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## ISIS's Get Rich Quick Scheme: Sell the World's Cultural Heritage on the Black Market—Purchasers of ISIS-Looted Syrian Artifacts Are Not Criminally Liable Under the NSPA and the McClain Doctrine in the Eleventh Circuit

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## ARTICLES

### **ISIS's Get Rich Quick Scheme: Sell the World's Cultural Heritage on the Black Market—Purchasers of ISIS-Looted Syrian Artifacts Are Not Criminally Liable Under the NSPA and the McClain Doctrine in the Eleventh Circuit**

LINDSEY LAZOPOULOS FRIEDMAN\*

*This article explores how an individual importing a looted artifact may face prosecution and liability in the Eleventh Judicial Circuit. The article begins with a background section that provides additional information about the history of ISIS and ISIS's current plundering scheme. The background section also provides the legal framework and historical treatment of looted art and stolen artifacts. In particular, this section explains the Eleventh Circuit doctrine on this issue, the McClain doctrine. The McClain doctrine applies the National Stolen Property Act ("NSPA") to foreign found-in-the-ground claims. Supporters of the doctrine argue that it helps "prevent looting internationally without placing an unacceptable burden on the cultural objects trade."*

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*The analysis section hypothesizes that a looter of a Syrian artifact would not be prosecuted in the Eleventh Circuit under the McClain doctrine. The analysis section also includes possible alternative means for prosecuting a trafficker of Syrian cultural property.*

INTRODUCTION .....	1069
I. BACKGROUND.....	1072
A. <i>What Is Cultural Property?</i> .....	1072
B. <i>ISIS</i> .....	1075
C. <i>Regulation of Cultural Property, the Cultural Property Industry, and United States Enforcement of Cultural Property Rights</i> .....	1077
1. INTERNATIONAL REGULATIONS OF CULTURAL PROPERTY.....	1077
2. UNITED STATES REGULATION OF CULTURAL PROPERTY.....	1079
3. THE McCLAIN DOCTRINE .....	1084
II. A PURCHASER OF LOOTED SYRIAN ARTIFACTS WOULD NOT BE CONVICTED UNDER THE NSPA IN THE ELEVENTH CIRCUIT.....	1088
III. ALTERNATIVES TO PROSECUTION UNDER NSPA .....	1094
CONCLUSION.....	1097

## INTRODUCTION

The tragedy that is the Syrian Civil War is a crisis of humanity, no matter how it is measured—with more than 200,000 civilian fatalities;<sup>1</sup> 9 million people displaced, including 4.7 million refugees;<sup>2</sup>

<sup>1</sup> See Suleiman Al-Khalidi, *Syria Death Toll Now Exceeds 210,000: Rights Group*, REUTERS (Feb. 7, 2015, 9:51 AM), <http://www.reuters.com/article/us-mideast-crisis-toll-idUSKBN0LB0DY20150207>.

<sup>2</sup> See generally Somini Sengupta, *Refugee Crisis in Europe Prompts Western Engagement in Syria*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/world/middleeast/europe-refugee-crisis-syria-civil-war.html>; *Syria Regional Refugee Response*, UNHCR, <http://data.unhcr.org/syrianrefugees/re>

chemical weapons usage;<sup>3</sup> and severe food and fresh-water shortages.<sup>4</sup> Another casualty of the foreign policy quagmire, and a lasting consequence of the Arab Spring, is a massive abduction of cultural property—artifacts and antiquities that make up our collective world heritage.<sup>5</sup> In particular, the presence of the puerile terrorist organization ISIS has had devastating consequences on Syria's former plethora of cultural heritage.<sup>6</sup> ISIS is "looting . . . the very roots of humanity, artifacts from the oldest civilizations in the world."<sup>7</sup>

Antiquities are "highly susceptible to looting because artifacts are very valuable; antiquities trace the evolution of a people, and can be easily liquidated by selling to museums, auction houses, and private collectors."<sup>8</sup> Stolen art, artifacts, and cultural property are not a new phenomenon; antiquity theft has become familiar news fare over the twentieth century. Stories of looted Cuban art;<sup>9</sup> popular

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gional.php (last updated May 18, 2016); BUREAU OF NEAR E. AFFAIRS, *U.S. Relations with Syria*, U.S. DEP'T STATE (Mar. 20, 2014), <http://www.state.gov/r/pa/ei/bgn/3580.htm>.

<sup>3</sup> See *Syria's Chemical Weapons Stockpile*, BBC (Jan. 30, 2014), <http://www.bbc.com/news/world-middle-east-22307705>.

<sup>4</sup> See *Aid Convoys Leave Lebanon for Syrian Town Facing Food Shortages*, TELESUR (Jan. 11, 2016), <http://www.telesurtv.net/english/news/Aid-Convoys-Head-to-Syrian-Towns-Facing-Food-Shortages-20160111-0007.html>.

<sup>5</sup> See Heather Pringle, *ISIS Cashing in on Looted Antiquities to Fuel Iraq Insurgency*, NAT'L GEOGRAPHIC (June 27, 2014), <http://news.nationalgeographic.com/news/2014/06/140626-isis-insurgents-syria-iraq-looting-antiquities-archaeology/>.

<sup>6</sup> See Rachel Shabi, *Looted in Syria—and Sold in London: The British Antiques Shops Dealing in Artefacts Smuggled by Isis*, THEGUARDIAN (July 3, 2015), <http://www.theguardian.com/world/2015/jul/03/antiquities-looted-by-isis-end-up-in-london-shops>.

<sup>7</sup> 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>.

<sup>8</sup> Alia Szopa, Comment, *Hoarding History: A Survey of Antiquity Looting and Black Market Trade*, 13 U. MIAMI BUS. L. REV. 55, 59 (2004).

<sup>9</sup> See Mari-Claudia Jiménez, *Restituting Looted Cuban Art*, 19 CUBA IN TRANSITION 140, 140 (2009), <http://www.ascecuba.org/c/wp-content/uploads/2014/09/v19-frntmtrr.pdf>; Sarah Cascone, *Reclaiming Art Seized by Castro's Government Will Be an Uphill Battle*, ARTNET NEWS (Jan. 8, 2015), <https://news.artnet.com/art-world/reclaiming-art-seized-by-castros-government-will-be-an-uphill-battle-215359>.

movies, such as *The Monuments Men*;<sup>10</sup> arrests of high-profile antiquities dealers;<sup>11</sup> and recent, high-profile lawsuits involving art pilaged by the Nazis bring the issues surrounding transnational cultural property and art constantly to the forefront.

The recent destruction faced in the Middle East has been particularly deplorable; videos show ISIS militants destroying antiquities in Syria<sup>12</sup> and Iraq.<sup>13</sup> In Iraq, ISIS used sledgehammers to destroy statues, including the entire collection of the Mosul Museum.<sup>14</sup> ISIS has obliterated ancient shrines, including the tomb of Jonah.<sup>15</sup> ISIS claims that it is motivated by a religious calling to destroy blasphemous idols from past cultures that worshipped false gods.<sup>16</sup> ISIS does not, however, destroy all artifacts it encounters—ISIS also “rake[s] in massive profits” from the “billion-dollar black market in ancient artifacts.”<sup>17</sup> Some of the items ISIS sells make their way into the hands of legitimate antiquity dealers and auction houses in the West.<sup>18</sup>

This article explores how an individual importing a looted artifact may face prosecution and liability in the Eleventh Judicial Circuit. The article begins with a background section that provides additional information about the history of ISIS and ISIS’s current

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<sup>10</sup> See *THE MONUMENTS MEN* (Columbia Pictures 2014).

<sup>11</sup> See, e.g., Tom Mashberg, *Antiquities Dealer Leonardo Patterson Faces New Criminal Charges*, N.Y. TIMES (Dec. 8, 2015), [http://www.nytimes.com/2015/12/09/arts/design/antiquities-dealer-leonardo-patterson-faces-new-criminal-charges.html?\\_r=0](http://www.nytimes.com/2015/12/09/arts/design/antiquities-dealer-leonardo-patterson-faces-new-criminal-charges.html?_r=0).

<sup>12</sup> 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/>.

<sup>13</sup> See Ben Wedeman & Dana Ford, *Video Shows ISIS Militants Destroying Antiquities in Iraq*, CNN (Feb. 27, 2015, 10:24 AM), <http://www.cnn.com/2015/02/26/middleeast/isis-antiquities-vandalism/>.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> Will Freeman, *How ISIS Is Making a Fortune on the Black Market for Ancient Artifacts*, THINKPROGRESS (July 10, 2014, 9:00 AM), <http://thinkprogress.org/world/2014/07/10/3458400/isis-black-market-artifacts-2/>.

