

# ILL-GOTTEN GAINS: A RESPONSE TO THE ISLAMIC STATE’S PROFITS FROM THE ILLICIT ANTIQUITIES MARKET

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*The illicit antiquities market is a thriving international enterprise that has the potential to fuel wide-scale criminal and terrorist activity. Nonetheless, the economic and symbolic impact of cultural property exploitation has been largely overlooked.*

*This Note explores the role that the illegal antiquities market can and does play in facilitating terrorist activities, particularly in ISIS-controlled areas of the Middle East. It addresses the regulatory obstacles uniquely inherent to the trade of cultural property, and examines international, national, and online intermediary responses to looting and the market.*

*Finally, this Note proposes a multi-faceted, counteractive response to the trade. First, the Note highlights the potential for online intermediaries to serve as powerful choke points. It then draws attention to the undertheorized and underutilized mechanisms of U.S. domestic law that are readily employable to combat the illicit trade. Lastly, this Note emphasizes the important function that education can have in reducing consumer demand, and consequently, in disincentivizing participation at every step along the trade.*

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## INTRODUCTION

There is an extensive global tradition of antiquities<sup>1</sup> looting<sup>2</sup> and trading, especially during times of conflict and conquest.<sup>3</sup> The Assyrians plundered Babylon,<sup>4</sup> Spanish conquistadors looted Incan gold,<sup>5</sup> Napoleon's conquests filled the Louvre,<sup>6</sup> and locals turned to looting in the aftermath of the First Gulf War.<sup>7</sup>

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1. Antiquities are broadly defined as archaeological or paleontological items that are at least a century old, and provide information about prehistoric and historic cultures. JAY S. ALBANESE, *TRANSNATIONAL CRIME AND THE 21<sup>ST</sup> CENTURY: CRIMINAL ENTERPRISE, CORRUPTION, AND OPPORTUNITY* 30 (2011).

2. In a 2013 survey of 2,358 field archaeologists, an overwhelming 89.6% said antiquities looting occurs in all countries and 78.5% had personally encountered looting. Blythe Bowman Proulx, *Looting Robs Us of Knowledge*, *SAVING ANTIQUITIES FOR EVERYONE* (2013), <http://savingantiquities.org/safe-resources/facts-figures/>.

3. LOUISE I. SHELLEY, *DIRTY ENTANGLEMENTS: CORRUPTION, CRIME, AND TERRORISM* 261 (2014). The illegal-antiquities trade has an estimated annual value between \$3.4 and \$6.3 billion. *Metropolitan Museum Event: Conflict Antiquities, Panel 1*, COMMITTEE FOR CULTURAL POL'Y (Oct. 28, 2015), <http://committeeforculturalpolicy.org/metropolitan-museum-event-conflict-antiquities-panel-1/>.

4. *THE CAMBRIDGE ANCIENT HISTORY, VOLUME 3, PART 2: THE ASSYRIAN AND BABYLONIAN EMPIRES AND OTHER STATES OF THE NEAR EAST FROM THE EIGHTH TO THE SIXTH CENTURIES B.C.* 38 (John Boardman et al. eds., 2d ed. 1991).

5. Amy Gazin-Schwartz, *All is Not Lost in ISIS's Attempt to Smash the Past*, *THE CONVERSATION* (Mar. 18, 2015, 6:17 AM), <http://theconversation.com/all-is-not-lost-in-isis-attempt-to-smash-the-past-38743>.

6. SHELLEY, *supra* note 3, at 261.

Though the trade is deeply rooted and has spanned civilizations, modern-day technological, economic, and political developments have fostered the growth of the black market.<sup>8</sup> Governments have largely deregulated their economies and opened their borders to porous international trade.<sup>9</sup> Additionally, booming online interconnectivity has democratized<sup>10</sup> and expanded the reaches of the illicit market.<sup>11</sup> As a result, twentieth-century regulatory mechanisms are largely outdated and ineffective.

Part I of this Note examines the Islamic State's involvement in the antiquities market. Subsequently, Part II discusses the unique regulatory obstacles that plague the antiquities trade. Thereafter, Parts III and IV discuss recent international and national responses to the influx of terrorism-funding black market antiquities, and Part V explores various efforts by online intermediaries to combat illicit antiquity listings and sales. Lastly, Part VI proposes a tripartite, consumer-targeted approach to combat the trade.

### I. ISIS AND THE TRADE

Antiquities are a natural resource “ripe for extraction and profit.”<sup>12</sup> Consequently, involvement in the illicit antiquities market has become a convenient fundraising tool for terrorist organizations.<sup>13</sup> Instances of cultural

7. Russell Howard et al., *Digging in and Trafficking Out: How the Destruction of Cultural Heritage Funds Terrorism*, CTC SENTINEL, Feb. 2015, 14, at 14.

8. MOISÉS NAÍM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS, AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 4–7 (2005). This Note uses the terms “black market” and “illicit market” to refer to the illegal face of the greater antiquities market. In reality, many goods travel through both the illegal and legal facets of the market. JAMES A.R. NAFZIGER ET AL., CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS 217 (2010).

9. NAÍM, *supra* note 8, at 4, 179–80.

10. Alex W. Barker, *Ethics, E-Commerce, and the Future of the Past*, SAA BULL. (Jan. 2000), <http://www.saa.org/Portals/0/SAA/publications/SAAbulletin/18-1/saa13.html>; see also Laura Reston, *Is the Internet the New Frontier for Luxury Goods Sales?*, BOSTON.COM (July 15, 2014), <http://www.boston.com/business/personal-finance/2014/07/15/the-internet-the-new-frontier-for-luxury-goods-sales/7vkMqDMv0Sd4yFuIEmzAxJ/story.html> (discussing Sotheby's partnership with eBay and the encroachment of the Internet on the art-auction world).

11. NAÍM, *supra* note 8, at 4.

12. Ben Taub, *The Real Value of the ISIS Antiquities Trade*, NEW YORKER (Dec. 4, 2015), <http://www.newyorker.com/news/news-desk/the-real-value-of-the-isis-antiquities-trade>.

13. Terrorist organizations directly engage with the trade. See SHELLEY, *supra* note 3, at 31 (describing an attempt by Mohammad Atta, the mastermind behind the 9/11 attack, to raise money to pay for flying lessons by selling stolen antiquities from Afghanistan); Tina Nguyen, *Did Hobby Lobby's C.E.O. Unknowingly Sponsor Terrorism?*, VANITY FAIR (Oct. 29, 2015, 10:04 AM), <http://www.vanityfair.com/news/2015/10/hobby-lobby-ceo-antiquities-terrorism> (noting al-Qaeda's decade-long looting enterprise). Even more often, terrorist organizations indirectly profit from market activities that take place in the jurisdictions they control by taxing or demanding a cut from such activities. See *Following the Money: Examining Current Terrorist Financing Trends and the Threat to the Homeland: Hearing Before the Subcomm. on Counterterrorism & Intelligence of the H.*

heritage looting and destruction in Iraq and Syria have multiplied rapidly since the outbreak of the Syrian Civil War in 2011<sup>14</sup> and the subsequent rise of increasingly well-organized terrorist organizations.<sup>15</sup> The Islamic State of Iraq and Syria (“ISIS”),<sup>16</sup> in particular, continues to capitalize upon its geographic position in the cradle of civilization<sup>17</sup> by invading archaeological sites in Iraq and Syria,<sup>18</sup> looting anything with revenue potential,<sup>19</sup> and destroying what remains.<sup>20</sup> The media is

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*Comm. on Homeland Sec.*, 114th Cong. 3 (2016) (statement of Deborah Lehr, Founder and Chairman, The Antiquities Coalition); *Episode 667: Auditing ISIS*, NPR: PLANET MONEY (Dec. 4, 2015, 10:07 PM), <http://www.npr.org/sections/money/2015/12/04/458524627/episode-667-auditing-isis>; Gretchen Peters, *Crime and Insurgency in the Tribal Areas of Afghanistan and Pakistan* 36–37, COMBATING TERRORISM CTR., [https://www.ctc.usma.edu/v2/wp-content/uploads/2010/10/Crime-and-Insurgency\\_Final.pdf](https://www.ctc.usma.edu/v2/wp-content/uploads/2010/10/Crime-and-Insurgency_Final.pdf).

14. Brian I. Daniels & Katharyn Hanson, *Archaeological Site Looting in Syria and Iraq: A Review of the Evidence*, in COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD’S HERITAGE 83, 83 (France Desmarais ed., 2015).

15. Eric Fish, *Can the World Save Antiquities Under Terrorist Threat?*, ASIA SOC’Y (Sept. 24, 2015), <http://asiasociety.org/blog/asia/can-world-save-antiquities-under-terrorist-threat>. Terrorist organizations and opposition groups are not the only groups involved in antiquity plundering. In Syria, even the Assad regime turned to antiquities dealing to economically buttress itself in the wake of civil war. Howard et al., *supra* note 7, at 15.

16. The Islamic State in Iraq and Syria (“ISIS”) is otherwise known as the Islamic State of Iraq and the Levant (“ISIL”), Islamic State in Iraq and al-Sham (“ISIS”), Da’ish, Daesh, and the Islamic State. Amanda Bennett, *Daesh? ISIS? Islamic State? Why What We Call the Paris Attackers Matters*, WASH. POST (Nov. 25, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/11/25/daesh-isis-islamic-state-why-what-we-call-the-paris-attackers-matters/>; Faisal Irshaid, *Isis, Isil, IS or Daesh? One Group, Many Names*, BBC (Dec. 2, 2015), <http://www.bbc.com/news/world-middle-east-27994277>. The terrorist start-up, which holds 100 times more territory than al-Qaida ever did, continues to expand and proclaim itself a “caliphate.” Bennett, *supra*; Steve LaTourette & Sarah Chamberlain, *We Can’t Ignore the World*, U.S. NEWS (July 1, 2015, 12:30 PM), <http://www.usnews.com/opinion/blogs/world-report/2015/07/01/the-world-needs-us-leadership-americans-must-remain-engaged>.

17. Remnants from the ancient Egyptian, Babylonian, Persian, Greek, Roman, Umayyad, and Ottoman empires are buried beneath Middle Eastern soil, and roughly 4,500 archaeological sites lie within ISIS-controlled territory. Mike Giglio & Munzer al-Awad, *Inside the Underground Trade to Sell Off Syria’s History*, BUZZFEED NEWS (July 30, 2015, 9:29 AM), [http://www.buzzfeed.com/mikegiglio/the-trade-in-stolen-syrian-artifacts#\\_qpKrLjw4JW](http://www.buzzfeed.com/mikegiglio/the-trade-in-stolen-syrian-artifacts#_qpKrLjw4JW); Nguyen, *supra* note 13.

18. For a description of the major sites ISIS has plundered, damaged, or destroyed, see Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT’L GEOGRAPHIC (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>.

19. Valuation estimates of black market sales are highly speculative. Howard et al., *supra* note 7, at 14 nn.8–10 (highlighting the lack of accurate evidence available to assess the revenue ISIS garners from its involvement in the antiquities trade). But the market for Near Eastern antiquities is undeniably prosperous, and recent reports list

flooded with ISIS's propagandistic displays of site destruction,<sup>21</sup> but little attention is paid to ISIS's expanding role in the antiquities black market.<sup>22</sup> Destruction does not generate revenue—looting does—and ISIS has situated itself in a prime position to be the foremost supplier of Iraqi and Syrian artifacts.<sup>23</sup> Mosaics, coins, cuneiform tablets, glass, and figurines are easily transportable, inconspicuous

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proceeds from involvement with the antiquities trade among ISIS's most profitable sources of revenue. *Terrorist Financing and the Islamic State: Testimony Submitted to the H. Comm. on Fin. Servs.*, 113th Cong. 10–11 (2014), <http://www.washingtoninstitute.org/uploads/Documents/testimony/LevittTestimony20141113.pdf> (statement of Matthew Levitt, Fromer-Wexler Fellow and Director, Stein Program on Counterterrorism and Intelligence, The Washington Institute for Near East Policy); David Kohn, *ISIS's Looting Campaign*, *NEW YORKER* (Oct. 14, 2014), <http://www.newyorker.com/tech/elements/isis-looting-campaign-iraq-syria> (a miniature Mesopotamian lion statue from the region sold for \$57 million in 2007); *Iraq, SAVING ANTIQUITIES FOR EVERYONE*, <http://savingantiquities.org/a-global-concern/iraq/> (last visited Sept. 17, 2016) (a 2014 Sotheby's Arts of the Islamic World auction grossed £6,980,175 and a 2014 Christie's Arts & Textiles of the Islamic and Indian Worlds auction grossed £1,318,813).

20. Anne Barnard, *Race in Iraq and Syria to Record and Shield Art Falling to ISIS*, *N.Y. TIMES* (Mar. 8, 2015), [http://www.nytimes.com/2015/03/09/world/middleeast/race-in-iraq-and-syria-to-record-and-shield-art-falling-to-isis.html?\\_r=0](http://www.nytimes.com/2015/03/09/world/middleeast/race-in-iraq-and-syria-to-record-and-shield-art-falling-to-isis.html?_r=0); Mostafa Heddaya, *Misreporting of Islamic State Looting Does Damage*, *BLOUIN ART INFO* (Feb. 27, 2015), <http://blogs.artinfo.com/artintheair/2015/02/27/misreporting-of-islamic-state-looting-does-damage/>. In addition to advertising its cultural cleansing mission, ISIS's destructive efforts emphasize the imminent scarcity of cultural-heritage goods. See Yaya J. Fanusie & Alexander Joffe, *Monumental Fight: Countering the Islamic State's Antiquities Trafficking* 8, *CTR. ON SANCTIONS & ILLICIT FIN. AT FOUND. FOR DEF. OF DEMOCRACIES*, <http://docs.house.gov/meetings/FA/FA18/20151117/104202/HHRG-114-FA18-20151117-SD001.pdf>. While such messages may encourage combative efforts, they may also drive up the price of black market goods from the region, potentially supplying ISIS with inflated profits. *See id.*

21. *See, e.g.*, Salma Abdelaziz, *ISIS Publicly Smashes Syrian Artifacts*, *CNN* (July 3, 2015, 11:12 AM), <http://www.cnn.com/2015/07/02/world/isis-syrian-artifacts/>; Sarah Almkhtar, *The Strategy Behind the Islamic State's Destruction of Ancient Sites*, *N.Y. TIMES* (Mar. 28, 2016), [http://www.nytimes.com/interactive/2015/06/29/world/middleeast/isis-historic-sites-control.html?\\_r=0](http://www.nytimes.com/interactive/2015/06/29/world/middleeast/isis-historic-sites-control.html?_r=0). The images of destruction that ISIS has released are not always accurate. The ancient Assyrian statues and monuments that ISIS members seemingly destroy in their propagandistic Mosul Museum video, for example, have been exposed as imitation plaster copies. Andrea Watson, *Islamic State and the 'Blood Antique' Trade*, *BBC CULTURE* (Apr. 2, 2015), <http://www.bbc.com/culture/story/20150402-is-and-the-blood-antique-trade>.

