

Art & Cultural Heritage Law Newsletter

A Publication of the Art & Cultural Heritage Law Committee



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UK PUBLISHES DRAFT LEGISLATION TO IMPLEMENT THE 1954 HAGUE CONVENTION AND PROTOCOLS

By Kevin Chamberlain

In January 2008 the UK published the draft Cultural Property (Armed Conflicts) Bill. The purpose of this legislation is to enable the UK to implement the Convention for the Protection of Cultural Property in the Event of Armed Conflict signed at The Hague in 1954 (The Hague Convention), as well as the 1954 Protocol and the 1999 Second Protocol.

The Hague Convention was adopted by UNESCO following the massive destruction of cultural property during the Second World War and provides a system to protect cultural property from the effects of international and non-international armed conflict. States Parties to the Convention are obliged to respect cultural property by not attacking it and ensuring that they do not use cultural property for military purposes, except where justified by imperative military necessity. The Convention also sets up a system of special protection designed to protect cultural property of the greatest importance. It provides for cultural property protected by the Convention to be identified by a special symbol (the Blue Shield) and requires States Parties to prevent misuse of the symbol. The 1954 Protocol was drawn up at the same time as the 1954 Convention and obliges States Parties to prevent the exportation of cultural property from territory occupied by them.

States parties are also obliged to seize cultural property imported either directly or indirectly from territory under occupation and to return it to the competent authorities of the occupied territory at the close of hostilities. The Protocol also provides for the return of cultural property deposited with a State Party for safekeeping during a conflict. In the aftermath of the conflict in former Yugoslavia, a Second Protocol to the Hague Convention was drawn up in 1999 under the auspices of UNESCO and opened for signature. This Protocol specifies the circumstances in which the obligation to protect cultural property may be waived on grounds of imperative military necessity. It creates a new category of protection called “enhanced protection” (*cont'd on Page 17*)

Welcome to our Second Issue!

On behalf of the Art & Cultural Heritage Law Committee, we welcome you to the second issue of our newsletter. Our aim is to inform art and cultural heritage law enthusiasts about recent developments in the field, to provide a forum for discussion of related issues, and to provide opportunities for interested persons to get involved. The first issue was such a success that we now intend to move from a biannual to a quarterly format. In future issues, we hope to incorporate a calendar for art and cultural heritage law related events and announcements relating to other events and internship opportunities. We welcome your input and hope you enjoy this issue!

Cristian DeFrancia & Lucille Roussin
Co-Chairs



Bonnie Czegledi

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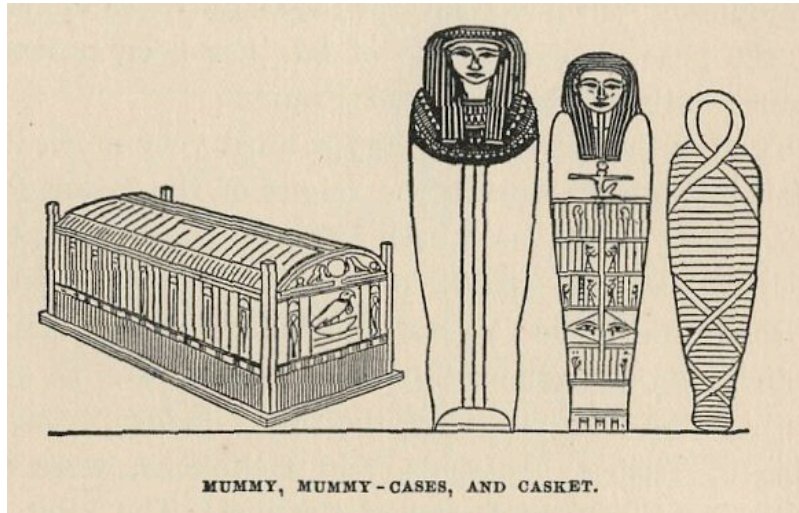
Submissions are welcome and will be published at the discretion of the editors. We also encourage artists to submit their work and border art in jpeg format, which will be duly credited to the artist. Views contained in the newsletter are those of the authors only and do not represent the official position of the Committee or the American Bar Association.

ART & ANTIQUITIES TRAFFICKING NEWS NOTES

March

☞ The Associated Press reports that Egyptian police arrested three people who planned to sell four mummies they had stolen to antiquities dealers. Police recovered the mummies of three men and one boy along with ten statues.

☞ The fifth meeting of the INTERPOL Expert Group (IEG) on Stolen Cultural Property took place in Lyon, France. The IEG called on auction houses to adopt ethics rules, urged controls on the internet to curtail the illicit sale of cultural property, and advocated for the monitoring of violence associated with art crime.



MUMMY, MUMMY-CASES, AND CASKET.

S. Rappaport

February

☞ The Art Newspaper reports that federal prosecutors in the United States filed court papers to seize a painting, *Hannibal*, by Jean-Michel Basquiat. *Hannibal* disappeared after a Brazilian court ordered convicted money launderer Edemar Cid Ferreira to turn it over along with other art works. The painting was smuggled into the US from London in 2007 and declared to be worth \$100, although it is valued at \$8 million.

☞ The Associated Press reports that the former chief archivist of the Mariners' Museum in Newport News, Virginia appeared in federal court to answer to charges of theft. A grand jury indicted Lester Weber and his wife, alleging that they stole items from the museum and sold up to 1,400 of the artifacts on eBay.

☞ Federal agents arrested an Army helicopter pilot for allegedly possessing ancient Egyptian objects stolen from the Ma'adi Museum near Cairo in 2002. Chief Warrant Officer Edward George Johnson, who served in Egypt in 2002, was charged with transportation of stolen property and wire fraud. The United States Attorney for the Southern District of New York is prosecuting the case.

January

☞ Federal agents are investigating alleged antiquities trafficking in California that involves Southeast Asian, Central American, and American Indian artifacts. Immigration and Customs Enforcement, the IRS, and the National Park Service raided the Los Angeles County Museum of Art, the Bowers Museum of Art in Santa Ana, the Pacific Asia Museum in Pasadena, and the Mingei International Museum in San Diego as part of a five year, coordinated investigation. Also searched was Markell's Silk Roads Gallery in Los Angeles and the Malter Galleries in Encino. Affidavits reveal that federal authorities believe that museums and collectors may have obtained antiquities in violation of federal law and that some objects were donated to museums in a manner suggesting tax fraud.

-Ricardo A. St. Hilaire

BARAKAT v. IRAN: UK COURTS INTERPRET IRAN'S NATIONAL OWNERSHIP OF ANTIQUITIES

By Patty Gerstenblith, Chicago, IL

A recently decided case involving the application of Iran's national ownership law of archaeological artifacts will determine the disposition of a cache of antiquities imported into England by a London dealer, Barakat Galleries. The antiquities at issue include jars, bowls and cups made of chlorite that date to the third millennium B.C. and that were allegedly excavated illegally in the Jiroft region of southwestern Iran. The sites in the Jiroft region were excavated only in recent years but had been subjected to looting for several years before. Iran sued to recover these artifacts, basing its claim of title on its laws pertaining to antiquities, and the case thus raises the same legal question as did the prosecution of New York antiquities dealer, Frederick Schultz. Many nations throughout the late 19th and 20th centuries enacted laws vesting title to as-yet undiscovered antiquities in the nation. If an antiquity is removed in violation of such a law, it is regarded as stolen property, both under the laws of the particular nation and, as determined under U.S. judicial precedent, in the laws of other countries such as the United States. Schultz was indicted for conspiring to deal in antiquities removed from Egypt in violation of its 1983 law that vests ownership of antiquities in the nation. In that case, the U.S. Second Circuit Court of Appeals held that the law of the country of origin determines ownership of antiquities and that objects removed in violation of such a law are considered to be stolen property, even under U.S. law.