<sup>18</sup> See Nick Robins-Early, *Syria’s Historical Artifacts Aren’t Just Being Destroyed by ISIS, They’re Being Looted*, WORLDPOST (June 4, 2015, 11:27 AM), [http://www.huffingtonpost.com/2015/03/13/isis-artifacts-looting\\_n\\_6857550.html](http://www.huffingtonpost.com/2015/03/13/isis-artifacts-looting_n_6857550.html).

plundering scheme. The background section also provides the legal framework and historical treatment of looted art and stolen artifacts. In particular, this section explains the Eleventh Circuit doctrine on this issue, the McClain doctrine. The McClain doctrine<sup>19</sup> applies the National Stolen Property Act (“NSPA”)<sup>20</sup> to foreign found-in-the-ground claims. Supporters of the doctrine argue that it helps “prevent looting internationally without placing an unacceptable burden on the cultural objects trade.”<sup>21</sup>

The analysis section hypothesizes that a looter of a Syrian artifact would not be prosecuted in the Eleventh Circuit under the McClain doctrine. The analysis section also includes possible alternative means for prosecuting a trafficker of Syrian cultural property.

## I. BACKGROUND

### A. *What Is Cultural Property?*

“There is something about great art that can move otherwise law-abiding people to seek to acquire it even by taking advantage of the chaos and desperation of war.”<sup>22</sup> “Great art” might be called by a number of different terms; for example, the terms “art,” “artifact,” “antiquities,” “cultural property or objects,” and “archeological resources” are commonly used in literature and legal writing when referring to antiquities and objects like those looted in Syria and discussed throughout this article.<sup>23</sup> But, “statutory law and case law have demonstrated great disparity in their definitions of antiquity.”<sup>24</sup> An archaeological or ethnological object is “a subset of the broader category of objects valued today for their cultural, archaeological,

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<sup>19</sup> See generally *United States v. McClain (McClain I)*, 545 F.2d 988 (5th Cir. 1977); *United States v. McClain (McClain II)*, 593 F.2d 658 (5th Cir. 1979).

<sup>20</sup> 18 U.S.C. §§ 2314–2315 (2000).

<sup>21</sup> Adam Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1031 (2006).

<sup>22</sup> Mary Ellen O’Connell, *Beyond Wealth: Stories of Art, War, and Greed*, 59 ALA. L. REV. 1075, 1075 (2008).

<sup>23</sup> See Szopa, *supra* note 9, at 58, 59.

<sup>24</sup> *Id.* at 58.

ethnological, aesthetic, and historical importance.”<sup>25</sup> Yet, archaeological and ethnological objects have important distinctions from other cultural objects: “[T]he original owners of archaeological objects are unknown, states pass legislation to protect archaeological finds as state property of scientific interest, the objects’ context may be more important than the objects themselves, and ‘the “nationality” of the object can be easily ascertained if the place of discovery is known.’”<sup>26</sup>

The United States defines an “archeological resource” as “any material remains of past human life or activities which are of archeological interest.” The definition requires that such artifacts be at least one hundred years of age, and its scope includes but is not limited to “pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or any portion of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items.”<sup>27</sup>

“Cultural objects,” “cultural patrimony,” “national patrimony,” “cultural property,” and “antiquities,” however, are terms that are most frequently used in the context of the concerns raised by archaeological and ethnological objects.<sup>28</sup> The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects defines “cultural objects” as “objects which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science . . . .”<sup>29</sup> The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention for the Protection of Cultural Property in the Event of Armed Conflict defines “cultural property” in Article 1:

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<sup>25</sup> Goldberg, *supra* note 23, at 1032 n.1.

<sup>26</sup> *Id.* (citing Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT’L L. 1067, 1077 (2005)).

<sup>27</sup> Szopa, *supra* note 9, at 58–59 (footnotes omitted) (quoting 16 U.S.C. § 470bb(1) (1994)).

<sup>28</sup> See Goldberg, *supra* note 23, at 1032 n.1 (citing Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 380 n.14 (1995) (noting the many terms used in the scholarly discussion of cultural objects, and that choice of term often connotes political perspective rather than distinguishable subject matter)).

<sup>29</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects art. 2, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention].

For the purposes of the present Convention, the term “cultural property” shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments”.<sup>30</sup>

“Cultural property” or “cultural objects” is the terminology most commonly used in this paper, as it is broadly encompassing—recognizing both the physical nature of the object and the object’s tangible and intangible value. The varying terminology and definitions may create a problem if the lack of a concrete definition, or a hyper-technical definition, precludes including the cultural property under a regulation or statute. This article will utilize the terms “antiquity,” “artifact,” “cultural property,” and “cultural object” interchangeably to mean, generally, an article representing the cultural heritage of a society.

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<sup>30</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 216 [hereinafter UNESCO Convention].



## B. ISIS

ISIS (Islamic State of Iraq and Syria), also known as ISIL (the Islamic State of Iraq and the Levant),<sup>31</sup> is a nascent Salafi jihadist militant group that follows an Islamic fundamentalist, Wahhabi doctrine of Sunni Islam.<sup>32</sup> The group also refers to itself simply as the Islamic State and claims religious, political, and military authority over all Muslims worldwide.<sup>33</sup> The United States Department of State designated ISIL a terrorist organization in December 2004.<sup>34</sup>

In August 2011, after the Syrian Civil War broke out, ISIS established a large presence in Syrian provinces.<sup>35</sup> While engaged in Syria's Civil War, ISIS engaged in brutal tactics, including mass executions, beheadings, chemical weapon use, and other extreme human rights violations.<sup>36</sup> ISIS also instituted looting "on an 'industrial' scale . . . ."<sup>37</sup>

By 2013, more than ninety percent of Syria's cultural sites were encompassed by civil unrest and fighting, and they were unprotected.<sup>38</sup> Since then, more than 1,000 historical sites have been looted for financial gain in Syria.<sup>39</sup> The American Association for

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<sup>31</sup> Ishaan Tharoor, *ISIS or ISIL? The Debate Over What to Call Iraq's Terror Group*, WASH. POST (June 18, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/06/18/isis-or-isil-the-debate-over-what-to-call-iraqs-terror-group/>.

<sup>32</sup> See Fouad al-Ibrahim, *Why ISIS Is a Threat to Saudi Arabia: Wahhabism's Deferred Promise*, ALAKHBAR ENGLISH (Aug. 22, 2014), <http://english.alakhbar.com/node/21234>.

<sup>33</sup> See *id.*; see also Audrey Kurth Cronin, *ISIS Is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist Threat*, 94 FOREIGN AFF. 87, 90 (2015).

<sup>34</sup> See BUREAU OF COUNTERTERRORISM, *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Mar. 28, 2016).

<sup>35</sup> See Oliver Holmes, *Al Qaeda Breaks Link with Syrian Militant Group ISIL*, REUTERS (Feb. 3, 2014, 8:33 AM), <http://www.reuters.com/article/2014/02/03/us-syria-crisis-qaeda-idUSBREA120NS20140203>.

<sup>36</sup> See *id.*; see also *World Report 2015: Syria*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2015/country-chapters/syria> (last visited May 10, 2016).

<sup>37</sup> Shabi, *supra* note 7.

<sup>38</sup> See Pringle, *supra* note 6.

<sup>39</sup> See John Nassivera, *ISIS Supporting War Fund by Stealing Artifacts and Selling Them to Western Collectors*, HNGN (Dec. 17, 2014, 3:55 PM),

the Advancement of Science compared satellite imagery of well-known Syrian archaeological sites from 2011 with imagery in 2014.<sup>40</sup> Comparisons of imagery from Dura Europa, an ancient walled city in eastern Syria, revealed thousands of looting holes and digs, which had not previously existed.<sup>41</sup> Although the United States has recovered antiquities believed to have come from sites under ISIS's control,<sup>42</sup> less than one percent of stolen artifacts known to have been taken from Syria have been recovered.<sup>43</sup>

Seized flash drives that contained ISIS's detailed financial records included records of financial transactions involving illicit antiquity trafficking.<sup>44</sup> In one region, ISIS had pocketed up to \$36 million from smuggling looted cultural property.<sup>45</sup> In addition to looting and selling artifacts itself, ISIS has created its own trafficking network,<sup>46</sup> allowing locals to search ancient sites for artifacts and retain a percentage of compensation received for the items.<sup>47</sup> The "increasingly systematized method of collecting and documenting profits from the illegal artifact trade" indicates that ISIS's wealth will continue to grow.<sup>48</sup>

The looted cultural artifacts are not only being sold on the black market in Europe and the United States,<sup>49</sup> but have also been found in British antiques shops and even in New York auction houses.<sup>50</sup>

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<http://www.hngn.com/articles/53161/20141217/isis-supporting-war-fund-by-stealing-artifacts-and-selling-them-to-west.htm>.