22. *See* Robert Fisk, *ISIS Profits from Destruction of Antiquities by Selling Relics to Dealers – and then Blowing up the Buildings They Come from to Conceal the Evidence of Looting*, *INDEPENDENT* (Sept. 2, 2015), <http://www.independent.co.uk/voices/isis-profits-from-destruction-of-antiquities-by-selling-relics-to-dealers-and-then-blowing-up-the-10483421.html>.

23. *See id.*

items that sell quickly and are readily unearthed in the culturally rich, ISIS-controlled areas of Iraq and Syria.<sup>24</sup>

Originally, ISIS incentivized locals to plunder ancient sites and sell their findings on the black market,<sup>25</sup> applying an estimated 12.5–50% tax to such sales.<sup>26</sup> Recently declassified documents obtained during a U.S. raid reveal that Abu Sayyaf, a high-ranking ISIS officer originally charged with managing ISIS's oil-smuggling operations, assumed responsibility over ISIS's antiquities-trafficking division in late 2014.<sup>27</sup> In early 2015, under Sayyaf's command, ISIS institutionalized artifact looting,<sup>28</sup> and now maintains control at every step of the trade<sup>29</sup>—a clear indication of the industry's economic vitality.<sup>30</sup>

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24. See Daniela Deane, *Islamic State is Selling Looted Syrian Art in London to Fund Its Fight*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/world/is-looted-syrian-art-showing-up-in-london-to-fund-activities/2015/02/25/785ab630-bcd0-11e4-b274-e5209a3bc9a9\\_story.html](https://www.washingtonpost.com/world/is-looted-syrian-art-showing-up-in-london-to-fund-activities/2015/02/25/785ab630-bcd0-11e4-b274-e5209a3bc9a9_story.html); Janine Di Giovanni et al., *How Does ISIS Fund Its Reign of Terror?*, NEWSWEEK (Nov. 6, 2014, 7:30 AM), <http://www.newsweek.com/2014/11/14/how-does-isis-fund-its-reign-terror-282607.html>; Watson, *supra* note 21. Additionally, though well-known, documented goods draw significant unwanted attention, large-scale, eye-catching pieces are also being trafficked. See Hugh Eakin, *Treasure Hunt*, NEW YORKER (Dec. 17, 2007), <http://www.newyorker.com/magazine/2007/12/17/treasure-hunt-3>; *Episode 667: Auditing ISIS*, *supra* note 13 (revealing that a team from the State Department documenting cultural heritage goods leaving conflict regions in the Middle East received a photograph of a massive Greco-Roman mosaic worth millions from its traffickers).

25. There are two general categories of diggers and looters in ISIS-controlled territory, and both are largely comprised of victims. See Giglio & al-Awad, *supra* note 17. Some are driven by desperation and hardship. *Id.* As one Syrian explained, “[W]e feel bad because we are stealing our history and selling it for a cheap price . . . [b]ut we have become homeless and jobless, so we don’t care.” *Id.* (internal quotation marks omitted). Others are given an ultimatum from ISIS—cooperate or be killed. *Id.* True to its word, in August 2015, ISIS decapitated Khaled al-Asaad, a renowned archaeologist and the former chief of antiquities at Palmyra, who refused to lead ISIS militants to artifacts. Murad Sezer, *Islamic State Militants Behead Top Archaeologist in Palmyra*, NEWSWEEK (Aug. 9, 2015, 9:11 AM), <http://www.newsweek.com/islamic-state-militants-behead-top-archaeologist-palmyra-364108>.

26. Howard et al., *supra* note 7, at 16; Amr Al-Azm et al., Opinion, *ISIS’ Antiquities Sideline*, N.Y. TIMES (Sept. 2, 2014), [http://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html?\\_r=1](http://www.nytimes.com/2014/09/03/opinion/isis-antiquities-sideline.html?_r=1).

27. Taub, *supra* note 12.

28. Under Sayyaf’s orders, teams were sent to investigate sites and evaluate the potential for profit buried beneath. *Id.* When a site was flagged as potentially lucrative, locals on the ISIS payroll were dispatched to excavate, with a percentage of the proceeds from all sales going to Diwan al-Rikaz, ISIS’s Department of Antiquities. *Id.*

29. Howard et al., *supra* note 7, at 16. The Middle East Forum recently obtained a copy of ISIS’s municipal budget for the Syrian province of Deir ez-Zor. *Episode 667: Auditing ISIS*, *supra* note 13. The budget highlights ISIS’s bureaucratic approach to looting: it describes receipts from antiquities transactions, photographs of goods for sale, the official looting permit process, the declaration requirement, and the tax applied to finds. *Id.* ISIS has even developed direct connections with buyers, limiting artifact exposure and risk of seizure. See Oliver Moody, *ISIS Fills War Chest by Selling Looted Antiquities to the West*,

The magnitude of ISIS's looting is unprecedented,<sup>31</sup> and although the antiquities trade is unsustainable,<sup>32</sup> ISIS's looting has the potential to continue indefinitely due to the organization's geographically opportune position.<sup>33</sup> To compensate for losses from United States-led airstrikes on ISIS-controlled oil infrastructure, the terrorist organization has increased its reliance on, and involvement in, the illicit antiquities revenue stream.<sup>34</sup>

Geospatial technology<sup>35</sup> has shed an alarming light on the aggressive nature of the looting campaigns in Syria and Iraq.<sup>36</sup> All six of Syria's UNESCO<sup>37</sup>

THE TIMES (Dec. 17, 2014, 12:01 AM), <http://www.thetimes.co.uk/tto/news/world/middleeast/article4299572.ece>; *The Smugglers, Dealers and Buyers of Antiquities Stolen by ISIS*, WNYC (Feb. 18, 2015), <http://www.wnyc.org/story/smugglers-dealers-and-buyers-stolen-antiquities-funding-isis/>.

30. Proof of expansive and systematic looting is easily discernible from satellite images of sites in ISIS-controlled areas. Julian Pecquet, *Congress Deals Blow to ISIS Looting in Syria*, U.S. NEWS (June 2, 2015, 1:28 PM), <http://www.usnews.com/news/articles/2015/06/02/congress-deals-blow-to-islamic-state-group-looting-in-syria>. Moreover, during the six months that Abu Sayyaf ran ISIS's antiquities division, he oversaw the collection of at least \$265,000 in antiquity taxes from the Syrian branch alone. Taub, *supra* note 12. Some have argued that, based on this number, antiquities profits are relatively trivial in the grand scheme of ISIS's financial network, but as a speaker for the U.S. State Department has made clear, counter-efforts must aim to cut off ISIS's revenue streams, no matter how small. *See id.*

31. Hugh Naylor, *Syria's Ancient Sites Were Already Damaged by War. Now They're Being Looted*, WASH. POST (Dec. 20, 2014), [https://www.washingtonpost.com/world/middle\\_east/syrias-ancient-sites-were-already-damaged-by-war-now-theyre-being-looted/2014/12/19/117911a8-2556-4c84-90f1-8034e8e8a001\\_story.html](https://www.washingtonpost.com/world/middle_east/syrias-ancient-sites-were-already-damaged-by-war-now-theyre-being-looted/2014/12/19/117911a8-2556-4c84-90f1-8034e8e8a001_story.html). ISIS's formalized, wide-scale, "bulldozer archaeolog[ical]" operation utilizes heavy-duty machinery, hydraulic diggers, dynamite, metal detectors, scanners, and on-site archaeologists. Giglio & al-Awad, *supra* note 17; Watson, *supra* note 21.

32. Neil Brodie, *Illicit Antiquities: The Theft of Culture*, in HERITAGE, MUSEUMS AND GALLERIES: AN INTRODUCTORY READER 122, 122 (Gerard Corsane ed., 2005).

33. *See* Pecquet, *supra* note 30.

34. Howard et al., *supra* note 7, at 16; The Editorial Board, Editorial, *Why is Money Still Flowing to ISIS?*, N.Y. TIMES (Oct. 10, 2015), <http://www.nytimes.com/2015/10/11/opinion/sunday/why-is-money-still-flowing-to-isis.html>. An added benefit of using the antiquities trade to generate revenue is that the trade does not usually provoke military intervention; "[u]nlike oil facilities, excavation sites are not likely to be targeted by missile strikes." Fanusie & Joffe, *supra* note 20, at 6.

35. Geospatial technology employs satellites to monitor changes in the landscape of sites over time. *Ancient History, Modern Destruction: Assessing the Status of Syria's Tentative World Heritage Sites Using High-Resolution Satellite Imagery Part One*, AAAS GEOSPATIAL TECHNOLOGIES AND HUMAN RTS PROJECT (Dec. 2014), [http://www.aaas.org/sites/default/files/content\\_files/AAAS-SyrianTWHS-122014.pdf](http://www.aaas.org/sites/default/files/content_files/AAAS-SyrianTWHS-122014.pdf) [hereinafter *Ancient History*].

36. *Id.*

37. The United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations' intellectual branch, was established after World War II to foster international relationships, promote peace and sustainable development, and broaden

World Heritage Sites<sup>38</sup> have been heavily damaged and plundered.<sup>39</sup> Furthermore, of the twelve sites that Syria has nominated to the UNESCO Tentative World Heritage List, eight show evidence of extensive looting and destruction.<sup>40</sup> Similarly, two of the five UNESCO World Heritage Sites, and two of the eleven Tentative World Heritage Sites in Iraq have been damaged and likely pillaged.<sup>41</sup>

ISIS has taken full advantage of its position in the midst of a plethora of cultural heritage manifestations. It sits in the cradle of civilization and continues to

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intellectual horizons. *Introducing UNESCO*, UNESCO, <http://en.unesco.org/about-us/introducing-unesco> (last visited Feb. 17, 2016). UNESCO grants World Heritage recognition to sites that it deems especially culturally or physically significant. World Heritage, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/about/> (last visited Feb. 17, 2016). UNESCO recognition is intended to raise general awareness and promote preservation. *Frequently Asked Questions: What Does It Mean for a Site to Be Inscribed on the List?*, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/faq/20> (last visited Feb. 17, 2016).

38. Damascus, Palmyra, Bosra, Aleppo, the Crac des Chevaliers and Qal'at Salah El-Din, and the ancient villages of Northern Syria. *Syrian Arab Republic*, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/statesparties/sy> (last visited Nov. 3, 2015).

39. Irina Bokova, Director-General, UNESCO, Address at the High-Level Conference Organized by the Asia Society, the Antiquities Coalition and the Middle East Institute 3 (Sept. 24, 2015), <http://unesdoc.unesco.org/images/0023/002347/234780e.pdf> [hereinafter Bokova Address]; see also *Ancient History*, *supra* note 35, at 5–9; Susannah Cullinane et al., *Tracking a Trail of Historical Obliteration: ISIS Trumpets Destruction of Nimrud*, CNN (Apr. 13, 2015, 8:43 PM), <http://www.cnn.com/2015/03/09/world/iraq-isis-heritage/>; Christine Mai-Duc, *Palmyra is Latest in Long List of Cultural Gems Threatened by Islamic State*, L.A. TIMES (May 21, 2015, 1:39 PM), <http://www.latimes.com/world/middleeast/la-fg-isis-heritage-sites-destroyed-20150521-htmlstory.html>.

40. Dura-Europos, the “Pompeii of the desert,” has been subjected to looting so extensive that counting individual pits on satellite images is impossible. *Ancient History*, *supra* note 35, at 5–9. Looting is also widespread at Mari, Ebla, and Apamea. *Id.* at 10–21; *Looting at Apamea Recorded via Google Earth*, TRAFFICKING CULTURE, <http://traffickingculture.org/data/data-google-earth/looting-at-apamea-recorded-via-google-earth/> (last visited Jan. 23, 2016). Raqqa has been at the center of the conflict in Syria since 2013, and has subsequently fallen victim to extensive looting and destruction. *Ancient History*, *supra* note 35, at 21–25; Franklin Lamb, “*Raqqa is Being Slaughtered Silently*,” COUNTERPUNCH (May 9, 2014), <http://www.counterpunch.org/2014/05/09/raqqa-is-being-slaughtered-silently/>. Furthermore, Qasr al-Hayr al-Sharqi has been looted and Maaloula has been sacked. Wissam Abdallah, *Syria's Ancient Sites Under Attack*, AL-MONITOR (Mar. 8, 2015), <http://www.al-monitor.com/pulse/culture/2015/03/syria-antiquities-looting.html#>; *Syrian Government Says Maaloula's Sites Sacked by Rebels*, AL-MONITOR (May 5, 2014), <http://www.al-monitor.com/pulse/security/2014/05/syria-maaloula-damage-christian-sites.html#>.

41. Affected sites include Hatra, Ashur, Nimrud, and Nineveh. See Ayad Kadhum Dawood & Abdul Razzak Aboudi, HATRA-ASHUR-SAMARRA STATE OF CONSERVATION REPORT (2016); Curry, *supra* note 18; Gianluca Mezzofiore & Arij Limam, *Iraq: Isis 'Blows Up Unesco World Heritage Assyrian Site of Ashur' Near Tikrit*, INT'L BUS. TIMES (May 28, 2015, 4:50 PM), <http://www.ibtimes.co.uk/isis-blows-unesco-world-heritage-assyrian-site-ashur-near-tikrit-1503367>.



pillage UNESCO World Heritage Site after UNESCO World Heritage Site. Moreover, it persists along its path to erase history, or alternatively, profit from it.

## II. REGULATORY OBSTACLES

The antiquities trade is deeply clandestine.<sup>42</sup> Buyers and sellers often opt to remain anonymous; provenances<sup>43</sup> and paper trails are often ambiguous or falsified;<sup>44</sup> and the distinction between legitimate and illegitimate is heavily blurred.<sup>45</sup> Furthermore, legal loopholes are pervasive,<sup>46</sup> enforcement resources are sparse,<sup>47</sup> prosecutions are rare,<sup>48</sup> and the Internet has removed virtually all geographic barriers that once confined the antiquities trade to brick-and-mortar auction houses.<sup>49</sup> These major regulatory obstacles are exacerbated by the existence of a legal facet in the market;<sup>50</sup> the role that unquenchable, primordial

42. NEIL BRODIE ET AL., *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 19 (2000); Di Giovanni et al., *supra* note 24.