The trial court handed down its decision in March 2007. It first examined the various laws of Iran that pertain to its archaeological heritage, in particular the laws of 1930 and 1979. In examining Iran's laws, however, the trial court in *Barakat* concluded that none made a clear statement of ownership, vesting title to

undiscovered antiquities in the nation. The court then turned to the question of whether Iran has a right to possession of the antiquities; if so, then the defendant had committed conversion or the tort of wrongful interference with goods. For the claim to succeed on the basis of a right to possession, Iran had to demonstrate that it had both a proprietary right and an immediate right to possession. While the court agreed that Iran had an immediate right to possession, because of a requirement that accidentally discovered antiquities had to be submitted to the state, Iran's right was not proprietary, as indicated by the court's earlier discussion of the failure of the law to clearly vest title in the nation.

Although Iran had failed to prove its ownership interest in the antiquities, the trial court turned to consider, in *obiter dictum*, the question of whether, even if Iran's law were clearly a vesting law, its ownership claim could be vindicated. The court cast this issue in terms of the justiciability of Iran's claim. Public laws of one nation, such as penal and revenue laws, are not enforceable in another state. On the other hand, the court conceded that a nation could assert its ownership rights to property located in another state. However, the court seemed to limit enforceable ownership rights to those acquired by means by which private individuals could acquire ownership, such as by purchase, gift and inheritance. Because acquisition by means of a national ownership law is a method available only to sovereigns, the court therefore characterized such laws as public in nature and held that Iran's claim was not justiciable.

Iran's appeal of the trial court decision was decided on December 21, 2007, with the appellate court reversing on the two main points. The appellate court held that the law of the place of origin (in this case, Iran) determines

THE BARAKAT DECISION (cont'd)

ownership of property and that Iran's 1979 Legal Bill confers both ownership and an immediate right to possession of newly discovered antiquities in the nation. Second, the appellate court distinguished between *recognition* of a foreign nation's ownership rights in property and *enforcement* of a foreign nation's laws in British courts. British courts should therefore recognize Iran's national ownership law as the basis for Iran to bring suit to recover its stolen antiquities. In reaching this conclusion, the court relied in part on the U.S. precedent established in *United States v. Schultz*.

The court also held that even if Iran's ownership law is a public law, British courts are not barred from enforcing it unless it is against public policy to do so. Citing to international conventions to which the United Kingdom is a party, including the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership

of Cultural Property and the European Union's Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, the court concluded that it is British public policy to recognize the ownership claim of a foreign nation to antiquities that are part of its cultural heritage. Although the relevant facts, such as that the artifacts came from Iran and were exported after enactment of the relevant vesting law still must be proved, the *Barakat* decision is highly significant as an additional element in the international legal regime that aims to protect the world's archaeological heritage and harmonizes the U.S. and U.K. judicial approaches to the status of national ownership of looted antiquities.

Patty Gerstenblith is the Director of the Program in Cultural Heritage Law at DePaul University College of Law and the Founder of the Lawyers' Committee for Cultural Heritage Preservation.



Millar Kelley, "Lady Grace"

CONTEMPORARY ART: DAMAGE, DESTRUCTION AND CHALLENGES FOR UK INSURERS & CONSERVATORS

By Paul Britton and Anna O'Connell, London

The recent record breaking prices achieved at auction serve to illustrate the continued global fashion for and importance of the market for contemporary works of art. The growing popularity and rapid expansion of the worldwide contemporary art market has resulted in an increased number of art fairs and auctions dedicated to this burgeoning sector. Once little considered aspects relating to the ownership and circulation of contemporary works of art have now become very real risks for both collector and insurer. Incidences of artworks becoming damaged, typically in transit, storage or whilst on display, are prevalent and continually generate new and complex challenges for collectors, insurers, valuers, conservators and lawyers.

Changes of environmental condition as a result of transit, storage and display, in particular fluctuating temperatures and humidity, greatly increase the risk of damage to certain artworks especially those created with fugitive or inherently fragile materials. Original and undamaged condition remains the financial touchstone of this category of art for collectors, dealers and insurers alike. Damage, however slight, will deter most potential buyers and consequently usually diminish value considerably.

As contemporary artists continue to seek to extend the material boundaries of their work, the increasingly unstable or transitory nature of cutting-edge and mixed-media works presents unique problems when assessing damage or loss. Consider the inherently fragile and perishable nature of Damien Hirst's famous shark floating in formaldehyde, Sarah Lucas' (real) 'Two Fried Eggs and a Kebab' and Mark Quinn's 'Self' created from nine pints of his own deep-frozen blood (and which was later destroyed by accident).

Important and now frequently raised questions are: How do insurers assess the value of artworks made from such material? Should insurers be liable if it is inherent in the nature of the work that it will deteriorate at an unknown and unusually fast rate? How far is it reasonable for a conservator to repair or restore an inherently fragile and unstable contemporary artwork without affecting its artistic integrity? In restoring or repairing an artwork how might an artist's intellectual property rights be infringed? A tear in an oil on canvas painting may necessitate lining the original canvas, thereby potentially obliterating the artist's original inscription on the reverse; should the original artist re-sign the restored work? A single signed image from a multi-image photographic work may become irreversibly damaged; should the complete work be re-printed from the photographic negatives? A modern sculpture owned by a collector becomes damaged and the artist offers to re-visit the work and undertake an 'invisible repair' – will this result in any loss in artistic integrity or financial value?

New Challenges for Insurers

Most art insurance policies are written on an All Risks basis. Insurers will usually seek to limit their exposure to certain 'risks' by including policy exclusions. Loss or damage owing to 'inherent vice', i.e. stemming from qualities inherent in the item lost or damaged, is usually excluded. This is also the case for damage arising from a 'latent defect' occasionally caused when an artist has used materials in preference to those of a more stable nature or methods in the creation of the artwork or its subsequent maintenance which are considered to be defective. Distinguishing the boundaries between normal wear and tear, routine

CONTEMPORARY ART: DAMAGE, DESTRUCTION AND CHALLENGES (cont'd)

conservation and that of damage is increasingly subjective and contentious. Consequently insurers have difficulty when considering the application of these exclusions, especially with so little case law to refer to.