<sup>40</sup> See *ISIL and Antiquities Trafficking: FBI Warns Dealers, Collectors About Terrorist Loot*, F.B.I. (Aug. 26, 2015), <https://www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking> [hereinafter *ISIL and Antiquities Trafficking*]; Robins-Early, *supra* note 20.

<sup>41</sup> See *ISIL and Antiquities Trafficking*, *supra* note 42; see also Robins-Early, *supra* note 20.

<sup>42</sup> See Saif Hameed, *U.S. Delivers Iraqi Antiquities Seized in Raid on Islamic State*, REUTERS (July 15, 2015, 4:07 PM), <http://www.reuters.com/article/us-mid-east-crisis-iraq-antiquities-idUSKCN0PP0ZE20150715>.

<sup>43</sup> See Nassivera, *supra* note 41.

<sup>44</sup> Pringle, *supra* note 6.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See Wedeman & Ford, *supra* note 15.

<sup>48</sup> Freeman, *supra* note 19.

<sup>49</sup> *Following the Trail of Syria's Looted History*, CBS NEWS (Sept. 9, 2015, 6:57 AM), <http://www.cbsnews.com/news/isis-looted-syrian-ancient-artifacts-black-market-us-and-europe/>.

<sup>50</sup> See Shabi, *supra* note 7.

Dealers sell artifacts that are “highly distinctive of [Syria],” but label the pieces Indian, Jordanian, or simply “near-eastern.”<sup>51</sup> The looted goods typically “pass first through Turkey or Lebanon, before being moved into Switzerland, Germany, or less commonly, Italy” in order to create a paper trail that could be used to eventually sell the cultural property at legitimate auction houses and antiques shops.<sup>52</sup> In February 2015, the United Nations Security Council prohibited the trading of artifacts that were illegally removed from Syria since 2011 in order to stanch the flow of funds ISIS and other terrorist groups derive from the looted cultural property.<sup>53</sup>

*C. Regulation of Cultural Property, the Cultural Property Industry, and United States Enforcement of Cultural Property Rights*

Over the twentieth century, in part due to highly publicized scandals that “revealed the involvement of esteemed institutions and individuals with looted objects[,]”<sup>54</sup> the United Nations and the United States developed various ways to regulate cultural property.<sup>55</sup> The regulations include import and export regulations and restitution.<sup>56</sup> “Import and export regulation attack illicit art trade as artifacts are being exported out of the source nation and into a new country, whereas restitution provides a remedy (return to the rightful owner) once the objects have already crossed borders.”<sup>57</sup>

1. INTERNATIONAL REGULATIONS OF CULTURAL PROPERTY

Recognizing that “cultural property constitutes one of the basic elements of civilization and national culture,” the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) met in 1970 to discuss protecting cultural property and preserving “its

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<sup>51</sup> See, e.g., *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> Asif Efrat, *Getting Governments to Cooperate Against Looting: Insights from the American and British Experience*, J. ART CRIME 31, 36 (2012).

<sup>55</sup> See *id.* at 37.

<sup>56</sup> See, e.g., Szopa, *supra* note 9, at 65–66.

<sup>57</sup> *Id.* at 66.

origin, history, and traditional setting.”<sup>58</sup> The convention was labeled the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“Convention”).<sup>59</sup> The Convention had a dual goal of protecting the cultural property from various countries against “theft, pillage or misappropriation” and providing for the requisition of such property.<sup>60</sup>

Recovery of cultural property is found in Article 7 of the Convention, which requires parties to the Convention to prohibit importation of cultural property stolen “from a museum or a religious or secular public monument” and to take measures to return such imported cultural property at the request of the “State Party of origin,” provided that the “requesting State” pay “just compensation to an innocent purchasers.”<sup>61</sup> But the Convention is not without limits; most obviously, the Convention is limited to cultural property stolen from museums, public monuments or similar institutions.<sup>62</sup> A gaping void is left for cultural properties that have not yet been discovered or that are held by private individuals.<sup>63</sup> In addition, most of the signatory nations agreed to the Convention in only limited ways, and “each signatory is allowed to ‘define the cultural property that is to be protected.’”<sup>64</sup>

Accordingly, subsequent regulations were needed. The 1995 International Institute for the Unification of Private Law (“UNIDROIT”) Convention “generally sought to establish uniform legal rules governing restitution claims for stolen cultural objects

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<sup>58</sup> Harrie Leyten, *Illicit Traffic in Collections of Western Museums of Ethnography*, in *ILLICIT TRAFFIC IN CULTURAL PROPERTY: MUSEUMS AGAINST PILLAGE* 14, 18 (Harrie Leyten ed., 1995), *quoted in* Szopa, *supra* note 9, at 64–65; *see also* Szopa, *supra* note 9, at 64–65.

<sup>59</sup> *See* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention of 1970]; *see also* Szopa, *supra* note 9, at 64.

<sup>60</sup> Szopa, *supra* note 9, at 64 (footnote omitted).

<sup>61</sup> UNESCO Convention of 1970, *supra* note 61, at art. 7.

<sup>62</sup> *See id.*

<sup>63</sup> *See* Szopa, *supra* note 9, at 66.

<sup>64</sup> *Id.* (quoting Michael Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio Animo Ferundi/Lucrandi*, 14 *DICK. J. INT’L L.* 31, 44 (1995)).

and return claims for illicitly exported cultural objects.”<sup>65</sup> Although the UNIDROIT treaty significantly expanded protection of cultural property,<sup>66</sup> it also is limited. The UNIDROIT treaty “is not retroactive and does not apply to pieces stolen from the host country before its ratification.”<sup>67</sup> “The majority of the countries which have signed the treaty are source nations[,]”<sup>68</sup> and now there are more than sixty-three members of UNIDROIT.<sup>69</sup> Many market nations, including the United States, did not initially sign the treaty based on negative responses to UNIDROIT from art dealers.<sup>70</sup> Dealers were concerned that UNIDROIT would limit exhibitions and sales of cultural property in signatory countries, as source nations might try to legally confiscate the cultural property.<sup>71</sup>

## 2. UNITED STATES REGULATION OF CULTURAL PROPERTY

The United States took art dealers’ concerns with UNIDROIT seriously, due in part to the United States’ status as “a well-developed marketplace for the cultural objects of other nations”<sup>72</sup> that has “maintained a laissez-faire mentality with regards to cultural property.”<sup>73</sup> “This [status] is likely due to the fact that the United States is one of the ‘largest buyer’s market in the world’ when it comes to artifacts obtained on the black market.”<sup>74</sup> Although “illegally exported property finds its way to respectable museums and auction houses[,]”<sup>75</sup> that laissez-faire attitude has shifted—due, in part, to

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<sup>65</sup> Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 RUTGERS L. REV. 117, 119 n.9 (2011).

<sup>66</sup> For example, it not only applies to museums or state institutions, but it also applies to any “possessor of a stolen cultural object . . .” UNIDROIT Convention, *supra* note 31, at arts. 3–4.

<sup>67</sup> Szopa, *supra* note 9, at 67; *see* UNIDROIT Convention, *supra* note 31, at art. 10.

<sup>68</sup> *See* Szopa, *supra* note 9, at 67.

<sup>69</sup> *See* *Membership*, UNIDROIT, <http://www.unidroit.org/about-unidroit/membership> (last updated Feb. 10, 2016).

<sup>70</sup> *See* Szopa, *supra* note 9, at 67.

<sup>71</sup> *See id.*

<sup>72</sup> Goldberg, *supra* note 23, at 1035.

<sup>73</sup> Szopa, *supra* note 9, at 71.

<sup>74</sup> *Id.* (footnote omitted).

<sup>75</sup> *Id.* For example, the Metropolitan Museum of Art in New York displayed marble sphinxes, gold, silver, and glass jewelry that were part of the infamously

the passage of the Pre-Columbian Monumental Sculpture and Murals Statute.<sup>76</sup>

The Pre-Columbian Monumental Sculpture and Murals Statute (“PCMSM”) “prohibits the import of large stone pieces of Pre-Columbian temples and murals into the United States” without proof that the exportation was not illegal.<sup>77</sup> The PCMSM also sets out a framework for restitution of certain Pre-Columbian art:

The [PCMSM] requires that an importer of Pre-Columbian monumental or architectural sculptures, murals, or fragments present proof regarding its legal exportation from the country of origin. If the importer cannot present such certificate of proof, the artifacts are forfeited to the United States government and remain in the government’s possession until the country of origin requests their return.<sup>78</sup>

Like most regulations of cultural property, however, the PCMSM is temporally limited: it applies only to cultural property exported on or before October 27, 1972.<sup>79</sup>

In 1979, the United States enacted the Archaeological Resources Protection Act of 1979 (“ARPA”) to combat a rise of unauthorized archaeological excavation on public and Indian lands *within* the United States.<sup>80</sup> Like the Cultural Property Implementation Act (“CPIA”), the ARPA was a recognition of the importance of securing “for the present and future benefit of the American people, the

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looted Lydian Hoard collection from the sixth century B.C. until it agreed to return the collection to the Republic of Turkey. See Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 409 (2003).

