The American Society of International Law

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Cultural Heritage & Arts Review

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In this Issue...

Millar Kelley, "Snow Buffalo"

Welcome!

The ASIL Cultural Heritage & Arts Interest Group

The publishers of the *Review* are pleased to announce the founding of the Interest Group on Cultural Heritage and the Arts at the American Society of International Law.

This group was formed by lawyers interested in providing a forum for discussion of law and policy issues relating to cultural heritage and the arts. The international law of cultural heritage and the arts has typically been concerned with artistic objects and cultural property, yet in a broader sense the law of cultural heritage also applies to intangible aspects of culture, or "living" cultural heritage, which involves the customs and practices of traditional and indigenous cultures. While human rights are well-known internationally, the next cutting edge topic of public international law will no doubt be the emerging area of "cultural rights." Stay tuned and learn about it here.

In the arts sector, objects and performances created by living artists specifically for today's for-profit or not-for-profit market implicate completely different contractual, copyright, trademark and other issues, such as moral rights and *droit de suite*.

Specific focal points for our group include: the illicit trade in looted antiquities and stolen works of art; intergovernmental cooperation on interdiction; the arbitration of disputes over ownership of works of art; the preservation of historic and world heritage sites; the protection of cultural property during armed conflict; museum law; public financing of the arts; underwater cultural heritage; and anthropolgical and cultural approaches to law.

We subscribe to the "big tent" theory and welcome you to get involved. Please join the American Society of International Law and the Interest Group at www.asil.org. Please contact us to explore how to get further involved, including writing an article for the *Review*. We look forward to bringing you a quality publication, sponsoring interesting events, and stimulating conversation about law, policy, and practices in the field of international art and cultural heritage.

-Cristian DeFrancia & Jennifer Kreder

Cultural Heritage & Arts Review

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We also encourage artists to submit their work for publication as clip and border art.

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Subscriptions
An electronic version of the newsletter is available free of charge to Members of the Interest Group. Print editions are available for sale through the editors.

The cover banner is an adaptation from "Magical Stela, 360–343 B.C.E.; Dynasty 30, reign of Nectanebo II" at the Metropolitan Museum of Art in New York.

High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The *Black Swan* Case

by Kimberly L. Alderman

Painting of the Mercedes Exploding

Treasure Beneath the Sea

"Odyssey set out to find the Mercedes and found it," explained a US District Court in Florida, having sifted through substantial evidence in an effort to resolve a dispute between Odyssey Marine Exploration, a deep-sea treasure hunting operation, and the sovereign nation of Spain.

The dispute began in 2007 when Odyssey recovered 594,000 Spanish coins from the ocean floor, 3,600 feet below sea level and 100 miles west of Gibraltar. Odyssey took the bounty into possession and returned to the United States with it. In order to secure title to the coins, the company filed a claim in the US District Court in the Middle District of Florida, asking the clerk to issue a warrant of arrest over the recovered coins and any remaining items at the wreck site. Odyssey publicly referred to the site via the codename Black Swan, and in court pleadings as " the unidentified shipwreck."

Spain entered an appearance as an interested party, claiming that the site was the final resting place for one of its frigates – The Nuestra Senora de las Mercedes – which exploded in an 1804 confrontation with a British squadron, resulting in the loss of 250 lives.

Interestingly, Peru then entered the action, claiming that the coins should be returned to the Peruvians, since they were minted in Lima, using local labor and precious metals, and never even made it to Spain. Even though Spain was a lawful colonial authority at the time the coins were minted, Peru made the unique argument that since the coins only left the country due to colonial exploitation, they should be repatriated. The resolution of that interesting question will have to wait, however, because the court declined to exercise jurisdiction over Spain, citing to the Foreign Sovereign Immunity Act ("FSIA").

The Court's Rationale: Sovereign Immunity

The court explained that the FSIA provides the exclusive means to bring a foreign sovereign under the jurisdiction of US courts. The general rule of the FSIA is sovereign immunity, but the law delineates a number of exceptions. Odyssey argued first that the FSIA did not apply because they were not dealing with cargo owned by Spain and alternatively relied on an exception contained in §1605(b), which allows the court to resolve a maritime lien over a vessel or cargo of a foreign state "if that lien is based upon a commercial activity of the foreign state."

This exception is consistent with admiralty and international law, which hold that "a sovereign vessel that appears to have been abandoned remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party." Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634, 643 (4th Cir. 2000) (quoting Dep't of Interior, Advisory Guidelines on Abandoned Shipwreck Act, 55 Fed. Reg. 50,116, 50,121 (1990)). Sea Hunt also confirmed the international law that sunken warships may be abandoned only by an "express act of abandonment."

In this case, Spain held tight to these firmly rooted laws, and filed a motion to dismiss Odyssey's claim pursuant to them. The court ultimately granted Spain's motion, but relied exclusively on the FSIA. Before this decision, the FSIA alone had never been applied to deny a US court jurisdiction over cargo recovered from the ocean floor.

The District Court resolved a myriad of legal issues posed by the parties by answering only one question – Is the wreck site in question the remains of the Mercedes? There is a wealth of evidence indicating it is, and Odyssey itself concedes that is the leading hypothesis of its own scholars. Hence, the court's observation, "Odyssey set out to find the Mercedes and found it."

A Sovereign Vessel, But Whose Cargo?

The problem with the court's methodology is this – assuming the site is the remains of the Mercedes: it wasn't just government cargo aboard the frigate. In fact, twenty-five descendants of private persons who owned cargo about the ship filed claims to Odyssey's booty. Spain has not contested that the Mercedes was carrying a significant load of civil cargo when she sank. The private owners argue that they never received compensation for the loss. Spain argues that they submitted the paperwork to receive compensation, but since it appears that compensation was never actually paid, it

Treasure Hunters and Sovereign Immunity: The *Black Swan* Case *(cont'd)*

is unclear how this should prevent them from making a claim. These descendant owners moved the court to deny Spain's motion to dismiss, and to adjudicate their rights as owners, awarding Odyssey a salvage award under the law of salvage.

This aspect of the fact-intensive litigation was critical to Odyssey's argument because if the coins recovered were indeed privately owned (as it appears many, if not most all of them were), then the natural conclusion might be that Spain would have no interest in the coins, perhaps only in the remains of the ship. In this case, however, no vessel was ever located or recovered. Odyssey distinguished the Mercedes from the recovered coins, arguing that even if the ship itself conveyed sovereignity under the FSIA, said sovereignity would not attach to the private cargo.

The District Court, however, explained in their order granting Spain's motion to dismiss that the ship and the cargo are indistinguishable for the purposes of the Foreign Sovereign Immunities Act.

There are certain aspects of the ruling that are troubling, however. First, the court stated, "The ineffable truth of this case is that the Mercedes is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain[.]" Even though the court considered substantial evidence in order to identify the ship as the Mercedes, there was no real factual inquiry into the contentions of Odyssey and the descendant owners that at least some portion of the cargo recovered was privately owned. Even Spain seemed to concede this point, but the reality was given little if any consideration in the 39-page magistrate recommendation and final order of dismissal.

The District Court instead declined to resolve the issue of private rights to the cargo, stating that to do so would implicate Spain's potential rights to it, making Spain an indispensable party. It followed that if Spain is immune under the FSIA, then they cannot be joined in the action, and Federal Rule of Civil Procedure 19(b) would apply, mandating a dismissal. The court explained that even if a dismissal under 19(b) would result in plaintiffs being left without a forum for a definitive resolution of their claims, the doctrine of sovereign immunity contemplates that possibility.

This logic is somewhat circular. If Spain has no interest in the cargo, then the FSIA should not apply. If the FSIA does apply, then Spain enjoys sovereign immunity and cannot be brought into the suit. Accordingly, if the cargo and ship are distinguishable, then the court cannot resolve whether the FSIA applies because Spain may have an interest in the cargo, and if it did, then the FSIA would apply. In order to avoid this paradox, the court ruled the ship and the cargo indistinguishable, which resulted in an easy application of the FSIA.

However, the immunity provided for in the FSIA, specifically under §1609, requires that the property be that of the foreign state. The District Court made no evidentiary ruling as to whether the descendant owners continue to hold a property interest, and so applied the FSIA by way of an assumption in Spain's favor, that if the cargo was on the ship, then it belonged to Spain. This is not factually consistent with the assertion of any party to the action, however.

Odyssey argued that even if the FSIA were implicated, that an exception is provided for in §1605(b), which allows the court to resolve a maritime lien over a vessel or cargo of a foreign state "if that lien is based upon a commercial activity of the foreign state." This argument resulted in a significant factual dispute between Odyssey and Spain, where the former argued that historical documents show the ship was indeed on a commercial mission, and the latter argued to the contrary.

The court did not give much weight to this dispute, or to Odyssey's argument that the §1605(b) exception to immunity should apply. Rather than resolve the factual issue as to whether the Mercedes was on a commercial mission, the court concluded that the §1605(b) exception "contemplates an arrest to enforce a judgment, not to create a legal right." In a footnote, the court explained, "Notably, salvage gives rise to a lien, but a find of maritime property does not."

Professor Moore also makes the argument that Peru has preferential rights to the coins. The Spanish domination of what was the New World was brutal and horrific, he explained. During the first century, the Indian population apparently declined by nearly 80 percent due to overwork, malnutrition, and the introduction of diseases. It took over 300 years to replace that loss in population, and the coins are argued to constitute a natural resource that is protected under international law.

This is the most troubling aspect of the District Court's order of dismissal. For the purposes of determining general applicability of the FSIA, the court concludes that the ship and the cargo are indistinguishable, thereby extending sovereignity to the recovered cargo. Some twenty pages later, however, the court says a certain exception to the FSIA does not apply because Odyssey recovered cargo rather than a ship!

Rights of Salvage and the Law of the Sea

Under maritime and international law, a salvage award is in-

Treasure Hunters and Sovereign Immunity: The *Black Swan* Case *(cont'd)*

deed a maritime lien, and therefore §1605(b) could feasibly apply. The court's resolution of a claim for a salvage award would not be "creating a legal right," but instead would be recognizing one that already exists pursuant to the law of the sea.

Further, law of the sea expert Professor John Norton Moore filed an affidavit in support of Peru. In his affidavit, he points out that Spain asks for the court to both dismiss the action per immunity, and to order the coins "returned" to Spain (even though the coins have never actually been to Spain). For Spain to make such a request, it is invoking the jurisdiction of the court, potentially waiving its immunity. For the court to grant such a ruling, it would be making a de facto adjudication of the merits of all the parties claims: Spain, Odyssey, Peru, and the 25 descendant owners included. Yet this is exactly what the court did – dismissed the action and ordered that Odyssey return the coins to Spain. Accordingly, Spain availed itself of the benefit of the court, supposedly without yielding to its jurisdiction.

Colonialism Revisited

Professor Moore also makes the expected argument that Peru has preferential rights to the coins. The way he makes it, however, was unexpected: convincingly. The Spanish domination of what was the New World was brutal and horrific, he explained. During the first century, the Indian population apparently declined by nearly 80 percent due to overwork, malnutrition, and the introduction of diseases. It took over 300 years to replace that loss in population, and the coins are argued to constitute a natural resource that is protected under international law. Even though Spain was acting pursuant to "lawful authority" at the time, so were the Germans when they appropriated artwork and artifacts during World War II, and it is now widely expected that those objects will be returned on laws that evolved from sheer principle. Accordingly, even though Peru did not get a chance for their argument to be heard on the merits, it would be a mistake to discount the position altogether. It remains to be seen whether the argument will be addressed in this particular case or if it will have to wait for another.

Odyssey Handout of a Coin from the Black Swan

The Hunt Continues

This litigation continues by way of the appellate process, and there will be some interesting issues for the Court of Appeals to resolve. Without a finding of fact as to whether the 594,000 coins recovered were private cargo, it will be impossible for the appellate court to determine whether the FSIA is implicated, unless they want to affirm the District Court's implicit holding that sovereignty extends even to private cargo aboard a sovereign ship.

Further, even though the court did find that "[t]he Mercedes clearly was not engaged in any commercial activity at the time of its demise," no factual analysis to support the finding was provided, and there seemed to be a significant question of fact around this issue. Without a record of the factual analysis of the evidence tending to show that the Mercedes was indeed engaging in commercial activity, it may prove difficult for the appellate court to determine the applicability of the §1605(b) exception to immunity that applies to vessels engaged in commercial activity.

Finally, the court's order of the return of cargo to Spain has been stayed pending the resolution of the appeal. If the Court of Appeals elects to uphold Spain's sovereignty, it may be hard pressed to justify what Professor Moore rightly called the de facto adjudication implicit in an order that the coins turned over to Spain.

The Black Swan litigation is bound to get only more interesting as the appellate court must consider the competing claims and decide whether to affirm the District Court's expansion of the Foreign Sovereign Immunities Act, or to remand for proceedings to resolve some of the outstanding factual issues.

Kimberly L. Alderman is an attorney and cultural property law scholar who enjoys gardening, home brewing, and traveling. She maintains the Cultural Property & Archaeology Law Blog at http://www.culturalpropertylaw.net, where she has made the most essential Black Swan pleadings available for download.

Panel Report:
Wrestling the Dead Hand of History: Perspectives on a Proposed State Department Commission on Nazi Looted Art

by Jennifer Anglim Kreder

On March 26, 2010, I moderated the Interest Group's inaugural panel on Nazi-looted art. I opened the panel by providing some background on the Nazi-looted art problem, which was followed by an introduction of the panelists, Ambassador Stuart Eizenstat, Ambassador J. Christian Kennedy, Charles A. Goldstein and Dr. Lucille Roussin (in opening round speaking order), and an impassioned debate about how to seek to resolve claims to Nazi-looted art in the United States.

Background

No one believes that restituting art will undo any of the horrors inflicted by the Nazis, but most believe that restituting valuable property to those from whom it was stolen because of their race is right. Most people don't realize that one core component of the Nazis' Final Solution was to steal Jews' art collections and eliminate modern art from the Reich, as they deemed it a degenerate influence on Germanic culture. The Nazis stole more art than any regime in history – even Napoleon. It is widely accepted that over 100,000 significant art objects stolen in the Holocaust era remain unaccounted for. Some were destroyed, but the pre-War art market is infected with Nazi-looted art.

The western world tried to reach some agreement on how to deal with the issue in 1998 when forty-four nations signed onto the Washington Principles calling for increased provenance (ownership history) research, creation of alternative dispute mechanisms and reaching of "just and fair" solutions, recognizing that what is just and fair may differ from case to case. National laws differ significantly in terms of whether a modern claimant to such art may successfully sue. Historically, U.S. law has been regarded as the most favorable toward claimants, but a wave of cases since a landmark Supreme Court case in 2004 (which favored the claimant) has significantly shifted the legal landscape in U.S. courts.

The Panelists (and Some Additional Background)

Ambassador Stuart Eizenstat, who organized and headed the U.S. delegation to the Washington Conference, was appointed to head the U.S. delegation to the Holocaust Era Assets Conference in Prague in June 2009, which resulted in the Terezin Declaration. The 2009 Terezin Declaration reaffirmed support for the 1998 Washington Principles, but the Terezin Declaration calls for the restitution of art transferred in "forced sales" as opposed to just "confiscated art," the term used in the Washington Principles. What exactly constitutes a "forced sale" is a raging debate in the art world.

A current wave of claims attempts to expand the definition of "forced sale" to include all property sold as a consequence of the Nazis' rise to power in 1933 and immediate persecution of Jews. U.S. Military Government Law 59 implemented a presumption that all transfers from Jews to non-Jews after implementation of the Nuremberg laws in 1935 were made subject to duress. Also quite significant is the Flight Tax, a racially neutral law pre-dating the Nazis that required citizens leaving the Reich to forfeit 25% of their assets, which was turned to evil ends as Jewish refugees tried to flee the new regime. If courts accept as historical fact that immediately upon Hitler's rise to power in March 1933, Germany's entire Jewish population was stripped of all legal rights and remedies and forced to sell artworks as a matter of survival, U.S. museums may be compelled to acknowledge that many more works were acquired under problematic circumstances and may rightfully belong to persecuted Jews. Perhaps out of fear, U.S. museums, alone in the world, have begun filing declaratory judgment actions raising technical defenses, such as statutes of limitation and *laches*, to defeat such claims.

The Department of State's Special Envoy for Holocaust Issues, Ambassador J. Christian Kennedy, has hosted a series of Town Hall Meetings since 2009 to explore the idea of creating a national com-

Panel Report :Perspectives on a Proposed State Department Commission on Nazi Looted Art *(cont'd)*

mission to issue non-binding opinions regarding claims to art displaced during the Holocaust. The State Department is going ahead with its plans to create a commission and is soliciting input into how the commission should be structured.

Charles Goldstein of Herrick, Feinstein LLP in New York, serves as Counsel to the Commission for Art Recovery and has been litigating Holocaust art claims for 15 years. The Herrick firm is deeply involved with Nazi-looted art litigation, including the Portrait of Wally case pending in New York since 1999 and set for trial later this year. Mr. Goldstein is critical of the commission proposal and has alternate proposals.