43. Though the terms “provenance” and “provenience” are generally used interchangeably, in the art and museum communities “provenance” refers to the “complete chronology of ownership” of an item, whereas “provenience” refers to an artifact’s geographic find-spot. *E.g.*, Neil Brodie & Morag M. Kersel, *Wikileaks, Text, and Archaeology: The Case of the Schøyen Incantation Bowls*, in *ARCHAEOLOGY OF TEXT: ARCHAEOLOGY, TECHNOLOGY, AND ETHICS* 198, 198 (Matthew T. Rutz & Morag M. Kersel eds., 2014); Barbara T. Hoffman, *Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy*, in *ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE* 1, 6 n.34 (Barbara T. Hoffman ed., 2006).

44. For example, there is a common practice of ascribing legal export licenses to multiple pieces. *See* Morag M. Kersel, *From the Ground to the Buyer: A Market Analysis of the Illegal Trade in Antiquities*, in *ARCHAEOLOGY, CULTURAL HERITAGE AND THE ANTIQUITIES TRADE* 188, 193 (Neil Brodie et al. eds., 2006).

45. *See id.* at 189 (emphasizing the role that trafficking plays in obscuring the legal and illegal facets of the market).

46. Francesco Francioni, *Thirty Years On: Is the World Heritage Convention Ready for the 21<sup>st</sup> Century?*, 12 *ITALIAN Y.B. INT’L L.* 13, 26 (2002); *see also* BRODIE ET AL., *supra* note 42, at 32–33 (discussing good-faith loopholes that allow stolen items to enter the legal market).

47. Though the FBI employs roughly 36,000 individuals, only 14 agents and 3 trial attorneys are currently assigned to its Art Crime Unit. U.S. DEP’T OF JUSTICE, FED. BUREAU OF INV’N, *TODAY’S FBI: FACTS AND FIGURES 2013–2014* 9, 43 (2013), <https://www.fbi.gov/stats-services/publications/todays-fbi-facts-figures/facts-and-figures-031413.pdf>. By comparison, Italy’s Comando per la Tutela del Patrimonio Culturale, the largest national cultural-crimes unit in the world, employs 280 officers. Frank Viviano, *Italy’s Artifacts Police Wage Global War, Recover 137,000 Objects*, *NAT’L GEOGRAPHIC* (June 19, 2015), <http://news.nationalgeographic.com/2015/06/150618-carabinieri-morgantina-italy-art-theft-antiquities-trafficking/>; *see also*, Kersel, *supra* note 44, at 197.

48. Giglio & al-Awad, *supra* note 17.

49. *See* Barker, *supra* note 10.

50. *See* NAM, *supra* note 8, at 6 (discussing the “illusion that illicit trade is an ‘underground’ phenomenon”); *cf.* Mary Rice, *The Case Against a Legal Ivory Trade: It Will Lead to More Killing of Elephants*, *YALE ENV’T* 360 (Oct. 13, 2014), [http://e360.yale.edu/feature/counterpoint\\_the\\_case\\_against\\_a\\_legal\\_ivory\\_trade\\_it\\_will\\_lead\\_to\\_more\\_killing\\_of\\_elephants/2815/](http://e360.yale.edu/feature/counterpoint_the_case_against_a_legal_ivory_trade_it_will_lead_to_more_killing_of_elephants/2815/).

urges play in driving demand;<sup>51</sup> and the societal misconception that cultural property crimes are victimless crimes.<sup>52</sup>

#### A. *Inertia at the International Level*

The international response to ongoing and pervasive looting, though powerful in message, leaves much to be desired.

No fewer than six international conventions<sup>53</sup> have been drawn up over the years to protect cultural heritage. Alarm bells have been sounded in U.N. Security Council resolutions and in declarations by heads of state, top museums and the art world. But, despite some successes . . . the effort is hamstrung by the patchwork approach of national authorities, a failure to tackle smuggling networks head-on and a lack of even basic information about the market they trade in.<sup>54</sup>

Of the six international conventions, two are fundamentally useless in curbing the commercialization of terrorist-sourced cultural property because they rely entirely on the misplaced presumption that all parties engaged in conflict

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51. E.g. Shahan Mufti, *Spoils of War*, HARPER'S MAG. Apr. 2011, at 38, 39 ("Owning a piece of another culture's heritage seems to feed some primordial urge . . . I wondered whether the only way to truly understand this impulse is to trace such objects back to their source—to observe them being pried loose from their native lands."). Some collectors assume a trophy mentality. See Patricia Leigh Brown, *Receding Waters in California Expose Artifacts to Plundering*, N.Y. TIMES (Dec. 1 2015), <http://www.nytimes.com/2015/12/02/us/receding-waters-in-california-expose-artifacts-to-plunder.html>. Others tie their antiquarian obsessions to an unexplainable urge. BLOOD ANTIQUES (Journeyman Pictures 2009) ("If you really like a piece, you have to go for it, even if you don't make a profit on it and it has no added value.").

52. "Victimless crime" is a common, unsound justification offered by purchasers of black market antiquities. See Heather Pringle, *New Evidence Ties Illegal Antiquities Trade to Terrorism, Violent Crime*, NAT'L GEOGRAPHIC (June 13, 2014, 4:37 PM), <http://news.nationalgeographic.com/news/2014/06/140613-looting-antiquities-archaeology-cambodia-trafficking-culture/>. In reality, artifact looting and trafficking networks often overlap with and attract violence in conflict areas. See *id.*

53. UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention]; UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]; UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 37; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 42671; UNIDROIT Convention on Stolen and Illicitly Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 231 [hereinafter 1995 UNIDROIT Convention]; Second Protocol to the Hague Convention of 1954, Mar. 26, 1999, 38 I.L.M. 769.

54. Mark John, *'Blood Antiquities: A Wound the World Struggles to Staunch*, REUTERS (June 10, 2015, 7:15 AM), <http://www.reuters.com/article/2015/06/10/us-mideast-crisis-antiquities-idUSKBN00Q15Z20150610>.

value cultural heritage.<sup>55</sup> Furthermore, the two most recently adopted conventions address underwater and intangible cultural heritage, and are therefore largely irrelevant in this area.<sup>56</sup> The remaining two conventions, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention”),<sup>57</sup> and its supplement, the 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects (“1995 UNIDROIT Convention”),<sup>58</sup> lay the foundation for a potentially comprehensive international regulatory tool. The scheme they establish, however, is largely disconnected from the current global landscape and is ill-equipped to address terrorist organization involvement.

The 1970 UNESCO Convention contains both an import restriction procedure that allows a nation to request that another nation restrict the import of specified classes of its cultural material,<sup>59</sup> and a repatriation mechanism that allows a nation to request the return of an antiquity illegally trafficked out of its borders.<sup>60</sup> However, there are two significant flaws in the text of the 1970 UNESCO Convention that drastically reduce its ability to combat black market activity. First, party nations are not required to adopt the Convention in its entirety.<sup>61</sup> Accordingly, when the United States ratified the Convention in 1983 by passing the Convention on Cultural Property Implementation Act (“CCPIA”), it adopted only Articles VII(b) and IX.<sup>62</sup> Second, the Convention is purely diplomatic; it

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55. Though the 1954 Hague Convention generally orders all parties of an armed conflict to avoid attacking cultural property, refrain from using cultural property for military purposes, and abstain from unlawfully removing cultural property, the Convention envisioned a future of armed conflicts between *state* actors. 1954 Hague Convention, *supra* note 53, arts. 3, 4, 11; *see also* CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 36 (2010). As a result, only Article 4 of the 1954 Hague Convention applies to non-international armed conflicts. 1954 Hague Convention, *supra* note 53, art. 19(1). The 1999 Second Protocol restates these party obligations with more detail and creates a second, higher level of protection for cultural-heritage sites that are deemed especially important. FORREST, *supra* at 110–126; TOM VAN HAM ET AL., THE ART OF THE INTERNET: A STUDY OF ILLEGAL ONLINE TRADING IN CULTURAL GOODS 13 (2011). These schemes, however, are not likely to influence ISIS, which has embarked on a cultural cleansing mission, and has thus clearly conveyed its utter disregard for cultural heritage. Bisma Mufti, *ISIS’ Destruction of Art as a Function of State Building*, WASH. U. POL. REV. (Jan. 1, 2016), <http://www.wupr.org/2016/01/01/isis-destruction-of-art-as-a-function-of-state-building/>.

56. UNESCO Convention on the Protection of the Underwater Cultural Heritage, *supra* note 53; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, *supra* note 53.

57. *See* 1970 UNESCO Convention, *supra* note 53.

58. *See* 1995 UNIDROIT Convention, *supra* note 53.

59. 1970 UNESCO Convention, *supra* note 53, at art. 9.

60. *Id.* at art. 7(b)(ii).

61. BRODIE ET AL., *supra* note 42, at 37.

62. *The United States Implementation of the 1970 UNESCO Convention: The Convention on Cultural Property Implementation Act*, ARCHAEOLOGICAL INST. AM., [https://www.archaeological.org/pdfs/sitepreservation/CPAC\\_OverviewAIA.pdf](https://www.archaeological.org/pdfs/sitepreservation/CPAC_OverviewAIA.pdf) [hereinafter *U.S. Implementation*].

binds only party nations,<sup>63</sup> and restitution actions under the 1970 UNESCO Convention can only proceed at the intergovernmental level.<sup>64</sup>

The 1995 UNIDROIT Convention, a potentially robust complement to the 1970 UNESCO Convention,<sup>65</sup> specifically targets the recovery and restitution phases.<sup>66</sup> Unlike the 1970 UNESCO Convention, the 1995 UNIDROIT Convention places the burden on the possessor of cultural property to prove that an object in question has been legally obtained, and includes a mechanism to enforce restitutionary orders.<sup>67</sup> Not surprisingly, there are only 37 states party to this Convention.<sup>68</sup>

Ultimately, despite the potential for these international conventions to combat the trade if implemented in tandem, they only function at the state level.<sup>69</sup> Though state actors are assuredly involved in the trade,<sup>70</sup> the swelling threat to cultural heritage in the twenty-first century comes from non-state actors.<sup>71</sup>

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63. See BRODIE ET AL., *supra* note 42, at 37; Angela M.H. Schuster, *Theft of Time*, in *THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA* 10, 11 (Milbry Polk & Angela M.H. Schuster eds., 2005).

64. BRODIE ET AL., *supra* note 42, at 37.

65. The 1995 UNIDROIT Convention invokes private law. Schuster, *supra* note 63, at 12.

66. UNESCO Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *UNESCO and UNIDROIT – Cooperation in the Fight Against Illicit Traffic in Cultural Property*, U.N. Doc. CLT-2005/Conf/803/2 (June 16, 2005), <http://unesdoc.unesco.org/images/0013/001399/139969E.pdf>.

67. FORREST, *supra* note 55, at 196–219; Riccardo Pavoni, *Sovereign Immunity and the Enforcement of International Cultural Property Law*, in *ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW* 79, 81–82 (Francesco Francioni & James Gordley eds., 2013).

68. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome 1995) – Status*, UNIDROIT, <http://www.unidroit.org/status-cp> (last visited Feb. 9, 2016). The United States is not a party. *Id.*

69. See Hilary A. Soderland & Ian A. Lilley, *The Fusion of Law and Ethics in Cultural Heritage Management: The 21st Century Confronts Archaeology*, 40 *J. FIELD ARCHAEOLOGY* 508, 518 (2015). It is important to note, however, that principles originally drafted in treaties may rise to the level of customary international law, at which point all states that form the international community, a community which includes not only recognized nation states but also non-state groups that effectively occupy territory in sovereign nation states, become universally bound by them. See Annyssa Bellal et al., *International Law and Armed Non-State Actors in Afghanistan*, 93 *INT'L REV. RED CROSS* 47, 62–63 (2011); see also *Eritrea-Ethiopia Claims Comm'n: Partial Award Regarding Eritrea Central Front Claims 2, 4, 6, 7, 8 & 22*, 26 *R.I.A.A.* 115, 149–150 (Apr. 28, 2004) (detailing a case in which the Eritrea-Ethiopia Claims Commission relied on customary international law to punish Ethiopia for causing the destruction of the Stele of Matara during the Eritrea-Ethiopia conflict even though Ethiopia was not a party to the international instrument that explicitly prohibited such conduct).

70. See *e.g.*, *United States v. Hollinshead*, 495 F.2d 1154, 1155 (9th Cir. 1974) (describing a group of traffickers who bribed Guatemalan officers to allow them to illegally transport a pre-Columbian stele out of the country); BRODIE ET AL., *supra* note 42, at 16

### *B. Underutilized Domestic Legal Avenues*

In the United States, enforcement resources are sparse, legal burdens disfavor source nations, and prosecutions are rare.<sup>72</sup> The Convention on Cultural Property Implementation Act (“CCPIA”) and National Stolen Property Act (“NSPA”), though often invoked, impose heavy procedural burdens on claimants.<sup>73</sup> The United States’ import laws, which provide for both civil and criminal penalties, however, have the power to regulate extensively, but remain underutilized.<sup>74</sup>

On its face, the CCPIA<sup>75</sup> explicitly prohibits the importation of stolen cultural property that has been documented and inventoried by a foreign museum, religious association, or public institution, and allows the president to impose import restrictions on threatened categories of cultural material.<sup>76</sup> However, the CCPIA is not self-executing,<sup>77</sup> and does not provide for criminal sanctions.<sup>78</sup> Furthermore, though repatriation would seem like a natural complement to civil forfeiture of foreign cultural heritage property, the CCPIA requires source countries to enter into bilateral agreements with the United States in order to gain access to the United States’ repatriation process.<sup>79</sup> No countries in the Middle East have current bilateral agreements with the United States, rendering repatriation

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(describing the relationship between the illegal antiquities market and impoverished bureaucracies).

71. SHELLEY, *supra* note 3, at 261; Soderland & Lilley, *supra* note 69, at 519–20.

72. Giglio & al-Awad, *supra* note 17.

73. See 19 U.S.C. §§ 2601–13 (1982); 18 U.S.C. §§ 2314–15 (2012).

74. See, e.g., 18 U.S.C. § 542 (1994) (prohibiting the entry of goods “by the means of false statements”); 18 U.S.C. § 545 (2006) (prohibiting the importation of merchandise “contrary to law” and subjecting prohibited imports to forfeiture); see also Patty Gerstenblith, *Enforcement in Domestic Courts*, in INTERNATIONAL CULTURAL HERITAGE LAW 150, 163 (Francesco Francioni & James Gordley eds., 2013) (noting that criminal import provisions, in particular, are not frequently employed against importers of illicit antiquities).