Elizabeth Taylor’s Van Gogh painting, which was alleged to have been forfeited by the original Jewish collector in a coerced sale and purchased by Taylor through a public auction at Sotheby’s, was sold at Christie’s International in London for \$16 million. See Stephen K. Urice, *Elizabeth Taylor’s Van Gogh: An Alternative Route to Restitution of Holocaust Art?*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 10–12 (2011); Lauren Torrisi, *Elizabeth Taylor’s Van Gogh Sells for \$16 Million*, ABC NEWS (Feb. 8, 2012), <http://abcnews.go.com/blogs/entertainment/2012/02/elizabeth-taylors-van-gogh-sells-for-16-million/>.

<sup>76</sup> Szopa, *supra* note 9, at 71 (citing 19 U.S.C. §§ 2091–2095 (2000)).

<sup>77</sup> *Id.* at 71–72; see Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, Pub. L. No. 92-587, § 202, 86 Stat. 1296, 1297 (1972).

<sup>78</sup> Szopa, *supra* note 9, at 72.

<sup>79</sup> See *id.* (citing 19 U.S.C. §§ 2093–2093 (1988)).

<sup>80</sup> Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, § 2, 93 Stat. 721, 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa–470ll).

protection of archaeological resources and sites which are on public lands and Indian lands . . . .”<sup>81</sup>

As the trend towards recognizing property rights in cultural artifacts and antiquities continued, the United States adopted the UNESCO Convention in 1983 through the CPIA.<sup>82</sup> The CPIA allows the United States to place restrictions for importing certain classes of archaeological and ethnographic material.<sup>83</sup> The CPIA also includes an emergency provision that allows the United States to restrict the importation of cultural property that is “in jeopardy from pillaging, dismantling, dispersal or fragmentation which is, or threatens to be of crisis proportions . . . .”<sup>84</sup> The United States’ decision to join the UNESCO Convention was a “critical turning point[] in the international efforts against the looting of antiquities.”<sup>85</sup>

Giving criminal teeth to the regulation of cultural property, the National Stolen Property Act (“NSPA”)<sup>86</sup> is a federal statute that criminalizes the transport and sale, in interstate or foreign commerce, of known stolen goods with a value of at least \$5,000.<sup>87</sup> The NSPA was passed in 1939 to “prevent criminals from moving stolen property across state lines in attempts to evade the jurisdiction of state and local law enforcement officials.”<sup>88</sup> The NSPA criminalizes the transportation and possession of goods worth at least \$5000 in interstate or foreign commerce, and—like most criminal statutes—the NSPA includes an intent element, requiring that the transporter

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<sup>81</sup> *Id.*

<sup>82</sup> Convention on Cultural Property Implementation Act, Pub. L. 97-446, § 302(5), 96 Stat. 2329, 2351 (1983).

<sup>83</sup> See Szopa, *supra* note 9, at 72.

<sup>84</sup> Howard N. Spiegler & Lawrence M. Kaye, *American Litigation to Recover Cultural Property: Obstacles, Options, and a Proposal*, in *TRADE IN ILLICIT ANTIQUITIES: THE DESTRUCTION OF THE WORLD’S ARCHEOLOGICAL HERITAGE* 125 (Neil Brodie, Jennifer Doole & Colin Renfrew eds., 2001), *quoted in* Szopa, *supra* note 9, at 72.

<sup>85</sup> Efrat, *supra* note 56, at 32.

<sup>86</sup> National Stolen Property Act, 18 U.S.C. §§ 2311–2323.

<sup>87</sup> *Id.* §§ 2314–2315.

<sup>88</sup> Spencer Simon, *The Economic Espionage Act of 1996*, 13 *BERKELEY TECH. L.J.* 305, 306 (1998) (explaining the origins of the NSPA in the context of intellectual property theft), *quoted in* Goldberg, *supra* note 23, at 1039.

or seller know that the goods were stolen, converted, or taken by fraud.<sup>89</sup>

In order to fall under the NSPA, an object must be stolen, but the NSPA does not define what “stolen” means.<sup>90</sup> Courts have applied the NSPA to cultural objects that have been taken in “contravention of foreign found-in-the-ground laws.”<sup>91</sup> Found-in-the-ground laws are “commonly adopted in archaeologically rich nations” and contain edicts that “rely on a theory of constructive possession to claim state ownership of unexcavated objects, objects located on unprotected sites or private lands, and even those in private collections.”<sup>92</sup> Found-in-the-ground laws also typically require that “all cultural objects located within a country stay there and be subject to repatriation if removed without permission.”<sup>93</sup>

“[F]ew nations enacted or consistently enforced found-in-the-ground laws until the twentieth century”<sup>94</sup>—even countries that are typically considered source nations for cultural property.<sup>95</sup> This does not come as a surprise, given that many countries experienced extreme political upheaval and went through various iterations of governments until recently. For example, Greece—of the famed two-hundred-plus-year-old Elgin Marbles crisis<sup>96</sup>—did not claim state

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<sup>89</sup> See 18 U.S.C. § 2314. The elements for criminal theft under the NSPA are the following: “(1) knowledge that the goods were stolen; (2) that the goods were transported in interstate or foreign commerce; and (3) that the value of the goods meets or exceeds \$5,000.” Goldberg, *supra* note 23, at 1035 n.17 (citing 18 U.S.C. § 2314 and discussing the elements of criminal theft under the NSPA).

<sup>90</sup> See Goldberg, *supra* note 23, at 1039.

<sup>91</sup> *Id.* at 1036.

<sup>92</sup> *Id.* at 1035 (footnotes omitted).

<sup>93</sup> *Id.* (footnote omitted).

<sup>94</sup> *Id.* at 1038.

<sup>95</sup> See *id.* (indicating that most nations, including Mexico and Greece, did not enact found-in-the-ground laws until the twentieth century); see also Andrea Cuning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT’L L. 449, 455 (2004) (indicating that Mexico and Greece are considered source nations).

<sup>96</sup> Thomas Bruce, the Seventh Earl of Elgin, served as the British Ambassador to the Government of the Ottoman Empire in the early 1800s. See Cuning, *supra* note 97, at 491; see also Goldberg, *supra* note 23, at 1032 n.3. While in Greece, Lord Elgin removed large marble sculpture panels from the Parthenon in Athens and shipped them to England. See Cuning, *supra* note 97, at 491. In 1816, Lord Elgin sold the Elgin Marbles to the British Museum, where they still reside. See *id.* Greece officially requested the return of the Elgin Marbles in 1983; the



ownership of “all cultural objects and maritime finds” until 1932.<sup>97</sup> And Egypt, of King Tutankhamun fame, has a found-in-the-ground law that declares that “all antiquities found in [Egypt] after 1983 are the property of the Egyptian government . . . .”<sup>98</sup> Algeria, Argentina, Belize, Bolivia, Brazil, Chile, Costa Rica, El Salvador, Guatemala, Haiti, Italy, Jordan, Kuwait, Lebanon, Liberia, Mauritania, Nicaragua, Nigeria, Panama, Tanzania, Tunisia, Turkey, and Venezuela also have found-in-the-ground laws.<sup>99</sup> Relevant to the analysis in the next section, Syria<sup>100</sup> and Iraq<sup>101</sup> have also, at varying points in modern history, instituted legislative provisions that protected movable cultural property.

The Federal Bureau of Investigation is generally the authority that regulates and enforces laws against stolen or illicit cultural property in the United States.<sup>102</sup> The FBI maintains a “computerized index of stolen art and cultural property” through the National Stolen Art File (“NSAF”).<sup>103</sup> The NSAF is developed using reports from law enforcement agencies throughout the country and

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request was denied and significant debate over Greece’s claim to the Marbles continues. *See id.* One argument is that the return of the Marbles would create a floodgate of requests for restitution of cultural property:

The Metropolitan Museum in New York, the British Museum in London, the Louvre in Paris, the Hermitage in Leningrad and indeed all of the great Western museums contain vast collections of works from other parts of the world. If the principle were established that works of foreign origin should be returned to their sources, as Third World nations increasingly demand in UNESCO and other international fora, the holdings of the major Western museums would be drastically depleted. The Elgin Marbles symbolize the entire body of unrepatriated cultural property in the world’s museums and private collections.