Dr. Lucille Roussin spoke at the Prague Conference. She is Founder and Director of the Cardozo Holocaust Restitution Claims Clinic and was the lawyer responsible for the first major restitution of a valuable piece of privately owned Judaica since the War. She brings both a practical and academic perspective to the Nazi-looted art problem and shares Mr. Goldstein's criticisms.

Discussion and Debate

First, Ambassador Eizenstat expanded on the background about the Washington Conference and Principles, the Prague Conference and the Terezin Declaration, and indicated that the current climate whereby U.S. museums are filing declaratory judgment actions against survivors and their heirs could be reformed by bringing the moral suasion of the Government of the United States to bear via the creation of a commission. He discussed how it might be structured and was passionate that we needed to return to the spirit expressed in Washington and Terezin that the Nazi-looted art problem must be viewed as a moral issue, not a legal one.

Second, Ambassador Kennedy discussed how the commission would be constructed. He stated that the commission would consist of five eminent persons who need not be drawn from the legal community but whose reputations and credibility would be beyond reproach. At this point, other firm details are not yet available as the commission is in its incipient stages. It is likely that the commission would have a staff to assist in provenance (ownership history) research and other matters. The current conception of the commission is that two tracks would be available, which would operate independently of one another to prevent potential adjudicators from acting as researchers: a finding track and an alternative dispute resolution track. Ambassador Kennedy stressed that that the Washington Principles and Terezin Declaration favored use of alternative dispute resolution mechanisms and commissions over litigation to resolve claims to Nazi-looted art.

Both Mr. Goldstein and Dr. Roussin stressed that they do not oppose the commission; they support it in concept because they support the idea of reducing costs and maximizing access to research for claimants. Both were critical of the current formulation of the proposal, however, because they believe it does not address the heart of the problem – that museums are asserting statute of limitations and *laches* defenses in court, which prevents an airing of the merits and true provenance of the art in question. Mr. Goldstein stressed that the museums must be forced to the table and that they would not cooperate with a commission if all it offers are optional alternative dispute resolution mechanisms, which already exist. He stressed that this was true in light of the fact that five different museums had filed and won declaratory judgment actions on limitations grounds against claimants in contravention of Association of American Museum Directors (AAMD) and American Association of Museum (AAM) guidelines.

Dr. Roussin was of the view that having "eminent persons" lead the commission was too vague, and that persons deeply knowledgeable about Nazi-looting and the subsequent infection of the market should lead the new commission. As a Ph.D. in Art History & Archaeology, Dr. Roussin stressed that provenance research is absolutely necessary and a means to support that research should be found. However, she also stated that anyone with a Ph.D. in Art History should be capable of doing this research.

In response, Ambassador Eizenstat was adamant that the *status quo* – a litigation model – could not remain the norm in the United States, and that legislative reform was not a possibility in the current congressional climate. Thus, creating a commission like the ones in place in the United Kingdom, the Netherlands, Germany, and France is imperative to bring the United States into compliance with what it promised in the Washington Principles. He was passionate in his views that the commission would exert moral authority that would have an impact on litigation and in the end reduce the need to rely on courts to resolve the Nazi-looted art problem – even without mandatory jurisdiction over all Nazi-looted art claims or legislation barring the use of limitations and laches defenses. Finally, he felt it was time for the United States to once again lead the effort to restitute art stolen from Holocaust victims and restore faith in our public institutions. Therefore, a commission is essential to facilitate the further disposition of claims. Ambassador Kennedy echoed Ambassador Eizenstat's statements.

In response to the final question posed to the panel about museums' fiduciary duties not to restitute artworks without compelling reason, Mr. Goldstein underscored that museums have no fiduciary duty to hold on to stolen property and that receiving stolen property is a crime.

Q&A with Cultural Anthropologist Scott Atran

In this Q&A, renowned cultural anthropologist Scott Atran addresses the problem of dealing with cultural sensitivities in global conflict. Early in his career, Atran was an assistant to Margaret Mead at the American Museum of Natural History, and has since become an authority in his own right, publishing numerous books and articles on culture and anthropology. Atran's recent work has focused on the clash of traditional and global cultures in the making of terrorist networks. He has recently been advising the government on developing field-based scientific understanding of pathways to and from seemingly intractable political and cultural conflicts. He is a professor at the University of Michigan and John Jay College of Criminal Justice, and Director of Anthropological Research at the Centre National de la Recherche Scientifique in Paris. His most recent book, "Talking to the Enemy: Faith, Brotherhood and the (Un)Making of Terrorists," will be released this Fall.

You have done extensive work on the role of cultural values in both the perpetuation and the resolution of conflict. Based on your field-work with jihadis who come from traditional cultures in the Middle East and Southeast Asia, what are the respective roles of pan-global Islamist values vs. local, traditional values in resisting Western influence?

The jihadi movement today is no longer under the control of the Al Qaeda terrorist organization and is no longer primarily aimed at freeing Muslim homelands from perceived occupiers. The jihadi movement has become the fight of small self-organizing groups of mostly young men who dream of belonging to a revolutionary global Islamic movement that would dispense Islamic justice. For centuries, the reasoning of Islamic jurists (*ulema*) has set down rules of interaction to cover almost any matter of trade, war or peace between Dar al-Islam (The House of Islam, Land of Islam) and Dar al-Kufar (the House of Unbelief, or Dar al-Harb, the House of War). Always clearly grounded in passages from the Koran, these rules have contained lethal sanctions against apostates, idolaters and those who challenge Muslim territorial dominance and the God-given right and duty to expand that dominance across the world.

Traditionally, however, there have been strong limits on using violence except when the House of Islam is under direct threat of physical attack. If there are no strong leaders and armies to defend, then it becomes a *fard al-'ayn*—a sacred duty incumbent upon any and every Muslim individual—to repel the infidel by any means necessary. According to Sayyid Qutb, "When they attack Dar al-Islam, it is *fard al-'ayn*, for every Muslim, woman or man, to fight."

No mercy, no quarter. What the jihadi movement has done in the 21st century is to take such reasoning two steps further. First, because there is no pure Islamic state anywhere, then the whole world must be a House of War. According to Sayyid Qutb, a founding father of global Jihad: "A Muslim has no country except that part of the world where the Sharia [Law] of God is established." Second, because Islam is under global attack by America and the forces of globalization, then the whole world is a global battlefield under the injunction of *fard al-'ayn*. "American Crusader interests are everywhere," reiterated Sufyan al-Azdi al-Shahri in 2010 in the name of Al Qaeda in the Arabian Peninsula: "Attack them and eliminate as many enemies as you can." As the social movement has spread to the diaspora, it has become increasingly global in scope and apocalyptic in vision. That's the bad news. But as it continues to wash through the margins of societies, it has also become more scattered and disjointed—materially, psychologically and philosophically. And that's probably good news.

Unlike Al Qaeda, the Taliban (like Somalia's Islamic Courts) are interested in their homeland, not ours. Things are different now than before 9/11. The Taliban know how costly keeping Qaeda can be. There's a good chance that enough of the factions in the loose and fractious Taliban coalition would decide for themselves to disinvite their troublesome guest if we contained them by maintaining pressure without trying to subdue them or hold their territory, intervening only when we see movement to help Al Qaeda or act beyond the region. A long leash on the Taliban is likely to be far more effective than a short one. And in the fight against violent extremism more generally, as far as our direct involvement goes, less just may be more.

How does Afghan traditional culture factor into these relationships?

A key factor helping the Taliban is the moral outrage of Pashtun tribes against those who deny them autonomy, including a right to bear arms to defend their tribal code, known as Pashtunwali. Its sacred tenets include protecting women's purity (*namus*), the right to personal revenge (*badal*), the sanctity of the guest (*melmastia*), and sanctuary (*nanawateh*). Among all Pashtun tribes, inheritance, wealth, social prestige and political status accrue through the father's line.

This social structure means that there can be no suspicion that the male pedigree (often traceable in lineages spanning centuries) is "corrupted" by doubtful paternity. Thus, revenge for sexual misbehavior (rape, adultery, abduction) warrants killing seven members of the offending group and often the "offend-

Q&A with Cultural Anthropologist Scott Atran *(cont'd)*

ing" woman. Yet hospitality trumps vengeance: if a group accepts a guest, all must honor him, even if prior grounds justify revenge. That's one reason American offers of millions for betraying Osama bin Laden continued to fail.

Afghan hill societies have withstood many would-be conquests and bouts of turmoil by keeping order with Pashtunwali in the absence of central authority and state institutions. When seemingly intractable conflicts arise, like repeating cycles of revenge, or problems caused by hosting guests and giving sanctuary, rival parties convene councils (*jirgas*) of elders and third parties to seek solutions through consensus. Although the Taliban argue that Sharia always supersedes Pashtunwali, in fact the Taliban's idiosyncratic version of Sharia incorporates Pashtunwali's main tenets. For example, in allowing executions for murder or violations of women to be carried out by members of the aggrieved family, state punishment is confounded with personal revenge.

A common view in the West is that the blood-feuds and the restriction of women "to the home or the tomb" are intrinsic to the Muslim religion or to the primitiveness of the Pashtun. But anthropologists will tell you that the constant fission and fusion of the tribes, and stringent enforcement of women's isolation from men, has more to do with the way some societies at the margins of the desert have adapted their social structures to extreme fluctuations in the availability of resources and the intense competition for them. Arabs and Kurds, Pashtuns and Pathans, Persian Bakhtiaris and Baluchis, all share this basic social structure.

This social structure, which resembles a constantly branching tree, but where the branches become ever more entangled through marriage alliances, generates myriad ways of maneuvering for control over women, flocks, land, political allies and other resources. When resources become scarce and competition intensifies, tribal relationships may contract and the patrilineages begin to tear apart at their branching points—and so, the saying: "me against my brother, brothers against cousins, cousins against the clan, clans against the tribe, the tribes against the world." These tribal segments, or factions, may then go on to seek out alliances of convenience even with distant and unrelated groups—hence, " the enemy of my enemy is my friend," even if the enemies of the moment are from one's own kin group and the friends are from another.

Afghan hill societies have withstood many would-be conquests and bouts of turmoil by keeping order with Pashtunwali in the absence of central authority and state institutions.

A structural corollary to maintaining this flexible system of alliances is the honor-bound duty to harbor the "guest," whether friend or foe (because any foe is also a potential friend, and vice versa). As T.L. Pennell noted over a century ago in *Wild Tribes of the Afghan Frontier*, "the relationship between host and guest is inviolable." He leveraged this fact to get the mullahs, who otherwise would have had his head, to tolerate his medical missionary work: "after having offered us hospitality and broken bread with us, we should be recognized as guests of the Mullah, and any opposition which he might have been contemplating against us would be seen at once by the observant Afghans around to have been laid aside in favour of the reception due to an honoured guest."

Hospitality trumps vengeance: if a group accepts a guest, all must honor him, even if prior grounds justify revenge.

Here is how anthropologist Thomas Barfield analyzes the internal Taliban debate over what to do with their Qaeda guests shortly after 9/11:

"With a nuanced approach that would have done credit to any Pashtun tribal jirga, the assembled clerics told Omar that he must indeed protect his guest, but that because a guest should not cause his host problems Osama should be asked to leave Afghanistan voluntarily as soon as possible. It is notable that the question Omar tabled was not one of sharia jurisprudence, but rather an issue of Pashtunwali. Very fittingly, the last major policy decision of the Taliban before they were driven from Afghanistan was based on good customary law standards in which religious law provided only window dressing."

While Mullah Omar readily gave sanctuary to Bin Laden after his expulsion from Sudan in 1996, Qaeda's attacks on the US embassies in Kenya and Tanzania in 1998, and the 2000 bombing of the USS Cole, focused intense international hostility on the Taliban. In June 2001, Omar declared that Bin Laden had no authority to issue fatwas, confiscated the Qaeda leader's satellite phone and put him under armed guard. The 9/11 Commission Report notes that Omar had previously "invited" Bin Laden to move to where he might be easier to control after the Qaeda leader gave an inflammatory interview on CNN in 1997. For their part, a number of jihadi leaders denounced Bin Laden's association with the "infidel" Taliban, religious deviants "created and controlled by Pakistan" and its intelligence services and thus worthy of excommunication (*takfir*).

Instead of keeping pressure on the Taliban to resolve the issue in ways they could live with, the US ridiculed their

Q&A with Cultural Anthropologist Scott Atran *(cont'd)*

deliberation and bombed them into a closer alliance with Al Qaeda. (Pakistani Pashtun then offered sanctuary to their Afghan brethren and guests).

Recently, someone who served with the US Afghan mission for some years asked if I would be willing to help evaluate US success in winning hearts and minds. The first thing I asked her was: "Do the Afghans you're in contact with accept Americans as guests, and do the Americans act as if they were guests?" A bit startled, she answered, "of course not, we're here because we have to be." I then asked, "Do they act as if they are the hosts and masters?" She didn't respond at first, so I gave her this scenario: "Surely you must have seen or heard about accidents on the road involving a US military vehicle colliding with some Afghan's donkey-drawn cart. What happened? Do the American military personnel come out of the vehicle and try to help the poor fellow?" Her answer: "Never. They leave the scene, those are the rules of the engagement; any Afghan knows where to find us to lodge a complaint or make a claim." I told her that I'd bet my bottom dollar that Al Qaeda doesn't behave that way, because they understand what it means to be a guest, and that's one good reason why they survive among the Pashtun tribes.

To get the tribesmen to lay down arms for a flag that many do not even know represents the country is about as farfetched as getting the National Rifle Association to support a constitutional repeal of Americans' right to bear arms.

In the summer of 2009, U.S. Secretary of State Hillary Clinton declared: "we and our Afghan allies stand ready to welcome anyone supporting the Taliban who renounces Al Qaeda, lays down their arms, and is willing to participate in the free and open society that is enshrined in the Afghan constitution." To get the tribesmen to lay down arms for a flag that many do not even know represents the country is about as farfetched as getting the National Rifle Association to support a constitutional repeal of Americans' right to bear arms.

Moreover, as Marc Sageman once said to me, "there's no Al-Qaeda in Afghanistan and no Afghans in Al Qaeda." The original alliance between the Taliban and Al Qaeda was largely one of convenience between a poverty-stricken national movement and a transnational cause that brought material help. U.S. pressure on Pakistan to hit the Taliban and Al Qaeda in their current sanctuary birthed the Pakistani Taliban, who forge their own ties to Al Qaeda to undermine the Pakistani state that has attacked them. While some Taliban use the rhetoric of global jihad to inspire their ranks or enlist foreign fighters into their insurgency, they show no inclination to hit Western interests abroad.

Al Qaeda understand what it means to be a guest, and that's one good reason why they survive among the Pashtun tribes.

In your Statement before the Senate Armed Services Subcommittee on Emerging Threats & Capabilities on March 10, 2010, you disputed the argument that we are engaged in a "clash of civilizations" on traditional historical fault lines, arguing that "[v]iolent extremism represents a crash of traditional territorial cultures, not their resurgence." Can you explain this notion further?

Religion and politics are becoming increasingly detached from their cultures of origin, not so much because of the movement of peoples (only about 3 percent of the world's population migrates), but through the worldwide traffic of media-friendly information and ideas. Thus, contrary to those who see global conflicts along long-standing "fault lines" and a "clash of civilizations," these conflicts represent a crisis, even collapse, of traditional territorial cultures, not their resurgence.

Many made giddy by globalization—the ever-faster and deeper integration of individuals, corporations, markets, nations, technologies and knowledge—believe that a connected world inexorably shrinks differences and divisions, making everyone safer and more secure in one great big happy family. If only it were not for people's pre-modern parochial biases: religions, ethnicities, native languages, nations, borders, trade barriers, historical chips on the shoulder. This sentiment is especially common among scientists and the deacons of Davos, wealthy and powerful globetrotters who schmooze one another in airport VIP clubs, three-star restaurants and five-star hotels, and feel that pleasant buzz of camaraderie over wine or martinis at the end of the day. I don't reject this world; I sometimes embrace it. But my field experience and experiments in a variety of cultural settings lead me to believe that an awful lot of people on this planet respond to global connectivity very differently than does the power elite. While economic globalization has steamrolled or left aside large chunks of humankind, political globalization actively engages people of all societies and walks of life—even the global economy's driftwood: refugees, migrants, marginals, and those most frustrated in their aspirations.

For there is, together with a flat and fluid world, a more tribal, fragmented and divisive world, as people unmoored from millennial traditions and cultures flail about in search of a social identity that is at once individual and intimate but with

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a greater sense of purpose and possibility of survival than the sorrow of here today, gone tomorrow. Ever since the collapse of the Soviet Union, which shattered the brief illusion of a stable, bipolar world, and for the first time in history, most of humanity is politically engaged. Many, especially the young, are increasingly independent yet interactive, in the search for respect and meaning in life, in their visions of economic advancement and environmental awareness. These youth form their identities in terms of global political cultures through exposure to the media. Even the blistered legacies of imperialism and colonialism are now more about the mediatization of the past and contemporary construction of cultural identity than the material effects of things that actually happened.