Conservation and Restoration of Damaged Works of Art

The repair and restoration of contemporary artworks of a transient nature can pose challenging ethical and legal considerations for the conservator. The treatment of contemporary artworks may be affected by legislation relating to the moral rights of an artist and this will vary from country to country. In the United Kingdom, the Berne Convention for the Protection of Literary and Artistic Works was ratified in 1928 and subsequently an artists' moral rights were expressly recognised by English copyright law in the Copyright, Designs & Patents Act 1988 (Part 1, Ch IV, ss77-89). These include the artist's moral right of integrity in respect of the work, i.e. the right to object to derogatory treatment of the work. Unlike copyright, moral rights cannot be assigned but they can be waived by the artist in writing. Under UK law, the right to object to derogatory treatment of a work arises where the treatment amounts to distortion or mutilation or is otherwise prejudicial to the honour or reputation of the artist. The right is infringed by a person who exhibits in public a derogatory treatment of the work. There are few reported cases on the subject. It was held, however, in *Tidy v the Trustees of the Natural History Museum*, that a book which reproduced a cartoonist's cartoons in reduced size was not sufficient to constitute derogatory treatment, in the absence of evidence as to whether the public considered the reproduction as affecting the cartoonist's reputation.

Although it may be difficult for the artist to establish infringement, conservators do need to take steps to protect their position, especially when treating works of an unstable nature. In order to preserve the artistic integrity and financial value of a work, it is normally advisable in the event of any significant damage to seek the input of the original artist. In the authors' experience, artists' attitudes to preserving their work vary considerably. Some are keen to directly undertake or oversee restoration, often on the basis that their participation will preserve the original artistic integrity and longevity of their work, whilst others refuse to cooperate in such instances. In extreme cases, an artist might seek the destruction of a damaged item or threaten de-attribution; thus effectively destroying the saleability and value of the item.

Consider the case of a valuable signed contemporary photographic work which is displayed and suffers a slight surface scratch to the corner. This will likely result in the work being treated as a 'total loss' for insurance claim purposes and the owner receiving an appropriate financial indemnity from their insurers. In these circumstances the damaged item would usually pass to insurance underwriters as salvage for disposal. The underwriters may subsequently decide to reduce the photograph in size in order to remove evidence of the damage and thereafter seek to dispose of it at auction. Although cropping the image may not on first impression be considered 'mutilation' of the artwork, the original photographer may object to such a scenario on the basis that it damages his reputation and amounts to derogatory treatment of the work concerned.

The decision of the artist or their representatives concerning the treatment of a damaged object can have significant financial

CONTEMPORARY ART: DAMAGE, DESTRUCTION AND CHALLENGES (cont'd)

implications both for the owners and the relevant insurers. In the case of posthumous treatment of an artist's work, it is not uncommon for approval to be given by either individually acknowledged experts, committees or family members empowered with the artist's authority to pass judgment on authenticity, conservation techniques and importantly on what may be considered derogatory treatment.

The combination of increased financial values attached to certain contemporary artworks and the often conflicting interests of artists, collectors and insurers will ensure the need for specialist advice when addressing questions of damage to and deterioration of this unusual type of property.

Anna O'Connell is a solicitor consultant at Klein Solicitors. Prior to this, Anna was an in-house solicitor at the Art Loss Register with responsibility for the resolution of title disputes involving stolen and looted works of art and antiques as well as general commercial matters. She is an author and recognized expert on anti-seizure laws for artworks loaned abroad temporarily for exhibition. Her work on the subject was published and quoted in a consultation paper issued by the UK's Department for Culture Media and Sport in 2006. She has spoken on anti-seizure laws on BBC radio. Anna can be reached at aoc@kleinsolicitors.com.

Paul Britton, MRICS FRSA, is a Chartered Arts and Antiques Surveyor providing independent art surveying and valuation services to those transacting in art. Prior to establishing his own practice in 2006, he gained 17 years experience working within specialist sectors of the UK art market including those of conservation, auctioneering and valuation. He has acted as Fine Art Surveyor to a leading international firm of insurance loss adjusters and continues to work on an International basis within this market sector, in particular for Underwriters at Lloyd's. His practice specializes in advising the Fine Art insurance market on post loss appraisal and valuation of Works of Art following damage, loss or theft; aspects include conservation/restoration and diminution in value, as well as preparation of technical reports for litigation support or in anticipation of court proceedings. Paul is a member of the Royal Institution of Chartered Surveyors and currently serves on the Arts and Antiques Faculty Board. He is an Approved Service Provider to LAPADA, the association of art and antiques dealers and is a director of ARTResolve, a specialist out-of-court facility for the resolution of disputes involving works of art, antiquities and cultural property. He is widely published on valuation practice. Paul can be reached at www.paulbritton.co.uk.



*Millar Kelley,
"Seven Foot Buffalo"*

LATEST DEVELOPMENTS IN RUBIN V. IRAN AND THE NEW FSIA EXCEPTION TO IMMUNITY, 28 U.S.C. §1605A

By Laina Wilk, Washington, D.C.

In the last issue of this newsletter, Ms. Gerstenblith reported on the *Rubin v. Iran* case pending in Chicago, Illinois. In that case, victims of a terrorist bombing are attempting to attach various ancient Persian artifacts, including the Persepolis and Chogha Mish Collections currently housed at the University of Chicago, in partial satisfaction of their multi-million dollar judgment against Iran. Recent events in the case and in Congress merit a second look at the suit.

First, the recent events in the case. As reported last issue, Iran filed a motion for summary judgment, which was stayed pending further discovery requested by Plaintiffs. Mainly, Plaintiffs requested discovery on two issues – (1) the University of Chicago’s possible agent-principal relationship with Iran to bolster Plaintiffs’ argument that the Persepolis Collection is attachable under the commercial activity exception of the Foreign Sovereign Immunities Act (“FSIA”), §1610(a)(2), and (2) the status of almost all of the artifacts’ title in support of Plaintiffs’ “blocked assets” argument under the Terrorist Risk Insurance Act (“TRIA”).

Shortly following the court’s ruling in favor of Plaintiffs on artifacts-related discovery, it became apparent that the parties had another discovery dispute – whether Plaintiffs were also entitled to discover information about all of Iran’s assets nationwide, including potentially (to the extent they exist) other Persian artifact collections in other U.S. museums.

Iran thus moved for clarification or, in the alternative, for protective order to quash the general assets discovery for three principal reasons: the Algiers Accords, comity, and foreign relations. First, in 1981, Iran and the United States settled the 1979 hostage crisis with the Algiers Accords. That agreement requires the

United States to return Iranian property then in the United States and otherwise not to create liens upon Iranian properties in the United States. Discovery against Iranian assets covered by the Accords (e.g., those assets pending before the Iran-U.S. Claims Tribunal) would, Iran argued, create such a prohibited lien. Second, comity dictates that a foreign state’s assets are generally immune from the burdens of litigation, including discovery. Third, Iran asserted, if the court granted general assets discovery in disregard for the presumption of immunity all foreign states usually enjoy, courts of nations worldwide could, and likely would, issue similar orders against the United States. Iran, for example, passed a law authorizing suits against the United States for violations of international law.

Recognizing the importance of these three issues, the United States filed a Third Statement of Interest with the court. (The first two Statements addressed just the immunity of the artifacts and standing). In its Third Statement, the United States agreed that Iran should not have to provide general assets discovery due to comity and foreign relations problems and also because discovery against the United States of property subject to Tribunal claims could harm the United States’ position in those Tribunal proceedings.