*Id.* at 492 (quoting another source).

<sup>97</sup> Goldberg, *supra* note 23, at 1038.

<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See* UNESCO, THE PROTECTION OF MOVABLE CULTURAL PROPERTY I: COMPENDIUM OF LEGISLATIVE TEXTS 264 (1984) [hereinafter UNESCO COMPENDIUM].

<sup>101</sup> *See Relating to Stolen Archaeological Property: Hearing on S. 605 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary, 99th Cong. 48–49 (1985) (testimony of Ely Maurer, Assistant Legal Adviser, Department of State) [hereinafter Hearing].*

<sup>102</sup> *See* Szopa, *supra* note 9, at 73.

<sup>103</sup> *National Stolen Art File (NSAF)*, F.B.I., [https://www.fbi.gov/about-us/investigate/vc\\_majorthfts/arttheft/national-stolen-art-file](https://www.fbi.gov/about-us/investigate/vc_majorthfts/arttheft/national-stolen-art-file) (last visited Apr. 1, 2016).

world.<sup>104</sup> NSAF's stolen art catalog includes detailed descriptions of the art, including images and physical descriptions.<sup>105</sup> The "FBI's jurisdiction of art thefts is limited to investigations where stolen goods valued at more than \$5,000 have been transported across state boundaries."<sup>106</sup>

The United States uses the NSPA to regulate cultural objects that are imported into the United States through traditional thefts and heists, as well as objects that are obtained in violation of a country's found-in-the-ground law.<sup>107</sup> Conventional art may constitute as little as ten percent of the illicit art trade.<sup>108</sup> Accordingly, the majority of NSPA enforcement cases concern "objects taken directly from the ground in contravention of foreign found-in-the-ground laws."<sup>109</sup> Applying the NSPA to objects taken in contravention of foreign found-in-the-ground laws is known as the McClain doctrine, which is based on two early cases.<sup>110</sup>

### 3. THE MCCLAIN DOCTRINE

Painting with a broad brush, the McClain doctrine generally affords deference to—and respects—foreign found-in-the-ground laws. Precariously balancing the United States' constant struggle between free trade and overly burdensome dead-hand property laws,<sup>111</sup> "[f]ound-in-the-ground laws 'are intended both to protect archeological sites from looting and to prevent the outflow of cultural property to consumers in wealthy market nations, with the ultimate goal

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<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See Szopa, supra note 9, at 73.*

<sup>107</sup> *See Goldberg, supra note 23, at 1035–36* (noting that the NSPA has been applied to conventionally stolen cultural objects without much controversy; however, courts have also applied it to cultural objects stolen in contravention of found-in-the-ground laws).

<sup>108</sup> *See id.* at 1036.

<sup>109</sup> *Id.*

<sup>110</sup> *See id.; McClain I*, 545 F.2d 988, 996 (5th Cir. 1977) (rejecting the argument that "the NSPA cannot apply to illegal exportation of artifacts declared by Mexican law to be the property of the Nation"); *McClain II*, 593 F.2d 658, 671 (5th Cir. 1979) ("[I]t is proper to punish through the [NSPA] encroachments upon legitimate and clear Mexican ownership, even though the goods may never have been physically possessed by agents of that nation.").

<sup>111</sup> *See Goldberg, supra note 23, at 1050* (noting that the United States has traditionally respected "private property rights and free trade").

of preserving the source nation's cultural heritage as embodied in the items of cultural property that define that heritage . . . ."<sup>112</sup> Typically, for a foreign found-in-the-ground law to be applied under the McClain doctrine, the source nation must (1) impose export restrictions, and (2) have declared national ownership in cultural property.<sup>113</sup> The first element, export restrictions, generally "forbid the unauthorized removal of cultural objects from a nation . . . ."<sup>114</sup> The second element, national ownership declarations, "vest ownership in the state of all cultural objects located within its territory."<sup>115</sup>

The *McClain* cases (*McClain I* and *McClain II*)<sup>116</sup> provided the first—and lasting—extensive analysis of the use of foreign found-in-the-ground laws.<sup>117</sup> The *McClain* cases involved defendants who had traveled to Mexico and excavated pre-Columbian artifacts.<sup>118</sup> Patty McClain and the other defendants then exported the artifacts without a permit or license, brought them into the United States, and were indicted under the NSPA.<sup>119</sup> The court described the posture as follows:

The defendants do not dispute that the artifacts involved in this case were illegally exported from Mexico. The government contends that the pre-Columbian artifacts were stolen from the Republic of Mexico; that Mexico owned these objects despite the probability or possibility that the defendants, or their vendors, acquired them from private individuals or "found" them—e. g., by accident in overturning the

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<sup>112</sup> *Id.* at 1037 (quoting another source).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *McClain I*, 545 F.2d 988 (5th Cir. 1977); *McClain II*, 593 F.2d 658 (5th Cir. 1979).

<sup>117</sup> See Goldberg, *supra* note 23, at 1039–40.

<sup>118</sup> *McClain I*, 545 F.2d at 992–93; see also Goldberg, *supra* note 23, at 1040.

<sup>119</sup> See *McClain I*, 545 F.2d at 991–92; see also Judith Church, Note, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 COLUM. J. TRANSNAT'L L. 179, 185 (1992); Goldberg, *supra* note 23, at 1040.

soil or digging at archaeological sites on private property in Mexico.<sup>120</sup>

Thus, the crux of the case—whether the defendants were properly convicted by a jury under the NSPA for trafficking in stolen property—concerned the definition of “stolen.”<sup>121</sup> The defendants argued that “‘stolen’ as used in the NSPA connotes only the wrongful deprivation of physical possession” and Mexico “had never alleged such deprivation . . . .”<sup>122</sup> Accordingly, the defendants argued that they had engaged only in unauthorized export, which was not penalized under United States law.<sup>123</sup> The defendants’ second argument was that the district court erroneously determined that, at the time the defendants had removed the cultural objects from Mexico, “Mexican law had established state ownership of all pre-Columbian artifacts . . . .”<sup>124</sup>

In *McClain I*, the court analyzed the meaning of “stolen” in the NSPA and held that it “should be interpreted broadly to comport with the NSPA’s purpose of protecting the owners of stolen property.”<sup>125</sup> The court took a broad view, recognizing “national ownership declarations as an attribute of sovereignty . . . .”<sup>126</sup> The court expanded the application of the NSPA, finding that the “NSPA could proscribe trafficking in cultural objects removed from their source country . . . .”<sup>127</sup> Removal without a license or a permit was essentially “wrongful deprivation of the true owner’s rights in its property.”<sup>128</sup> The court concluded, however, that “Mexican law did not assert clear national ownership of its pre-Columbian artifacts

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<sup>120</sup> *McClain I*, 545 F.2d at 993.

<sup>121</sup> *See id.* at 992; *see also* Goldberg, *supra* note 23, at 1040 (noting that the defendants’ main argument on appeal was based on the connotation of “stolen” under the NSPA).

<sup>122</sup> Goldberg, *supra* note 23, at 1040; *see McClain I*, 545 F.2d at 994.

<sup>123</sup> *See* Goldberg, *supra* note 23, at 1040; *see also McClain I*, 545 F.2d at 994 (“[T]he appellants contend that application of the [NSPA] to cases of mere illegal exportation constitutes unwarranted federal enforcement of foreign law.”).

<sup>124</sup> Goldberg, *supra* note 23, at 1040; *see McClain I*, 545 F.2d at 994.

<sup>125</sup> Goldberg, *supra* note 23, at 1040–41 (citing *McClain I*, 545 F.2d at 994–95).