75. *U.S. Implementation*, *supra* note 62.

76. Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 177 (2007).

77. J. Alexandra Darraby, *Art, Artifact Architecture & Museum Law*, in INTERNATIONAL TRADE 400, 400 (West ed., 2010); Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the “Getty Bronze”*, in CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW 301, 318 (Silvia Borelli & Federico Lenzerini eds., 2012).

78. Gerstenblith, *supra* note 76, at 177.

79. See Pecquet, *supra* note 30. The bilateral agreement process is onerous. Only 17 nations have been granted import restrictions under the CCPIA since its inception. *The Convention on Cultural Property Implementation Act and Restrictions on the Trade in Looted Coins* 1, LAWYERS’ FOR CULTURAL HERITAGE PRESERVATION, <http://www.culturalheritagelaw.org/Resources/Documents/2011%20Siena%20Symposium%20Brochure%20-%20web.pdf>. Agreements must also be reconsidered every five years. *Id.*

arguments to return looted Syrian and Iraqi artifacts legally groundless under the CCPIA.<sup>80</sup>

The NSPA provides for both civil and criminal causes of action in response to cultural heritage offenses. The NSPA, 18 U.S.C. § 2314–2315, is available as a prosecutorial tool if the antiquity in question: (1) is worth at least \$5,000; (2) was “stolen, converted or taken by fraud”; (3) was transported, purchased, or sold in interstate or foreign commerce; (4) by a person with knowledge that the item had been stolen.<sup>81</sup>

Despite the NSPA’s broad purpose and design,<sup>82</sup> cultural heritage cases tried under NSPA theories are almost certain to fail absent clear evidence of the item’s theft and the possessor’s subjective knowledge<sup>83</sup> of its illegal status.<sup>84</sup> Furthermore, in NSPA repatriation actions, the country seeking repatriation has the burden of proving ownership.<sup>85</sup> Contemporary nation borders rarely coincide with those of past societies, often making it impossible for a nation to prove that an artifact was sourced within its borders.<sup>86</sup>

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80. *U.S. Implementation*, *supra* note 62, at 2. There are, however, other mechanisms in play to encourage and facilitate the return of looted objects. *See Security Council Approves Resolution Targeting Sources of Financing for ISIL*, UN NEWS CTR. (Feb. 12, 2015), <http://www.un.org/apps/news/story.asp?NewsID=50067#.V2Q4WaZNBUQ>.

81. 18 U.S.C. §§ 2314–2315 (2012).

82. *United States v. Schultz*, 333 F.3d 393, 402 (2d Cir. 2003) (quoting *McElroy v. United States*, 455 U.S. 642, 655 (1982)).

83. Actual subjective knowledge is a nearly impossible element to prove. The defendant in a criminal NSPA action can almost always successfully defend himself on the ground that he did not have actual knowledge that the property in question had been stolen. *See Summary of Law-National Stolen Property Act 1*, NOAA OFFICE FOR COASTAL MANAGEMENT, <https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20National%20Stolen%20Property%20Act.pdf?redirect=301ocm> (last visited June 16, 2016).

84. *See, e.g., United States v. Hollinshead*, 495 F.2d 1154, 1155–56 (9th Cir. 1974) (affirming an NSPA conviction only in light of “overwhelming evidence that the defendants knew that it was contrary to Guatemalan law to remove the [artifact], and that the [artifact] was stolen.”).

85. *See, e.g., United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) (affirming NSPA convictions for dealing in pre-Columbian artifacts illegally trafficked out of Mexico); *cf. Gov’t of Peru v. Johnson*, 720 F. Supp. 810, 815 (C.D. Cal. 1989), *aff’d sub nom., Gov’t of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991) (holding that Peru was not entitled to the artifacts at issue because it could not prove ownership over the artifacts).

86. *See* Marion P. Forsyth, *International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation*, 8 CHL. J. INT’L L. 197, 197–98, 211 (2007) (arguing that repatriation claims are “often unsuccessful when ancient cultural borders overlap modern state boundaries.”); *Johnson*, 720 F. Supp. at 815 (holding that Peru failed to establish ownership and consequently failed to prevail on its claim because it failed to prove both that the artifacts in question came from an archaeological site located within modern-day Peru, and that those objects left Peruvian borders after 1929, when Peru’s patrimony legislation went into effect).

In contrast, U.S. import law provides for civil and criminal causes of action, but contains neither a threshold amount requirement nor stringent scienter requirements,<sup>87</sup> rendering it an effective forfeiture tool and criminal penalty source.<sup>88</sup> U.S. import law prohibits a person from trying to pass an item through customs via materially false, forged, or fraudulent documentation.<sup>89</sup> Thus, an actor who makes materially<sup>90</sup> false statements on customs forms violates U.S. import law, and subjects himself to a substantial fine, imprisonment, or some combination of both.<sup>91</sup> In some instances, absent a satisfactory explanation for making the false statements, the defendant's possession alone is sufficient to convict.<sup>92</sup> Moreover, the statute does not provide for an innocent-ownership defense.<sup>93</sup>

Despite these potentially robust legal enforcement tools, involvement in the criminal antiquities market is widely and accurately believed to be high-profit, low-risk because Western enforcement mechanisms do not efficiently combat the industry.<sup>94</sup> Available legal tools gather dust as terrorists' antiquities activities gain muster.

### C. Blurred Lines of Legality

The existence of a legal antiquities market renders effective monitoring virtually unattainable,<sup>95</sup> and the vast discrepancies in national property laws further

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87. 18 U.S.C. § 542 subjects anyone who “introduces, or attempts to introduce . . . any imported merchandise by means of any fraudulent or false . . . [document or statement] . . . as to any matter [that is] material” to fine, imprisonment, or both. 18 U.S.C. § 542 (1994). Accordingly, an actor who attempts to preserve his ignorance about the origin of an antiquity or who is otherwise unaware that he is importing an illegally looted item, could potentially be found in violation of U.S. import law if he significantly undervalues or misrepresents the origin of the item on a customs form. *See* *United States v. An Antique Platter of Gold*, 184 F.3d 131, 137, 140 (2d Cir. 1999) (finding that a misstatement about the country of origin on a customs form was material, rendering the object subject to forfeiture); *United States v. Holmquist*, 36 F.3d 154, 161 (1st Cir. 1994) (concluding that “[u]ndervaluations are by their nature materially related to the importation process, both because they may interfere with the government’s efforts to monitor and regulate the flow of goods in the United States and because they undermine the integrity of the importation process.”).

88. *See* Stefan D. Cassella, *Using the Forfeiture Laws to Protect Cultural Heritage* 10–18, <http://assetforfeiturelaw.us/wp-content/uploads/2015/12/Cultural-Property-Forfeiture-Article.pdf>.

89. 18 U.S.C. § 542.

90. A false statement is material if it “has the potential significantly [sic] to affect the integrity or operation of the importation process as a whole . . . neither actual causation nor harm to the government need be demonstrated.” *An Antique Platter of Gold*, 184 F.3d at 136 (citing *United States v. Holmquist*, 36 F.3d 154, 159 (1st Cir. 1999)). The test is whether a reasonable customs agent would deem the statements “significant to the exercise of his or her official duties.” *Id.*

91. 18 U.S.C.A. § 542.

92. 18 U.S.C. § 545 (1994).

93. *An Antique Platter of Gold*, 184 F.3d at 138–39.

94. SHELLEY, *supra* note 3, at 259.

95. VAN HAM ET AL., *supra* note 55, at 20–21.

exacerbate confusion.<sup>96</sup> The phrase “black market,” which signifies “an ability to draw moral and economic lines and patrol . . . boundaries,” suggests activity that takes place in an underground location.<sup>97</sup> This misrepresentation ignores the interconnected webs of legal and illegal activity that comprise modern-day markets.<sup>98</sup> The legal and illegal art worlds “fit together like a jigsaw puzzle”:<sup>99</sup> the legal sector functions as a laundering mechanism for the illegal sector.<sup>100</sup> “Once [an] object appears in a publication . . . the object is given a new, respectable label . . . [and] illegal origins are gradually forgotten. This is how illegal material is whitewashed, through sale and publication in Europe and North America.”<sup>101</sup>

#### D. The Internet as Complex Facilitator

For more than a century, there were three antiquities market venues: public auctions, commercial markets, and private locales.<sup>102</sup> In the twenty-first century, the Internet provides the illicit market with a robust facilitating platform.<sup>103</sup>

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96. Generally speaking, in common-law jurisdictions a thief cannot convey good title to a bona fide purchaser; however, under civil-law systems, a thief *can* pass good title to a bona fide purchaser if certain statutory conditions are met. Barbara T. Hoffman, *Introduction to Parts II and III: Cultural Right, Cultural Property, and International Trade*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 89, 90 (Barbara T. Hoffman ed., 2006); see e.g., *Bakalar v. Varva*, 619 F.3d 136, 140 (2d Cir. 2010) (noting that under the Swiss civil-law system, “a buyer acting in good faith will acquire valid title to stolen property after a period of five years,” where under the New York common-law system, “a thief cannot pass good title”); *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1158 (2d Cir. 1982) (determining whether to apply the civil-law German doctrine of *Ersitzung*, “under which a good faith purchaser gains title to a stolen object upon 10 years’ possession without notice of defect in title,” or New York common law, under which “a purchaser cannot acquire good title from a thief.” In civil-law systems, even if unambiguous proof that an antiquity was illegally removed from its source country is later presented, the antiquity will not be deemed stolen as a matter of law. Neil Brodie, *Introduction*, in ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY 1, 3 (Neil Brodie & Kathryn Walker Tubb eds., 2002).

97. NAÍM, *supra* note 8, at 6.

98. See *id.*

99. BLOOD ANTIQUES, *supra* note 51.

100. Rice, *supra* note 50. The legal market can substantially hinder enforcement of illicit offshoots, as illustrated by the ivory market. See NAÍM, *supra* note 8, at 166 (reporting that eBay averaged 1,000 ivory auctions per week in 2004, but an eBay spokesperson explained that it could not ban ivory sales on its website because “it wouldn’t be fair” to legal ivory sellers).

101. VAN HAM ET AL., *supra* note 55, at 14 (quoting Kim Noovens, *Kunstroof in Nigeria* (Apr. 18, 2003) (unpublished dissertation, Ghent University) ([http://www.thesis.net/nigeria/Kunstroof\\_nigeria.pdf](http://www.thesis.net/nigeria/Kunstroof_nigeria.pdf))).

102. Christopher Chippindale & David W J Gill, *On-line Auctions: A New Venue for the Antiquities Market*, CULTURE WITHOUT CONTEXT (2001), <http://www2.mcdonald.cam.ac.uk/projects/iarc/culturewithoutcontext/issue9/chippindale-gill.htm>.

103. See Neil Brodie, *The Internet Market in Antiquities*, in COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD’S



E-commerce is booming,<sup>104</sup> and with the rise in e-commerce has come the democratization of the antiquities trade.<sup>105</sup> Everyone with an internet connection has access to an antiquities dealer or auction house at the click of a mouse.<sup>106</sup> Iraqi cultural goods, in particular, which were once sold at auction houses, are now sold almost exclusively online.<sup>107</sup>

Because it costs a seller essentially nothing to display and auction goods on virtual sites, non-extraordinary, mid-value antiquities that conveniently fall beyond the scope of regulatory and media radars can easily be advertised and openly traded on the virtual global market.<sup>108</sup> Because determining legality is increasingly problematic in the “largely self-policed and geographically confusing world” of e-commerce, online marketplaces’ attempts to police illegal sales are often fruitless.<sup>109</sup> Moreover, the sheer number of sales listings, variety of venues available to sellers, and shortness of bidding periods further obstruct monitoring efforts.<sup>110</sup>

Virtual marketplaces may also secondarily function as business cards.<sup>111</sup> It has been suggested that some traders may only display a select fraction of their goods on the Internet in order to attract buyers to further inquire about potentially higher value, higher risk items.<sup>112</sup>

Furthermore, actors’ reliance on online communication during the intermediary period of the trade adds an additional layer of virtual obscurity to the formula. At the intermediary stages, traders and middlemen rely heavily on social-messaging platforms to connect with potential buyers.<sup>113</sup> Photo and video

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HERITAGE 11, 11 (France Desmarais ed., 2015); Chippindale & Gill, *supra* note 102. Antiquities sales have reached unparalleled levels due in large part to the ease with which illegal goods can be bought and sold online. See SHELLEY, *supra* note 3, at 263. A February 25, 2016 eBay search revealed 46,358 seller-labeled antiquities for sale. *Antiquities*, EBAY, [http://www.ebay.com/sch/Antiquities-/37903/i.html?\\_sop=15](http://www.ebay.com/sch/Antiquities-/37903/i.html?_sop=15) (last visited Feb. 25, 2016).

104. See Matt Lindner, *Global E-Commerce Sales Set to Grow 25% in 2015*, INTERNET RETAILER (July 29, 2015, 4:17 PM), <https://www.internetretailer.com/2015/07/29/global-e-commerce-set-grow-25-2015>.

105. Paige Williams, *Bones of Contention*, NEW YORKER (Jan. 28, 2013), <http://www.newyorker.com/magazine/2013/01/28/bones-of-contention-2> (noting that “eBay ‘did for auctions what Fidelity did for stocks—took it down to the Everyman.’”).

106. Barker, *supra* note 11; Brodie, *supra* note 103, at 11.

107. VAN HAM ET AL., *supra* note 55, at 19.

108. Brodie, *supra* note 103, at 11.

109. Barker, *supra* note 11.

110. *Basic Actions Concerning Cultural Objects Being Offered for Sale Over the Internet* 1, UNESCO, <http://portal.unesco.org/culture/en/files/21559/11836509429MesuresTraficIlliciteEn.pdf/MesuresTraficIlliciteEn.pdf>.

111. VAN HAM ET AL., *supra* note 55, at 23.

112. *Id.* at 23–24.