Despite the United States’ support and the significant international implications of permitting such broad-based discovery against a foreign state, the magistrate denied Iran’s motion. Iran has filed objections before the district court judge, and the Plaintiffs’ opposition was filed on March 18. A decision is likely this Spring.

Now, to the recent developments in Congress. On January 28, 2008, Congress signed into law §1083 of the Defense Authorization Act, thereby

LATEST DEVELOPMENTS IN RUBIN V. IRAN AND THE NEW FSIA EXCEPTION TO IMMUNITY (cont'd)

creating a new “terrorism exception to immunity” in the FSIA, 28 U.S.C. §1605A, and amending §1610, the FSIA’s exception to immunity from attachment and execution. For the reasons described just below, this Act should be of major concern to museums and cultural institutions not just in the United States but around the world. For example, those museums displaying or studying artifacts belonging to Iran, Cuba, North Korea, Sudan, and Syria should be prepared for possible litigation against their collections under the new law. Even institutions holding cultural properties belonging to Libya should take note. Although Libya was removed from the State Sponsors of Terrorism list in 2006, the law is retroactive and a set of plaintiffs already is attempting to apply the new law to Libya in a years-old suit.

The Act is landmark first because new §1605A provides a private right of action against a foreign state itself for materially supporting an act of terrorism and permits the award of punitive damages against the state. The Act therefore aims to correct prior legislation, which the Court of Appeals for the D.C. Circuit found to create a cause of action only against individuals acting in their non-official capacity. As a result of new §1605A, terrorism judgments already in the multi-millions of dollars are sure to be in the multi-billions of dollars, meaning more and larger assets will be needed to satisfy the judgments.

Second, filing under new §1605A, even retroactively, will automatically establish a lien of *lis pendens* upon “any real property or tangible personal property” that is subject to execution under the amended §1610. Such a lien, to the extent it covers Iranian assets pending before the Tribunal, violates the Algiers Accords.

Third, under new §1610(g), property of foreign states and their agencies and instrumentalities is subject to attachment regardless of the foreign state’s level of economic control over the property, including profits, day-to-day management, and certain other factors. Indeed, under new §1610(g), there is no requirement that the property be used for “commercial activity” at all. This section thus seems aimed directly at eliminating Iran’s defense in the *Rubin* case that the Persepolis Collection has not been used for any commercial act in the United States. On March 27, 2008, the Rubin plaintiffs filed a new lawsuit pursuant to the FSIA amendments.

Fourth and perhaps most importantly, §1610(g) has possible worldwide reach. In another terrorism case against Iran, *Greenbaum v. Iran*, pending in Los Angeles, California, the plaintiffs have alleged that they are entitled, pursuant to the amended FSIA, to attach all “debts owed” to Iran around the world. While “debts owed” likely does not cover cultural items, and it is unclear if the law will be upheld by the courts, the Greenbaums are at least attempting to attach assets beyond the borders of the United States.

Laina Wilk is an an associate with Berliner, Corcoran & Rowe. Together with Thomas G. Corcoran Jr., Ms. Wilk defends Iran in the Rubin case and in other cases nationwide.



Bonnie Czeglédi

TEACHING CULTURAL HERITAGE LAW TO NON-LAWYERS

By Erin Thompson, New York

Protecting the world's cultural heritage requires educating diverse audiences about the goals and difficulties of cultural heritage law. However, it is difficult to convey the legal technicalities of this field to non-lawyers. How can we more effectively communicate with students, art professionals, or even the general public?

Use Case-Studies as a Framework

Tempting as it is to craft a standard law school class, it may be more effective to address non-lawyers in a different fashion. This is especially true for cultural heritage law, where standard legal readings, such as judicial opinions, are relatively rare and usually do not address the most important issues. An alternate way to guide students through cultural property law is to use case-studies. The Elgin Marbles are a standard introduction to the general topic of cultural heritage, but specific areas of cultural heritage law can be taught through case-studies as well. For example, an analysis of the competing positions taken on the Russian "Trophy Art" debate provides a microcosm of the history of justifications for appropriating cultural heritage, while the impact of colonialism on cultural heritage is illustrated by the stories of the Afo-a-Kom, bust of Nefertiti, or Kennewick Man.

Encouraging students to take the devil's advocate position, for instance by defending the Taliban's right to protect their own culture through the destruction of the Bamiyan Buddhas, can lead to lively class discussions. Asking a student to research, present, and lead class discussion on a case-study can also increase class participation as well as promote early investment in a final paper topic.

Increase Enthusiasm through Guest Speakers and Field Trips

Once students understand the basic issues, guest speakers can give real-world perspective on the actual operations of cultural heritage law.

Most speakers will find it helpful to be given guidance on their talks. For example, a lawyer who has worked on Holocaust repatriation cases could walk students through the typical timeline of this type of legal process. A curator or art dealer could discuss the due diligence they undertake to ensure that artworks are in compliance with export laws. After hearing a range of speakers, students can contrast their different interests in issues such as the treatment, ownership, and disposition of cultural property.

Students can also see theoretical debates about cultural heritage in action by touring collections of culturally significant objects. Try discussing acquisition histories and display philosophies while visiting a museum, university art properties office, or even a library.

Focus on the Future

Cultural heritage law is a developing field. After students have critically analyzed past and present cultural heritage positions, they should be able to formulate their own set of cultural heritage values and identify the ways in which current law falls short of their goals. Assigning an on-going dispute, such as the Sevso Treasure, as a final paper topic can increase student's sense of impact.

Ideally, students will emerge from their course as enthusiastic advocates, even if they have not mastered the many legal technicalities of cultural heritage law.

Erin L. Thompson (et157@columbia.edu) is currently teaching a cultural heritage class, "Art on the Move: Issues in Cultural Property," in the Art History department of Columbia University. She has a Ph.D. in ancient Greek art history, and is working on a J.D. degree at Columbia Law School.

Q&A *with Thomas R. Kline*



In each issue of the newsletter, we conduct a Question & Answer with a prominent attorney in the field of art & cultural heritage law. We are pleased to have for this issue Thomas R. Kline of Andrews Kurth, LLP in Washington, D.C. Tom is a renowned art and cultural heritage lawyer who has been handling art and cultural property cases consistently for the past 19 years. He currently concentrates his practice on civil litigation, arbitration, and alternate dispute resolution of art and cultural property as well as intellectual property matters. He has authored numerous articles and speaks frequently about the recovery of stolen art and cultural property.

You helped with the formation of The Monuments Men Foundation for the Preservation of Art. The Monuments Men have been in the news lately ever since they received the National Humanities Medal. During WWII, the Monuments Men tracked down thousands of looted artifacts that were snatched because of the war. Can you tell us a little bit about your work in this area? Do you think that the US military should have a unit like the Monuments Men to deal with the cultural property issues resulting from wars in Iraq and Afghanistan?

Most -- but not all -- of the art cases I have handled over the past 19 years have involved restitution of artworks or cultural property that have been lost, stolen or displaced during wartime, particularly objects confiscated by the Nazis and art looted by Allied soldiers that finds its way into the art market. US Monuments Fine Arts and Archives troops (known colloquially as the "Monuments Men," although there were some women) set the standard for protection of cultural property during armed conflict, endeavoring to direct the combat away from monuments and art depots. They are unmatched in their dedication and effectiveness, particularly in the work they did after the War in seeing stolen artworks returned to countries of origin. Although the post-War restitution effort was

largely successful, the task remained unfinished because of the immensity of the job, the press of other business, and the onset of Cold War competition between the US and the Soviet Union.