<sup>126</sup> *Id.* at 1041 (citing *McClain I*, 545 F.2d at 1002–03).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

until 1972 and remanded to determine when the appellants had removed the contested objects from Mexico.”<sup>129</sup>

On remand, the defendants were convicted again, and they again appealed.<sup>130</sup> In *McClain II*, the court concluded that due process concerns arose when claims prosecuted under the NSPA were “based on vague or incomprehensible found-in-the-ground laws . . . .”<sup>131</sup> This was due in part to the fact that applying the NSPA to a criminal case “may have been beyond the original intention of Congress,” and thus, evoked “constitutional due process issues that required the court to subject the foreign laws to a rigorous interpretation.”<sup>132</sup> The court was concerned with subjecting United States citizens to criminal liability based on Mexican ownership laws “that were too vague to be a predicate for criminal liability . . . .”<sup>133</sup> The court held that “[p]roperty claimed by virtue of a foreign found-in-the-ground law . . . cannot be considered under the NSPA unless the relevant ownership declaration is clear enough for United States citizens to understand.”<sup>134</sup>

Thus, the McClain doctrine is derived from *McClain I* and *McClain II*.<sup>135</sup> Although the doctrine provides that criminal liability exists under the NSPA for cultural property trafficked in contravention of a source nation’s found-in-the-ground laws, the doctrine is significantly restricted.<sup>136</sup> First, intent is required.<sup>137</sup> A trafficker must know that the cultural property is “claimed by a foreign state before [the property] can be considered stolen.”<sup>138</sup> Second, a mere “violation of export restrictions does not make possession of the illegally exported property a violation of the NSPA.”<sup>139</sup> The source

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<sup>129</sup> *Id.*

<sup>130</sup> *See id.*

<sup>131</sup> *Id.* (citing *McClain II*, 593 F.2d 658, 665–66 (5th Cir. 1979)).

<sup>132</sup> Church, *supra* note 121, at 190–91.

<sup>133</sup> *McClain II*, 593 F.2d at 670.

<sup>134</sup> Goldberg, *supra* note 23, at 1041 (citing *McClain II*, 593 F.2d at 670).

<sup>135</sup> *See id.* at 1042.

<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *Id.* (citing *McClain II*, 593 F.2d at 671).

<sup>139</sup> *McClain I*, 545 F.2d 988, 996 (5th Cir. 1977), *quoted in* Goldberg, *supra* note 23, at 1042.

nation must do more than merely restrict exportation; it must establish national ownership over the object.<sup>140</sup> Third, the trafficked cultural property must originate from the source nation's territory.<sup>141</sup> Fourth, the source nation's found-in-the-ground law must be clear enough to provide adequate notice of its ownership over the object.<sup>142</sup> Last, the taking of the cultural property must have occurred after the relevant found-in-the-ground law's effective date.<sup>143</sup> The determination of a foreign law's sufficiency is a question of law for the court.<sup>144</sup> Relevant evidence and expert witnesses may be used to prove the foreign law's adequacy, but the judge maintains the final say as to the applicability of the law.<sup>145</sup>

## II. A PURCHASER OF LOOTED SYRIAN ARTIFACTS WOULD NOT BE CONVICTED UNDER THE NSPA IN THE ELEVENTH CIRCUIT

United States courts "have seen little of McClain doctrine over the past thirty years,"<sup>146</sup> and the Eleventh Circuit has never revisited the doctrine or even applied it again. In order to create a legitimate entitlement to cultural property, a Syrian national ownership law

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<sup>140</sup> See *id.* at 1002 (where the court distinguished between a state's police power to restrict and actual ownership); see also Goldberg, *supra* note 23, at 1042.

<sup>141</sup> See Goldberg, *supra* note 23, at 1042; see also *McClain I*, 545 F.2d at 1002–03.

<sup>142</sup> *McClain II*, 593 F.2d at 666 (stating that "had there been no subsequent enactments that declared ownership with enough specificity to be accessible to and understandable by our citizenry, criminal penalties may well have violated our fundamental standards of due process"); *id.* at 670 (reversing the substantive count on the grounds that the defendants may have been convicted under laws that were too vague); see also Goldberg, *supra* note 23, at 1042.

<sup>143</sup> See *McClain I*, 545 F.2d at 1000–01; see also Goldberg, *supra* note 23, at 1042.

<sup>144</sup> See Church, *supra* note 121, at 199.

<sup>145</sup> See *id.*

<sup>146</sup> Goldberg, *supra* note 23, at 1043. *But see* *Gov't of Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989) (recognizing the validity of applying the McClain doctrine in replevin claim and holding that the claimant had failed to establish that the antiquities in question came from Peru and that Peruvian law was not clear); *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 143 (N.Y. App. Div. 1990); *Republic of Croatia v. Trustee of the Marquess of Northampton 1987 Settlement*, 203 A.D.2d 167, 167 (1994); *United States v. Schultz*, 178 F. Supp. 2d 445, 448 (S.D. N.Y. 2002) (discussing the applicability of the McClain doctrine to an Egyptian law).

would need to be exclusive and exhaustive.<sup>147</sup> To be exclusive, the law “must contain a clear statement of state ownership, not merely state protection of the property or state interest.”<sup>148</sup> Again, the law cannot simply create an abstract desire to maintain cultural property and must do more than impose an export restriction. To be exhaustive, the law should consider other categories of property that may be outside of the law—such as prior private ownership—and contemplate why certain items of property do not fit into other categories.<sup>149</sup>

UNESCO’s 1984 Compendium of Legislative Texts, The Protection of Movable Cultural Property I,<sup>150</sup> and UNESCO’s 1988 Handbook of National Regulations Concerning the Export of Cultural Property<sup>151</sup> include the Syrian Arab Republic’s Decree Law No. 222 of October 26, 1963 (“Decree”) as relevant national legislation on cultural property. But from 1963 until Civil war broke out in 2011,<sup>152</sup> the Syrian Arab Republic was under Emergency Law, which effectively suspended most constitutional protections<sup>153</sup> and instituted a non-democratic, authoritarian regime.<sup>154</sup> In 2012, a new constitution was adopted, which allows a president to appoint ministers, declare war, and issue laws which are ratified by a legislative

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<sup>147</sup> Church *supra* note 121, at 199.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> UNESCO COMPENDIUM, *supra* note 102, at 264.

<sup>151</sup> LYNDEL V. PROTT & PATRICK J. O’KEEFE, UNITED NATIONS EDUC., SCI. AND CULTURAL ORG. (UNESCO), HANDBOOK OF NATIONAL REGULATIONS CONCERNING THE EXPORT OF CULTURAL PROPERTY (1988), <http://unesdoc.unesco.org/images/0011/001191/119126eo.pdf> [hereinafter UNESCO HANDBOOK].

<sup>152</sup> See Katherine Marsh & Ian Black, *Syria to Lift Emergency Rule After 48 Years—But Violence Continues*, GUARDIAN (Apr. 19, 2011, 2:41 PM), <http://www.theguardian.com/world/2011/apr/19/syria-lift-emergency-rule-violence>.

<sup>153</sup> See *Bashar al-Assad: Syria’s Unintended President*, CNN (Aug. 11, 2011, 11:18 AM), <http://www.cnn.com/2011/WORLD/meast/08/10/syria.al.assad.profile/>.

<sup>154</sup> See *The World Factbook, Middle East: Syria*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> (last updated Aug. 1, 2016) [hereinafter *Factbook*]; see also Michael Bröning, *The Sturdy House that Assad Built: Why Damascus Is Not Cairo*, FOREIGN AFF. (Mar. 7, 2011), <https://www.foreignaffairs.com/articles/syria/2011-03-07/sturdy-house-assad-built>.

body.<sup>155</sup> Nonetheless, Syria's politics and governance remain in a state of extreme upheaval.<sup>156</sup> Accordingly, it is extremely difficult to find anything that resembles a found-in-the-ground law, except for Syria's 1963 Decree.

The Decree contains several chapters, each of which is broken into articles. Chapter 1, Article 1 defines "antiquity":

Antiquity" means any movable or immovable property erected, manufactured, produced, written or drawn by man more than 200 years ago (Christian era) or 206 years ago (in the Hegira). The Antiquities Authority may also designate as an antiquity any more recent movable or immovable property which has historical or artistic value of national importance. A ministerial order shall be made to this end.<sup>157</sup>

The Decree covers movable and immovable antiquities<sup>158</sup> and contains conflicting ownership provisions, which differentiate between discovered antiquities and excavated antiquities. Chapter III,

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<sup>155</sup> See *Syrian Arab Republic*, EUR. FORUM FOR DEMOCRACY AND SOLIDARITY, [http://www.europeanforum.net/country/syrian\\_arab\\_republic](http://www.europeanforum.net/country/syrian_arab_republic) (last updated Apr. 23, 2015); see also *Factbook*, *supra* note 157.

<sup>156</sup> See Leon Wieseltier & Michael Ignatieff, *Enough Is Enough—U.S. Abdication on Syria Must End*, BROOKINGS INST. (Feb. 12, 2016), <http://www.brookings.edu/blogs/markaz/posts/2016/02/12-moral-outrage-on-syria-ignatieff-wieseltier> (describing the death toll, displacement of civilians, indiscriminate bombardment of "bread lines" and hospitals, and other morally corrupt practices conducted by the Assad regime in order to maintain power in the region).