113. Commonly used platforms include Skype, WhatsApp, and Kik. Giglio & al-Awad, *supra* note 17; Rachel Shabi, *Looted in Syria – and Sold in London: The British Antiques Shops Dealing in Artefacts Smuggled by Isis*, THE GUARDIAN (July 3, 2015, 10:55 AM), <http://www.theguardian.com/world/2015/jul/03/antiquities-looted-by-isis-end-up-in->

technologies allow sellers to exhibit their goods at arms-length;<sup>114</sup> images of unearthed goods pass from smartphone to smartphone, middleman to middleman,<sup>115</sup> and popular social-messaging platforms serve as ideal conduits for anonymous, illicit activity.<sup>116</sup> Many do not monitor or store conversation content for any significant period of time, some do not require users to provide identifying information upon registration,<sup>117</sup> and GPS has become virtually commonplace in allowing users to implicitly communicate specific locations to one another.<sup>118</sup>

### III. INTERNATIONAL ACTION TO COMBAT THE ENTRY OF TERRORISM-FUNDING GOODS INTO THE ILLICIT ANTIQUITIES MARKET

In the wake of the ongoing cultural devastation in Iraq and Syria, the United Nations passed U.N. Security Council Resolution 2199, which condemns the destruction of cultural heritage in Iraq and Syria, and aims to prevent the trade of illegally procured Iraqi and Syrian conflict antiquities.<sup>119</sup> Adopted in February 2015, the Resolution outlines the serious penalties actors who illegally import antiquities trafficked from regions under threat may face,<sup>120</sup> and calls upon U.N.

london-shops; Ashleigh Tilley, *ISIS, Blood Antiquities, and the International Black Market*, HUMAN SECURITY CTR. (Feb. 1, 2016), <http://www.hscentre.org/policy-unit/isis-blood-antiquities-international-black-market/>. In April 2016, WhatsApp announced that it would enable end-to-end encryption. Mike Isaac, *WhatsApp Introduces End-to-End Encryption*, N.Y. TIMES (Apr. 5, 2016), [http://www.nytimes.com/2016/04/06/technology/whatsapp-messaging-service-introduces-full-encryption.html?\\_r=0](http://www.nytimes.com/2016/04/06/technology/whatsapp-messaging-service-introduces-full-encryption.html?_r=0). Though designed to protect its users' digital information, some suspect that such encryption will further bolster WhatsApp as a hub for illegal activity. *E.g.*, Asheeta Regidi, *WhatsApp's End-to-End Encryption is Legal in India, but Not for Long*, TECH2 (Apr. 12, 2016, 12:11 PM), <http://tech.firstpost.com/news-analysis/whatsapp-end-to-end-encryption-is-legal-in-india-but-not-for-long-307842.html>.

114. Brodie, *supra* 103, at 19 (noting that there are reports of Syrian militia members arranging sales over Skype); *Samuel Andrew Hardy: Archaeomafias Traffic Antiquities as Well as Drugs*, UNESCO (Mar. 29, 2016), <http://en.unesco.org/news/samuel-andrew-hardy-archaeomafias-traffic-antiquities-well-drugs> (reporting that there is a community of market participants on Instagram).

115. A reporter observed a veteran dealer receive a constant bombardment of artifact photos via WhatsApp. Giglio & al-Awad, *supra* note 17.

116. *See Fact Sheet 35: Social Networking Privacy: How to Be Safe, Secure and Social*, PRIVACY RTS. CLEARINGHOUSE (Feb. 2016), <https://www.privacyrights.org/social-networking-privacy-how-be-safe-secure-and-social> (discussing how social media acts as an anonymous platform for individuals engaging in illegal activities).

117. *See, e.g., Frequently Asked Questions*, WHATSAPP (June 14, 2016), <https://www.whatsapp.com/faq/en/general/28030015>.

118. *See* Di Giovanni et al., *supra* note 24.

119. Press Release, Security Council, Unanimously Adopting Resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens Further Targeted Sanctions, U.N. Press Release SC/11775 (Feb. 12, 2015).

120. Jack Martinez, *Culture Under Threat: The Fight to Save the Middle East's Antiquities from Terrorism*, NEWSWEEK (Sept. 24, 2015, 5:18 PM), <http://www.newsweek.com/syria-antiquities-trafficking-threat-isis-376338>.

members to engage in combative efforts to curb the looting of Syrian and Iraqi artifacts.<sup>121</sup> In furtherance of this agenda, the U.N. General Assembly unanimously adopted a resolution in May 2015 condemning ISIS's cultural cleansing campaigns.<sup>122</sup> However, despite these international decrees, there have been few national moves to implement strict and effective bans on the import of Iraqi and Syrian antiquities.<sup>123</sup>

Through UNESCO, the U.N. has designated particular sites in Iraq and Syria as being especially valuable and vulnerable.<sup>124</sup> Though this designation is intended to foster curatorial preservation efforts, the UNESCO designation is little more than a label; it has done nothing to stop the pillaging of UNESCO sites.<sup>125</sup> Two of the four UNESCO World Heritage sites in Iraq have been destroyed, and all six in Syria have been heavily damaged.<sup>126</sup>

UNESCO has, however, taken several additional steps to illuminate the value and irreplaceable nature of cultural heritage sites, engage U.N. members to combat terrorist-sourced looting,<sup>127</sup> and raise awareness through targeted educational campaigns.<sup>128</sup> In 2014, UNESCO established an Emergency Response Action Plan ("ERAP")<sup>129</sup> to function as an educational alert system to inform and educate actors—particularly customs agents, Interpol, and auction houses—about the trade.<sup>130</sup> Furthermore, UNESCO endorsed the U.N. Security Council's proposal to deploy peacekeeping forces to protect cultural heritage sites in conflict zones.<sup>131</sup>

In addition to these proposed and implemented efforts, UNESCO and the U.S. Department of State announced a Red List in September 2014.<sup>132</sup> The List,

121. Pecquet, *supra* note 30.

122. Rick Gladstone, *U.N. Resolves to Combat Plundering of Antiquities by ISIS*, N.Y. TIMES (May 28, 2015), <http://www.nytimes.com/2015/05/29/world/middleeast/un-resolves-to-combat-plundering-of-antiquities-by-isis.html>.

123. John, *supra* note 54.

124. *List of World Heritage in Danger*, UNESCO, <http://whc.unesco.org/en/danger/> (last visited Feb. 27, 2016).

125. Barnard, *supra* note 20.

126. Bokova Address, *supra* note 39.

127. See Pecquet, *supra* note 30.

128. See #UNITE4HERITAGE, <http://www.unite4heritage.org/en/unite4heritage-celebrating-safeguarding-cultural-heritage> (last visited Feb. 27, 2016).

129. *Emergency Plan to Safeguard Iraq's Cultural Heritage*, UNESCO (Nov. 6, 2014), <http://whc.unesco.org/en/news/1187/>.

130. See *Iraq*, *supra* note 19 (Our Efforts to Protect Iraq's Cultural Heritage).

131. *United Nations' Cultural Blue Helmets to Protect World Heritage Sites from Islamic State Attacks*, ABC NEWS (Oct. 17, 2015, 8:17 PM), <http://www.abc.net.au/news/2015-10-18/un-blue-helmets-to-protect-world-heritage-from-isis/6863482>; see also May Abboud Abi Aki, *Looters Find Path to Export Antiquities via Lebanon*, AL-MONITOR (July 30, 2015), <http://www.al-monitor.com/pulse/security/2015/07/middle-east-smuggling-antiquities-lebanon.html> (discussing the U.N. Security Council called to assistance in Lebanon).

132. Mostafa Heddaya, *Q&A: Congressman Bill Keating on Upcoming Legislation to Prevent Antiquities Trafficking*, BLOUIN ARTINFO (Feb. 5, 2015), <http://origin->

which was circulated to customs agencies, catalogs cultural heritage goods at risk of being sold on the illicit market.<sup>133</sup> Though the List may be informative and lead ethical museums and collectors to be cautious when dealing with Iraqi and Syrian goods, the List is not supported by an enforcement mechanism, and thus will leave both unaware and disreputable actors unfazed and unaffected.<sup>134</sup>

#### IV. NATION-STATE ACTION TO COMBAT THE ENTRY OF TERRORIST-FUNDING GOODS INTO THE ILLICIT ANTIQUITIES MARKET

Illicit antiquities generally move in patterned fashion from illicit source to laundering intermediary to the “legal” market,<sup>135</sup> highlighting several potential choke points along the trade. There is, however, only one consistently active, static step during the trade that serves as an ideal target for domestic legislation: the market stage.

##### A. Source Nations<sup>136</sup>

Residents in Iraq and Syria take photos of damaged sites, curators cover mosaics with sealant and sandbags, and iron bars guard the National Museum of Iraq.<sup>137</sup> Beyond tracking and taking preventative measures to secure, hide, and document,<sup>138</sup> there is little that can be done in Iraq and Syria without armed support,<sup>139</sup> and even armed support is not unassailable.<sup>140</sup> Some have advocated for

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[www.artinfo.com/news/story/1079700/qa-congressman-bill-keating-on-upcoming-legislation-to#](http://www.artinfo.com/news/story/1079700/qa-congressman-bill-keating-on-upcoming-legislation-to#).

133. *Id.*

134. Pecquet, *supra* note 30.

135. Peter B. Campbell, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, INT’L J. OF CULTURAL PROP., May 2013, 113, at 116–118.

136. “Source nations” are culturally rich countries in which “the supply of desirable cultural property exceeds the internal demand.” John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832 (1986). Iraq and Syria are widely considered source nations. *See, e.g.*, Paul Barford, *They Blow Up Shrines, Don’t They?*, PORTABLE ANTIQUITY COLLECTING & HERITAGE ISSUES BLOG (Oct. 29, 2014, 4:09 AM), <http://paul-barford.blogspot.com/2014/10/they-blow-up-shrines-dont-they.html>.

137. Barnard, *supra* note 20. Organizations like the Iraqi Institute for the Conservation of Antiquities and Heritage (IICAH) train and educate museum, conservation, and archaeology experts. *The Iraqi Institute for the Conservation of Antiquities and Heritage (IICAH)*, UNIV. OF DEL.: ART CONSERVATION, <http://www.artcons.udel.edu/public-outreach/iraq-institute> (last visited Nov. 3, 2015).

138. To aid local efforts, a team from the U.S. State Department is asking smugglers to text it photos of the items they are trafficking out of Iraq and Syria in an attempt to gather information about the items entering the antiquities market from the inside. *Episode 667: Auditing ISIS*, *supra* note 13.

139. Barnard, *supra* note 20.

140. *See* Roger Atwood, *Afghanistan’s Hidden Treasures*, NAT’L GEOGRAPHIC (June 2008), <http://ngm.nationalgeographic.com/print/2008/06/afghan-treasures/atwood-text> (“[Looters] are armed, and no matter how many officers we place at sites, they attack them

securing Iraqi and Syrian borders, thereby containing the market's supply, but the very concept of a secured border in this integrally interconnected world is a naive fiction: people, drugs, and weapons are openly and consistently transported across Iraqi and Syrian borders.<sup>141</sup>

After an antiquity has left its source country's borders, it has entered the prospective repatriation stage.<sup>142</sup> To address the repatriation stage, many nation states have passed patrimony laws, which enable them to assert ownership over and prohibit export of all cultural property discovered within their borders.<sup>143</sup> While this is a crucial step in securing legal cultural heritage protection, parties seeking repatriation face an uphill battle plagued with legal fees and onerous procedural hurdles.<sup>144</sup> Even with patrimony legislation in place, a country seeking repatriation must prove: (1) that the artifact was sourced within its borders; (2) when the artifact was removed from the country; (3) that its patrimony laws are

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and drive them off. Then they loot.”). During the recent conflict in Afghanistan, antiquities looters killed at least ten officers from Afghanistan's archaeology police force. *Id.*

141. Some traffickers force refugees pouring into neighboring Lebanon to smuggle antiquities in their belongings; others pay taxi drivers to transport goods across the border. Simon Cox, *The Men Who Smuggle the Loot that Funds ISIS*, BBC NEWS (Feb. 17, 2015), <http://www.bbc.com/news/magazine-31485439>.

142. Ongoing cultural destruction in Iraq and Syria has revived the heated debate over whether artifacts should be repatriated. For a general summary of the arguments on both sides, see Tom Mashberg & Graham Bowley, *Islamic State Destruction Renews Debate Over Repatriation of Antiquities*, N.Y. TIMES (Mar. 30, 2015), [http://www.nytimes.com/2015/03/31/arts/design/islamic-state-destruction-renews-debate-over-repatriation-of-antiquities.html?\\_r=0](http://www.nytimes.com/2015/03/31/arts/design/islamic-state-destruction-renews-debate-over-repatriation-of-antiquities.html?_r=0).

143. Kersel, *supra* note 44, at 198. Egypt's patrimony law, Egyptian Law on the Protection of Antiquities Law 117, is arguably one of the most effective national ownership laws in the world and should serve as a model. It broadly and unambiguously states that all antiquities found within Egyptian borders are property of the Egyptian government. See Angelea Selleck, *Case Review: US v. Mask of Ka-Nefer-Nefer (8th Cir.)*, CTR. FOR ART L. (Aug. 10, 2014), <http://itsartlaw.com/2014/08/10/case-review-us-v-mask-of-ka-nefer-nefer-8th-cir/>. Patrimony legislation is especially susceptible to misinterpretation, thus it is paramount that a nation's patrimony legislation declare ownership over cultural objects found within its jurisdiction with extreme clarity. See, e.g., *United States v. McClain*, 593 F.2d 658, 665 (5th Cir. 1979) (determining that Mexico first unambiguously declared ownership over cultural property in 1972, contrary to expert testimony that Mexico made such declaration in 1897).

144. E.g., *Gov't of Peru v. Johnson*, 720 F. Supp. 810, 815 (C.D. Cal. 1989), *aff'd sub nom.*, *Gov't of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991) (determining that, though the United States supports looting-prevention efforts, (1) Peru could not prove with certainty that the artifacts in question were excavated in modern-day Peru; (2) Peru could not determine when the artifacts were excavated; (3) Peru could not prove that the items were in private possession in Peru for more than a year after the official registry book was opened; and (4) because Peru could not establish legal ownership over the antiquities at the time of their removal due to Peru's ambiguous patrimony laws, the court found in favor of the collector).

clear and unambiguous; and (4) that it owned the artifact when it was removed from the country.<sup>145</sup>

Patrimony laws are not internationally recognized as applying retrospectively,<sup>146</sup> and because most antiquities on the illicit market are undocumented, not only is it nearly impossible to determine the date an artifact was removed from its source country, but it is often impossible to determine provenience at all.<sup>147</sup> Additionally, because borders are largely arbitrary constructions that change over time, complications surface when modern-day borders do not neatly encase an ancient society's territory.<sup>148</sup> How, for example, will Iraq be able to prove with certainty that an undocumented antiquity from the Ottoman Empire, which spanned the Mediterranean,<sup>149</sup> was sourced within its borders, and not in neighboring Syrian territory?<sup>150</sup>

### *B. Corridor Countries*<sup>151</sup>

Upon leaving its homeland, an antiquity typically enters the illicit market via a corridor country, a geographically advantageous or art-market nation.<sup>152</sup>

145. See *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir. 2003) (affirming a smuggler's conviction because Egypt's patrimony legislation was unambiguous and laid claim to the artifacts in question, which were smuggled out of Egypt); see also *Johnson*, 720 F. Supp. at 815 (ruling that a nation seeking repatriation must show that the antiquities at issue were unearthed within that nation's borders, and that the nation's cultural-heritage law must be clear in its scope in order to be effective).