In spite of the high moral tone set by the Monuments Men of the United States and its Western allies, there was considerable wartime and post-War looting of art and cultural property by Allied troops, creating yet another quantity of stolen art and cultural property that gradually drifts into the art market. Not all invaders are as disrespectful of the culture of defeated or occupied peoples as were the Nazis, stealing and destroying wherever they went, but no country has matched the effort of the WWII Monuments Men, before or since.

More recently, in Bosnia, Afghanistan and Iraq, the US has come nowhere near the standard it set in WWII, with few, if any, Monuments Men in any of these conflicts and pervasive looting tolerated in occupied areas of Iraq, including from the National Museum and Library, and also from archeological sites. Major losses have resulted from these countries, and many looted pieces will undoubtedly make their way into the art market in the future in the same way that Nazi looted art has.

Q&A *with Thomas R. Kline (cont'd)*

How did you first start representing restitution claimants?

In early 1989, I was practicing law (and awaiting the birth of my daughter) at a firm that represented the Republic of Cyprus when we received word that the US Customs Service had refused to seize fragments of a well-documented mosaic stolen from the Church of Panagia Kanakaria in the Turkish-occupied area of Cyprus, even though the pieces were being offered for sale. The art dealer in suburban Indianapolis who had them at first threatened to sell the mosaics, but then consented to a Temporary Restraining Order on condition that the Republic, and the mosaic's owner, the Autocephalous Greek-Orthodox Church of Cyprus would go to trial within two months. Lacking another option, the Church agreed and we tried the case 60 days later in Indianapolis, winning at trial and later on appeal as well as in numerous post-trial and post-appeal applications. Despite the expedition with which the case had to be tried, it addressed numerous fundamental art restitution issues, including choice of law, standards for due diligence of art theft victims and for buyers in the art market, lack of abandonment when the owner of art or cultural property is forced to flee and also the potential claims of nationalization by an occupation authority (the so-called Turkish Republic of Northern Cyprus).

The New York Times covered the Kanakaria mosaics trial and also had the inside track in investigating the reappearance of the Quedlinburg Treasures, a group of medieval religious objects that had disappeared in the closing days of World War II from a cave outside the former royal capital of Germany, and were starting to resurface on the art market. After finding the objects and obtaining another

emergency Temporary Restraining Order and, in this case, a settlement, I was hooked and did whatever I could -- writing, speaking, teaching, taking pro bono cases, and so on -- to develop a practice in art, cultural property and museum law. My practice has now broadened to include claim recipients, and other art and museum litigation, as well as advice and counseling matters.

What do you see as the future of the field--specifically for Holocaust claims as potential claimants age? And, more generally, will the field grow or contract?

Holocaust-related art claims are burdened with the unique history that the theft was attendant on and related to the murders of millions. This history makes the claims highly emotional and frequently difficult to handle under normal legal standards. Nonetheless, art looted by Allied soldiers in World War II or by soldiers or civilians in connection with other armed conflict is just as stolen, and the problems raised by antiquities, most of which are undocumented, dwarf those raised by the Holocaust. The problems we must all face today grow out of the unfortunate co-incidence of two factors: (1) the pervasiveness of art looting and theft in wartime, from archeological sites and otherwise; and (2) abysmal standards for buyer diligence in art market transactions over the decades, which permitted such stolen and undocumented objects to circulate freely -- with few, if any, questions asked, compromising our premier museum and private collections. Remedying this problem will not be the work of a single additional decade, even for the Holocaust-related claims alone. Presently, we are seeing fewer serendipitous discoveries and more finds tied to the larger and better documented pre-war Jewish collections,

Q&A *with Thomas R. Kline (cont'd)*

including dealer collections. Because sufficient records exist to support these claims and because of increased scrutiny within the art market, particularly from the major auction houses, and dramatically improving museum practices, we can expect the claim, negotiation and resolution process to continue.

Is there a shift toward more hostility or more receptiveness to claims? Do you believe that the recent declaratory judgment actions filed by US museums represent a shift in museums' receptiveness to restitution claims?

It is still too early to tell whether museums have become generally more combative in responding to Holocaust-related art claims. In fairness to the museums, I have to recognize that some poorly substantiated claims have been advanced. I believe US museums are still receptive to relatively strong claims, but are less tolerant of claims they see as marginal or poorly documented.

Do you think the Holocaust Victims Redress Act (HVRA) should apply to private suits? If not, why not?

I have no quarrel with the way this issue was resolved by the federal courts in California: Congress passed the HVRA without explicitly creating a private right of action. Courts rightfully hesitate to find an implied private right to sue on the theory that Congress must have intended those rights to be there, even though they are not to be found in the words of the legislation itself.

Would you describe the primary factors guiding museums in deciding whether to retribute looted art today?

I believe museums today focus on (1) whether they have the right claimants and all the right claimants; (2) whether there is compelling evidence of loss associated with Nazi persecution; and (3) whether the museum has a strong legal defense available. I believe we have seen museums waive colorable legal issues, but it seems these days that a museum with one stopper issue -- such as the absence of clear evidence of loss due to persecution or the statute of limitations -- will want to test that issue in court, rather than settling in response to the initial claim.

Do you believe that now, ten years after the Washington Conference and the opening of many new archives, that most museums in considering whether to retribute a piece of Nazi-looted art or reach a settlement with the claimant would still be as forgiving of a claimant's statute of limitations problems?

This question perfectly captures the tension in today's claim handling: the Nazi Era Guidelines of the American Association of Museums authorize member museums to waive defenses, but do not require them to do so, nor do they advise museums on how to exercise their judgment in deciding which defenses might be waived or in what circumstances. At the time of the Washington Conference in 1998, there was much discussion of museums waiving technical legal defenses and trying to resolve claims on an ethical and moral basis to achieve a just a fair solution. I think museums today will not return art when they have a strong statute of limitations defense, but may settle a case when they have a colorable defense that might be won or lost, and can justify saving the litigation costs through a reasonable settlement.

Q&A *with Thomas R. Kline (cont'd)*

What advice would you have for a young lawyer interested in working in the cultural heritage field?

Opportunities in the art and cultural property field are increasing gradually, but steadily. Young lawyers have to target the field as they believe it will be positioned in front of them mid-career, not right now. The art, cultural property and museum worlds receive far less high-skilled legal assistance than they need. Eventually, lawyers will be hired to provide representation and advice as needed. Since most young lawyers interested in the field generally can't just apply for a job and hope for the best, they should prepare themselves for the opportunities that will come along and then be ready to jump when they appear. Along the way, I advise young lawyers to (1) develop their overall training and

development; (2) learn as much as they can about art, cultural property or museum law and try to put it to use through writing or in some other way; and (3) keep looking for opportunities to put those skills and that knowledge to work somewhere in the art field, as a volunteer or otherwise. They might, for example, identify and try to help the most under-served community where they live: is it artists, dealers, museums? They could also think about identifying their preferred approach: transactions, tax, intellectual property, litigation, academics, or government. They can then hone their skills in one of these areas in matters unrelated to art and try to become better known (and also be in the right place at the right time) as opportunities present themselves.