<sup>157</sup> UNESCO COMPENDIUM, *supra* note 102, at 265 (footnote omitted).

<sup>158</sup> Article 3 of the Decree states the following:

There shall be two categories of antiquities; immovable antiquities and movable antiquities.

A. "Immovable antiquities" . . .

B. "Movable antiquities" means any antiquities which are designed from their very nature to be detached from the soil or from historic monuments, and which may be transported. Movable antiquities include sculptures, coins, figurines, engravings, manuscripts, textiles and any manufactured object regardless of its material, design or use.

C. Certain movable antiquities shall be considered immovable if they form part of any immovable property or of the decoration thereof. Any decision in this respect shall be made by the Antiquities Authority.

*Id.*



Article 35, allows any individual who “fortuitously discovers a movable antiquity” to keep the antiquity after reporting it to the Antiquities Authority, until it is delivered to the Antiquities Authority and the Antiquity Authority decides whether “to add the antiquity in question to the collections in its museums or to place it at the disposal of the finder thereof.”<sup>159</sup> Conversely, Chapter IV, Article 52, which governs archaeological excavations, states the following: “All antiquities discovered by the institution, society or mission carrying out the excavations shall be the property of the State. Under no circumstances may ownership thereof be renounced in favour of the institution, society or mission in question . . . .”<sup>160</sup>

The Decree was likely intended to be a valid national ownership declaration, rather than an export control. Decree does more than “merely restrict;” it declares “national ownership.”<sup>161</sup> On the other hand, the Decree arguably works like an export control because it allows, in some instances, “fortuitously discovered” antiquities—which would more likely be discovered by Syrians—to remain in the possession of the finder (thereby making it more likely that the objects would remain in the country), while it decrees that excavated antiquities found by institutions or societies (which would more likely be removed from the country) are owned by the State.

Whether or not the Decree would be deemed to sufficiently declare national ownership over cultural objects, it is unlikely that the United States government would be able to prove that the Decree meets the other necessary aspects of the McClain doctrine: scienter, origination from the source nation, and adequate notice. The intent

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<sup>159</sup> *Id.* at 272.

<sup>160</sup> *Id.* at 275.

<sup>161</sup> *Cf. McClain I*, 545 F.2d 988, 1002–03 (5th Cir. 1977) (“We distinguish, therefore, between varying types of governmental control over property within the borders of a state. . . . [T]he state’s power to regulate is not ownership. Nor does the fact that a state has regulated an object in and of itself constitute ownership. . . . The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner; the declaration is an attribute of sovereignty.” (footnote omitted)).

element focuses on whether a trafficker knows that the cultural property is protected by a foreign source nation.<sup>162</sup> Given that Syria has undergone several regime changes since the Decree of 1963, a purchaser of a looted Syrian antiquity would likely not know that the Decree exists, or would assume that former decrees and laws were abandoned when Emergency Law was enacted, when civil war broke out, or when a new government was created in 2012.

Given the political upheaval in the region, it would likely be difficult to prove that the trafficked cultural property originated from Syria's territory.<sup>163</sup> Syria and the surrounding region's official borders were established only in the last century;<sup>164</sup> since then, there have been hordes of militants and migrants moving through the region.<sup>165</sup> Moreover, Syria shares a cultural and indigenous heritage with the Levant,<sup>166</sup> the Umayyad Caliphate,<sup>167</sup> and the Ottoman Empire,<sup>168</sup> among other Caliphates, Sultanates, and Empires.<sup>169</sup> Looted

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<sup>162</sup> See *McClain II*, 593 F.2d 658, 671 (5th Cir. 1979) (evaluating whether the defendants knew that Mexican law claimed the nation's ownership over the property that was taken).

<sup>163</sup> See *McClain I*, 545 F.2d at 1003.

<sup>164</sup> Jim Maceda, *How a Line Drawn in the Sand Nearly 100 Years Ago Helped Create Syria Mess*, NBC NEWS (June 4, 2013, 8:52 AM), [http://world-news.nbcnews.com/\\_news/2013/06/04/18749358-how-a-line-drawn-in-the-sand-nearly-100-years-ago-helped-create-syria-mess](http://world-news.nbcnews.com/_news/2013/06/04/18749358-how-a-line-drawn-in-the-sand-nearly-100-years-ago-helped-create-syria-mess).

<sup>165</sup> See Sengupta, *supra* note 3 (noting the massive numbers of refugees and migrants that have crossed over into neighboring countries); *Syria Regional Refugee Response*, *supra* note 3.

<sup>166</sup> The Levant region of the Eastern Mediterranean includes what are today recognized as Cyprus, Egypt, Iraq, Israel, Jordan, Lebanon, Palestine, Syria, and Turkey. See generally Matthew J. Suriano, *Historical Geography of the Ancient Levant*, in THE OXFORD HANDBOOK OF THE ARCHAEOLOGY OF THE LEVANT: C. 8000-332 BCE (Margreet L. Steiner & Ann E. Killebrew eds., 2014).

<sup>167</sup> Syria was the center of the Umayyad Caliphate, which, at its greatest extent, encompassed the Arabian Peninsula, Northern Africa, Spain, Portugal, and Pakistan. See generally H.U. Rahman, A CHRONOLOGY OF ISLAMIC HISTORY: 570-1000 CE (3d ed. 1999).

<sup>168</sup> See DONALD QUATAERT, THE OTTOMAN EMPIRE: 1700-1922 3 (2d ed. 2005) (indicating that Syria is a successor state of the Ottoman Empire).

<sup>169</sup> The Mamluk Sultanate (1250-1517) and the French mandate (WWI-1946) are examples. The transience of cultures, people, and objects in that region would also make it difficult to prove that the taking of the cultural property occurred after the Decree's effective date, as is required by the McClain doctrine. See *McClain I*, 545 F.2d 988, 1003 (5th Cir. 1977) ("If the exportation occurred before the effective date of the 1934 law, it could not have been owned by the Mexican

Syrian cultural property that has made its way into the West is labeled as Indian, Jordanian, or near-eastern.<sup>170</sup> Additionally, the Department of State's Bureau of Educational and Cultural Affairs does not have a Red List for Syria.<sup>171</sup> Thus, proving that an allegedly trafficked piece of cultural property came from Syrian would be difficult.

Lastly, a court would likely find that the Decree of 1963 is not clear enough to provide adequate notice of its ownership over the controverted object.<sup>172</sup> For example, what if a cultural object was found, not fortuitously, but also not during an excavation? It is not clear whether the Decree of 1963 declares national ownership in that cultural property. And, if the purchaser of the looted material had been told that the cultural object was found fortuitously, would that satisfy the intent requirement?

A court in the Eleventh Circuit applying the McClain doctrine to an allegedly ISIS-looted Syrian artifact would likely find that the purchaser had not knowingly purchased stolen art pursuant to the NSPA. Even if a purchaser admitted that the cultural property was purchased directly from ISIS and that ISIS had taken the cultural property out of Syria, under the McClain doctrine, the Decree of 1963's declaration of national ownership is too unclear.

However, it is possible that the Eleventh Circuit would reevaluate its use of—and reject—the McClain doctrine. Like the “particularly horrendous circumstances of the Holocaust,” the dire situation

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government, and illegal exportation would not, therefore, subject the receiver of the article to the strictures of the [NSPA].”).

<sup>170</sup> See Shabi, *supra* note 7.

<sup>171</sup> Red Lists of Antiquities at Risk contain pictures and descriptions of known “archaeological, ethnographic, and ecclesiastical objects that have been looted from cultural sites, stolen from museums and churches, and illicitly trafficked.” Bureau of Educ. and Cultural Affairs, *Red List*, U.S. DEP'T STATE, <http://eca.state.gov/cultural-heritage-center/iraq-cultural-heritage-initiative/red-list>.