146. Alessandro Chechi, *Multi-Level Cooperation to Safeguard the Human Dimension of Cultural Heritage and to Secure the Return of Wrongfully Removed Cultural Objects*, in *CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW* 347, 360–61 (Silvia Borelli & Federico Lenzerini eds., 2012).

147. See, e.g., *Johnson*, 720 F. Supp. at 812–13; BRODIE ET AL., *supra* note 42, at 31; see also *Cox*, *supra* note 141 (“The warehouses at archaeological sites have objects they know are not listed or catalogued yet, and . . . [looters] think it could be easier to sell them.”).

148. JAMES CUNO, *WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE* 11–12 (2010); *Who Owns Our Ancient Past?*, BBC: TODAY (Nov. 5, 2008, 9:57 AM), <http://news.bbc.co.uk/1/hi/7709000/7709332.stm>; see also JANET BLAKE, *INTERNATIONAL CULTURAL HERITAGE LAW* 56 (2015).

149. Stanford J. Shaw, *Ottoman Empire: The Peak of Ottoman Power 1481-1566*, *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/place/Ottoman-Empire/The-peak-of-Ottoman-power-1481-1566> (last visited Feb. 25, 2016).

150. One scholar has suggested that countries sharing ancient cultural territory should negotiate International Cultural Property Trusts in response to the burden of proof challenges that plaintiffs face in stolen-antiquities litigation. Forsyth, *supra* note 86 at 197–98.

151. Corridor countries, also known as transit countries, are intermediary nations through which goods move as they are transported from source country to market nation. Campbell, *supra* note 135 at 121–22; Kersel, *supra* note 44, at 191–93. Corridor countries are geographically advantageous, and generally have laws that enable actors to successfully launder goods. See Kersel, *supra* note 44, at 191–93.

152. Kersel, *supra* note 44, at 197.

During this stage of laundering, goods are ascribed with false provenances<sup>153</sup> or acquire alternative auras of legitimacy<sup>154</sup> in preparation for entry into the legal market.<sup>155</sup> There are four hotspot corridor countries that are linked to ISIS-controlled territory by centuries-old smuggling routes and are flooded with ISIS-sourced goods: Turkey,<sup>156</sup> Lebanon,<sup>157</sup> Jordan,<sup>158</sup> and Israel.<sup>159</sup>

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153. A smuggler or dealer can transport a looted antiquity to a country with lenient import and export laws, and easily acquire false documentation attesting to its “legal” origins. This process allows goods to be sold to legitimate dealers like museums. Robert Swift, *ISIS Looting and Destruction of Heritage Sites Has Roots in Ideology and Finance*, THE MEDIA LINE (Sept. 9, 2015), <http://www.themedialine.org/news/isis-looting-and-destruction-of-heritage-sites-has-roots-in-ideology-and-finance/>. Alternatively, traffickers can designate places of origin using overly expansive, generic labels that span multiple nation-state territories. A million-dollar dinosaur skeleton’s provenience, for example, was listed in an online auction catalogue as “Central Asia.” Williams, *supra* note 105. Use of this tactic can make it especially difficult for source countries to prove ownership in repatriation actions. *See supra* notes 141–44 and accompanying text.

154. Dealers can misuse legitimate tools to mask the illicit origin of a looted antiquity. For example, in the case of a freshly unearthed or undocumented object, a dealer can send a photograph of the object to the Art Loss Register, a database of known stolen art, fully knowing that the return letter will confirm that the object does not match anything in the database. *Treasure Wars: The Odd Couple of Antiquities & Art Theft*, NAT’L GEOGRAPHIC (2015), <http://video.nationalgeographic.com/video/news/treasure-wars/stolen-antiquities-tw>. The dealer can then claim that he or she has done his or her due diligence, turn around with his freshly laundered good, and sell it to a museum or collector. *Id.*

155. Campbell, *supra* note 135, at 117 (describing that during this stage of the trade, launderers interact with the legal market and present themselves as legitimate intermediaries). A man with ten years of experience in paleontology and a good reputation in the community was accused of smuggling a \$1 million dinosaur skeleton into the United States and attempting to sell it at auction. Deborah L. Jacobs, *Stolen Dinosaur Bought for \$1 Million at New York Auction, Will Be Returned to Mongolia*, FORBES (May 6, 2013, 3:42 PM), <http://www.forbes.com/sites/deborahljacobs/2013/05/06/stolen-dinosaur-bought-for-1-million-at-new-york-auction-will-be-returned-to-mongolia/>; Williams, *supra* note 105; *see also* United States v. One Tyrannosaurus Bataar Skeleton, No. 12 Civ. 4760(PKC), 2012 WL 5834899, at \*1, \*1–2 (S.D.N.Y. Nov. 14, 2012).

156. *See* Pinar Tremblay, *Turkey Major Conduit for Syrian ‘Blood Antiquities,’* AL-MONITOR (Sept. 25, 2015), <http://www.al-monitor.com/pulse/originals/2015/09/turkey-syria-cultural-heritage-turns-into-blood-antiquities.html#>; Watson, *supra* note 21.

157. *See* Assad Seif, *Illicit Traffick in Cultural Property in Lebanon*, in COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD’S HERITAGE 65, 71 (France Desmarais ed., 2015); Watson, *supra* note 21.

158. *See* Russell D. Howard, *Trafficking in Antiquities*, THE CIPHER BRIEF (Jan. 13, 2016), <https://www.thecipherbrief.com/article/trafficking-antiquities>.

159. *See* 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](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).

Turkey and Lebanon, in particular, appear to be the most saturated hubs.<sup>160</sup> In 2010, no archaeological, historical, or ethnographic imports from Lebanon or Turkey were declared to United States Customs.<sup>161</sup> By contrast, in 2014, \$214,000 worth of archaeological, historical, and ethnographic goods from Lebanon and \$1,245,000 worth of such goods from Turkey were declared upon entry to the United States.<sup>162</sup>

Turkish authorities are generally thought to be more diligent about policing for illicit artifacts than authorities in other conduit nations.<sup>163</sup> Nonetheless, dealers tout photographs of looted goods and earn an estimated \$200 for obtaining the phone number of a credible potential buyer, who is often an American.<sup>164</sup> Lebanon has pledged to better monitor illicit antiquities,<sup>165</sup> but its borders are “liquid,” void of security procedures that could more effectively screen for and deter antiquities trafficking across its borders,<sup>166</sup> and its markets remain flush with looted goods.<sup>167</sup> In late 2015, security and antiquities experts from Italy and Lebanon collaborated to broadly evaluate Lebanon’s cultural smuggling problem—a first step toward reducing Lebanon’s appeal as a conduit nation.<sup>168</sup> Yet corridor countries remain rich in marketable illicit antiquities.<sup>169</sup>

### C. Market Nations<sup>170</sup>

Generally speaking, the industry is a one-way trade, moving from south to north, east to west, third world to first world.<sup>171</sup> The United States, Britain, and the European Union are major black market consumers.<sup>172</sup>

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160. Fanusie & Joffe, *supra* note 20, at 19 chart 4.

161. *Id.*

162. *Id.*

163. See Giglio & al-Awad, *supra* note 17. Between 2011 and 2015, Turkish authorities seized nearly 7,000 looted antiquities. Steven Lee Myers & Nicholas Kulish, ‘Broken System’ Allows Militants to Profit from Looted Treasures, N.Y. TIMES, Jan. 10, 2016, at A14.

164. See Tremblay, *supra* note 156.

165. Raymond Arijji, Lebanon’s Minister of Culture, has called for a proactive international campaign aimed at educating prospective smugglers about the consequences of participating, even circuitously, in the trade. Abboud Abi Aki, *supra* note 131.

166. Mat Nashed, *Lebanon, Italy Team Up to Tackle Illegal Antiquities Trade*, DAILY STAR (Oct. 21, 2015, 12:12 AM), <http://www.dailystar.com.lb/News/Lebanon-News/2015/Oct-21/319613-lebanon-italy-team-up-to-tackle-illegal-antiquities-trade.ashx>.

167. Howard et al., *supra* note 7, at 16.

168. Nashed, *supra* note 166. All agreed on the need for Lebanon to adopt a database to track and highlight missing antiquities. *Id.*

169. See e.g. Campbell, *supra* note 135, at 121 (noting the heavy traffic of antiquities passing through the United Arab Emirates, another key transit nation for goods sourced in the Middle East).

170. “Market nations” are those in which cultural property demand exceeds national supply. Merryman, *supra* note 136, at 832. The United States, Switzerland, and the United Kingdom are widely considered market nations. Hoffman, *supra* note 43, at 3.



The value of Iraqi works of art, collectors' pieces, and antiques imported to the United States increased by more than 400% between 2010 and 2014,<sup>173</sup> and the value of declared Syrian antiquities entering the United States rose to an estimated \$11 million in 2013.<sup>174</sup> Though there has not yet been a documented seizure of a looted artifact linked to ISIS on U.S. soil, such artifacts have assuredly penetrated U.S. borders.<sup>175</sup> Furthermore, if the aftermath of the recent conflict in Iraq and Afghanistan is any indication, a wave of black-market antiquities is imminent.<sup>176</sup>

U.S. officials have appropriately broadcast their increasing concerns about the indirect funding of terrorist organizations by U.S. citizens. In May 2016, Congress passed the Protect and Preserve International Cultural Property Act (H.R. 1493),<sup>177</sup> which instructs the President to: (1) restrict importation of Syrian archaeological and ethnological material; and (2) establish a committee to coordinate U.S. efforts to protect at-risk international cultural property, and to combat illegal looting, trafficking, and trading.<sup>178</sup> Additionally, the sponsors of

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171. BRODIE ET AL., *supra* note 42, at 12. The final destination points are predominantly in consumer countries that boast museums and collectors with ample disposable income. Hoffman, *supra* note 43, at 3.

172. See Giglio & al-Awad, *supra* note 17. This is not to say, however, that these are the only consumer nations. In addition to the steady demand in Western markets, there is a growing demand for antiquities in the Gulf countries where import laws are notably lax. *Id.* One scholar has suggested that a pattern has emerged: pre-Islamic artifacts tend to go to Western collectors while Islamic artifacts tend to go to Gulf buyers. Myers & Kulish, *supra* note 163, at A14.

173. Fanusie & Joffe, *supra* note 20, at 15–16.

174. Joe Parkinson et al., *Syrian 'Monuments Men' Race to Protect Antiquities as Looting Bankrolls Terror*, WALL ST. J. (Feb. 10, 2015, 7:52 P.M.), <http://www.wsj.com/articles/syrian-monuments-men-race-to-protect-antiquities-as-looting-bankrolls-terror-1423615241>.

175. See David Grantham, *Shutting Down ISIS' Antiquities Trade*, NAT'L CTR. FOR POL'Y ANALYSIS 2–3 (Jan. 2016), <http://www.ncpa.org/pdfs/ib185.pdf>.

176. During the 2003 U.S. invasion of Iraq, tens of thousands of cultural items were looted from Iraq, many of which continue to move through the market. See Robert M. Poole, *Looting Iraq*, SMITHSONIAN MAG. (Feb. 2008), <http://www.smithsonianmag.com/making-a-difference/looting-iraq-16813540/?no-ist> (reporting that an estimated 15,000 items were seized from the Iraq Museum alone); Myers & Kulish, *supra* note 163, at A14 (noting that in March 2015, the United States repatriated 80 seized objects to Iraq). Likewise, in the years following the conflict in Iraq and Afghanistan, more than four tons of looted Afghan antiquities were seized by British police; some 5,000 items were confiscated by Swiss and Danish officials; and numerous relics were seized from international antiquities markets in Jordan, Lebanon, Syria, Kuwait, Saudi Arabia, and New York. Atwood, *supra* note 140. Experts suspect that recently plundered items are likely being stored until the hype has died down and they can more safely be sold on the black market. Myers & Kulish, *supra* note 163, at A14.

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

178. *Id.*

H.R. 1493 have urged the Treasury Department to impose sanctions on those importing illegally procured Syrian antiquities.<sup>179</sup>

Furthermore, in an attempt to stimulate civilian involvement, the U.S. State Department's Rewards for Justice program is offering a reward of up to \$5 million for "information leading to the significant disruption of the sale and/or [sic] trade of oil and antiquities by, for, or on behalf of, or to benefit" ISIS.<sup>180</sup>

## V. THE PRIVATE SECTOR: ONLINE INTERMEDIARIES' ATTEMPTS TO COMBAT ILLICIT ANTIQUITY SALES

eBay, which hosts more than 160 million active users<sup>181</sup> and operates sites in over 30 countries,<sup>182</sup> has established itself as one of the world's largest online marketplaces. Just as national legislation varies from country to country, eBay's guidelines vary from nation site to nation site. eBay U.S.A. requires antiquities sellers to include the ownership history of the object for sale "and, if available, [a copy] of an official document that clearly shows both the item's country of origin and the legal details of the sale (it has to be approved for import or export)."<sup>183</sup> eBay U.S.A. also bans the sale of "[I]llooted or stolen goods" and provides a link to the International Council of Museums' Red Lists for Syrian and Iraqi goods.<sup>184</sup> Ultimately, however, these restrictions and prohibitions are largely unmonitored because eBay U.S.A. is self-regulated.<sup>185</sup>

In a multinational effort to combat illegal listings, Austria, Germany, and Switzerland partnered with eBay in 2008 to inform sellers about what is required

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179. Pecquet, *supra* note 30.

