultural destruction, including in dangerous areas of Syria. It is a relatively small task to collect soil samples and submit them to an international database, and the database would have great utility in combating cultural property trafficking.¹⁹⁶

B. Focusing on Criminal Prosecution

In the instances when an individual has been caught buying or selling illicit cultural property, few prosecutions have successfully held the individual criminally responsible for their actions. Criminal laws require the government to bear the burden of proving that the purchaser had knowledge that their actions violated the law. Proving knowledge is difficult in most theft prosecutions, but is even more so in cases of undocumented antiquities.¹⁹⁷

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* Use of soil analysis technology, however, may lead traffickers to take greater measures to ensure that all soil traces are removed prior to import, eliminating hope of connecting an object to its place of origin.

197. Leila Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 FORDHAM INT'L PROP. MEDIA & ENT. L.J. 729, 758 (2014); *Controlling the Int'l Market in Antiquities*, *supra* note 25, at 179; see U.S. v. An Antique Platter of Gold, 991 F. Supp. 222 (S.D.N.Y. 1997); see also Mueller, *supra* note 40.

As a result of the difficulty in establishing the elements required for a criminal prosecution, most cases involving looted antiquities have been brought as civil forfeitures or private replevin claims.¹⁹⁸ The lower burden of proof and reduced mental state in civil actions makes it easier to recover objects than through criminal prosecutions. Since 2007, ICE has facilitated thirty-eight repatriations, but few of these cases have resulted in arrests, indictments, prosecutions, or convictions.¹⁹⁹

Returning cultural property to its country of origin is a valid objective, but ultimately is of limited utility. By the time an object is subject to recovery, its informational value is irredeemably reduced by the destruction of context caused by its theft, and returning the object does not return the money that a terrorist organization earned through the sale. With few exceptions, repatriated objects are relatively small and mundane, and their return can never repair the harm that was caused by their initial removal and sale.²⁰⁰

Most importantly, civil forfeiture does not deter dealers from trading in illegal cultural property.²⁰¹ Market participants must face the threat of an additional monetary penalty or a prison sentence to be effectively deterred from trading in Syrian antiquities; mere forfeiture is not sufficient to achieve this objective.²⁰² It is therefore imperative that the United States put a greater focus on holding individuals criminally accountable for trading in illicit antiquities in order to reduce the market.

Amending RICO to include criminal penalties for cultural property trafficking will enhance the likelihood of successful criminal prosecutions and will increase the severity of the resulting penalties.²⁰³

198. *Controlling the Int'l Market in Antiquities*, *supra* note 25, at 180.

199. #CULTUREUNDERTHREAT, *supra* note 14, at 27.

200. Repatriation of antiquities has been beneficial for U.S. diplomacy, “[b]ut a photo op is hardly a deterrent for smugglers.” See Abby Seiff, *Looted Beauty Bolstered by A Growing Body of Int'l & Domestic Law, More Countries Are Successfully Gaining the Return of Looted Cultural Treasures*, ABA J., July 1 2014, http://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasur Repatriation of antiquities has been beneficial for U.S. diplomacy, “[b]ut a photo op is hardly a deterrent for smugglers.” Further, repatriation imposes the unforeseen cost of long-term curation on the country. Brodie, *supra* note 25, at 324.

201. See Brodie, *supra* text accompanying notes 110–11.

202. See Brodie, *supra* note 25, at 325.

203. Racketeer Influenced Corruption Act, 18 U.S.C. §§ 1961–68 (2014). Among RICO’s purposes is “to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in

Prosecuting traffickers under RICO will not eliminate the need to prove the defendant's knowledge, but it increases law enforcement's ability to do so.²⁰⁴ A successful criminal RICO prosecution requires proving that a defendant engaged in the illegal conduct of an enterprise²⁰⁵ through a pattern of racketeering activity.²⁰⁶ The list of racketeering activities laid out in section 1961(1) constitutes the requisite predicate acts to bring a RICO charge.²⁰⁷ H.R. 1493 and the CPIA should be added to the list of predicate offenses in section 1961(1). Adding these will put cultural property trafficking in the same category as other serious criminal offenses, such as weapons and drug trafficking, and will make it a liable offense for money laundering and racketeering.

RICO makes a single prosecution of multiple defendants much easier by expanding the concept and application of traditional conspiracy law. By having to prove only the defendant's "association in fact" to an enterprise, as opposed to proving a single agreement or common objective as is necessary in a traditional conspiracy, it is much easier to convict multiple defendants for crimes, even diverse ones, that are committed in furtherance of a criminal enterprise.²⁰⁸ Thus, amending RICO's list of predicate acts to include cultural property crimes will make it much easier to prosecute entire cultural property trafficking networks at once.

The simultaneous prosecution of an entire trafficking network has a number of benefits. First, it will efficiently eliminate entire trafficking networks at once by dismantling the foundations of organized criminal groups, instead of individually prosecuting each defendant. Individual prosecutions are historically ineffective to combat organized crime, as a new leader typically stands ready to replace a convicted predecessor.

organized crime." JIMMY GURULÉ, *COMPLEX CRIMINAL LITIGATION: PROSECUTING DRUG ENTERPRISES & ORGANIZED CRIME* 50 (3rd ed. 2016).