Global political cultures arise horizontally among peers with different histories, rather than vertically as before, in traditions tried and passed in place from generation to generation. The decidedly non-secular Jihad is another political culture in this massive, media-driven transnational awakening: thoroughly modern and innovative, despite its atavistic appeal to the harsh purity of the Prophet's original community in the Arabian Desert. Jihad offers the group pride of great achievements for the underachieving: an englobing web of brave new hearts for an outworn world tearing at the seams. Its attraction, to youth especially, lies in its promise of moral simplicity, a harmonious and egalitarian community whose extent is limitless, and the call to passion and action on humanity's behalf. It is a twisting of the tenets of human rights that grant to each individual the "natural right" of sovereignty. It claims a moral duty to annihilate any opposition to the coming of true justice, and gives the righteous the prerogative to kill. The means justify the end, where no sacrifice of individuals is too costly for progress towards the final good.

Global political cultures arise horizontally among peers with different histories, rather than vertically as before, in traditions tried and passed in place from generation to generation.

I don't know how this crisis of territorial cultures and the ensuing conflict of global political cultures will play out in the end. I'm aware that we are living on the cusp of perhaps the second great tipping point in human history, and that this is an awesome and chancy thing to experience. I can almost imagine myself in ancient Mesopotamia, following the advent of the written word, as if in a time machine, out of the cold and cyclical universe of oral memory and myth, and into the spiraling torrent of history and civilizations. And then today, cruising in cyberspace among all the world's words and through all of its walls, I can see once indispensable material technologies and territorial relationships, like books and nation states, vanishing in a chain reaction of knowledge and technology produced by a global social brain that anybody can access but nobody can manage.

For there is, together with a flat and fluid world, a more tribal, fragmented and divisive world, as people unmoored from millennial traditions and cultures flail about in search of a social identity.

As things now stand, I see both the chance that political freedom and diversity, or a brave new world of dumbing homogeneity and deadening control by consensus, will prevail; or perhaps they will alternate in increasingly destructive cycles. For the media-driven global political awakening is the oxygen that is both opening societies and spreading spectacular violence to close them.

As it happened, around the Shi'ite holiday of Ashura (December 28, 2009), I received an email from a friend in Tehran who said how helpless he felt to stop the merciless beating of a young woman at the hands of government thugs, but he went on to say: "We will win this thing if the West does nothing but help us keep the lines of communication open with satellite internet." The same day, I saw the Facebook communications of "farouk 986," the 2009 Christmas Day plane bomb plotter who self bound into a virtual community where dreams of glory awaken real and bloody sacrifice.

"Happiness is martyrdom" can be as emotionally contagious on the Internet to lost or searching youth as "Yes, we can." That is a stunning and far-reaching development that we have not yet begun to master or steer.

The concept of "sacred values" is a particularly important concept in your work in the Middle East. The importance of these seemingly non-negotiable beliefs was on prominent display when the Taliban rejected offers of financial compensation to refrain from destroying the Buddhas of Bamyan in 2001. How do you contend with a situation in which the sacred value of one cultural belief system seems to require the destruction of the cultural heritage of another?

Neither traditional methods of negotiation and arbitration, nor standard logic of the marketplace or realpolitik, work when sacred values clash.

Sacred values provide the moral framework that makes collective life enduring. They frame the space of morally allowable

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tradeoffs. As such, people are often not aware of their society's sacred values unless they are challenged from the outside. (Much like food, which takes on asymptotic value and trumps almost all other values only when it is denied). In 2001, the Taliban leader, Mullah Omar, ordered the Buddhas dynamited because they were "idols." The Sharia scholars of Cairo's Al Azhar University tried to talk him out of it, but he responded that he would decide what Sharia meant in his country. And why was the outside world so interested in stonework when his people were starving? This question suggests that shows of respect and recognition by an adversary for the core values of issues of the Other may lessen the need to violently assert one's adherence to sacred values. In this respect, apologies, for instance, are quite telling.

One telling example concerns the Federal Government of Germany's apology to the Jewish people. In 1948, the newly established State of Israel was in dire economic straits. But Israel and the World Jewish Congress refused to accept compensation from Germany for the property of murdered European Jews. Israel insisted that before any amount of money could be considered, Germany must publicly declare contrition for the murder and suffering of Jews at German hands.

I can almost imagine myself in ancient Mesopotamia, following the advent of the written word, as if in a time machine, out of the cold and cyclical universe of oral memory and myth, and into the spiraling torrent of history and civilizations. And then today, cruising in cyberspace among all the world's words and through all of its walls, I can see once indispensable material technologies and territorial relationships, like books and nation states, vanishing in a chain reaction of knowledge and technology produced by a global social brain that anybody can access but nobody can manage.

On September 27, 1951 German Chancellor Konrad Adenauer delivered a much anticipated speech at the Bundestag, the German national parliament, acknowledging that "the Federal Republic and with it the great majority of the German people are aware of the immeasurable suffering that was brought upon the Jews of Germany and the occupied territories during the time of National Socialism. The overwhelming majority of the German people abominated the crimes committed against the Jews and did not participate in them." Although this symbolic concession to Jewish sensibilities was only half-hearted – because, in fact, the majority of wartime Germans at least acquiesced to Nazi actions – it was enough to start the reconciliation process between Israel and Germany.

Does this imply that non-material considerations are more important in resolving cultural conflicts?

Symbolic gestures don't always stand alone, unhinged from all material considerations. Rather, they often help to recast a moral frame that determines the scope and limits of possible material transactions and negotiations. Consider, in this regard, attempts by Israeli and Palestinian negotiators to reach agreement following the 2000 Camp David Summit. Then-Israeli Prime Minister Ehud Barak had expressed readiness to state regret for the suffering of Palestinian refugees who fled or were expelled during what Israel calls its "War of Independence" and what Palestinians call "the Catastrophe" (*al-Nakba*) and to perhaps accept shared responsibility but not primary responsibility (as Palestinian leaders insisted). Bill Clinton was further prepared to declare publicly the need to compensate and resettle refugees, without requiring Israel to accept refugees into its own territory or to acknowledge responsibility for their sorrow.

At Taba, in January 2001, the Palestinian delegation responded positively. Unfortunately, the timing was wrong. Clinton was handing over power to George W. Bush, and Ehud Barak was about to be replaced by Ariel Sharon. The new leaders wanted to revise the decisions of their political rivals.

Another important lesson from this case is that without the acceptance of responsibility, apologies don't work. Symbolic gestures provide openings only if consistent actions follow.

An apology should be consistent with one's own core values while simultaneously demonstrating sensitivity to the values of others. A good example why this is necessary is Japan's repeated apologies for atrocities committed in World War Two. China dismissed Japan's apologies and practically froze relations between the two countries when Japanese Prime Minister Junishiro Koizumi visited the Yasukuni Shrine, a shrine that honors Japan's 2.5 million war dead but also includes fourteen convicted top war criminals.

Likewise, a qualified apology can be seen as worse than none at all. Take, for example, the U.S. administration's apology for the abuse of detainees at Abu Ghraib prison in Iraq. In May 2004, then-Secretary of Defense Donald Rumsfeld offered his "deepest apology" to "those Iraqis who were mistreated." He then went on to claim that mistreatment was not the fault of U.S. policy, purpose or principle, but of a few wayward soldiers whose behavior was "inconsistent with the values of our

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nation, inconsistent with the teachings of the military, and it was fundamentally un-American." The qualifier - a few wayward soldiers - resulted in an angry dismissal of the apology by many in the Arab and Muslim world, a dismissal amply justified by subsequent revelations about U.S. policy permitting waterboarding and other forms of torture.

How are sacred values formed?

Sacred values often have their basis in religion, but such transcendent core secular values as a belief in the importance of individual morality, fairness, reciprocity, and collective identity ("justice for my people") can also be sacred values. These values will often trump the economic thinking of the marketplace or considerations of *realpolitik*. Rational choice involves selecting and ordering the best means for achieving given goals in the future. The further down the line a goal is, the less it's real value here and now, and the less committed a person is to implement the means to realize it. But sacred values upset these calculations.

In many cases, sacred values are concerned with sustaining tradition for posterity. In other cases, the future takes on a transcendent value, the dream of what ought to be rather than what is, as in the fight for liberty or justice. Sometimes, sacred values take on aspects of both tendencies: say, to regain the freedom that should have been, or the dream of a righteous Caliphate. In all of these cases, there's no discounting of the future. In fact the opposite: on the basis of sacred values, people may purposely choose to live and act now for a remote end, and to value the traditions of a distant past more than the trappings of the present or probable future.

Devotion to some core values may represent universal responses to long-term evolutionary strategies that go beyond short-term individual calculations of self-interest but that advance individual interests in the aggregate and long run. This may include devotion to children, to community, or even to a sense of fairness. Other such values are clearly specific to particular societies and historical contingencies, such as the sacred status of cows in Hindu culture or the sacred status of Jerusalem in Judaism, Christianity, and Islam. Sometimes, as with sacred cows or sacred forests, what is seen as inherently sacred in the present may have a more instrumental origin, representing the accumulated material wisdom of generations who resisted individual urges to gain an immediate advantage of meat or firewood for the long-term benefits of renewable sources of energy and sustenance.

Matters of principle, or "sacred honor," are enforced to a degree far out of proportion to any individual or immediate material payoff when they are seen as defining "who we are." Revenge, "even if it kills me," between whole communities that mobilize to redress insult or shame to a single member go far beyond individual "tit-for-tat," and may become the most important duties in life. This is because such behavior defines and defends what it means to be, say, a Southern gentleman, a Solomon Islander, or an Arab tribesman. The Israeli army has risked the lives of many soldiers to save one as a matter of "sacred duty," as have certain elite U.S. military units.

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Can you talk about limitations negotiators might face in dealing with sacred values?

Understanding sacred values abroad requires some measure of empathy, even with enemies, with the "who we are" identity aspect that is often so hard for members of opposing cultures to understand. Consider America's pacification of post-war Japan. Many in the wartime U.S. administration and military considered the Japanese Emperor a war criminal who should be executed. But wartime advisors, such as anthropologists Ruth Benedict and Margaret Mead, as well as psychological-warfare specialists in General Douglas MacArthur's command, argued that preserving, and even signaling respect for, the Emperor might lessen the likelihood that the Japanese, who regarded him with religious awe, would fight to the death to save him. Moreover, his symbolic weight could, and would, be used by the occupation government to bolster pro-American factions in post-war Japan.

Sometimes the symbolic value of a gesture that is weighty to the parties directly involved may seem trivial to an outside party. If France allowed Muslim women to wear headscarves in public schools, which is now prohibited, beneficial effects might reverberate throughout the Muslim world. For most Americans, it's a no-brainer. The problem is that in France, unlike in the U.S., signs of physical and religious distinction in school are considered an affront to the symbolically defining value of French political culture ever since the French Revolution, namely, a universal and uniform sense of social equality (however lacking in practice).

This example shows that recognizing one another's sacred values isn't transparent, even for allies and for members of societies that seem similar in so many other ways. More impor-

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tantly, it illustrates that recognizing and showing respect for another's core values is really possible only if doing so doesn't entail compromising one's own core values.

Can cultural differences be maintained in a culturally sensitive negotiation context?

People hold sacred values to be absolute and inviolable. So any symbolic "concession" must not appear to violate or weaken one's own sacred values. Doing so would likely be seen as tantamount to abandoning or altering core social identity. What often makes values incompatible is the way they are applied to the here and now. While values can be held firmly, their application depends a good deal on how they are understood, and what they are taken to imply, and these interpretations and applications of sacred values are not always fixed and inflexible. Indeed, sacred values that seem incompatible within certain frames may actually become compatible when reframed.

Robert Axelrod and I worked together to address ideas for reframing sacred values in order to overcome barriers to conflict resolution, and came up with the following.

Symbolic gestures provide openings only if consistent actions follow.

First, it is sometimes important to exploit the ambiguity of the sacred. People often apply the "same" sacred values in different ways, which facilitates creative use of ambiguity.

For both Israelis and Palestinians "The Land" is sacred, with Jerusalem at its center. Israelis simply refer to their country as "The Land" (*Ha-Aretz*), whereas for Palestinians "Land and Honor" (*'Ard wal Ard*) are one. Israeli political leaders creatively reinterpreted the historical scope of "The Land," first to justify claims on Gaza and then to justify leaving it. If Palestinians, who simply refer to Jerusalem as "The Holy" (*Al Quds*), can reframe their idea of the city to include only its Arab neighborhoods and part of the Temple Mount (*Haram Al-Sharif*), then Israel might be willing to accept the Palestinian capital there. Reframing the issue in this way need not call into question "the strength of attachment" to the sacred value of Jerusalem.

Matters of principle, or "sacred honor," are enforced to a degree far out of proportion to any individual or immediate material payoff when they are seen as defining "who we are."

For Muslims, the meaning of Jihad, or "Holy War," can be interpreted in radically different ways, whether as an inner mental struggle for the preservation of faith or as physical combat against external enemies who threaten Islam. For supporters of militant Islamist groups whom we have surveyed, including members of Hamas, Jihad is the "Sixth Pillar" of Islam, which trumps four of the five traditional pillars (almsgiving, pilgrimage, fasting, and prayer); only the pillar expressing faith in God stands up to Jihad. For many other Muslims, there is no such Sixth Pillar, and professed belief in it may be heretical and blasphemous. Given the popular and political division of Palestinian society today, Palestinian leaders must carefully navigate meanings of Jihad without alienating major segments of Palestinian society or the outside world.

Second, negotiators may need to provisionally prioritize values. Fulfilling one sacred value may require the delay of achieving others.

Yasser Arafat, who headed the Palestine Liberation Organization (PLO), steered that organization to officially recognize Israel. But Fateh, the PLO's largest contingent and also headed by Arafat, has never renounced its guiding principles and goals, which includes, in Article 12 of Fateh's constitution, the "complete liberation of Palestine, and eradication of Zionist economic, political, military and cultural existence." Israeli governments were never entirely convinced that Arafat's commitment to the PLO position on recognition of Israel trumped the Fateh constitution's prohibition of recognition. Successive Israeli government have rejected the idea that any Palestinian government that included Hamas would possibly "allow" recognition of Israel as a Hamas ploy to mask its real intentions to destroy Israel. But several senior members of the present Israeli government and opposition to whom we spoke consider Arafat's successor Mahmoud Abbas to be sincere in recognizing Israel's right to exist and in wanting peace, despite the persistence of non-recognition clauses in Fateh's Constitution. This suggests, again, that pragmatic prioritization of one value over another, however provisional to begin with, may facilitate a more permanent realignment of values.

Third, it may be important to refine sacred values to exclude outmoded claims.

Our talks with leaders on both sides of the Israeli-Palestinian conflict indicate awareness that their current positions involve outmoded and historically inaccurate claims. They also acknowledge that were the other side to renounce such blatant falsehoods, this could lead to a psychological breakthrough. Overcoming historical precedents and emotional barriers to renouncing even patently false claims, however, may require neutral mediation by those who understand both sides. Even then, it takes time. Sometimes a

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lot of time. According to Lord John Alderdice, a principal mediator in the Northern Ireland conflict, it took nine years of back-and-forth for this to happen in Northern Ireland.

Have you found much concern in the field for the destruction of objects of cultural heritage in combat zones? If yes, in what ways?

War is an emotional, often ecstatic and frequently vengeful means of dominance, conquest and annihilation of real or perceived adversaries. As such, there is usually precious little interest in preserving an adversary's "cultural heritage" unless it is also perceived to be a part of the warmaker's perceived heritage. As political and economic globalization advance, however, and traditional cultures collapse, the vestiges of other people's cultural heritage are increasingly considered worthy of protection for those who believe in global doctrines of human rights. But even then, it is only after the fighting has died down that interest and effort in protecting the cultural patrimony of erstwhile adversaries becomes compelling. Even when "democratization" and allowance of cultural diversity in political participation become objectives of war, in the heat of war respect for rights of any kind usually falls by the wayside.

As one U.S. Air Force General Officer recently said to me: "I was trained for Ds - defeat, destroy, devastate - now I'm told we have responsibility for the Rs - rebuild, reform, renew. Well, I was never trained for that, so what the Hell am I supposed to do? Destroy them in just the right way to rebuild them?" But I can foresee that in limited wars, awareness and respect for an adversary's cultural heritage can be increased even in the heat of battle.

Is it possible to maintain a respect for rights and culture in the context of war?

There were two broad and overlapping epochs in human prehistory: one in which men primarily hunted animals, and another in which men primarily hunted men. The passage from one to the other may be the most important advance in human social evolution. The basic psychology of "us versus them" is much the same when ethnic, national or religious groups compete for territory, vital resources, or membership. Only, the stakes are usually much higher (than candy, street turf, or a football or election victory) and can lead to war. Human warfare is vastly more lethal than intergroup conflict in other primate species. Genocide, the extermination of one group by another, is a frequent method of "conflict resolution" that humans have practiced since prehistoric times.