Tom Kline speaking with Lucille Roussin and Monica Dugot at the Committee's April 4, 2008 panel "Legal and Ethical Problems in Art Restitution" at the Grand Hyatt in New York

HAGUE CONVENTION (cont'd from Front Page)

which would replace the category of special protection under the 1954 Convention. The Protocol reinforces the provisions relating to jurisdiction and criminal responsibility in the Convention by requiring States parties to the Protocol to establish criminal jurisdiction over and prosecute or extradite persons committing certain serious violations of the Convention and Second Protocol. Finally, the Second Protocol establishes new institutional structures to supervise the implementation of the Protocol, including setting up a new standing committee, the Committee for the Protection of Cultural Property in the Event of Armed Conflict.

The UK signed the Hague Convention in 1954 but never ratified it. Nor has it acceded to either the 1954 Protocol or to the 1999 Second Protocol. The scenes of looting and destruction of cultural property following the invasion of Iraq by coalition forces in 2003 and in particular the looting of the Baghdad National Museum led to calls for the UK to reconsider its position with regard to the Hague Convention and its Protocols. The UK Government publicly announced its intention to ratify the Hague Convention and accede to its Protocols in May 2004, on the 50th anniversary of the Convention.

Many of the provisions of the Convention and Protocols can be implemented by the UK without new legislation. However legislation is required to give effect to the criminal offences created by the Second Protocol, to implement the obligations in the First Protocol concerning the import of cultural property from occupied territory, and to protect the cultural emblem designated under the Convention.

Article 15.1 of the Second Protocol requires Contracting States to make serious violations of the Protocol criminal offences and prosecute or extradite persons committing such offences. A serious violation consists of the following acts when committed intentionally and in violation of the Convention or Protocol:

- a) making cultural property under enhanced protection the object of attack;
- b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c) extensive destruction or appropriation of cultural property protected under the Convention and the Protocol;
- d) making cultural property protected under the Convention and the Protocol the object of attack;
- e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

Under Article 16 of the Protocol, Contracting States are obliged to take jurisdiction over such offences when the offence is committed within the territory of that State, when the alleged offender is a national of that State, and in the cases of offences in sub-paragraphs (a) to (c) of Article 15.1, when the alleged offender is present in its territory. The Protocol does not preclude the exercise of jurisdiction under national or international law, or affect the exercise of jurisdiction under customary international law. However, the Protocol does not impose individual criminal responsibility over the members of the armed forces of a State or its nationals that are not Parties to the Protocol or require Parties to the Protocol to establish jurisdiction over such persons or extradite them (except in cases where a non-Party has agreed to accept and apply the provisions of the Protocol).

The Bill will make it an offence to commit a serious breach of the Second Protocol. A person commits an offence if (i) that person intentionally does any of the acts described in paragraphs (a) to (e) of Article 15.1 of the Second Protocol, (ii) the act is a violation of the Convention or the Second Protocol, and (iii) the person knows or reasonably suspects that the property to which the act relates is cultural property as defined in Article 1 of the Convention. The Courts are given jurisdiction over the offences irrespective of

HAGUE CONVENTION (cont'd)

where the offences may be committed and, in the case of offences set out in sub-paragraphs (a) to (c) of Article 15.1, irrespective of the nationality of the offender. In the cases of offences set out in sub-paragraphs (d) and (e), jurisdiction will be exercised only if the offender is a UK national or a person subject to UK service jurisdiction.

As noted, Article 16 of the Protocol does not require the UK to establish jurisdiction over offences committed by persons who are nationals of States that are not Parties to the Protocol. There is nothing in the Bill that covers this expressly. However, to constitute an offence under the Bill the act must not only be an act described in Article 15.1 but also be in violation of the Convention or Protocol. Thus action taken by the armed forces of a country that is not a Party to the Convention or Protocol would not amount to an offence since it would not be in violation of the Convention or Protocol.

Criminal responsibility is also imposed on military commanders or superiors who fail to exercise sufficient control over their subordinates to prevent the commission of the offences or to take adequate measures to repress such acts or submit them to the competent authorities for the purpose of investigation or prosecution. However, the duties imposed on military commanders are more stringent than those imposed on superiors, such as government officials or heads of civilian organisations, where it is recognised that the latter may not exercise such strict control as military commanders. Military commanders will incur liability where the commander knew, or under the circumstances prevailing at the time should have known, that his or her forces were committing an offence, whereas a superior will only incur liability where he or she knew, or consciously disregarded information, that the subordinate was committing an offence. The Bill specifically states that the provisions on criminal responsibility of military

commanders and superiors are based on Article 28 of the Statute of the International Criminal Court and in interpreting or applying them a court must take account of any relevant judgement or decision of the International Criminal Court.

Persons convicted of offences of serious violations of the Second Protocol are liable to be sentenced for by up to thirty years imprisonment.

The Bill also makes it an offence punishable by a fine of up to £5,000 for the unauthorised use of the cultural emblem as designated in the Convention. This would include the use of any other design that so closely resembles the cultural emblem as to be mistaken for it. There are a number of defences to a charge of unauthorised use. For example if the emblem forms part of a trade mark that was registered before the Bill became law, or was on a design on goods that were manufactured before the goods came into the possession of the accused. Provision is also made on conviction for the forfeiture of any article on which the symbol was being used without authorisation.

In implementation of the First Protocol as well as Article 21 of the Second Protocol (which obliges a Contracting Party to take measures to suppress any illicit removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or Second Protocol), the Bill makes it an offence, punishable by up to seven years imprisonment, for any person to deal in cultural property that has been unlawfully exported from occupied territory if the offender knew or had reason to suspect that the cultural property concerned had been unlawfully exported. Cultural property is "unlawfully exported" if it has been exported at any time from territory occupied by a Party to the First or Second Protocol and its export is unlawful under the laws of the territory in question or under international law. The term

HAGUE CONVENTION (cont'd)

“occupied territory” is defined by reference to Article 42 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land and a certificate of the Secretary of State as to whether territory is occupied is conclusive evidence of that fact. Although the unlawful export may have taken place before the entry into force of the Bill, for an offence to take place the cultural property must have been imported into the UK after the entry into force of the Bill. No offence is committed in relation to cultural property that has not been imported into the UK.

Provision is also made for the seizure and forfeiture of unlawfully exported cultural property, whether or not an offence may have been committed in the UK, and for compensation to be paid to any person who may have acquired the property in good faith. Once such property has been seized and forfeited it would be for the Secretary of State to make the necessary arrangements for the return of the property to the competent authorities at the close of hostilities in accordance with the First Protocol.

Paragraph 1 of the First Protocol would also oblige the UK in cases where it was in occupation of a territory to prevent the export of cultural property from that territory. The implementation of this obligation would be through the enforcement of the law of the occupied territory or through occupation law.

Finally, the Bill ensures that where cultural property is deposited with the United Kingdom for safekeeping, for example under Part II of the

First Protocol, or being transported to or from the United Kingdom under Article 12 of the Convention, such property shall have immunity from seizure and forfeiture in any criminal or civil proceedings.