180. *Act of Terror: Information That Leads to the Significant Disruption of . . . Trafficking in Oil and Antiquities Benefiting the Islamic State of Iraq and the Levant (ISIL)*, U.S. DEP'T OF STATE: REWARDS FOR JUSTICE, [https://www.rewardsforjustice.net/english/trafficking\\_oil\\_and\\_antiquities.html](https://www.rewardsforjustice.net/english/trafficking_oil_and_antiquities.html) (last visited Feb. 9, 2016). The Rewards for Justice program has paid more than \$125 million to more than 80 individuals since it was established in 1984. Media Note, Office of the Spokesperson, U.S. Dep't of State, Rewards for Justice – Reward Offers for Information that Leads to Disruption of Financing of Islamic State of Iraq and the Levant (ISIL) (Sept. 29, 2015) (<http://www.state.gov/r/pa/prs/ps/2015/09/247470.htm>). However, because the program rarely announces the payment of a reward, data that could be used to evaluate its importance as an information gathering tool is largely unavailable. *Frequently Asked Questions*, U.S. DEP'T OF STATE: REWARDS FOR JUSTICE, <https://www.rewardsforjustice.net/english/about-rfj/frequently-asked-questions.html> (last visited Jan. 22, 2016).

181. *Number of eBay's Total Active Buyers from 1st Quarter 2010 to 4th Quarter 2015 (in millions)*, STATISTA, <http://www.statista.com/statistics/242235/number-of-ebays-total-active-users/> (last visited Feb. 28, 2016).

182. *Global Trade*, EBAY, <http://pages.ebay.com/globaltrading/buyer/index.html> (last visited Feb. 26, 2016).

183. *Artifacts, Grave-Related Items, and Native American Arts and Crafts Policy*, EBAY, <http://pages.ebay.com/help/policies/artifacts.html#what> (last visited Feb. 26, 2016) [hereinafter eBay U.S.A. Artifacts Policy].

184. *Id.*

185. Brodie, *supra* note 103, at 18.

to legally sell cultural goods, and to monitor the marketplace by removing non-compliant listings (i.e., those not accompanied by proof of authenticity).<sup>186</sup> Seller compliance improved significantly just one month into the project.<sup>187</sup>

Eight years later, eBay Germany and eBay Switzerland remain stringent regulators of the trade. eBay Switzerland strictly prohibits the sale of archaeological artifacts that are not accompanied by official proof of legality documentation.<sup>188</sup> The site provides information about how prospective sellers can acquire official proof of legality, makes clear that customs export declarations are not sufficient, and states that where there is no proof of origin, no official legality certificate may be issued.<sup>189</sup> Moreover, eBay Switzerland explicitly states that listing or purchasing illegal goods can result in criminal or other legal consequences.<sup>190</sup>

eBay Germany similarly requires listings to be accompanied by provenance or guarantee of origin documentation.<sup>191</sup> Specific requirements for objects from abroad require sellers to include an export license or number, and indicate which authority issued the license.<sup>192</sup> Furthermore, eBay Germany is externally regulated by the *Landesdenkmalpflege* (Monument Protection Authority),<sup>193</sup> which monitors compliance with eBay Germany's policies and verifies provenance documents submitted by sellers.<sup>194</sup>

186. Wolfgang Weber, *Public Private Partnerships: Education & Enforcement Project in Austria, Germany and Switzerland*, CULTURAL GOODS: EBAY'S POLICIES & COOPERATION WITH REG. AUTHORITIES & NGOS 7 (Sept. 29, 2015), [https://eca.state.gov/files/bureau/150914\\_antiquities\\_roundtable\\_nyc\\_final.pdf](https://eca.state.gov/files/bureau/150914_antiquities_roundtable_nyc_final.pdf).

187. *Id.*

188. *Grundsatz zu Archäologischen Funden*, EBAY, <http://pages.ebay.ch/help/policies/artifacts.html> (last visited Feb. 27, 2016) [hereinafter eBay Switzerland Artifacts Policy].

189. *Id.*

190. *Id.* eBay U.S.A., eBay France, eBay Italy, and eBay Spain, for example, do not list “legal consequences” under their “violation of our principles” sections. *Artéfacts, Archives, Antiquités, Biens Culturels et Objets Sépulcraux*, EBAY, <http://pages.ebay.fr/help/policies/artifacts.html> (last visited Feb. 27, 2016) [hereinafter eBay France Artifacts Policy]; *Manufatti, Archivi, Oggetti di Antiquariato, Oggetti Tombali e Caratteristici della Cultura del Paese*, EBAY, <http://pages.ebay.it/help/policies/artifacts.html> (last visited Feb. 27, 2016) [hereinafter eBay Italy Artifacts Policy]; *Utensilios, Archivos, Antigüedades, Artículos de Valor Cultural y Artículos Funerarios*, EBAY, <http://pages.ebay.es/help/policies/artifacts.html> (last visited Feb. 27, 2016) [hereinafter eBay Spain Artifacts Policy]; eBay U.S.A Artifacts Policy, *supra* note 183.

191. *Grundsatz zu Archäologischen Funden*, EBAY, <http://pages.ebay.de/help/policies/artifacts.html> (last visited Feb. 27, 2016) [hereinafter eBay Germany Artifacts Policy].

192. *Id.*

193. Brodie, *supra* note 103, at 17–18.

194. *Id.* Antiquities activities on eBay UK are also externally monitored. Press Release, The British Museum, eBay Partners with British Museum and Museums, Libraries and Archives Council to Protect British Treasures (2006)

Ultimately, even with potentially stringent policy guidelines in place, the presence or absence of external regulation appears to be a crucial element of effective online policing of the antiquities trade.<sup>195</sup> There are thousands of antiquities unaccompanied by documentation on eBay U.S.A.,<sup>196</sup> but there are a mere handful of antiquities for sale on eBay Germany, all of which are accompanied by documentation attesting to the legality and authenticity of the pieces.<sup>197</sup>

## VI. RECOMMENDATION: TARGET CONSUMERS

Ultimately, as long as there is a demand for looted goods, there will be an illicit market.<sup>198</sup> It is buyers, both in the form of museums and private collectors, who give value to antiquities and keep the trade alive.<sup>199</sup> The challenges associated with curbing the demand for antiquities are not to be taken lightly. Tools that have successfully curbed other illegal industries cannot easily be grafted onto the antiquities market due in large part to the finite nature of the merchandise involved.<sup>200</sup>

It is quite clear, though: “We’re faced with the largest-scale mass destruction of cultural heritage since the Second World War, and we’re going to have to do something about it.”<sup>201</sup> Just as World War II demonstrated a need for a comprehensive and effective framework to deal with the protection of cultural property during times of conflict, the emergence of ISIS, unprecedented in terms of economic and territorial growth, has demonstrated the need to combat the illicit antiquities trade. Though countermeasures will ultimately be circumvented in the face of demand,<sup>202</sup> regulatory modalities targeting ultimate destination points will curtail demand, thereby reducing the trade.

In a world of increasingly complex sovereign nation states, targeted national laws are likely to have a more substantially constrictive effect on the illicit

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([http://www.britishmuseum.org/about\\_us/news\\_and\\_press/press\\_releases/2006/ebay\\_partnership.aspx](http://www.britishmuseum.org/about_us/news_and_press/press_releases/2006/ebay_partnership.aspx)). The British Museum and the Museums, Libraries and Archives Council manage the Portable Antiquities Scheme (PAS), which oversees and reports illegal activity to eBay and law enforcement. *Id.*

195. Brodie, *supra* note 103, at 17–18.

196. *Id.* at 18.

197. *Id.* at 17–18.

198. NAFZIGER ET AL., *supra* note 8, at 217.

199. Leila Alexandra Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 729, 733 (2015); Gerstenblith, *supra* note 76, at 173.

200. The rise of legal alternatives, like Spotify and Netflix, has curbed music and film piracy, but there are no legal alternatives to the illicit antiquities market that are as inexpensive and readily available as the illegal market itself. See Sophie Curtis, *Spotify and Netflix Curb Music and Film Piracy*, *TELEGRAPH* (July 18, 2013, 9:57 AM), <http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>.

201. Myers & Kulish, *supra* note 163, at A14 (quoting France Desmarais, Director of Programs & Partnerships at ICOM).

202. BRODIE ET AL., *supra* note 42, at 25.

market than generalized international treaties.<sup>203</sup> There are four potential choke points along the antiquities trade: (1) point of looting; (2) point of international transport (upon import or export); (3) point of sale; and (4) ultimate destination.<sup>204</sup> The most effective regulatory approaches will likely be those that target points of import into market nations and points of sale involving market-nation consumers. Because consumer countries are relatively stable, sound in infrastructure, and increasingly influential as soundboards, there are significant benefits to steering regulatory and educational efforts towards market nations. The United States, as a common terminus for antiquities,<sup>205</sup> is in a leadership position to take a more active stance against the illicit antiquities market. Taking such initiative would likely promote international awareness and encourage complementary efforts.<sup>206</sup>

This Note proposes a three-part approach to reducing the United States' involvement in the illicit market. First, more tailored mechanisms must be implemented to monitor online commerce of cultural property. Second, the robust legal tools that are readily available under current U.S. law must be implemented to prosecute truly complicit actors and carry out civil forfeitures of cultural objects that have entered the market illegally. Finally, efforts must be made to generate awareness and engage the public; in order to curb overall market demand, consumer norms must change.

#### ***A. Implement Mechanisms to Identify Illegal Goods and Associated Actors***

Auction commerce is moving online,<sup>207</sup> and while the Internet is an “open platform,”<sup>208</sup> cyber regulation has the ability to extend the reaches of traditional

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203. *But see supra* text accompanying note 69 (customary international law, which often originates in principles developed in international treaties may provide a potent avenue of prosecution employable against terrorist participants involved in the cultural property crimes).

204. Recent big-ticket ICE seizure and repatriation missions targeted goods at the point of import and point of sale. *See Cultural Property, Art and Antiquities Investigations*, DEP'T OF HOMELAND SEC.: U.S. IMMIGR. & CUSTOMS ENF'T (Dec. 12, 2011), <https://www.ice.gov/factsheets/cultural-artifacts> (hundreds of antiquities were confiscated at the point of sale, and more than 100 artifacts were confiscated upon import).

205. LaTourette & Chamberlain, *supra* note 16 (“More than that the rest of the world still looks to the United States for leadership”). According to the U.S. International Trade Commission, U.S. importation of art, collector's items, and antiquities from Iraq increased by 412% between 2010 and 2014. Fanusie & Joffe, *supra* note 20, at 15, 16 chart 1.

206. *See* Letter from President William J. Clinton to the U.S. Senate 3 (Jan. 6, 1999) (<http://www.gpo.gov/fdsys/pkg/CDOC-106tdoc1/html/CDOC-106tdoc1.htm>). The United States has pioneered efforts to track and document looting, and while such efforts are crucial to engage the public and increase awareness, complementary and comprehensive additions to these efforts are needed. *See* Ralph Blumenthal & Tom Mashberg, *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=0](http://www.nytimes.com/2015/11/09/arts/international/ted-grant-goes-to-archaeologist-who-combats-looting-with-satellite-technology.html?_r=0).

207. Meredith Mendelsohn, *How the World's Biggest Auction Houses Are Adapting to the Digital Market*, ARTSY (Dec. 28, 2015, 12:00 PM),

regulatory tools.<sup>209</sup> In other words, code can interject even when the law would not.<sup>210</sup> Accordingly, online marketplaces, auction houses, and other commercial platforms must be urged to adopt stricter and clearer requirements that address the legal and ethical issues that accompany the antiquities market.

The U.S. branches of many large online auction houses advise buyers to avoid purchasing antiquities absent documentation verifying lawful provenance.<sup>211</sup> However, these sites not only fail to explain to users why such documentation is important, i.e., that purchasing an illicitly looted or removed item is not just unwise in terms of guaranteeing authenticity, but is also largely illegal,<sup>212</sup> but they also fail to enforce such action. Intermediary facilitators should follow and expand upon the policies of eBay Germany and eBay Switzerland by mandating that sellers provide proof of provenance and appropriate export documentation before their listings will appear. eBay Germany and eBay Switzerland have implemented screening procedures that have successfully reduced the availability of undocumented antiquities on their platforms. What is stopping eBay from incorporating these successful systems across the board, in every nation in which it operates? Lastly, online platforms should be encouraged to establish partnerships with outside organizations such as academic institutes<sup>213</sup> and enforcement agencies<sup>214</sup> that have the tools and requisite knowledge to serve as external oversight committees and police listings to ensure compliance.<sup>215</sup>

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<https://www.artsy.net/article/artsy-editorial-the-auction-world-is-moving-online-is-it-paying-off>.

208. *An Open Internet Platform for Economic Growth and Innovation*, INTERNET SOCIETY, <http://www.internetsociety.org/open-internet-platform-economic-growth-and-innovation> (last visited Feb. 28, 2016).

209. JACQUELINE LIPTON, *RETHINKING CYBERLAW: A NEW VISION FOR INTERNET LAW 1* (2015); *see also* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501 (1999) (discussing regulation in the context of cyberlaw).

210. *See* Rachael Bale & Jani Actman, *Internet Giants Struggle to Keep Ivory Off the Market*, NAT'L GEOGRAPHIC (Jan. 29, 2016), <http://news.nationalgeographic.com/2016/01/160129-Yahoo-ivory-online-sales-Google-eBay-Amazon-Craigslist/> (Yahoo U.S. bans all ivory sales, even though most U.S. states' laws allow the sale and purchase of ivory imported before 1989).

211. *See* Brodie, *supra* note 103, at 18.

212. *See id.* at 17.

213. Examples include Interpol and the Art Loss Register, which operate global databases of stolen works. *Works of Art*, INTERPOL, <http://www.interpol.int/Crime-areas/Works-of-art> (last visited June 16, 2016); THE ART LOSS REGISTER, <http://www.artloss.com/en> (last visited June 16, 2016).

214. Examples include the FBI and the Carabinieri, which maintain stolen art and antiquities databases. *National Stolen Art File (NSAP)*, FBI, [https://www.fbi.gov/about-us/investigate/vc\\_majorthefts/arttheft/national-stolen-art-file](https://www.fbi.gov/about-us/investigate/vc_majorthefts/arttheft/national-stolen-art-file) (last visited July 16, 2016); *The Carabinieri TPC*, CARABINIERI, <http://www.carabinieri.it/multilingua/en/the-carabinieri-tpc> (last visited July 16, 2016).