War is never wholly a product of reason and rational calculation. It's never just "politics by other means," despite what von Clausewitz famously stated in his classic study *On War*. This, the sentiment of a Prussian regimental officer in the post-Napoleonic era of state interests and strategies to rearrange "the balance of power," disastrously misguided European elites into believing that wars could be started and pursued to a desired end by careful planning (although he did grant that in the fog of war events can sometimes spin out of control). Yet many of our political and military leaders still believe in this Clausewitz delusion: it's a mainstay in the curricula of U.S. war colleges and the international relations departments of top U.S. universities. Yet war is almost always an emotional matter of status and pride, of shedding blood and tearing the flesh of others held dear, of dread and awe and of the instinctual needs to escape from fear, to dominate and to avenge.

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In all societies, moral norms strongly constrain and punish murder, rape, torture, desecrating the body, pillage and plunder. But in war, all may be allowed, even encouraged. A man who kills many in our own society is a mass murderer. In war, mass killing may rate the Medal of Honor: Sergeant Alvin York, America's best-known World War I war hero, religiously rejected all forms of violence at home, but got a ticker tape parade for attacking a German machine gun nest and killing 28. Torture "is basically subject to perception," said CIA lawyer Jonathan Friedman, according to meeting minutes released at a Senate hearing in June 2008: "If the detainee dies, you're doing it wrong." Arguably, this may be some sort of an advance over cannibalizing an enemy, but it's doubtful the victims appreciate the difference.

Ever since the Enlightentment, and the Western cultural expansion of its dominance over humankind, "human rights" have been invoked in order both to diminish and justify genocidal and "total" wars. The terrible history of the 20th century is one of geometrically increasing mass murder of civilian populations for the purported salvation of humankind.

Ideas of "self-evident," "natural" and "human" rights are anything but inherently self-evident or natural in the history of our species. For example, the culturally widespread and age-old practice of slavery flourished in Europe and America into the 19th century, lingering in lynchings through America's Jim Crow South into the 1960s. It was only banned in Saudi

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Arabia and Muscat in 1970 and in Niger in 2003, and still is practiced along the fringes of the Sahara. Racism and subordination of women remain, of course, very much a part of the modern world, although in many places they have become less noxious than in the Stone Age.

"Cultural Rights" have emerged as an extension of "human rights" with the waning of Western hegemony over the world. Other social forms are now recognized as having a right to exist in their own right, rather than to be simply steamrolled by the some supposedly more progressive, salvational civilization.

Ideas of "self-evident," "natural" and "human" rights are anything but inherently self-evident or natural in the history of our species.

You are a strong advocate of cultural sensitivity training in zones of conflict, although you have opposed the military's use of "combat ethnographers." You noted in your Senate testimony that training military officers should go "beyond learning a language or studying a checklist of cultural preferences and habits." Can you describe what would be an ideal program for training officers to become more culturally sensitive?

Soldiers continue to be trained and rewarded as operators and combat organizers, but they are not as adequately trained for the political mission that they are now being asked to carry out, which requires cultural and psychological expertise and experience at being social mediators, managers and movers in creating alliances, leveraging non military advantages, reading intentions, building trust, changing opinions, managing perceptions, and understanding what moves people.

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Training soldiers in cultural anthropology is important. So is some sense of history: After the Kennedy tapes were released to the public, people learned that General Curtis Lemay, an unfunny version of the General Jack D. Ripper character in *Doctor Strangelove,* had been pressing the President to preemptively strike Cuba and perhaps even Russia during the Cuban missile crisis. Kennedy had recommended, instead, that those around him pause to read *The Guns of August*, by Barbara Tuchman, about the lead up to World War I through a rapid chain of events that no one at the time had the patience or prescience to think through and avoid.

But even more important than education about culture and history is training in empathy (which is hard if you may also have to kill the people you're supposed to empathize with). The best hostage negotiator that the U.S. had in Iraq, Chris Voss, had never had linguistic or cultural training, but his experience as an FBI hostage negotiator taught him that empathy and respect were key to saving lives. "I constantly had to keep the army and political people away from the scene in Iraq," he told me, "because they would always mess up things by calling the hostage takers cowards, criminals and the like and that would kill the hostages."

The late Jack Maple, a famously flamboyant but phenomenally effective former deputy commissioner of the NYPD, wrote that "the more information a detective has, the more creative, authoritative and effective he or she can be." Professional interrogators talk about building empathy and dependence. But the best technique? "If you can get them to laugh, you'll get a statement. That's always true." Internal CIA documents reveal that empathy is also likely what got Abu Zubaydah to reveal how Al Qaeda planned 9/11 and its other operations. His repeated torture, which was closely monitored by medical personnel to make sure procedures followed rules, brought little of real value, only the moral demeaning of his tormentors.

After The Great Pakistan Earthquake of October 2005, I went to Azad Kashmir. For the Kashmiri people, especially those in the hundreds of villages far from the main concentration of relief efforts in the Azad Kashmir capital of Muzaffarabad, Cubans are the real heroes. Cuba sent some 3,000 doctors into nearly every remote corner of the devastated area, earning deep admiration. Although the the Cuban Hospital on the Road up from the Nilam river to Rawalakot now lies deserted, there is a lesson for U.S policy makers who recognize, as Bill Clinton once said, that "we need more partners and fewer terrorists."

When I brought up the example of the Cuban doctors at a briefing on the Middle East in Washington organized by the Chief of Naval Operations, one senior officer said tongue-in-cheek: "Maybe it's a shame we don't have more earthquakes and tsunamis; besides, can you imagine the doctors in this town giving up six figure salaries for a bunch of people with no health insurance?" Then he added," We're just not built to help people, and maybe that should change."

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While human rights law is very well-developed, international law relating to cultural traditions is much less so. Your research on cultural sensitivities and respect for sacred values in conflict situations is at the cutting edge of international conflict resolution. Could this work have implications for the development of international law? Do you see a role for international legal specialists in framing debates on cultural conflict?

People at this moment are trying to square the circle of universal human rights with Pashtunwali in Afghanistan. The path is long and complicated, and has no hope of success until the war ends. But it is a good case study of the process the question intimates (indeed, it has been going on in Afghanistan since the 1920's). After the wildly popular Amir Amanullah kicked out the English, he began a drive for reform, including alleviating the isolation of women. He visited Turkey and upon his return to Afghanistan tried to implement Kemalist reforms. He became instantly unpopular among the tribes that had supported him and he was deposed. Communist and Soviet reforms met an even more inglorious fate. Reforms initiated by outsiders, however morally justified and desirable, must be fit to the cultural context. Democratization worked in post-War Germany and Japan because it played off a highly developed sense of national purpose and identity. But these were industrialized nations with a keen sense of national identity, (born of industrialization and the massive displacement of rural populations, the sundering of communal and confessional ties, and subordination to a nationalist worldview). Democracy is not all that good at adjudicating across tribal and confessional boundaries. That doesn't mean it's undoable. But it's got to be a lot more locally driven and context sensitive than standard programs drawn up in Washington or the UN. French revolutionary leader Maximilien Robespierre stated a truth that he and so many others who would force cultural change ignore to everyone's peril: "No one loves armed missionaries."

Democracy is not all that good at adjudicating across tribal and confessional boundaries. That doesn't mean it's undoable. But it's got to be a lot more locally driven and context sensitive than standard programs drawn up in Washington or the UN.

Tibetan (Buddhist) Nomad Girl on the Thango La Range, Cristian DeFrancia

Essay on Cultural Rights: The Protection of Culture as a Shared Interest in Humanity

by Michela Cocchi

On the Concept of Culture

In its widest sense culture means all cultivation of spirit and intellect, that is, the whole spectrum of civilization. Culture is intrinsic to the life of human communities and relates to the environment, the economy, agriculture, industry, tradition, communication and food. There are hundreds of definitions of culture emphasizing different viewpoints.

The semi-official UN definition of culture is based on the Mexico Declaration from 1982, in which UNESCO defined culture as follows: "In its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs."

It is not possible to give culture one single, absolute, and exhaustive definition, it is always a question of relative content and interpretation in a given historical and social context. Rodolfo Stavenhagen defines culture in three dimensions: as capital, as creation and as a way of life. As capital, culture means the heritage accrued by humankind and in this sense a right to culture means access to this capital.

Cultural Property and Cultural Heritage: Two Different Concepts?

The term "cultural property" is well known in the international legal context. It was used in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, followed some fifteen years later by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

The term is used again in the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (of 26 March 1999), which applies to both international and non-international armed conflicts.

Unlike the examples mentioned above, the Unidroit Convention of 24 June 1995 relates to the slightly different concept of "cultural objects."

Other legal instruments expressly refer to the concept of "heritage," notably some international agreements executed under the auspices of the Council of Europe, such as the 1969 European Convention on the Protection of the Archaeological Heritage and the 1985 Convention for the Protection of the Architectural Heritage of Europe.

It is not possible to give culture one single, absolute, and exhaustive definition, it is always a question of relative content and interpretation in a given historical and social context.

However, the said choice of terminology does not reflect a theoretical approach specific to that international organization: UNESCO refers variously to that same concept in the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage and in the more recent UNESCO Convention for the Protection of Underwater Cultural Heritage of 2 November 2001, the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, both of 17 October 2003.

In legal doctrine, the difficulty of providing a sole and universally accepted definition of the interests and values protected has been encountered by a number of authors, who have emphasized the difference between the concept of "cultural property" and the broader concept of "cultural heritage."

It is evident that the concept of cultural heritage, if compared to that of cultural property, is broader in scope and includes, *inter alia*, non-material cultural elements (like dance, folklore, etc.) more recently deemed entitled to legal protection at the international level. This can readily be seen from the text of Article 2 of the above Convention for the Safeguarding of Intangible Cultural Heritage of 17 October 2002, which includes in the definition of "intangible cultural heritage" the practices, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups, and in some cases individuals recognize as part of their cultural heritage.

The concepts of "cultural heritage" and "cultural property" practically never appear together as complementary notions in the same legal text. This was, almost exceptionally, the case of the 1985 Draft European Convention on the Protection of the Underwater Cultural Heritage prepared by an *ad hoc* Committee of Experts and presented to the Committee of Ministers of the Council of Europe, which in Article 1, paragraph 1, stated that: "For the purposes of this Convention all remains and objects and any other traces of human existence (…) shall be considered as being part of the underwater cultural heritage, and are hereinafter referred to as 'underwater cultural property'." Significantly, the final text of Article 1 of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage has dispensed with that draft and provides a completely different definition exclusively based on the concept of underwater cultural heritage.

It must be stressed that the various language versions of the terms under consideration here pose an obstacle as they often do not provide a correct transla-

Culture as a Shared Interest in Humanity *(cont'd)*

tion of the same concept. This creates a substantive problem of differing legal concepts: the term "cultural property" is commonly translated into terms such as *biens culturels*, *beni culturali*, *bienes culturales*, *Kulturgut*, and *bens culturais*, which are not only the apparent equivalent of it in other languages, but may have slightly but significantly different legal meaning in their relevant domestic legal systems. The same applies to the term "cultural heritage": expressions such as *patrimoine culturel*, *patrimonio culturale*, and *património cultural* do not convey exactly the same or an equivalent concept.

Consequently, one of the difficulties to be born in mind when starting negotiations on the drafting of a bilingual international text authentic in both languages, such as English and French, is to ensure that the different language versions not only convey the same meaning but also — if not primarily — take into account differing legal traditions.

It is evident that the concept of cultural heritage, if compared to that of cultural property, is broader in scope and includes non-material cultural elements (like dance, folklore, etc.) more recently deemed entitled to legal protection at the international level.

The Illicit Traffic of Cultural Property

Looting and stealing from archaeological sites, museums, and rural cultural areas have become frequent events the world over. Every day in countries in the southern hemisphere, cases of looting or art theft are reported either by museum professionals or by villagers who are shocked by the sudden disappearance of an object that was full of religious significance and/or formed part of their cultural environment. From east to west in northern hemisphere countries, in spite of legislation protecting national heritage, the looting of archaeological sites continues, as well as the theft of artworks from museums, historical monuments, castles, public places, and places of worship.

In the history of mankind, the looting and trading of cultural

Elizabeth Dillinger, "Big Horn Sheep"

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property is nothing new. It was denounced in one of the oldest legal documents in Egypt at the time of the pharaohs, in the *Amherst Papyrus* dating from 1134 BC .

The reason the phenomenon is extremely worrying today is the extent to which it has grown over the last few decades.

During the 1990s, numerous cases of looting at archaeological sites have been reported worldwide.

In West Africa, illicit excavations on the Thial site in Mali are a prime example. In September 1993, several bronze heads and others in terracotta were taken from Nigeria's Ile-Ife National Museum. In Latin America, the remains of the Maya civilisation have fallen prey to treasure hunters. In Europe, Italy, with its great archaeological potential, is one of the continent's most badly affected countries as far as illicit excavation is concerned. Every year hundreds of Etruscan tombs are plundered by Tombaroli looters who use an iron bar or *spiedo* to test and open up the ground. Looting is not unknown on the rest of the continent. A catalogue several hundred pages long entitled *Le catalogue des vols de la sculpture religieuse protégée au titre des monuments historiques* (Thefts of listed religious sculpture from Historic Monuments) and published in 1993 by the French Ministry of the Interior and the Heritage Department gives an idea of the scale of thefts from churches in France alone. In 1992, thieves stole several icons and a Bible from a church in Siatista in Greece. An estimated three hundred and eighty-five icons were stolen from Bulgaria. During the same period in Turkey, two marble tombstones and the capital of a column were illicitly removed from a site in Anavarza and ancient manuscripts in Arabic were taken from a public library in Amasya Beyazit. In Asia, during the Gulf War, an estimated 4,000 items were stolen from Iraqi museums. In January 1993, seventeen bronze statuettes were stolen from the Karachi National Museum in Pakistan. Apart from the looting of Khmer artworks from Angkor in Cambodia, which is well-known, there is the case of China. According to David Murphy, who between 1989 and 1990 carried out research on the looting of archaeological sites in China, about 40,000 ancient tombs have been excavated illicitly.

Looting archaeological sites, stealing artworks from museums and ethnological objects from rural areas have become frequent events the world over.

Thefts of artworks from museums reached such proportions that in 1994 the Secretary General of INTERPOL launched "A Call for Action."

A combination of factors explains why the looting of archaeological sites and the theft of cultural property has been intensifying.

The last two decades have seen an unprecedented growth in the art market.

The higher the demand, the more the suppliers of raw material, the looters and middlemen of all types hasten to meet the needs; and when an object is considered rare, market speculation is fierce.

An ever increasing demand by the countries that buy exacerbates the situation, with disastrous consequences for cultural heritage. The higher the demand, the more the suppliers of raw material, the looters and middlemen of all types hasten to meet the needs; and when an object is considered rare, market speculation is fierce.

Moreover, the economic climate in poor countries has also reinforced the situation. Political instability in many countries, the fact that borders are easy to cross, and the absence of national legislation, or the lack of resources for enforcement, clear the way for looting, all to the detriment of any will to safeguard national heritage.

Culture, Human Rights and Fundamental Freedoms

Culture may also be considered as a component of a shared interest of humanity, with the consequent need for international law to safeguard it in its material and living manifestations, including the cultural communities that create, perform and maintain it.

In the contemporary world, culturally homogeneous nation-States are the exception rather than the rule. Today, within most States different cultures, traditions, and minorities co-exist.

International law has not remained indifferent to this cultural dynamic within the State and between States.

The 1948 UN Charter does not contain specific clauses connecting culture to human rights. Yet, the development of international law since then provides evidence that the protection of human rights, now part of positive international law, extends to culture and cultural heritage of peoples.

The concept of human dignity, which informs the human rights provisions of the Charter and of the Universal Declaration, forms an integral part of identity, history and civilization: the rights in Articles 22, 18, and 27 of the Universal Declaration are evidence of the linkage between human rights and culture.

The exponential growth of international cultural property law in the past fifty

Culture as a Shared Interest in Humanity *(cont'd)*

years bears witness to the emergence of a new principle according to which international aspects of cultural heritage may be protected as the common heritage of humanity. This principle is valid both in the event of armed conflict and in peacetime. In armed conflict, the 1954 Hague Convention recognizes that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each populace makes its contribution to the culture of the world. In peacetime, the 1972 World Heritage Convention confirms the same principle with respect to cultural and natural heritage as an outstanding universal value and requires that the State Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate.

With the adoption by the UNESCO General Conference in October, 2003 of the Declaration on Intentional Destruction of Cultural Heritage, the cultural rights of individuals, groups and of humanity as a whole are guaranteed not only in inter-State relations, as in the case of international conflicts, but also in relation to purely domestic situations where the protection of cultural heritage arises within the territory of the State.