<sup>172</sup> Cf. *McClain II*, 593 F.2d 658, 666, 670 (5th Cir. 1979) (stating that “had there been no subsequent enactments that declared ownership with enough specificity to be accessible to and understandable by our citizenry, criminal penalties may well have violated our fundamental standards of due process”); *id.* at 670 (reversing the substantive count on the grounds that the defendants may have been convicted under laws that were too vague); see also Goldberg, *supra* note 23, at 1042.

in Syria may “necessitate a change in the legal rules and special consideration”<sup>173</sup> to address the “industrial-level looting” of Syrian cultural property for financial gain. Such a change on the part of the judiciary would not be unprecedented—the legislative and executive branches have already responded to the Syrian cultural appropriation crisis. Last summer, the United States House of Representatives passed the Protect and Preserve International Cultural Property Act (“Act”).<sup>174</sup> The Act directs the President to impose import restrictions on Syrian archaeological objects. In response to concerns from the Association of Art Museum Directors that a prior version of the Act prohibits importing cultural property to safeguard the property, the Act includes a provision that allows for temporary importation of Syrian cultural property for safekeeping.<sup>175</sup> In addition, the Cultural Heritage Center of the Department of State’s Bureau of Educational and Cultural Affairs has created an inventory of cultural heritage sites and an Emergency Red List of Syrian Cultural Objects at Risk.<sup>176</sup>

### III. ALTERNATIVES TO PROSECUTION UNDER NSPA

Although a purchaser of looted Syrian cultural property likely would not be found guilty under the NSPA and McClain doctrine, there are alternative means for prosecuting the purchasers of ISIS-looted cultural property. Syria has been on the U.S. list of state sponsors of terrorism since the list was created in 1979,<sup>177</sup> even before

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<sup>173</sup> See Gerstenblith, *supra* note 77, at 444.

<sup>174</sup> Protect and Preserve International Cultural Property Act, H.R. 1493, 114th Cong. (2016).

<sup>175</sup> See Kevin P. Ray, *House Passes Bill to Coordinate U.S. Cultural Property Protection*, NAT’L L. REV. (June 26, 2015), <http://www.natlawreview.com/article/house-passes-bill-to-coordinate-us-cultural-property-protection>.

<sup>176</sup> See Bureau of Educ. and Cultural Affairs, *Syria Cultural Heritage Initiative*, U.S. DEP’T STATE, <http://eca.state.gov/cultural-heritage-center/syria-cultural-heritage-initiative>.

<sup>177</sup> Krishnadev Calamur, *Who’s on the List of State Sponsors of Terrorism, and Why*, NPR (Apr. 15, 2015, 12:26 PM), <http://www.npr.org/sections/thetwo-way/2015/04/15/399809412/whos-on-the-list-of-state-sponsors-of-terrorism-and-why>.

the Syrian Civil War broke out.<sup>178</sup> “Because of its continuing support and safe haven for terrorist organizations, Syria [has been] subject to legislatively mandated penalties, including export sanctions under the Syrian Accountability Act and ineligibility to receive most forms of U.S. aid or to purchase U.S. military equipment.”<sup>179</sup> Additionally, ISIS has been designated as a terrorist organization since 2004.<sup>180</sup>

Because of those classifications, it might be possible to pursue purchasers under a criminal liability theory of material support for terrorists and terrorist organizations.<sup>181</sup> Title 18 U.S.C. § 2339B prohibits “knowingly” providing material support or resources to a foreign terrorist organization or conspiring to provide support. The statute subjects those found guilty of providing “material support” for terrorists to a fine and imprisonment for a term of up to fifteen years.<sup>182</sup> Although there are no documented cases of cultural-property-related prosecution under these statutes, the FBI warns that “[p]urchasing an object looted and/or sold by the Islamic State may provide financial support to a terrorist organization and could be prosecuted under 18 USC 233A.”<sup>183</sup> A prosecution under 18 U.S.C. § 2339A–C likely would not require proof that the material support resulted in an actual terrorist act.<sup>184</sup> Given the FBI’s warnings, this seems like the most likely way that someone purchasing looted Syrian artifacts could face liability.

The Terrorism Risk Insurance Act of 2002 (“TRIA”)<sup>185</sup> was enacted in response to the terrorist attacks of September 11, 2001, and created United States government reinsurance to provide reinsurance coverage to insurance companies with policies for property and

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<sup>178</sup> See *State Sponsors of Terrorism*, U.S. DEP’T STATE, <http://www.state.gov/j/ct/list/c14151.htm>.

<sup>179</sup> BUREAU OF NEAR E. AFFAIRS, *supra* note 3.

<sup>180</sup> See BUREAU OF COUNTERTERRORISM, *supra* note 36.

<sup>181</sup> See 18 U.S.C. §§ 2339A–2339B (2001).

<sup>182</sup> *Id.*

<sup>183</sup> *ISIL and Antiquities Trafficking*, *supra* note 42.

<sup>184</sup> See *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 692 (7th Cir. 2008).

<sup>185</sup> Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-292, 116 Stat. 2322 (2002).

personal-injury related to terrorism.<sup>186</sup> Although it was meant as a short term measure,<sup>187</sup> Congress extend TRIA through the year 2020.<sup>188</sup>

Although TRIA has not been used to prosecute a purchaser of looted cultural property, TRIA has been used on at least one occasion to attach to cultural property that was not properly titled. A district court upheld the use of TRIA to block antiquities that were the property of Iran and in possession of an American university and several museums.<sup>189</sup> The court found that the antiquities qualified as “blocked assets” within the meaning of TRIA, and thus, the antiquities were subject to attachment by a trustee recovering on a \$109 million default judgment against Iran.<sup>190</sup> The court focused on the issue of title, finding that the university and museums failed to obtain a written opinion that Iran did not have title or only had partial title to the antiquities.<sup>191</sup>

Furthermore, as originally enacted in 1917, the Trading with the Enemy Act “provided the President with broad authority to impose comprehensive embargoes on commerce with foreign countries, during both peacetime emergencies and wartime.”<sup>192</sup> In addition, the President holds certain powers to punish purchasers of looted cultural property. Under the Trading with the Enemy Act, the President may, “through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions,

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<sup>186</sup> See Robert P. Hartwig, *9/11 and Insurance: The Five Year Anniversary*, INS. INFO. INST. (Sept. 2006), <http://www.iii.org/sites/default/files/docs/pdf/September%2011%20Anniversary.pdf>.

<sup>187</sup> See David C. John, *Let the Terrorism Risk Insurance Act (TRIA) Expire*, HERITAGE FOUND. (Dec. 11, 2007), <http://www.heritage.org/research/reports/2007/12/let-the-terrorism-risk-insurance-act-tria-expire>.

<sup>188</sup> See Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, 129 Stat. 3 (2015).

<sup>189</sup> *Rubin v. Islamic Republic of Iran*, 541 F. Supp. 2d 416, 421 (D. Mass. 2008).

<sup>190</sup> *Id.*

<sup>191</sup> If the university and museum had been able to show that Iran had no title, they could assert that Iran, therefore, had no interest in the antiquities, and thus, the antiquities, which the court specifically called “property,” would be exempt from levy. *Id.* at 420–21.

<sup>192</sup> *Cernuda v. Heavy*, 720 F. Supp. 1544, 1546 (S.D. Fla. 1989); see *Trading with the Enemy Act of 1917*, 40 Stat. 411 (1917).

licenses, or otherwise” prohibit any transactions or payments between, by, through or to any banking institution.<sup>193</sup> However, as of 2016, Cuba was the only country restricted under the Trading with the Enemy Act.<sup>194</sup> Moreover, the Trading with the Enemy Act no longer applies during emergency peacetime situations.<sup>195</sup> Thus, it is unlikely that the Trading with the Enemy Act could be applied soundly to Syrian cultural property looted by ISIS.

#### CONCLUSION

Although there are alternative means of prosecuting stolen or looted Syrian cultural property, the devastation wreaked on the Middle East—the continued financial support of ISIS through the sale of black market (and legitimate) Syrian artifacts—must be quelled. The Syrian people and our collective world heritage has already been despoiled beyond repair, and ISIS should not be permitted to grow richer and more powerful at the expense of our identity as a species. In order to stop the market, the demand must be quelled, and the demand can be quelled by loosening the restrictions imposed by the McClain doctrine and by enforcing criminal liability under the NSPA against purchasers of ISIS-looted Syrian cultural property.

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<sup>193</sup> 12 U.S.C. § 95(a).

<sup>194</sup> See Uri Friedman, *Obama Quietly Renews U.S. Embargo on Cuba*, WIRE (Sept. 13, 2011, 3:05 PM), <http://www.thewire.com/global/2011/09/obama-quietly-renews-us-embargo-cuba/42430/>. Although, the United States delisted Cuba from the list of state sponsors of terrorism, see Press Statement from Jeff Rathke, Office of Press Relations Dir., U.S. Dep’t of State, *Rescission of Cuba as a State Sponsor of Terrorism* (May 29, 2015), <http://www.state.gov/r/pa/prs/ps/2015/05/242986.htm>, President Obama did extend Cuba’s designation under the Trading with the Enemy Act, see Taylor Wofford, *Obama Extends Cuba’s Designation Under Trading with the Enemy Act*, NEWSWEEK (Sept. 14, 2015, 1:56 PM), <http://www.newsweek.com/cubatradingwithenemyactextension-obama-castro-371978>.

<sup>195</sup> See *Cernuda*, 720 F. Supp. at 1546.