215. Mere adoption of rules absent active, independent enforcement renders them meaningless. *See* Brodie, *supra* note 103, at 18. eBay's regulatory scheme is particularly illustrative of this phenomenon. eBay Germany and eBay U.S.A. have adopted similar rules

### *B. Employ Existing Legal Enforcement Tools*

The domestic statutory tools most apt to prosecute cultural property crimes in the United States are federal money-laundering statutes, 18 U.S.C. §§ 1956-1957, and the Anti-Terror Act (“ATA”), 18 U.S.C. §§ 2331-2399(D). The ATA is particularly potent because it contains a relatively lax scienter requirement.<sup>216</sup>

U.S. federal money-laundering statutes were designed to permanently criminalize the use of proceeds from criminal activities,<sup>217</sup> lending them especially applicable to antiquities traffickers and sellers. Similarly, the ATA, which has never been used to prosecute traffickers or purchasers of terrorist-funding antiquities, is equipped to serve as a potent enforcement mechanism against buyers who, even indirectly, financially support terrorist activities.<sup>218</sup> As recent case law and an FBI press release have highlighted, the government need only prove that the purchaser of an illicit cultural object knowingly provided some degree of funding to an intermediary trafficker or to the organization itself, or that the buyer acted with deliberate indifference in order to establish an ATA charge.<sup>219</sup> The ATA’s broad scope, significant penalty allowances, and minimal prima facie requirements render it especially forceful.<sup>220</sup>

Alternatively, when criminal prosecution is undesirable or unavailable, civil forfeiture provides an attractive avenue, especially if the ultimate goal is

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regarding the sale of nondomestic antiquities; both require that valid documentation accompany any antiquity for sale. *Id.* at 17. However, a February 12, 2015 search found only a handful of antiquities for sale on eBay Germany, all of which were accompanied by the required documentation, but thousands of antiquities for sale without documentation on eBay U.S.A. *Id.* at 17–18. This difference is due in large part to the presence of external oversight monitoring eBay Germany, and the absence thereof to supervise eBay U.S.A. *See id.* at 18; *see also supra* notes 186–97 and accompanying text.

216. *Weiss v. Nat’l Westminster Bank*, 768 F.3d 202, 208 (2d Cir. 2014) (finding that under the ATA, plaintiffs need only show that the defendant acted with deliberate indifference when it provided funds to terrorist organizations).

217. *See* Charles Doyle, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law* 1–2, CONG. RES. SERV. (Feb. 8, 2012), <https://www.fas.org/sgp/crs/misc/RL33315.pdf>.

218. *ISIL and Antiquities Trafficking: FBI Warns Dealers, Collectors About Terrorist Loot*, FBI (Aug. 26, 2015), <https://www.fbi.gov/news/stories/isil-and-antiquities-trafficking>; Timur Tusray, *The New Frontier of Cultural Property Projections: When Acquiring Cultural Objects Supports Terrorism*, CTR. FOR ART L. (Sept. 2, 2015), <http://itsartlaw.com/2015/09/02/ata-offers-cultural-property-protection/>. The ATA has been used primarily to prosecute financial institutions used by terrorist organizations. *Id.*; *see also Weiss*, 768 F.3d at 208 (holding that under the ATA, plaintiffs need only show that the financial institution had knowledge or acted with deliberate indifference when it channeled funds to terrorist organizations); *Linde v. Arab Bank*, 269 F.R.D. 186, 203 (E.D.N.Y. 2010) (finding Arab Bank guilty of multiple ATA offenses for knowingly allowing millions of dollars to flow through their accounts to Hamas members).

219. *See* 18 U.S.C. § 2339A(a) (2006); *Weiss*, 768 F.3d at 208; Tusray, *supra* note 218.

220. *See* 18 U.S.C. § 2339A(a).

seizure of cultural property and subsequent repatriation.<sup>221</sup> Because civil forfeiture proceedings are in rem proceedings, they do not require the plaintiff to prove that any individual currently associated with the object in question was involved in the initial theft of the object or had any knowledge that it was in fact stolen.<sup>222</sup> Furthermore, because they are civil proceedings, a plaintiff must only satisfy the traditional preponderance-of-the-evidence standard.<sup>223</sup>

Though civil forfeiture actions have the power to return illicit antiquities to their rightful owners, civil forfeiture does not deter behavior as effectively as criminal enforcement does.<sup>224</sup> Thus, those who engage willfully or with deliberate indifference to the illicit market should face criminal charges.

### C. Stimulate Public Awareness

The legal system often demands significant expenditures of time, money, and effort.<sup>225</sup> When facing a prominent dealer or buyer engaged in the illicit trade, such costs are likely warranted, but levels of engagement ought to be considered.<sup>226</sup> In many instances, education may be a more cost-effective and just way of approaching a community of uninformed potential actors. Furthermore, the more informed the public becomes, the easier it becomes to identify the malicious and cognizant participants against whom legal force is most befitting.

Illegally procured artifacts are contraband, yet they elicit a largely understated response, perhaps because, unlike in the drug and weapons contexts,

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221. See Kyle Brennan, *Civil Forfeiture, Customs Law, and the Recovery of Cultural Property*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 335, 338 (2015).

222. See 19 U.S.C. § 1595a(c) (2012); 18 U.S.C. § 981 (2012).

223. Stefan D. Cassella, *An Overview of Asset Forfeiture in the United States*, in CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME 23, 44 (Simon N.M. Young, ed. 2009).

224. Brodie, *supra* note 103 at 17–18; Abby Seiff, *How Countries Are Successfully Using the Law to Get Looted Cultural Treasures Back*, A.B.A.J. (July 1, 2014, 10:40 AM),

[http://www.abajournal.com/magazine/article/how\\_countries\\_are\\_successfully\\_using\\_the\\_la\\_w\\_to\\_get\\_looted\\_cultural\\_treasur](http://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_la_w_to_get_looted_cultural_treasur); see also Donna Yates, *Illicit Trafficking in Latin America: Looting, Trafficking, and Sale*, in COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD'S HERITAGE 33, 42 (France Desmarais ed., 2015).

225. Viviano, *supra* note 47.

226. There was much debate, for example, about whether an antiquities sting operation that targeted those involved in the looting, dealing, and purchasing of Native American artifacts in the Four Corners region constituted “overkill or justice.” Dennis Romboy, *Overkill or Justice? Costly 5 Year-Old Artifacts Case Nets No Prison Time and 3 Suicides, But Retrieves Native American Treasures and Raises Awareness*, DESERET NEWS (Sept. 24, 2011, 11:00 PM), <http://www.deseretnews.com/article/700182158/Overkill-or-justice-Costly-5-year-old-artifacts-case-nets-no-prison-time-and-3-suicides-but.html?pg=all>. During the sting operation, agents armed with automatic weapons raided homes and arrested dozens suspected of trafficking in Native American artifacts. *Id.* Twenty-six of those suspects were indicted, two committed suicide while their cases were pending, and none received jail time. *Id.*



they are not blatantly associated with bodily harm and violence. The normative attitude and status symbolism<sup>227</sup> associated with antiquities collecting must change,<sup>228</sup> and more transparency is exceedingly overdue.

Many consumers are so physically separated from the terrorist acts they are funding that they either brush aside ethical considerations or fail to realize that the ancient coin or figurine they are purchasing online may be a blood antiquity.<sup>229</sup> Campaigns to educate the consuming public about the intricacies and consequences of the illegal blood diamond<sup>230</sup> and ivory trades have been massively successful,<sup>231</sup> and such campaigns have played major roles in shedding a pervasively negative light over illicit markets and in ultimately diminishing consumer demand.<sup>232</sup> Campaigns must now be aimed at educating the general American public about the illegal antiquities market.<sup>233</sup> Furthermore, because there

227. Campbell, *supra* note 135, at 117 (arguing that “collectors generally purchase artifacts as status symbols . . . [indicative of] the owner’s wealth, prestige, or connoisseurship”).

228. Kersel, *supra* note 44, at 199–200 (arguing that real progress in diminishing the illicit antiquities trade can be made only if societal norms change). To many, “[n]o matter how ornate a stock certificate may be, an Egyptian amulet is always going to look better in your living room display case.” Maria Baugh, *Antiquities: The Hottest Investment*, TIME (Dec. 12, 2007), <http://content.time.com/time/business/article/0,8599,1693792,00.html>.

229. A recent report observed that the majority of buyers “are, ironically, history enthusiasts and art aficionados . . . representatives of the Western societies which [ISIS] has pledged to destroy.” Fanusie & Joffe, *supra* note 20, at 4; *see also* Brodie, *supra* note 103, at 17. Recently, for example, the United States opened an investigation against Hobby Lobby for allegedly attempting to import hundreds of illegal cuneiform tablets from Iraq in 2011 to fill its Museum of the Bible. *See* Candida Moss & Joel Baden, *Feds Investigate Hobby Lobby Boss for Illicit Artifacts*, DAILY BEAST (Oct. 26, 2015, 9:00 PM), <http://www.thedailybeast.com/articles/2015/10/26/exclusive-feds-investigate-hobby-lobby-boss-for-illicit-artifacts.html?via=desktop&source=email>.

230. Additionally, increased dialogue about the diamond industry following the release of the 2006 film *Blood Diamond* highlights the ability of pop culture productions to advance awareness, engage the press, and promote social responsibility. *Conflict Diamonds Receive Attention from Hollywood*, PBS NEWSHOUR (Dec. 13, 2006, 4:35 PM), [http://www.pbs.org/newshour/bb/africa-july-dec06-diamonds\\_12-13/](http://www.pbs.org/newshour/bb/africa-july-dec06-diamonds_12-13/).

231. Much like the illegal ivory trade, where there is “mechanized, militarized slaughter,” criminal actors are engaged in mechanized, militarized looting and cultural cleansing in the Levant. *GPS Trackers in Fake Elephant Tusks Reveal Ivory Smuggling Route*, NPR (Aug. 12, 2015, 1:33 PM), <http://www.npr.org/templates/transcript/transcript.php?storyId=431908397>.

232. Furthermore, in response to pressure from international law enforcement groups and conservation campaigns, eBay banned the sale of ivory on its sites, a step forward in addressing the cyberspatial obstacles that accompany illicit streams of commerce. eBay’s regulatory scheme with respect to ivory is stricter than most nations’ laws. Felicity Barringer, *Yielding to Conservationists, eBay Will Ban Ivory Sales*, N.Y. TIMES (Oct. 21, 2008), <http://www.nytimes.com/2008/10/21/us/21animals.html>.

233. Though UNESCO and other organizations have initiated global education efforts, such campaigns are only marginally known. *Awareness-Raising*, ICOM INT’L OBSERVATORY ON ILLICIT TRAFFIC CULTURAL GOODS, <http://obs-traffic.museum/awareness->

is such a complex and often intertwined relationship between the antiquities market, both licit and illicit, and educational institutions, sponsorship from educational institutions is paramount.<sup>234</sup>

In addition to curbing demand, enhancing public knowledge would make it easier for prosecutors to bring legal actions against complicit actors because increasing the level of general public knowledge about an issue raises the applicable standard of care an individual will be required to meet.<sup>235</sup> Increased general knowledge could also amplify the scrutiny applied to institutional actors.<sup>236</sup> A mass awareness campaign would almost certainly intensify the pressure on museums and auction houses to repatriate artifacts with questionable provenances, and would help identify and shame those involved in trafficking and transacting.<sup>237</sup>

Regulatory tools are largely available, especially in market-nations, but such tools remain significantly under-theorized and underutilized. In the United States, implementation of legal courses of action in combination with development of educational awareness campaigns would almost assuredly curb market demand for blood antiquities.

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raising (last visited Feb. 17, 2016). While technological advancements have complicated efforts to suppress the black market, social media has become “the King of reaching the masses” and the campaigner’s “new best friend.” *Social Media – The Campaigner’s New Best Friend*, YOKE (Aug. 31, 2011), <http://www.thisisyoke.com/successful-social-media-campaigns/>.

234. Furthermore, museums must practice what they preach. The Metropolitan Museum of Art, for example, hosted an Emergency Red List of Syrian Antiquities at Risk press conference in 2013. *Emergency Red List of Syrian Antiquities at Risk is Launched in New York*, UNESCO: WORLD HERITAGE CTR. (Sept. 30, 2013), <http://whc.unesco.org/en/news/1073/>. The press conference voiced loud concerns about irreversible cultural heritage destruction and the need to fight illicit trafficking, yet that very year, the Metropolitan Museum of Art fought to keep two Cambodian statues, despite clear and monumental evidence that they had been looted and illegally exported during Cambodia’s civil war. *See* Seiff, *supra* note 224.

235. *Cf.* DAVID ORMEROD, SMITH AND HOGAN’S CRIMINAL LAW 148 (13th ed., 2011) (explaining that in negligence cases, “if D has more knowledge . . . a higher standard will legitimately be expected of him”)

236. The publication of *Chasing Aphrodite* and *Loot*, as well as the publicized trial of the Getty Museum’s former curator, Marion True, brought the Getty’s unethical acquisition practices to the attention of the public. Leila Amineddoleh, *The Role of Museums in the Trade of Black Market Cultural Heritage Property*, 18 ART ANTIQUITY & L. 227, 228 (2013). As a result, the Getty has returned dozens of antiquities to their countries of origin. *See* Daniel Grant, *What Happens When Museums Return Antiquities?*, HYPERALLERGIC (Mar. 18, 2014), <http://hyperallergic.com/115015/what-happens-when-museums-return-antiquities/>.

237. *See* Donna Yates, *Illicit Trafficking in Latin America: Looting, Trafficking, and Sale*, in COUNTERING ILLICIT TRAFFIC IN CULTURAL GOODS: THE GLOBAL CHALLENGE OF PROTECTING THE WORLD’S HERITAGE 33, 42 (France Desmarais ed., 2015) (arguing that we should publicly laud collectors and museums that “do the right thing” and shame those who do not).

### CONCLUSION

The illicit antiquities market has become increasingly complex in the globalized twenty-first century, and has been infiltrated by the most sophisticated and destructive terrorist organization in history. International conventions are largely inept because they lack force and universal applicability. Similarly, national legal courses of action are highly underutilized and ill-adjusted to address cultural heritage disputes, which often involve non-extant boundaries of ancient civilizations and non-state actors.

In the wake of the continuous plundering and destruction in Syria and Iraq, monitoring mechanisms must be improved to reduce the availability of illicit goods in brick-and-mortar and online venues; legal enforcement tools must be implemented to punish complicit persons and deter potential actors; and public awareness must be stimulated to generate discussion and curb the global appetite for antiquities. “The smuggled goods are staring you in the face.”<sup>238</sup>

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238. BLOOD ANTIQUES, *supra* note 51.