The general category of "cultural rights" thus can be considered one category of human rights, along with civic, political, and economic rights. Cultural rights are moving to the forefront of international rights discussions.

Globalisation and polarization, migration, cultural relativism and identity policy, peace, security and terrorism are all components of the entity within which cultural rights are either realized or disregarded. With the current advances in technology and media, the world is shrinking and different cultures interact ever more closely. Cultural rights may offer a means for alleviating tensions and creating guidelines for harmonious coexistence and dialogue. Violations of human rights inevitably have cultural dimensions.

The exponential growth of international cultural property law in the past fifty years bears witness to the emergence of a new principle according to which parts of cultural heritage of international relevance are to be protected as the common heritage of humanity.

In addition to the foremost international instruments of the Universal Declaration of Human Rights (UN, 1948), and the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the latter two adopted in 1966, cultural rights are also addressed in the Declaration on Race and Racial Prejudice (1982), the Convention on the Elimination of all forms of Discrimination Against Women (1981), the Convention on the Rights of the Child (1989) and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

Under these treaties, the contracting States commit themselves to respecting, protecting and implementing cultural rights. They must take legislative, administrative, legal, and other measures to fulfil the obligations. In practice, this means that the UN human rights structures and regional organizations can monitor how governments implement these instruments.

The development of international law provides evidence that the protection of human rights, now part of positive international law, extends to culture and cultural heritage of peoples.

At the European level, the foremost international statutes include the Council of Europe instruments for the protection of human rights and fundamental freedoms, which include the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the European Cultural Convention (1954), and the Charter of Fundamental Rights of the European Union (2000). While according little attention to cultural rights, these instruments contain provisions which can be seen as relevant, such as freedom of thought, conscience and religion, freedom of expression and information, and freedom of assembly and of association in the Convention for the Protection of Human Rights and Fundamental Freedoms. In addition to these, the EU Charter addresses the freedom of the arts and sciences, right to education, non-discrimination, cultural, religious and linguistic diversity, and equality between men and women. The European Cultural Convention underscores the significance of research on the member States' languages and cultures, cultural activities of European interest, and the common cultural heritage of Europe. Further, the European Charter for Regional or Minority Languages (1992) and the Framework Convention for the Protection of National Minorities (1995) touch upon cultural rights.

In Article 5 of the UNESCO Declaration on Cultural Diversity (2001), the significance of cultural rights is clearly

Culture as a Shared Interest in Humanity *(cont'd)*

expressed: "Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue." UNESCO conventions are binding and obligate States to act.

Conclusions

The impact of the international concern for cultural heritage goes beyond the territorial dimension of sovereignty. Cultural heritage is linked to humanity. It represents the symbolic continuity of a society beyond its contingent biological existence. Thus, the obligation to respect cultural heritage is closely bound with the obligation to respect human rights and to sanction its most serious breaches with individual criminal liability under international law.

Globalization has necessitated a more intense reflection on cross-border ethics and raises the question of a global ethic with respect to cultural heritage. The ethical dimension of cultural policy is wide-ranging, touching upon universal rights vis-à-vis cultural practices.

Cultural policy ethics involve diverse elements of cultural heritage, including: ways of life and identity; the vitality, diversity and continuity of culture; cultural infrastructure; the availability of, access to, and participation in cultural life; accessibility; consumption; pluralistic media; diversity of content; ethnic-cultural and other minority-related diversity; social cohesion; interaction between cultures; cultural policy; administration and implementation; and art education.

Ethical choices are not always black-and-white, right-or-wrong setups but can, in different situations, be justified by different means and aim toward different ends. In cultural policy, the important thing is to make choices consciously and transparently after a keen scrutiny of ethical consequences.

In order to illustrate the ethical aspect in cultural policy, one could refer to a norm of "fair culture," which has been defined as the realization of people's cultural rights and inclusion in cultural signification, irrespective of age, gender, language, state of health, ethnic, religious or cultural background.

The social significance and justification of cultural policy rest on two pillars: democracy and diversity: an *ethos* of freedom and an *ethos* of responsibility. Democracy in cultural policy means an aspiration for the availability and accessibility of and inclusion in cultural heritage in the local or global community. Diversity means respect for creativity and cultural diversity and the promotion of interaction within a given culture and between different cultures.

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Cristian DeFrancia, Village Festival Dance, Rathoe, Tibet

Should Cultural Heritage Be on the Judical Auction Block?

by Laina Lopez

Here is a hypothetical. Let's say a Frenchman, Mr. Rousseau, traveling on business in Iraq, is injured by U.S. missile fire. Now, let's say that France permits Mr. Rousseau to sue the United States in France for his injuries. Mr. Rousseau sues and wins a multi-million dollar default judgment against the United States. The United States refuses to pay, arguing that a French court should not and may not determine whether the United States acted unlawfully for its conduct in Iraq. Now let's say that the U.S. Declaration of Independence is on exhibit at the Louvre. Should a French court order that the Declaration of Independence be seized for judicial auction – even though the executive branch of France protests such seizure – so that the proceeds can be used to satisfy Mr. Rousseau's default judgment against the United States?

Persepolis Fortification Tablet, Photo Courtesy of the Iran National Museum

Because the Declaration of Independence is a national treasure, isn't the answer obviously "no"? If a French court did so regardless of the Declaration's national treasure status, wouldn't such a seizure strain and perhaps even fracture foreign relations between France and the United States? Think we don't have to worry about these questions because the hypothetical sounds far-fetched? Think again.

Consider the following real-life case on which I am currently working. In 1997, several persons, including some Americans, were injured in a suicide bombing in Israel for which Hamas later took credit. In 2003, the U.S. victims of that bombing, in a lawsuit entitled Rubin v. Iran, sued Iran in a U.S. federal court in Washington, D.C. pursuant to a section of the Foreign Sovereign Immunities Act in effect at the time. That portion of the law, 28 U.S.C. §1605(a)(7), permitted Americans who suffered injury (or death) to sue those nations designated by the United States as "state sponsors of terrorism" for providing "material support" to commit an act of terrorism. At the time of the lawsuit, the nations designated as state sponsors of terrorism were Iran, Cuba, Syria, Iraq, Libya, North Korea, and Sudan. Today, only Iran, Cuba, Syria, and Sudan remain on the list.

In the Washington, D.C. case, the Rubin plaintiffs won against Iran a multi-million dollar default judgment, which Iran refused to pay. The plaintiffs, still determined to collect their money, thus registered their judgment in jurisdictions in the United States where the plaintiffs believed Iranian assets were located. They asked the courts in those jurisdictions to permit them to "attach" (a legal term meaning essentially judicial seizure) the various alleged Iranian assets, sell them at judicial auction, and use the proceeds of such sales to satisfy their multi-million dollar judgment.

In one such instance, the plaintiffs registered their judgment in the U.S. District Court for the Northern District of Illinois. The plaintiffs selected that court because there are three collections of ancient Persian artifacts owned by Iran or alleged to be owned by Iran in Chicago. One of the collections is not a true collection but rather a smattering of artifacts at the Oriental Institute at the University of Chicago and the Field Museum of Natural History collectively known as the Herzfeld Collection. The artifacts are so named because, according to the plaintiffs, noted archaeologist Ernst Herzfeld surreptitiously took the items from Iran

Should a French court order that the Declaration of Independence [if on display in France] be seized for judicial auction – even though the executive branch of France protests such seizure – so that the proceeds can be used to satisfy a default judgment against the United States?

Should Cultural Heritage Be on the Judical Auction Block? *(cont'd)*

in the early 20th Century and later unlawfully sold the allegedly stolen items to the University of Chicago and the Field Museum. Iran makes no claim to these artifacts and the University and the Field Museum vigorously defend their lawful ownership of the items. The plaintiffs assert that Iran nonetheless owns the Herzfeld items by operation of an Iranian patrimony law which, according to the plaintiffs, provides that any item unearthed in Iran is owned by Iran. Notably, the Rubin plaintiffs also have sued Harvard University and the Museum of Fine Arts of Boston in the U.S. District Court for the District of Massachusetts alleging that those museums also have in their possession several items stolen by Herzfeld and hence are Iran-owned. Like the museums in Chicago, however, the Boston museums vigorously defend their lawful ownership of the items.

The other two collections involved in the Chicago litigation, the Persepolis Collection and the Chogha Mish Collection, are housed at the Oriental Institute and are, everyone agrees, owned by Iran. These two collections arrived at the Oriental Institute in the 1930s and 1960s, respectively, following archaeological digs. In the 1930s, the Oriental Institute sent a team of its archaeologists – led by Ernst Herzfeld – to Iran, with the Iranian Government's consent, to excavate the ancient Persian city of Persepolis. Persepolis, the capital of the Achaemenid Empire, was built by Darius I in approximately 515 B.C. and destroyed by Alexander the Great in approximately 330 B.C. Though largely destroyed by Alexander, the site was designated as a UNESCO World Heritage site in 1979 due to monumental ruins which were left standing. Following the excavation, Iran agreed to loan to the Institute for study a grouping of rare tablet and tablet fragments found in the fortifications. Some of the tablets are written in an ancient text known as Elamite, a now extinct language understood today by a handful of people. The tablets contain administrative records of daily Achaemenid society, such as the amounts and recipients of food rations.

In the 1960s, the Oriental Institute sent another team of archaeologists – led by Pierre Delougaz and Helene Kantor – to Iran to excavate Chogha Mish, an archaeological site from the early fifth-millennium B.C. Iran again agreed to loan to the Institute for study a grouping of artifacts discovered there. These artifacts reveal, among other things, that there was human culture in that area of Persia at least one millennium earlier than what was previously known.

Even if the plaintiffs were victims of state-sponsored terrorism, should they have the right to force the sale of these national treasures and collect the proceeds from the sale to satisfy the default judgment?

The study of these two collections took many years longer than anticipated with the result that the artifact collections remain at the Oriental Institute today. The Institute and Iran agree, however, that, pursuant to the loan terms, the Institute will return the artifacts to Iran's National Museum for permanent housing. Given the importance of Chogha Mish and Persepolis in Persian history, Iran considers both of the collections of artifacts discovered there to be national treasures.

Although Iran did not appear in the underlying court proceeding in Washington, D.C., which resulted in the money judgment, it did appear in the Chicago attachment proceeding to defend these national treasures. My firm represents Iran in that proceeding. My colleague, senior partner Thomas G. Corcoran, Jr., and I have filed numerous briefs seeking to save the artifacts from the auction block. Even the U.S. Government, not a typical ally of Iran's, has filed several briefs in favor of Iran's position, including a brief urging the court to deny the plaintiffs' request to auction the artifacts given the significant foreign relations concerns posed by the lawsuit. To date, however, because a decision in the case has been delayed by the need to resolve other legal issues, the court has not yet ruled on the fate of the artifact collections.

So now to pose a question – even if the plaintiffs were victims of state-sponsored terrorism, should they have the right to force the sale of these national treasures and collect the proceeds from the sale to satisfy the default judgment? If the answer to the question posed above regarding our hypothetical Mr. Rousseau was obviously "no," shouldn't the answer to this real-life question also be obviously "no"? Should the treasures of a nation currently out of favor with the United States be treated any differently than those of nations that are currently in favor? What are the ramifications of setting a precedent that courts may seize national treasures found within their borders as a form of compensating victims of another nation's alleged wrongs? Should Congress step in and eliminate even the possibility of judicial auction of national treasures?

Perhaps the court will, in the end, protect the artifacts from the auction block and none of these questions will require answers. But if not, the Mr. Rousseau hypothetical of auctioning the Declaration of Independence or other U.S. national treasure may, one day, also become a reality.

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UK Restitution Update: The Holocaust (Return of Cultural Objects) Act 2009

by Charlotte Woodhead

Background and Context

As is the case in many other jurisdictions, claimants in the UK seeking the return of cultural objects misappropriated during the Nazi era are faced with bars to recovery due to the passing of statutory periods of limitation. Therefore, claimants are left to frame requests for the return of objects on purely moral grounds, rather than relying on legal rights.

In order to provide an alternative dispute resolution process, in 2000 the UK government established the Spoliation Advisory Panel ("the Panel"). The Panel's function is to consider claims from victims (or their heirs) who were dispossessed of cultural objects when such objects are held in UK national collections or UK museums or galleries established for the public benefit. The Panel is not restricted to considering just the legal entitlement of claimants, but can also take into account moral considerations. These considerations include the moral strength of the claimant's case based on the circumstances in which the victim was dispossessed of his cultural object, as well as any moral obligation which rests on the museum—particularly at the time the object was acquired. The Panel can make recommendations to return cultural objects to the claimants, to pay compensation, or to make ex gratia payments. Where monetary payments are made and the museum or gallery retains the object, the Panel can also recommend that a notice recounting the object's Nazi era history be placed next to the object. See generally, Spoliation Advisory Panel Constitution and Terms of Reference, Hansard vol 348 col 255W (13 April 2000).

The Panel has made recommendations in a total of ten claims within nine reports (the reports of the Panel are available at www.culture.gov.uk), of which seven were successful. The Panel has recommended the return of the cultural object in four of those claims, but statutory constraints on institutional ability to transfer objects from their collections have created a barrier to consistent results. The recommendations of the Panel have varied depending on the institution in which the object finally resides even when there are two claims involving substantially similar morally reprehensible circumstances. For example, in claims brought by the heirs of Heinrich Rothberger against the British Museum and the Fitzwilliam Museum, Cambridge, an ex gratia payment from the government was recommended in the British Museum claim, while restitution was recommended to resolve the Fitzwilliam claim (Report of the Spoliation Advisory Panel in respect of three pieces of porcelain now in the possession of the British Museum London and the Fitzwilliam Museum, Cambridge (11 June 2008) (2008 HC 602)).

Edward Vaizey, MP, indicated that the fact that the legislation may be nothing more than symbolic "is no less important for that as it puts on to the statute book a clear commitment from our national museums to return any object that has been found to have been looted during the Nazi period."

Prior to the passage of the Holocaust (Return of Cultural Objects) Act 2009, national museums in the UK (meaning those directly funded by the government and governed by statute) were prevented by their governing statutes from acceding to purely moral claims for the return of cultural objects taken during the Nazi era. Most museum governing statutes only permitted transfer in the most limited of circumstances (for example, when the objects were unfit to be retained, as was the case under the British Museum Act 1963). It was not even possible for these institutions, in their capacity as charities, to return cultural objects to their pre-war owners when they felt compelled by moral obligations to do so (see the decision of Attorney General v Trustees of the British Museum [2005] Ch 397 (Ch)). In contrast, non-national museums, such as the Fitzwilliam Museum, tended to be free to accede to transfers based on moral considerations.

The New Legislation

On January 13, 2010, the Holocaust (Return of Cultural Objects) Act 2009 ("the Act") came into force in the UK. This legislation, which passed smoothly through the various stages of debate in the Houses of Parliament, gives power to the governing bodies of various national museums to transfer cultural objects from their collections which were taken during the Nazi era (1933-1945). The Act provides that worthwhile claims can result in the recommendation of restitution rather than just monetary compensation, regardless of the identity of the institution involved.

In order for the statutory power under the Act to arise, two conditions must first be satisfied, in addition to the object itself not being subject to a trust or condition which would prevent its transfer. The first condition is that an appointed panel must recommend the transfer (section 2(2)). It is likely that the Spoliation Advisory Panel will be appointed by the Secretary of State under section 3 of the Act in order to fulfil this function. The second condition is that the Secretary of State approves the recommendation (section 2(3)). It would then be up to

The Holocaust (Return of Cultural Objects) Act 2009 *(cont'd)*

the museum's governing body to decide whether or not to exercise its power with respect to the particular object. The final decision therefore lies with the governing body itself. During the debates which led to the Act, the Parliamentary Under-Secretary of State for Culture, Media and Sport, was at pains to emphasize that museum governing bodies should retain their independence, free of influence from the government, when determining whether or not to de-accession particular cultural objects (Hansard HC vol 492 col 1172 (15 May 2009).

The Act has a limited legislative life since it will only remain in force until November 12, 2019 (10 years from the date on which it received Royal Assent). This sunset clause means that claims for the transfer of cultural objects will need to be made promptly due to the length of time that it will take to complete the three-stage procedure for obtaining approval for a transfer. The Act is not retroactive, so any claimants who have previously brought a claim before the Panel would need to start a new claim in order to be considered under the Act (Lord Carter Hansard HL vol 712 col 917 (10 July 2009).

The Member of Parliament who introduced the legislation which led to the creation of the Act, Andrew Dismore, indicated that there are only approximately 20 looted items in UK museums, although he acknowledged that there could be more (Hansard HC vol 494 col 1044 (26 June 2009). It would appear, therefore, that the legislation may be used quite infrequently. Indeed, John Whittingdale, MP, suggested that the Act is largely symbolic since it might not even be used once passed, being that so few cases have been brought before the Spoliation Advisory Panel to date (Hansard HC vol 494 col 1046 (26 June 2009)). However, Edward Vaizey, MP, indicated that the fact that the legislation may be nothing more than symbolic "is no less important for that as it puts on to the statute book a clear commitment from our national museums to return any object that has been found to have been looted during the Nazi period" (Hansard HC vol 494 col 1047 (26 June 2009).