The draft Bill is now open for public consultation. Assuming it is included in the 2008-2009 Legislative Programme it should become law sometime in 2009 and UK ratification of the Convention and accession to both Protocols can then take place. In the meantime, work will need to be undertaken to prepare for the implementation of the Convention and Protocols, a major part of which will be the process of identifying the cultural property that the UK considers should be protected under the Convention, preparing inventories of such property, ensuring adequate protective measures are in place, and identifying the cultural property in respect of which the UK would seek enhanced protection under the Second Protocol.

*Kevin Chamberlain is a Barrister based in London. He formerly served as Deputy Legal Adviser to the Foreign and Commonwealth Office, has been a consultant to Department for Culture Media and Sport, and is the author of **War and Cultural Heritage** (2004), published by the Institute of Art and Law. Mr. Chamberlain has been intimately involved in matters relating to the passage of the Hague Convention in the United Kingdom.*



Bonnie Czeglédi

HERITAGEWATCH UNDERTAKES EFFORT TO CONSOLIDATE REGIONAL CULTURAL PROPERTY LEGISLATION IN SOUTHEAST ASIA

By Terressa Davis, San Francisco

In an effort to facilitate the protection of Southeast Asia's archaeological sites, the organization HeritageWatch is creating an online database of regional cultural property legislation. The lack of such a reference is hindering efforts to staunch the illicit antiquities trade — and thus the looting of archaeological sites — because lawyers, law enforcement officers, customs officials, and antiquities dealers are often ignorant of the current law and thus unable to follow or enforce it. The database will launch early in 2009, and will later be expanded to cover other regions.

Because the antiquities trade lacks the international regulation required for industries of a similar magnitude, the legal protection of cultural heritage depends largely on national legislation. In recognition of this fact, countries are increasingly trying to preserve their patrimony through the enactment of domestic laws. Unfortunately, this flurry of lawmaking has resulted in a tangled web of national and international laws — which are complex, often overlapping, and sometimes contradictory.

“HeritageWatch understands firsthand how efforts to safeguard cultural property are hampered by the lack of a comprehensive reference of relevant and current legal information,” said Dr. Dougald O'Reilly, archaeologist and founder of the not-for-profit organization, which has been working since 2003 to protect Southeast Asia's archaeological sites. He added, “We fill this conspicuous gap with DHARMA: the Database of Historical and Archaeological Regulations for the Management of Antiquities.” The database's name is appropriate — *dharma* is the Sanskrit word for “law.”

The DHARMA Database will complement work already undertaken by UNESCO, which has made significant progress with its own

international Cultural Heritage Laws Database. That reference, however, excludes most of the Southeast Asian countries. Furthermore, UNESCO's database comprises only heritage specific legislation, neglecting other statutory and common law. Civil procedure, criminal, contract, property, and tort laws — while not created with cultural preservation in mind — are becoming primary vehicles for protecting heritage worldwide and will be included in the DHARMA Database.

Legal research on the DHARMA Database begins in June 2008, when interns from the United States arrive in Singapore and Cambodia to work full-time on the project. These interns will research and collect municipal and international legislation affecting cultural heritage in the region. Once collected — and translated into English when necessary — these laws will be analyzed and annotated by the project staff and advisory board. Following an editing process, confirming that there have been no recent amendments, the legislation will be entered into a free to access, easily searchable, online database that will launch in early 2009.

Project Director Terressa Davis encourages interested lawyers and students to become involved in the DHARMA Database. Said Davis, “This is a wonderful opportunity to make a valid contribution to an important global effort, while gaining hands-on experience in the growing field of cultural property legislation.”

Terressa Davis can be contacted at tess@heritagewatch.org. To find out more about Heritage Watch and its work, please visit www.heritagewatch.org

PRESERVING HISTORY

By Kris Wilton, New York

(This article was originally published on March 7, 2008 in artinfo.com and has been reprinted with permission from the publisher)

U.S. Marine Corps Colonel Matthew Bogdanos was heading counterterrorism operations in Basra, Iraq, in 2003 when he heard about the looting of the Iraq Museum in Baghdad. Also an assistant district attorney in New York with a master's degree in classics from Columbia, Bogdanos took it upon himself to travel the hundreds of miles to Baghdad and hunt down the stolen antiquities.

A brash, passionate, and compelling public speaker, Bogdanos, who co-wrote a book, *Thieves of Baghdad*, about his adventures, was selected to kick off a day-long event at the Benjamin N. Cardozo School of Law at New York's Yeshiva University on Tuesday that brought together some of the top people wrangling with the complicated issues of cultural heritage. Filled with images of looted works, statistics, and words of inspiration, Bogdanos's presentation set the tone for the day: Irreversible damage is happening right now, something needs to be done, and you, conference participants, are the ones to do it.

Titled "War and Peace: Art and Cultural Heritage Law in the 21st Century" and sponsored by the Cardozo Public Law, Policy & Ethics Journal and the Lawyers' Committee for Cultural Heritage Preservation (LCCHP), the symposium was notable for bringing together different sorts of specialists invested in protecting the world's cultural treasures: archaeologists, curators, art market specialists, lawyers, and law students. Says moderator and Cardozo professor Lucille A. Roussin, "It will be a long time before you see another panel like this one where every single speaker is number one in their field."

The conference's goal was to discuss "how to prevent looting during times of both war and peace, how to deal with looted cultural material

that enters into the international art market, and legal issues related to restitution of artworks," and the program touched on three principal areas: the problem of looting in post-invasion Iraq, archaeology in the Americas, and the hot-button issue of World War II restitution.

Iraq

Panelist Donny George, former director of the Iraq Museum, put the rampant looting of the museum's collections—and the issue of cultural heritage in general—into a larger perspective. In Iraq, says George, it's not just local culture that's being destroyed, but world culture, since the museum is the only one to present an uninterrupted history of civilization, and of artmaking. "It's a big risk that's happening to our—and when I say our, I mean everyone's—culture of mankind," he says.

George says of 15,000 objects known to have been stolen from the museum since the American invasion, 4,000 have been returned by Iraqis thanks to an amnesty program. Still, artifacts are being removed from the country every day, and Iraq's neighbors aren't necessarily doing much to stop it. George says that sources have told him that looted objects are being found on the borders to Turkey and Iran but not being confiscated or reported. And the Iraqi government has also been less than helpful, underfunding, underoutfitting, and ultimately undermining forces hired to curb looting — particularly in the south of the country, where aerial shots of the landscape show looted sites as numerous as potholes on city streets.

Patty Gerstenblith, director of the cultural heritage law program at DePaul University College of Law, says "the looting of cultural heritage is an old process." She adds that while conventions put in place to curb damage and stealing can't actually prevent it—most

PRESERVING HISTORY (cont'd)

significantly, the Hague conventions of 1899 and 1907 established international guidelines for how parties are to handle opponents' cultural institutions during warfare—they at least provide the mechanisms for restitution and prosecution.