204. Indictment under RICO does not require any *mens rea* beyond that necessary for the predicate act. *See* U.S. v. Scotto, 641 F.2d 47, 55–56 (2nd Cir. 1980).

205. 18 U.S.C. § 1961(4). An "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

206. *See* 18 U.S.C. § 1962(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (holding that a "pattern of racketeering activity" requires at least two acts of racketeering activity committed within ten years of each other); *H.J., Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (stating that Congress intended a fairly flexible concept of a pattern).

207. 18 U.S.C. § 1961(1).

208. *See* U.S. v. Griffin, 660 F.2d 996, 999 (4th Cir. 1981) (stating that the prosecution must only show the existence of association in fact to establish an enterprise, not that there was a single agreement or common objective between individuals, as is required to prosecute a conspiracy).

An investigation that aims at bringing down an entire trafficking network, as opposed to a single defendant engaged in selling illicit antiquities, will incentivize the government to increase the resources allotted to the investigation. That, in turn, will increase the likelihood of establishing the defendant's knowledge.

Moreover, presenting the crime to the court in its full context will help to establish that the defendant had requisite knowledge to hold him criminally accountable. Understanding the defendant's crime in the context of an entire trafficking network and a criminal career, rather than as one isolated instance of selling a looted antiquity, makes it easier to establish the defendant's knowledge.

For instance, if H.R. 1493 is added to the list of section 1961(1) predicate offenses, and an individual is charged with RICO for the predicate offense of trafficking Syrian cultural property, the prosecution must first prove the existence of an enterprise by showing the defendant's "association in fact" to an enterprise. A traditional conspiracy requires proving a single agreement or common objective, and it would be very difficult to show that ISIS had the same objective as the traffickers who had the same objective as U.S. sellers of Syrian antiquities.²⁰⁹ Instead, showing only that these individuals worked together to facilitate the illegal trafficking and sale would be far easier. Next, the prosecutor must establish that the enterprise engaged in, or its activities affected, interstate or foreign commerce by showing how Syrian artifacts that are illegally brought into the United States and across state lines affect the market for legal cigarettes. The prosecutor must then show that the defendants were employed by or associated with the enterprise. This includes individuals who supplied the enterprise with the antiquities and profited from trafficking the antiquities or selling the antiquities. Then, the prosecutor must establish that the defendants conducted or participated, directly or indirectly, in the conduct of the affairs of the enterprise. Finally, the prosecutor would need to show that the defendants participated in the affairs of the enterprise through a pattern of racketeering activity. This would be satisfied by showing that the individual aided in trafficking or selling Syrian antiquities pursuant to H.R. 1493 two or more times within ten years of each offense.

Prosecutors may use RICO's enhanced sanctions to completely eliminate whole trafficking networks and to serve as a deterrent.

209. *Id.*

Those found guilty of racketeering may be fined up to \$25,000; sentenced to twenty years in prison per racketeering count; and the racketeer must forfeit all ill-gotten gains and interest in any business gained through the pattern of racketeering activity.²¹⁰ The defendant must forfeit to the U.S. “any interest . . . acquired . . . in violation of § 1962; any interest in . . . any enterprise . . . in violation of § 1962; and any property constituting, or derived from, any proceeds . . . from racketeering activity . . . in violation of § 1962.”²¹¹ Additionally, the defendant may be “fined not more than twice the gross profits or other proceeds.”²¹² These measures typically result in the offender paying more in fines than the value of the contraband, taking the profit out of the illegal cultural property trade. Further, offenders who face substantial punishment are more inclined to cooperate with law enforcement than defendants facing a light penalty.²¹³ Even when a large portion of the criminal network is located outside of the United States and may not become subject to domestic RICO prosecution, eliminating U.S. sellers of Syrian antiquities by draining all of their resources will prevent the international network from selling the antiquities in the United States. Because the United States is one of the leading buyers of illegal antiquities, it follows then that this will eliminate a significant amount of the network’s business, and will help to prevent the looting of Syrian antiquities. Thus, RICO prosecutions will prevent cultural property trafficking from being a low-risk, high-profit crime.

CONCLUSION

Purchasing pillaged antiquities incentivizes the looting of archaeological sites and finances terrorist organizations. As one of the world’s largest antiquities markets, the United States has the responsibility to reduce the demand for illicit antiquities. Although the CPIA, NSPA, PPICP, and section 2339A provide a meaningful legal framework to do so, these laws are ineffectively implemented. The United States must increase its use of investigative technology such as soil analysis to successfully identify illicit cultural property at the border. Further, amending RICO to include cultural property crimes will facilitate the

210. 18 U.S.C. § 1963(a)(1)-(3).

211. *Id.*

212. *Id.*

213. Testimony of Dan Ashe, Director, U.S. Fish & Wildlife Service, Department of the Interior, Before the Senate Committee on Foreign Relations, Subcommittee (May 21, 2014), <https://www.fws.gov/laws//Testimony/displaytestimony.cfm?ID=243>.

successful prosecution of entire trafficking networks and deter participation in the market. The looting of archaeological sites to fund terrorism is not a problem that started with ISIS, and is not a problem that will end with ISIS. The United States must strengthen and harmonize its efforts to combat cultural property trafficking in order to preserve the world's heritage for generations to come.