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Bonnie Czegledi, "Garden Hill"

ADR brings "Kirche in Cassone" to Auction: Sotheby's Sells a Rare Klimt from the Collection of the Late Viktor and Paula Zuckerkandl

by Andreas Cwitkovits and Irina Tarsis

On February 2, 2010, Sotheby's London auctioned a rare Klimt landscape, *Kirche in Cassone*. The painting, promoted as the only surviving depiction of Lake Garda executed by the artist,[1] was estimated to fetch between 12 and 18 million pounds, but it sold for almost 27 million pounds (hammer price and buyer's premium) to set the record on a Klimt landscape sold at auction. Unlike many other collectors of Klimt's works acquired during or after World War II, the new owners of this precious painting need not worry about title claims.

Better known for his sensual portraits and allegorical murals, Gustav Klimt (1862-1918), the seminal Austrian Symbolist painter, stood at the forefront of the modernism in Austria. He was a co-founder of the Viennese Secession, an artistic movement that broke away from the traditional academic art association, and embraced decorative arts coupled with international artistic movements of cultural renewal and experimentation. Klimt, who started painting landscapes relatively late in his life at the age of thirty-five, produced about fifty-four landscape canvasses, most of them painted during summer vacations on the Attersee and Garda.

Klimt's paintings were prized and collected by famed art patrons, including Adele and Ferdinand Bloch-Bauer as well as the Austro-Hungarian iron magnate and collector, Victor Zuckerkandl. Klimt enjoyed public appreciation during his lifetime, but due to his early death and the mounting popularity of Expressionists, he was overshadowed and arguably forgotten by the collectors until the 1950s, when American collectors and collections started adding his works to their holdings. The first painting to enter an academic institution in the United States was a landscape, Pear Tree (1903), housed at Harvard University's Busch-Reisinger Museum. Otto Kallir, A New York City art gallery owner, presented Pear Tree to Harvard Museum in 1956 in his effort to revitalize appreciation of the famed Austrian painter. The Museum of Modern Art in New York City bought another Klimt landscape from Kallir less than a year later.

Gustav Klimt, "Kirche in Cassone"

Painted almost 100 years ago in 1913, Kirche in Cassone was originally purchased by Victor Zuckerkandl directly from the painter. Following Zuckerkandl's death in 1927, title to the painting passed to Zuckerkandl's sister, Amalie Redlich. Together with her daughter Matilde, Redlich was deported to Lodz in 1941. Both women likely perished. The painting, which was stored by a shipping company on behalf of Redlich, went missing during the war. According to the Sotheby's catalog description, around 1947 Kirche in Cassone was acquired by Galerie Welz in Vienna, then it passed to Hans Fritz in Gerlitzen and in 1962 it was acquired by the anonymous owner and it remained in the collection of that family from the 1960s to this year. While it took decades to negotiate a settlement, the latest owner agreed to offer the painting for sale and split the proceeds with the heirs of Zuckerkandl and Redlich to clear the title. The present case is illustrative of the advantages that alternative dispute resolution offers in title negotiations between two innocent parties -- bona fide purchasers of stolen art and the heirs of the rightful owners of art works looted during World War II.

Andreas Cwitkovits is an Art Attorney in Vienna and represented the heir of the good faith purchaser of the painting to help broker the settlement.

Irina Tarsis is a student at Benjamin N, Cardozo School of Law and co-founder and co-president of the Cardozo Art Law Society.

1 In 2006, an Austrian court of arbitration ruled to remove five Klimt paintings from the Österreichische Galerie Belvedere, and to restore them to the heirs of Adele and Ferdinand Bloch-Bauer, whose estate was illegally kept by the Nazi government following the Annexation of Austria in 1939. The lot of returned paintings included three landscapes Beech Woods (1903), Apple Tree I (1911 or 1912), and Houses in Unterach on Lake Attersee (1916).

Heritage Watch Takes Action To Protect Cambodian Heritage

by Terressa Davis

Cultural heritage is one of the most valuable — and threatened — resources in the small Southeast Asian nation of Cambodia. Today, the country's antiquities, archaeological sites, and historic buildings are in a precarious state, not yet recovered from years of turmoil, and endangered by nature, time, development, and even their own popularity. Cambodia has tried to protect this patrimony through legislation, but the current legal framework is a tangled web of national and international laws, which are complex, often incomplete, and sometimes contradictory.

The difficulty of accessing and comprehending this legal framework is thwarting efforts to protect Cambodia's heritage. Even the country's strongest laws and regulations will remain weak until they are properly published and understood. Additionally, Cambodia's specific cultural property laws would be more effective if used in conjunction with its general criminal, contract, property, and delict laws. Unfortunately, those working to preserve Cambodia's heritage are rarely familiar with the latter, meaning that the protections these laws afford cultural resources are rarely utilized. Lastly, many of the forces threatening the heritage of Cambodia — especially the illicit antiquities trade — transcend its legal jurisdiction. Ignorance of how the country's national laws interact with foreign and international laws is rendering them all less effective.

Many of the forces threatening the heritage of Cambodia — especially the illicit antiquities trade — transcend its legal jurisdiction. Ignorance of how the country's national laws interact with foreign and international laws is rendering them all less effective.

In response to these difficulties, Heritage Watch — a not-for-profit organization dedicated to preserving Southeast Asia's patrimony through research, education, and advocacy — has been working with the Cambodian government to compile, publish, and analyze the country's legal framework for cultural resource management. To date, we have collected nearly one hundred relevant laws and regulations, which will soon be published in an online database. This has not been an easy task, since most of these legal documents have never been properly published and many have never been previously published, even within the country. But by improving the ease by which lawyers, law enforcement officers, government officials, and others can access the governing law — and thus enabling them to better follow or enforce it — we hope that this database will greatly facilitate national and regional efforts to protect Cambodia's cultural property.

It is clearly not enough to create such a resource: we also must use it to identify the strengths of the existing law, but also its weaknesses, such as inconsistencies and gaps that must be corrected or filled. In this important — but challenging task — we have luckily been joined by some of Cambodia's most distinguished cultural heritage experts. These include representatives from the Authority for Protection and Management of Angkor and the Region of Siem Reap (APSARA); the Ministry of Culture and Fine Arts (MoCFA); and the Ministry of Land Management, Urban Planning, and Construction (MoLMUPC).

Banteay Samre (Angkorian Temple), Cambodia

Working together with these specialists, we will analyze Cambodia's current legal framework and publish a report with our findings, which will form the basis of a seminar scheduled for Spring 2011. This seminar — which the U.S. Embassy in Phnom Penh has generously agreed to sponsor — will bring together other intergovernmental, governmental, and nongovernmental groups working to protect Cambodia's cultural property and give them an opportunity to comment on the current law and make recommendations for its improvement. It will be an important step in Cambodia's continuing efforts to improve the country's legal framework for the protection of its great cultural heritage.

This project demonstrates that nongovernmental organizations such as Heritage Watch can play a valuable role in the development and improvement of domestic cultural property law. Such institutions are in a unique position to act as intermediaries between the various government stakeholders, facilitating national efforts, rather than superseding them. I encourage those interested in learning more about this important work to visit www.heritagewatchinternational.org or contact me personally at tess@heritagewatchinternational.org.

Implementation of Guidelines Gives Boost to the Protection of Cultural Property in Armed Conflict

by Karim Peltonen and Nout van Woudenberg

On November 24, 2009, after two and a half years of collaboration, the Meeting of the Parties of the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict endorsed the Guidelines for the implementation of the Second Protocol ("the Second Protocol"). This can be seen as a major achievement in the international implementation of the Second Protocol. It is to be expected that from now on, the Second Protocol will become fully operative and that States Parties will start requesting the granting of enhanced protection for their cultural property.

The Second Protocol, the Committee, the Guidelines, and the Fund

The Second Protocol was adopted in March 1999 and entered into force in March 2004. One of the goals of the Second Protocol was to strengthen the Hague Convention by supplementing its provisions. The 1954 Hague Convention is the main multilateral instrument for the protection of cultural property during armed conflicts. It creates a legal regime intended to protect cultural property against the effects of armed conflict in times of peace, and obliges the States Parties to respect and protect cultural property during an armed conflict. The conclusion of the Second Protocol was a direct consequence of the armed conflicts in the early 1990s, which showed that the system of protection created by the 1954 Hague Convention (and the First Protocol) required improvement. The Second Protocol, among others, establishes a new regime for the protection of cultural property, called "enhanced protection," and provides financial and other assistance for the protection of cultural property. Also, the Protocol has a chapter on individual criminal responsibility. Important institutional elements under the Protocol are the Meeting of the Parties, the Committee for the Protection of Cultural Property, and the Fund for the Protection of Cultural Property.

The Committee is an intergovernmental executive body formed by the States Parties to the Second Protocol. It has 12 members, elected by the Meeting of the Parties for a four-year term and has several functions. First of all, it has developed, on the basis of Article 27(1)(a) of the Protocol, the Guidelines for the implementation of the Second Protocol, which are a tool aimed to facilitate the implementation of the Second Protocol by its Parties, and to provide guidance to the Committee and the Secretariat of UNESCO for the fulfilment of their functions as established under the Second Protocol. The practices of the World Heritage Committee (under the 1972 World Heritage Convention) stood as a model for the Guidelines. Second, the Committee has adopted rules for the submission of requests for international assistance, which are spelled out in the Guidelines. Furthermore, the Committee will decide on enhanced protection and on disbursements from the Fund for the Protection of Cultural Property in the Event of Armed Conflict. That Fund, established by Article 29 of the Second Protocol, is a trust fund based on voluntary contributions of the States Parties or other donors with the purpose of providing financial and other assistance for the protection of cultural property. On the occasion of the endorsement of the Guidelines, the Kingdom of the Netherlands made the first contribution to the Fund, an amount of 100,000 Euros.

The Content of the Guidelines

The Guidelines have been divided into six chapters, including an introduction to the Second Protocol and its scope of application and key actors. They encompass elements closely related to the functions of the Committee, including enhanced protection, dissemination, monitoring of the implementation of the Second Protocol, and international assistance. These are all crucial elements, not just for the Committee, but also for the strengthening of the protection of cultural property in armed conflicts in general.

After an introductory chapter with basic information regarding the Second Protocol, and a short second chapter dealing with the safeguarding of cultural property and precautionary measures against the effects of hostilities, the third chapter relates to enhanced protection, which is one of the key elements of the Second Protocol. This chapter concerns both conditions set by the Second Protocol, as well practices adopted by the Committee. The third chapter starts by introducing three criteria for granting enhanced protection to cultural property under Article 10 of the Second Protocol, namely that (a) it is cultural heritage of the greatest importance for humanity; (b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and

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Implementation of Guidelines Gives Boost to the Protection of Cultural Property in Armed Conflict *(cont'd)*

historic value and ensuring the highest level of protection; and (c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used. The Guidelines then turn to the procedural aspects of granting such protection and introduce the concept of tentative lists and the content of the request. To address uncommon situations, Chapter 3 provides for the possibility of adopting a decision on enhanced protection in exceptional cases and on provisional enhanced protection. It then provides the modalities of the List of Cultural Property under Enhanced Protection and deals with the issue of the loss, suspension, and cancellation of enhanced protection. Finally, it deals with the use of the distinctive emblem to mark cultural property under enhanced protection.

As stipulated, the cultural property concerned needs to be of greatest importance for the humanity. Implicit in the phrase "cultural heritage of the greatest importance for humanity" is that the property in question has exceptional cultural significance. That significance may be deduced from the following indicative criteria, as developed by the Committee: (a) the property is an exceptional cultural property bearing testimony to one or more periods of the development of humankind at the national, regional, or global level; (b) it represents a masterpiece of human creativity; (c) it bears an exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (d) it exhibits an important interchange of human achievements, over a span of time or within a cultural area of the world, on developments in arts and sciences; or (e) it has a central significance to the cultural identity of societies concerned.

The term "greatest importance for humanity" also implies uniqueness. Cultural property may be considered unique if there is no other comparable cultural property that is of the same cultural significance. Influential criteria include age, history, scientific or aesthetic value, artistic craftsmanship, shape or design, location, and context.

With regard to other UNESCO Conventions and programs within the cultural sector, two principles were adopted along with the above mentioned criterion of greatest importance for humanity. The first one is that immovable property inscribed on the World Heritage List is considered to satisfy in principle the condition of greatest importance for humanity. The Committee was, however, hesitant to create an automatic linkage between these two regimes and therefore reserved a right to make a decision in each case. The second principle is more or less similar, but deals with movable property. According to paragraph 37 of the Guidelines, the Committee will take into account the fact that a property is inscribed on UNESCO´s Memory of the World Register.

With regard to the other two conditions set for the property under Article 10(b) and (c) of the Second Protocol, it needs to be emphasized that both adequate domestic legal and administrative measures of protection for the property, as well as the criterion of no military use of the property, are to be proved by the applicant while applying for the granting of enhanced protection. They also may be subject of further inquiry or evaluation.

The Second Protocol establishes a new regime for the protection of cultural property and provides financial and other assistance for the protection of cultural property. Also, the Protocol has a chapter on individual criminal responsibility.

When it comes to the procedure for granting enhanced protection, inspiration has been taken from the practices adopted by the World Heritage Committee. Applicants are asked to approach the Committee through the Secretariat (of UNESCO), which verifies the completeness of the request and forwards complete requests on to the Bureau of the Committee for a preliminary evaluation. The Bureau may consult organizations with relevant expertise before the request is brought in front of the Committee. While presenting requests to the Committee, the Bureau may propose a decision. The Guidelines also include detailed specifications on information to be provided along with the requests for the enhanced protection. These include such basic information as the name and location of the property concerned as well its boundaries and other specifications. In order to assist the applicants, a form listing the required information is annexed into the Guidelines. While deciding upon the enhanced protection, the Committee (deciding normally with a 2/3 majority) adopts a statement and the property concerned is registered on the List of Enhanced Protection.

The Committee discusses in detail the conditions for the loss of enhanced protection. The Guidelines describe the rele-

The term "greatest importance for humanity" also implies uniqueness. Cultural property may be considered unique if there is no other comparable cultural property that is of the same cultural significance.

Implementation of Guidelines Gives Boost to the Protection of Cultural Property in Armed Conflict *(cont'd)*

vant conditions set forth by the Protocol, as well as the procedure to be followed. There are three ways in which enhanced protection can be lost: loss, suspension or cancellation. If the protection is going to be suspended or cancelled, a procedure must be followed by the Committee. However, the loss of enhanced protection happens by operation of law, which means that it is lost automatically and without a specific procedure, namely if and for as long as the property has, by its use, become a military objective.

Chapter 4 of the Guidelines, regarding dissemination, merely restates the provisions of Article 30 of the Second Protocol and does not contain any additional information beyond the Protocol. Dissemination is entirely the responsibility of the Parties. The topic has been put into the Guidelines in order to emphasise its importance.

Chapter 5 deals with monitoring of the implementation of the Second Protocol, which is a task entitled to the Committee. This chapter reiterates the obligation of States Parties to provide national reports on the implementation of this instrument every four years. In order to facilitate the work of the Parties, as well as in order to cover all essential elements of the reporting, a list of topics to be covered in reports is provided in the Guidelines.

The last chapter in the present Guidelines, Chapter 6, addresses international assistance, which was a central element in the implementation of the Second Protocol. This chapter is rather extensive in order to fully cover the provisions of the Protocol, as well procedural issues related to its application. Chapter 6 first gives an overview of different forms of assistance, such as: international assistance provided by the Committee, technical assistance of the Parties through the Committee, technical assistance provided by the Parties directly on a bi- or multilateral level, and technical assistance of UNESCO. These forms are all stipulated under Articles 29, 32, and 33 of the Second Protocol. Chapter 6 also deals with the process of the consideration of requests for international assistance, including assistance from the Fund. In order to serve the reader, annexes related to different forms of assistance, procedural issues, examples of possible measures of international assistance provided by the Committee, and examples of possible measures of technical assistance provided by the Secretariat of UNESCO have been attached to the Guidelines.

We have the Second Protocol and the implementing tools in our hands; thus, the practical and successful implementation is for the first time within reach.

It should be stressed that such assistance is not automatic, and is in principle complementary to national measures taken by a Party for the protection of its cultural property under enhanced protection. Thus, it cannot replace the efforts of the Party concerned.

With regard to the practices adopted by the Committee for granting international assistance, it was decided that all forms of assistance including financial assistance from the Fund shall follow the same procedure. In principle, requests concerning assistance should be submitted to the Committee through the Secretariat six months prior to the ordinary meeting of the Committee. As an exception, requests concerning emergency measures may be submitted at any time, and the Committee will consider these requests on an ad hoc basis. Requests for international assistance are to be presented in working languages of the Secretariat.