The problem is that these guidelines aren't always so easy to decipher. For example, while U.S. law is clear that our troops should avoid damaging and should even protect opponents' cultural heritage sites unless militarily necessary, it's unclear whether U.S. troops are required to step in if Iraqi people are damaging or looting from their institutions themselves. Gerstenblith cited the example of an iconic ninth-century minaret in Samarra that is used as a national symbol on Iraqi currency. U.S. troops occupied the structure because it provided a good vantage point (a defensible action), and then Iraqi insurgents bombed and damaged the minaret. Who's in the wrong?

The Americas

Experts working in the Americas, meanwhile, face a very different sort of problem: a public insufficiently aware of what constitutes a cultural heritage site. Sherry Hutt, manager of the National Park Service's Native American Grave Protection and Repatriation Act Program, gave an impassioned speech about saving Native American burial sites from plundering; her colleague Robert Palmer suggested that up to 12 incidents of looting occur on American soil every day — as people thoughtlessly pick up Native arrowheads and comb Civil War battlefields with metal detectors — with most looters not knowing they're doing anything wrong. Terence D'Altroy, a professor of archaeology at Columbia University, warned of the dangers urban sprawl poses to the myriad Inca sites in the rapidly expanding, tourist-heavy Cuzco region of Peru and presented a program to capture 3D images of the sites before they vanish altogether.

World War II

While the panels on the Middle East and the Americas demonstrated the urgency of protecting cultural treasures now, the panel on World War II restitution illustrated what can happen if we don't.

Monica Dugot and Lucian Simmons, senior vice presidents responsible for restitution issues at Christie's and Sotheby's, respectively, both said that the auction houses deal with the aftermath of Nazi looting daily. Dugot called it "one of the most important issues we face," adding "what we sell and how is under constant examination."

Simmons presented a slide show of works that his department has dealt with this season, including a painting by Giovanni Battista Franco (aka Il Semolei) that listed Hermann Goering, an avid art looter, among its previous owners. Provenance research indicated that the widow of the original owner had willingly sold it to the Nazi leader, an unlikely story but one her heirs confirmed, and the sale was allowed to go forward (the work was offered in a January sale of old masters but did not sell). Another consigned work, Franz Marc's *Weidende Pferde III* (*Grazing Horses III*) (1910), was forcibly deaccessioned by the Dusseldorf Museum in 1937 after the Nazis deemed it degenerate art. It changed hands several times between then and 1990, and a private collector sold it for £12,340,500 (\$25 million) in February.

"A sense of justice being done [is] what drives restitution," says Dugot, but it's still very hard to identify looted art. Most of it is not documented, and there's no central depository of information. Given poorly kept records and how often some works have changed hands, "tracing the provenance of a work of art is anything but straightforward."

Even when you have good documentation, locating artworks can be a problem. New York

PRESERVING HISTORY (cont'd)

attorney Howard Spiegler, a partner in the firm Herrick, Feinstein, which specializes in art law, outlined the landmark case of Dutch dealer Jacques Goudstikker, who fled the Netherlands in 1940, leaving behind a collection of 1,200-plus artworks, which were later seized by Goering. Goudstikker died tragically onboard the boat carrying him into exile, but he left behind a little black book listing essential details of almost all of his works. Still, despite this wealth of information; years of efforts by the firm, the heirs, and independent research organizations;

and a landmark restitution case in which the Dutch government handed over 200 of the works to Goudstikker's sole remaining heir, daughter-in-law Marei von Saher, hundreds of the works have yet to be located.

Extensive steps have been taken in terms of the law, provenance research, and restitution agreements in the last ten to 12 years, but the challenge is as great as ever, Dugot says. "We've learned a lot, but it just underscores how much is left to do, and the enormous importance of getting it right."

MODERN ART THEFT: RECENT TRENDS

By Barry Goldbrenner

It seems somewhat counterintuitive that in the age of modern technology, where art is catalogued, photographed, documented, and protected, and where nearly every transaction leaves a paper trail, that serious art theft would remain an issue of concern to collectors. But a recent spate of robberies in Switzerland indicates that despite modernization and technological advances in protection methodology, collectors need to remain vigilant.

In early February of this year, two Swiss art museums were burglarized. The museums were located in Zurich and in neighboring Pfäffikon, and had countless pieces of priceless art as part of exhibited collections. The thefts, which authorities believe were unrelated, amounted to an estimated 163 million (USD) in losses. Paintings that were stolen include works of Picasso, Monet, Cezanne, van Gogh, and Degas. The museums were both lightly guarded, and so the thieves escaped with ease.

More broadly, experts place the annual value of transactions in stolen art as exceeding 1 billion (USD). Less than 20% of all stolen art is recovered successfully. The poor recovery rate

may be attributed to many factors both legal and practical, and law enforcement has neither the assets nor resources to track individual pieces of art through established international channels. Even when thieves are caught, they face weak penalties and prison sentences. Lacking specific statutory guidance, thieves of precious and priceless artifacts often face the same consequences as car burglars.

Recovering priceless artifacts is exponentially hampered by the unfortunate catch-22 that arises in many situations. Victims are often reluctant to contact authorities to report thefts, and investigations may result in the piece of art being forced "underground." This meaning that thieves or collectors who are in possession of art of dubious provenance may wait several years, or perhaps decades before displaying or acknowledging the possession of a missing artifact. The lapse of time is often longer than the applicable statute of limitations, and so even when proper owners do claim a piece of artwork as theirs, they have no judicial recourse.

While a limited number of US jurisdictions have statutes that protect true owners of stolen

MODERN ART THEFT (cont'd)

art, most do not. New York has enacted legislation that places the *burden on a buyer of art to research its origins*. If the art is discovered to be stolen, the statute of limitations runs from the date of discovery, and not from the original date of theft.

Competing claims in some cases present an added burden, as several states or nations may have some claim to a recovered artifact. While determining ownership is certainly a concern, states may claim a sovereign interest in a piece of art, arguing that the piece is so culturally significant that no individual has a claim superior to that of the state.

All told, once a piece of art is stolen, the associated legal and logistical difficulties make

recovery difficult, if not impossible. To conjure a regime of equity and resolution is easier said than done, and the transnational nature of art theft exacerbates the issues. Steps are being taken, through coordinated efforts of domestic and international law enforcement and tracking projects such as the Art Loss Register, to secure and track priceless artifacts. But the coordination of these entities is hardly seamless. Until there is greater unity in those efforts, along with more clear statutory guidelines worldwide, we will continue to see a Monet on the front cover of some newspaper, with the caption "Art Thieves Strike Museum, Again."

Announcement: Upcoming Event

WHO OWNS THIS IMAGE? Art, Access, and the Public Domain after *Bridgeman v. Corel*

When:

Tuesday, April 29, 2008 6:30 – 8:00 pm

Where:

**New York City Bar Association
42 W. 44th Street, New York City
The Great Hall**

Panelists:

Dr. Theodore Feder, President, Art Resource, Artists Rights Society

Christopher Lyon, Executive Editor, Prestel Publishing

William Patry, Senior Copyright Counsel, Google

Hon. Richard A. Posner, United States Court of Appeals, 7th Circuit

Maureen Whalen, Associate General Counsel, J. Paul Getty Trust

Moderator:

**Virginia Rutledge, Chair, Art Law Committee, New York City Bar Association,
Vice President and General Counsel Creative Commons**



***This program is free and open to the public; no reservation required.
Seating is limited.***