Afterthought

The Guidelines for the implementation of the Second Protocol give a practical frame to execute its provisions. In practice this means that the Committee may perform its duties and tasks, and the Parties can apply the regime of enhanced protection, as well request international assistance as stipulated in the 1999 Second Protocol. In this regard we can consider the Protocol finally operational. What the real impact of the Guidelines will be remains to be seen. Parties play an important role in the potential impact: it is in their interest to apply enhanced protection and to contribute financially to the Fund. Another critical factor includes the resources of the Secretariat of UNESCO. Management and evaluation of requests concerning enhanced protection and international assistance require fairly large resources in order to guarantee proper conduct of business, and with its current resources this will be a challenge. The Guidelines provide relevant mechanisms, but further elaboration of the co-operation is required. This depends on the State Parties, as well as the NGOs and international organizations. We have the Second Protocol and the implementing tools in our hands; thus, the practical and successful implementation is for the first time within reach.

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A Not So Starry Night:
The Pension Protection Act's Destruction of Fractional Giving

by Elizabeth Dillinger

Introduction

Vincent van Gogh painted "The Starry Night," his most renowned work, while recuperating in a mental asylum in southern France in the summer of 1889 after slicing off part of his ear with a razor.[1] He completed the painting in a furious burst of action, dashing onto the canvas "rockets of burning yellow" and planets that "gyrate like cartwheels."[2] His thick, sweeping brushstrokes created a flame-like cypress and a night sky that is a "field of roiling energy."[3] "Looking at the stars always makes me dream," van Gogh said.[4] "Why, I ask myself, shouldn't the shining dots of the sky be as accessible as the black dots on the map of France?"[5] Millions of people have been able to share van Gogh's provocative vision of the night sky by viewing this masterpiece in New York City's Museum of Modern Art, thanks to the generous bequest of an art collector who left the painting to the museum when she died.[6]

Recently, another work, the Pension Protection Act of 2006, was created in a similarly frenzied manner. Section 1218 of that Act, a small provision buried deep within the legislation, dealt a critical blow to the practice of fractional giving, a vital method by which museums obtain charitable contributions of artwork from private donors. The U.S. House of Representatives passed the Act – a document running approximately nine hundred pages in length – late at night, on short notice, with legislators barely having had time to read even a brief summary of the bill's contents, with only one hour allotted for debate, and with not a single word spoken by anyone about the drastic restrictions that the legislation would impose on fractional giving. That night would turn out to be a very dark one for the art world. A few days later, the U.S. Senate rushed to slap its approval on the bill in the same hasty and haphazard manner, passing the legislation after a mere twenty minutes of discussion.

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Fast and furious can be a wonderful approach to creation of art, as van Gogh's fevered work demonstrates. It is not, however, a good recipe for crafting sound and well-considered legislation. The Pension Protection Act has already had a severely adverse effect on art museums, art collectors, and society as a whole, and it will continue to do so until Congress acts to reverse its misguided destruction of the practice of fractional donations of artwork and other tangible personal property to charities.

Fractional giving is simply a way for an individual to donate property gradually without immediately losing all ownership of the item. Art collectors are often reluctant to donate works during their lifetimes because it means losing all rights of ownership, but fractional giving is an attractive alternative because it ensures the collectors' intentions for the works are properly met and gives them immediate tax deductions, while allowing them to retain partial ownership rights. The process begins with a collector donating a partial ownership interest in a piece of art to a museum (usually ten to twenty percent) and taking a tax deduction for an equivalent percentage of the appraised, fair-market value of the work. Over time, the donor then makes subsequent donations of additional shares of the ownership of the artwork, and takes deductions for each of those gifts. If the value of the art has increased by the time of a subsequent donation, the donor is entitled to a deduction reflecting the increased value of the portion of the work donated at that time. A reappraisal of the art upon each subsequent donation determines the dollar value of the donor's deductions, and of course the art's market value could rise or fall over the time period during which the donations occur. The museum receiving the donations, in turn, becomes entitled to exhibit the art for the amount of time equivalent to its ownership interest. For example, if the museum has received ten percent ownership, then the museum would be entitled to the art for 36.5 days out of the year. For the remainder of the year, the donor would remain entitled to have the art. Ultimately, the donor usually gives the museum full ownership of the art, either through a series of fractional gifts over time or by a final bequest of the donor's remaining ownership interest upon the donor's death.

Section 1218 of the Pension Protection Act of 2006 essentially eliminated all incentives for donors to give fractional gifts of art to museums. The consequences of this ill-advised revision of our tax laws are serious. America's dazzling array of museums and other charitable institutions is one of its greatest assets, and the generosity of donors is the lifeblood of those institutions. Donations account for the vast majority of art acquisitions by U.S. museums, and in the past, fractional giving accounted for the most valuable of these donations. By eliminating incentives for fractional giving, section 1218 of the Pension

1 WebMuseum, "Vincent van Gogh, The Starry Night," http://www.ibiblio.org/wm/paint/auth/gogh/starry-night/ (last visited March 20, 2010).

2 *Id.*

3 Museum of Modern Art, "The Collection, Vincent Van Gogh, The Starry Night," http://www.moma.org/collection/browse_results.php?object_id=79802 (last visited March 20, 2010).

4 *Id.* (quoting Museum of Modern Art, MoMA Highlights 35 (revised ed. 2004) (originally published in 1999)).

5 *Id.*

6 *See* Rona Roob, *A Noble Legacy: Soon After the Museum of Modern Art in New York Was Founded, the Bequest of Lillie P. Bliss Played a Crucial Role in Establishing a Permanent Collection for the Fledgling Institution – 1864-1931 – Patrons – Biography*, Art in America, Nov. 2003, *available at* http://findarticles.com/p/articles/mi_m1248/is_11_91/ai_110963133/print.

The Pension Protection Act's Destruction of Fractional Giving *(cont'd)*

Protection Act thus poses a dire threat to the flow of new art into museums.

Fractional Giving Reform

Legislators and tax officials have grown increasingly concerned about the area of charitable deductions and tax-exempt organizations in recent years, sparked by a number of cases of abuse in the charitable sector where donors overstated the value of donated property or inappropriately derived personal economic benefit from donated works. After covering a rash of accounting scandals at corporations like Enron, many journalists turned their attention to the charitable sector and uncovered illegal or problematic practices.

An article in the *Wall Street Journal* caught the eye of Sen. Chuck Grassley (R-Iowa), the chairman of the Senate's Finance Committee.[7] The article described the growing popularity of fractional giving and the benefits it offered to museums and donors alike. [8] Among other things, the article emphasized that fractional giving could enable donors to receive deductions while keeping and enjoying the artwork in their homes for most of the year.[9] This apparently alarmed Sen. Grassley, whose aggressive scrutiny of the nonprofit sector had earned him a reputation as "the Senate's philanthropy cop,"[10] and prompted him to begin looking at fractional giving and the possibility of amending the pertinent tax laws. "It isn't right for a donor to get a big tax break for supposedly donating a painting that hangs in his living room, not the museum, all year," Sen. Grassley said. "A painting in a private living room doesn't benefit the public."[11] Sen. Grassley began convincing his fellow legislators that there was a problem if donors of fractional interests in art were getting "big tax deductions while museums sometimes see little or nothing of what's been given."[12]

Vincent Van Gogh, "A Starry Night"

While Sen. Grassley had good reasons to be concerned about fractional giving carried out in a fraudulent or abusive way, he went too far in condemning the entire practice of fractional giving just because of the possibility that it could be misused. Sen. Grassley made it sound like the whole notion of fractional giving was nothing but a corrupt scam, and his characterizations of fractional giving bordered on being misleading. To take just one example of a fractional giving transaction mischaracterized as being abusive, a prominent corporate executive donated half of his interest in a Winslow Homer oil painting, entitled "Young Man Reading," to the Baltimore Museum of Art.[13] Despite half the ownership of the painting having been given to the museum, the painting spent only one month in the museum, and was never put on display during that time. For the remaining eleven months of the year, "Young Man Reading" remained in the donor's hands.

That is precisely the sort of situation that incurred the wrath of Sen. Grassley and his legislative colleagues. The legislators failed to consider, however, that the Baltimore Museum of Art was perfectly happy with the arrangement. A museum must prepare for proper exhibition of a painting before showing it, and the Baltimore museum would have been forced to keep a highly fragile work in storage if forced to take possession of it before being ready to complete its preparations for displaying the piece. In addition, the Baltimore museum knew that it eventually would inherit full ownership of the work at some point in the future, providing it a superb opportunity for enhancement of its collection. Ignoring those considerations, Sen. Grassley and the Senate Finance Committee overreacted to the fact that fractional giving, like anything else, can be abused by unscrupulous taxpayers. Motivated by legitimate concerns but stretching them too far, and disregarding the Panel on the Nonprofit Sector's recommendations against changing the current tax laws on deductibility of gifts of appreciated property, Sen. Grassley plowed ahead with an

7 Press Release, Sen. Chuck Grassley, Chairman, U.S. Senate Committee on Finance, Fractional Art Donation Reform Timeline (Dec. 11, 2006), *available at* http://finance.senate.gov/press/Gpress/2005/prg121106.pdf.

8 *See* Rachel Emma Silverman, *Joint Custody for Your Monet – 'Fractional Giving' Hits the Art World, as Donors Share Works with Museums*, Wall St. J., July 6, 2005, at D1.

9 *Id.*

10 David Whelan, *Nonprofit Noodge*, Forbes, Apr. 23, 2007, at 37.

11 Mary Abbe, *Law Could Hang Up Donations of Artworks: Museums Are Worried That a Recent Tax Change Could Hamper Valuable Gifts*, Star Trib. (Minneapolis), Nov. 2, 2006, at 1A.

12 Jay Hancock, *Fractional Art Donations Prove Charity Starts at Home*, Balt. Sun, Feb. 4, 2007, at 1C.

13 *Id.*

The Pension Protection Act's Destruction of Fractional Giving *(cont'd)*

effort to have Congress dramatically alter the rules regarding fractional giving.

Sen. Grassley's proposal to limit contributions of fractional interests in tangible personal property made its first appearance in proposed federal legislation in the fall of 2005.[14] A few months later, it was approved by the U.S. Senate, as a piece of a large package of reforms of the tax laws relating to charitable donations, by a voice vote without undergoing debate. The proposal popped up again several months later as part of the Pension Protection Act of 2006, a law enacted in a mad rush just before Congress went on its 2006 summer break.

The Pension Protection Act's New Restrictions on Fractional Giving

Section 1218 of the Pension Protection Act changed the tax laws regarding fractional giving in several crucial ways.

First, the legislation created a new, special rule for valuation of fractional gifts. While the first gift of a fractional interest in any item of property is simply valued at its fair market value at the time the gift occurs, the deduction for all subsequent fractional gifts is limited to "the lesser of (A) the fair market value of the property at the time of the initial fractional contribution, or (B) the fair market value of the property at the time of the additional contribution."[15] This provision essentially denies the donor a tax deduction for any appreciation of the property after the time of the initial fractional contribution. The new valuation rules thus create an asymmetry under which a taxpayer's deductions for giving additional fractions of an item can be pushed down if the item's market value declines, but cannot rise no matter how much the item increases in value. The new statute requires a taxpayer who makes an initial fractional gift to ignore subsequent appreciation in the item's value for purposes of calculating her gift and estate tax *deductions*, but still requires that taxpayer to take into account that appreciation in value when calculating her gift and estate tax *liability*.

Fractional giving is simply a way for an individual to donate property gradually without immediately losing all ownership of the item.

Second, the Pension Protection Act also created a new time limit for completion of donations made through a series of fractional gifts. The statute requires that a donor must give full ownership of the entire item of property "before the earlier of (I) the date that is 10 years after the date of the initial fractional contribution, or (II) the date of the death of the donor."[16] If you failed to do so, or if you died before completing the transfer of full ownership to the museum, all deductions that you ever took for the fractional interests that you gave to the museum would be "recaptured" or wiped away. Having retroactively lost those deductions that you previously took, you suddenly would owe a substantial amount of extra tax for the years in which the deductions were taken, on top of which would be added interest and a ten percent penalty.[17]

Third, the legislation forces the recipient of the fractional gift to possess and use the donated property. Under the previous law, the recipient of the gift was entitled to possess the item for an appropriate fraction of the year, but was not required to do so. Section 1218 of the Pension Protection Act instead demands that the donee must take "substantial physical possession of the property" and must have used the property in a way related to the donee's charitable purpose or function.[18] That possession and use must occur within the ten-year period after the initial fractional gift (or before the donor's death, if the donor does not survive for the entire ten-year period).[19] Again, if these requirements are not fulfilled to the tax authorities' satisfaction, a significant tax liability arises because all deductions taken by the taxpayer for gifts of fractional interests in the property are retroactively recaptured, resulting in the taxpayer owing a large amount of tax, interest, and penalties.

On top of all that, § 1218 of the Pension Protection Act denies deductions for fractional gifts in any instances where someone other than the taxpayer and donee owns an interest in the property. This narrow ownership requirement may have the result of prohibiting any fractional gift of community property, and clearly prevents fractional giving in other situations where a group of individuals share ownership of an item and want to join together in giving it to charity.

A Five Point Plan for Legislative Action to Save Fractional Giving

1. Permit deductions for the true fair market value of subsequent fractional gifts.

The deduction for each fractional gift should be determined simply by the fair market value of the item on the date when that particular gift occurs. This would return the law on this point to exactly where it was before the Pension Protection Act's adoption in 2006.

2. Require fractional donations of an item to be completed within a short time after the donor's death.

14 *See* Joint Comm. on Taxation, Description of the Chairman's Modification to the Provisions of the "Tax Relief Act of 2005" 74-75 (Nov. 14, 2005), *available at* http://finance.senate.gov/sitepages/leg/111405modmk.pdf; Press Release, U.S. Senate Comm. on Fin.

15 *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 1218(a)-(d), 120 Stat. at 1081-82; Joint Comm. on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006 308 (Aug. 3, 2006), *available at* http://www.house.gov/jct/x-38-06.pdf.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

The Pension Protection Act's Destruction of Fractional Giving *(cont'd)*

Congress should require the fractional donation of an item to be completed within a short period of time after the donor's death, such as six months or one year. If the donor or her estate or heirs failed to complete the gift within that period, the tax deductions previously taken for gifts of fractional interests in the item would be recaptured.

3. Eliminate the mandates on a donee's possession and use of the donated property.

Congress should restore the standard that existed prior to the enactment of the Pension Protection Act, so that the recipient of a fractional interest in an item would be entitled to possess and use the item for its rightful share of each year, but would not be required to do so.

4. Remove the prohibition of joint donations by two more co-owners.

Congress should remove this restraint, at least for situations in which all owners will participate in the fractional giving plan. Likewise, the law should be revised to make clear that it does not prohibit fractional giving of community property.

5. Implement strict enforcement measures to stop fraud and abuse involving fractional giving.

Last but not least, Congress should enact tough measures to crack down on fraudulent and abusive use of charitable donations, including those involving fractional giving. Inflated appraisals of donated property were one of the primary problems that sparked legislative concern about charitable giving in the first place, and Congress should have focused its attention on that rather than making such sweeping attacks on fractional giving in general. Before Sen. Grassley ever introduced his proposals to undermine fractional giving, the Panel on the Nonprofit Sector had already laid out a sound approach to concerns about art valuation. The Panel recommended that Congress require taxpayers to obtain qualified appraisals for contributions of property claimed to have a value of more than $100,000, prepared by a certified appraiser, in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP").[20] In addition, the Panel recommended that taxpayers who claim improper deductions for over-valued property should be subject to stiff sanctions such as a penalty of "10 percent of the amount of the tax not properly paid if the claimed value of the donated property exceeds the correct value of the property by 50 percent or more."[21] Congress should be doing its best to ensure that no taxpayer obtains exaggerated tax benefits through charitable giving, regardless of whether the donation is made outright or through fractional giving.

Elizabeth Dillinger, "Tree in Central Park"

Conclusion

Fractional giving was a practice that significantly benefited museums, donors, and the public. The Pension Protection Act effectively destroyed that practice and the benefits it produced. By adopting the simple five-point legislative plan outlined here, fractional giving and the benefits it previously produced can be restored. Following this plan will guard the interests of taxpayers while at the very same time doing what is in the best interests of the donors who generously give precious gifts to museums and other institutions in the art world that do so much to enrich America's culture and the hearts and minds of its people.

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20 Panel on the Nonprofit Sector, *Strengthening Transparency Governance Accountability of Charitable Organizations – a Final Report to Congress and the Nonprofit Sector* 13 (2005), *available at* http://www.nonprofitpanel.org/Report/final/Panel_Final_Report.pdf.

21 *Id*. at 87.

Is the Cultural Property of States Immune from Seizure Under Customary Law?

by Nout van Woudenberg

In the early days of 1963, American-French connections, fed by the personal connections between Jacqueline Kennedy and the French Minister of Culture, André Malraux, were expressed in a very exciting way: It had been agreed after a lot of persuasion by Mrs. Kennedy, that the Mona Lisa, the masterpiece of Leonardo da Vinci, would be given on loan to the United States. In December 1962, the painting arrived by ship in the United States, and on January 8, 1963, it was unveiled in the Washington National Gallery. One month later, it went on show at the Metropolitan Museum in New York. It was an unprecedented action and a lot needed to be taken into account: How to pack the Mona Lisa for travel; how to handle and transport the packing case; how to make sure that maritime law concerning the salvage rights of property retrieved outside territorial waters would not allow the painting to be wrenched from the possession of France; how to secure the painting. But nothing with regard to immunity from seizure. Nobody seemed to worry that an individual or a company would have in mind seizing the painting.

That would not take long, though. Only a few years thereafter, in 1965, the United States was pressed to establish immunity from seizure legislation with regard to temporarily borrowed cultural objects of foreign States. France followed as the first European State in 1994, and since then the amount of States which enacted legislation is growing. One can say that meanwhile, the issue of immunity from seizure for travelling cultural objects has become a real concern for States and museums. This was mainly due to the increase of legal disputes over the ownership of cultural objects, particularly as a result of claims made by heirs of cultural objects expropriated by Communist regimes in Eastern Europe, as well as Holocaust claims. But ownership disputes are not the only worry. There are situations known in which one may want to seize cultural objects temporarily on loan because the individual or company is of the opinion that the owner of the object on loan has a debt (not related to the work of art) towards the claimant and this claimant has concerns regarding the enforcement of a judgment or arbitration award in the State of residence of the owner.

An important reason for providing cultural objects with immunity from seizure is to provide security or assurance to the foreign lenders of cultural objects that objects loaned by them for a temporary exhibition will not be subject to judicial seizure while in the borrower's jurisdiction.

An important reason for providing cultural objects with immunity from seizure is to provide security or assurance to the foreign lenders of cultural objects that objects loaned by them for a temporary exhibition will not be subject to judicial seizure while in the borrower's jurisdiction and thereby to try to prevent that works of art on loan can be held hostage in disputes. For States, the reason for enacting immunity from seizure legislation appears to be twofold. On one hand, States simply would not like to risk any acts of seizure, so they try to act as pragmatically as possible in order to overcome the reluctance of lenders to send their cultural objects into a foreign jurisdiction where they might be subject to judicial seizure. Acting pragmatically would imply that as a State you are still being considered as safe and interesting for international art loans, thereby keeping your position upfront. On the other hand, States appear to be acting this way because they feel there is a legal obligation to do so. Explanatory Reports and statements of States point in that direction.

On December 2, 2004, the UN General Assembly adopted without a vote resolution A/Res/59/38 regarding the UN Convention on Jurisdictional Immunities of States and Their Property. Cultural objects play a special role under the Convention when it comes to immunity from seizure. While the Convention proceeds from the principle that no measures of constraint (as it is called under the Convention) may be taken against property of a State, it also provides for certain exceptions to that principle. However, Article 21(1)(e) of the Convention explicitly states that "property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale" should be considered goods intended for public service. As a consequence, these cultural objects are by definition immune from measures of constraint. The Convention has not, however, come into force yet.

The question arises as to whether the immunity of cultural objects of States from seizure can be seen as a rule of customary law: can we state that a rule of customary international law exists, implying that cultural objects of foreign States temporarily abroad for an exhibition are immune from seizure? Or is this kind of rule probable to emerge? Or is there insufficient ground for believing that such a rule exists or emerges? As future cases appear, this question will have increasing importance to the outcome of those disputes and, more broadly, to the process of developing specialized laws to protect cultural property when it is loaned. Investigating the existence of such a rule is the subject of my PhD research.

Nout van Woudenberg is a PhD researcher at the University of Amsterdam, the Netherlands. He will be publishing his work on immunity from seizure in late 2011. He works also as legal counsel at the International Law Division of the ministry of Foreign Affairs of the Kingdom of the Netherlands This article has been written in his personal capacity.

Art & Antiquities Trafficking News Notes

by Rick St. Hilaire and Terressa Davis

JANUARY 2010

Ma'at, Goddess of Justice

Paintings by Pablo Picasso and Henri Rousseau were among the roughly 30 paintings stolen from a private collector in southern France. The *Associated Press* reported that the theft occurred when the homeowners were on vacation. The Central Office for the Fight against Traffic in Cultural Goods is one of the agencies investigating the case.

Headlines were made when the Royal Ontario Museum's controversial Dead Sea Scroll exhibition prompted Jordan to ask Canada to take possession of the scrolls. Jordan claimed that Israel should not have the scrolls until issues of ownership were settled, according to *The Jerusalem Post*. Jordan asked Canada to seize the cultural property under the terms of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. That is because Jordan alleges that Israel improperly took the scrolls from a museum in Jerusalem during the Six Day War in 1967. *National Post* reported that the Canadian government rejected Jordan's request.

Iraqi police took control of 39 antiquities bound for illegal export from the country. The *Associated Press* described how the artifacts were located inside a hole in Nasiriyah near a shrine. It was believed that the objects were bound for Iran.

The *New York Post* explained that Natella Croussouloudis of Brooklyn, NY, was sentenced to probation, community service, and rehab for attempting to sell a Nicholas Roerich drawing to an undercover police officer. The drawing could have netted the drug addict the art's reported value of $125,000. Titled "Himalayas," the piece was one of two stolen from the Roerich Museum in New York City last spring.

AFP, through *Daily News Egypt*, told of Egypt's plan to host an international conference in April 2010 on the repatriation of artifacts. Zahi Hawass, head of the Supreme Council of Antiquities, is quoted to say that countries will gather to discuss how to acquire looted antiquities located across the globe. At least thirty countries have agreed to participate, including China and Greece.

Federal prosecutors pressed criminal charges against a California antiques seller alleged to have sold a forged Picasso for $2 million, according to KTLA-TV in Los Angeles. The complaint charged that Tatiana Khan, 69, paid an artist to draw a recreation of "The Woman in the Blue Hat" and then sold the drawing. The FBI investigated the case.

The United States Attorney for the Southern District of New York announced that a jury concluded that the federal government could forfeit Pissaro's "Le Marché" as stolen property. US Immigration and Customs Enforcement confiscated the painting from Sotheby's in 2006 after learning that the artwork was stolen from the Faure Museum in Aix-les-Bains, France, in 1981. French authorities requested the return of the painting, and US prosecutors successfully took control of the painting under the terms of the National Stolen Property Act.

Polish police arrested a suspect and recovered Monet's "Plage de Pourville" originally stolen in 2000, according to *CBC News*.

The ongoing trial of former Getty Museum curator Marion True in Italy attracted attention recently when papers came to light that, according to the *Los Angeles Times*, "show that the billionaire oilman [J. Paul

Art & Antiquities Trafficking News Notes *(cont'd)*

Getty] and another potential buyer were troubled by the questionable legal status of the [Getty Bronze] statue.

In the continuing federal case between a Connecticut woman and the Norton Simon Museum in California over the possession of two paintings of Adam and Eve by Lucas Cranach the Elder, the 9th Circuit Court of Appeals denied a rehearing on an appeal by Marei Von Saher who is seeking the return of the artwork based on the argument that her father-in-law was forced to abandon the paintings when taking flight from the Nazis. Last summer, a 2 to 1 court ruling declared California's Holocaust art restitution law to unlawfully interfere with the federal government's right to determine foreign policy.

An exhibit at the Korin Maman Museum in Ashdod called "Antiquities Thieves in Israel" lived up to its name when burglars stole ancient Greek coins featuring the face of Alexander the Great, a bronze spear, gold earrings, and other artifacts. *Reuters* said the theft was reported to the police.

The *Associated Press* reported that police in Cyprus busted a large antiquities smuggling ring moving nearly $23 million worth of artifacts. Ten Cypriots and a Syrian were implicated in the plot.

Global Times of China described how bulldozers ripped archaeological artifacts from the ground in Jiangsu Province. The news report stated that "[t]he incident came almost a month after the Chinese Academy of Social Sciences claimed a major discovery of the tomb of Cao Cao, a renowned warlord and politician in the 3rd century AD, in central China."

Nigeria has been attempting to recover cultural objects taken from the country during periods of colonization. The French government returned two monoliths in January, and Nigeria announced that it was preparing to take possession of Nok culture artifacts in Canada, explained the Nigerian Compass.

Following the devastating earthquake in Haiti, the United Nations Education, Scientific and Cultural Organization launched an effort to prevent the looting and smuggling of cultural objects. The *Associated Press* reported that UNESCO called for a global ban of Haitian artifacts.

February 2010

The Egyptian government tightened its laws covering theft and smuggling of cultural artifacts by creating harsher criminal sentences, among other provisions. A story appearing in *Middle East Online* explained that the new law "increases the punishment for tampering with antiquity sites to five years in jail, while a new provision gives patent rights to the antiquities council on precise replicas of antiquities that are certified by the council." The law passed following a parliamentary stir created by a suggestion that some archaeological objects should be placed on the commercial market.

An Italian judge ordered the seizure Thursday of the J. Paul Getty Museum's iconic bronze statue of an athlete, citing "grave negligence" in the museum's acquisition of the ancient statue in 1977.

March 2010

Nearly 20 years after the enigmatic Isabella Stewart Gardner Museum heist, key investigators are redoubling efforts to publicize an offer of full and unconditional immunity to anyone who helps locate or return 13 stolen items valued at a half-billion dollars.

BBC reported that Police in Colombia have found 16kg (35lb) of cocaine inside replicas of three sculptures by artist Fernando Botero being shipped to Spain.

News agencies reported that eighteen works of art, including 13 sketches by prominent Turkish painter Hoca Ali Rıza (1858-1930), were stolen from the State Art and Sculpture Museum in Ankara.

The National Cultural Heritage Act of 2009 was signed into law by President Macapagal-Arroyo on March 26.

Art & Antiquities Trafficking News Notes *(cont'd)*

April 2010

The Independent reported that a collection of Roman sculptures that was due to be sold at Bonhams auction house in London had been withdrawn amid concerns that the statues may have originally been illegally excavated.

After nine years of regulatory review, the federal government gave the green light on Wednesday to the nation's first offshore wind farm, a fiercely contested project off the coast of Cape Cod. Reported by the New York Times.

The Boston Globe reported that efforts of the FBI to recover masterpieces stolen from the Isabella Stewart Gardner Museum by a criminal gang in Corsica two years ago failed in part because of bureaucratic infighting among federal agents and supervisors.

The FBI reported on April 7 that it returned to the government of Peru two Colonial paintings that were recovered by the FBI Art Crime Team. FBI Assistant Director Kevin Perkins, Criminal Investigative Division, presented the artifacts to Ambassador Luis Miguel Valdivieso at a ceremony at the Embassy of Peru in Washington, D.C.

At the request of the National Central Bureau in New Delhi, a stone sculpture was added to INTERPOL's Stolen Works of Art database despite the fact that it was sold by an "international auction house having bases in New York and London." It was only located in New York after it was spotted by somebody in New Delhi featured in a magazine advertising its sale. By this time the object was already in the port of New York being prepared for shipment to England. The sculpture was seized by US Immigration and Customs Enforcement agents on Friday, April 16.

The Christian Science Monitor reported in its April 24 edition on efforts in the Gaza Strip to rein in the black market in ancient treasure and better preserve items often found by chance.

An Italian judge turned down an appeal from the John Paul Getty Museum against the seizure of an Ancient Greek bronze statue at the center of a long-running dispute between Italy and the U.S. museum.

The BBC reported that five men accused of conspiring to extort £4.25m ($6.5m) for the safe return of a Leonardo da Vinci painting have been cleared.

The Guardian reports that after years of collecting Native American artifacts as a hobby, three residents of Blanding, Utah have committed suicide as they face plunder charges.

Zawi Hawass, head of Egypt's Supreme Council of Antiquities, hosted a conference in Cairo in which he called upon museums to return such treasures as the bust of Queen Nefertiti, the Rosetta Stone, the Benin Bronzes, and the Elgin Marbles among others. Sixteen countries in attendance stated their intention to sign a declaration demanding the return of those items.

ABC News reported that a woman who sold $20 million in phony artwork she claimed was by Picasso, Dali and Chagall to thousands of people through a semiweekly televised auction has been sentenced to seven years in federal prison.

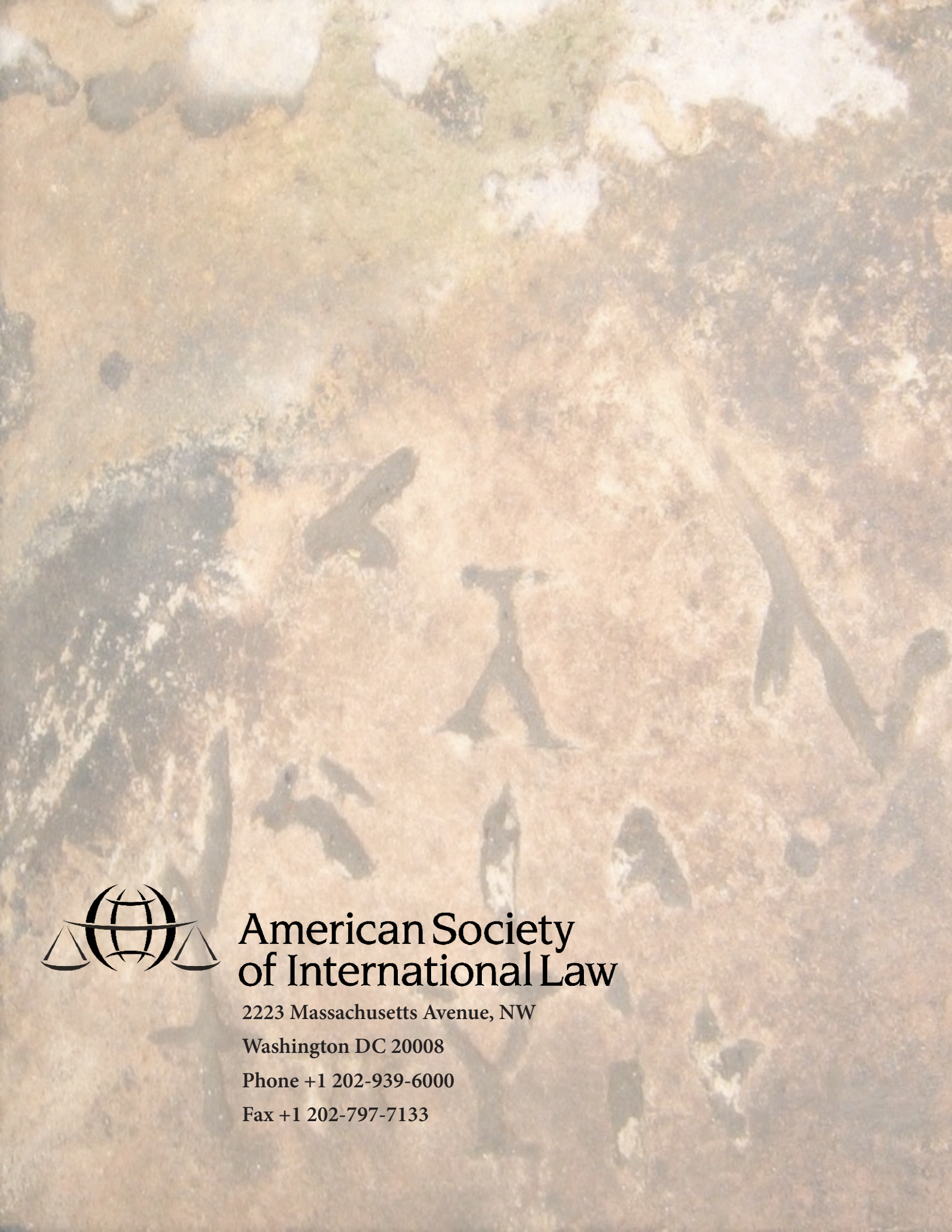
May 2010

The National reported that historical treasures continue to be stolen from important archaeological sites in Iraq, hundreds of which remain unguarded.

The Associated Press reported that Picasso's painting "Nude, Green Leaves, and Bust" sold at a Christies auction in New York for a record $106.5 million

The AFP reported that the French parliament voted on May 4 to return around 15 tattooed and mummified heads of Maori warriors to New Zealand, ending years of debate over the restitution of the human remains.

On Wednesday, June 2, 2010, Sotheby's London will offer for sale restituted paintings by Jean-Baptiste-Camille Corot (1796-1875). Estimated at £800,000-1,200,000, "Jeune femme à la fontaine" enjoyed an exceptional early provenance before it was requisitioned during the Nazi period. It has now been restituted to the heirs of its erstwhile owners and will be one of the centerpieces of Sotheby's forthcoming sale of 19th Century Paintings.



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