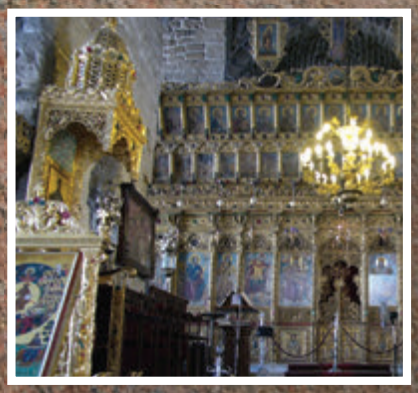
American Society of International Law

CULTURAL HERITAGE & ARTS REVIEW

Volume 2, Issue 1



Post-Conflict Cyprus: A Call for Cooperative Efforts

New Threats to Underwater Cultural Heritage

Historic Urban Landcape Preservation & Changing Societal Needs

plus

Howard Spiegler: The Ramifications of Portrait of Wally

Dr. Allan Gerson on the Konowaloff Litigation

A Renoir Dispute in Small Claims Court

and more!

The *Review* is a publication of the American Society of International Law's Interest Group on Cultural Heritage & the Arts.

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American Society of International Law

In this Issue...

Welcome!

A Note from the Editor

Welcome, readers! The past few months have been an exciting time of change for the Review. You've probably already noticed our fresh, new look. We've also experienced some changes in the editorial staff. As the new Editor-in-Chief, I would like to express my sincere appreciation to the outgoing staff, especially Cristian DeFrancia, whose extensive efforts in getting our young publication off the ground have played a pivotal role in the success that the Review has had so far.

While the content and mission of the Review remain the same, we have changed the format somewhat to showcase a single, more robust article in each issue. In this issue, our feature article is an excellent piece by Dr. Alessandro Chechi about the effect of the conflict in Cyprus on the country's historic cultural property. While legal mechanisms can provide some protection for cultural property, Dr. Chechi advocates for cooperative efforts as a necessary means for mitigating the continued destruction of Cypriot cultural property. You won't want to miss our other articles either, which cover a broad range of subjects. Two, in particular, come to mind: Dr. Mark Spalding, an expert in the field of marine conservation, has prepared an article discussing the effects of climate change on underwater cultural heritage, and Justice Barbara Jaffe of New York has provided an account of how a Renoir authenticity case ended up before her in small claims court.

Lastly, I'd like to express our appreciation for our sponsors, the Art Law Group at Herrick, Feinstein, LLP and the Commission for Art Recovery, whose support has been instrumental in making this issue of the Review possible.

Cheers,

Ben Bauer

What's A Renoir Authenticity Case Doing In A Small Claims Court Like This?

by Justice Barbara Jaffe

The authenticity of a work of fine art is usually litigated in federal court or in the state higher trial courts, for, after all, large sums of money and important issues are often at stake. You can therefore imagine my surprise one evening as I presided in the Small Claims Part of the New York City Civil Court and was presented with a case involving an alleged pastel by Pierre-Auguste Renoir.

Before me stood a tall, lanky man. Behind him in the audience sat his supporting entourage. The case card showed that the man was suing Sotheby's for $5,000, the court's jurisdictional limit, on the ground that Sotheby's had failed to recognize that his picture is a genuine Renoir pastel study of "The Bathers," a Renoir oil painting. Appearing for Sotheby's was John Cahill, of Lynn & Cahill, New York, New York.

For the next hour or so, I listened to the claimant and his witnesses describe how Sotheby's had defamed his picture and destroyed his chances of, if not selling the picture, then educating the world about it. The claimant's passion and sincerity were apparent, as was his lack of understanding of the law and how to prove authenticity and defamation.

Many of us have been disappointed to learn that others fail to appreciate something that we value. If not a work of art or some palpable possession, it could be a talent or skill. Why won't Hollywood produce my script? Why can't I publish my book? Why can't I be the next American Idol? Likewise, the claimant before me that evening in Small Claims Court was asking, essentially, "Why doesn't Sotheby's recognize that this is a genuine pastel by Renoir?"

The answer lies in understanding that there must be objective criteria for assessing the value of a work of art. While gold and silver can be weighed, and the carat-weight of a diamond can be measured, the assessment of the value of a work of art is less definite, and it is this lack of definiteness that inspires the hope that the picture owned is authentic. Hope is insufficient, however, to prove authenticity.

In court, we attempt to resolve disputes and measure claims against legal standards that are, at best, mere approximations gleaned from human experience, which changes over time. But legal standards serve an important purpose. Without them, there would be little certainty regarding judicial outcomes, and a chaotic, judicial anarchy would reign. And so, the Renoir claim failed because the claimant did not satisfy the legal standards for proving the authenticity of his picture or the other causes of action arising from his allegations.

I rendered a brief decision dismissing the claim on the grounds that the claimant failed to prove that he relied to his detriment on Sotheby's opinion or that Sotheby's controls the pertinent market. The claimant then sent me an angry letter along with a notebook filled with documentation. Given his passion and apparent sincerity, not to mention my background in art history and willingness to plunge into the issues, I decided to write a decision addressing all of the possible causes of action arising from the evidence. I took pains to describe how the evidence was either inadmissible or unreliable when measured against the applicable legal standards. The claimant's sole evidence of the picture's provenance was his testimony that he had purchased the picture in 1993 from an unidentified dealer who told him that it came from an unidentified estate. He only had one real expert, one whose area of expertise was not in pastels or Renoir. His other witnesses were amateurs, and his documentary evidence was both insufficiently authenticated and addressed to the medium of the picture rather than its artist.

I also explained that it made no sense to pursue such a claim in the Small Claims Court, and I questioned whether the claimant had sought a favorable ruling from me just to buttress his claim. As the rules of evidence are relaxed in the Small Claims Part, it is easier to prove authenticity there. Hearsay evidence is admissible, for example. But even if I found in the claimant's favor, and even if I awarded him a $5,000 judgment, that would have been the end of it – a small claims judgment is not "an adjudication of any fact at issue." (New York City Civil Court Act § 1808). In other words, a small claims judgment has no *res judicata* effect.

Thus, while the claimant was free to seek a judgment far below what may have been the actual value of the picture, given that the purpose of the Small Claims Court is to facilitate the handling of minor claims without the need to hire a lawyer, he was in the wrong court. His claim was hardly minor, and it ought not to have depended on evidence that would not meet the more rigorous evidentiary standards of the higher courts. If the picture is indeed a Renoir pastel, its authenticity should be proven with reliable, admissible evidence and qualified experts. Finally, I noted that the claimant had recourse to the International Foundation for Art Research (IFAR), a nonprofit organization that provides low-cost research assistance in instances where the authenticity of a work of art is in dispute.

The decision, *Kitchen v Sotheby's*, is available at 18 Misc 3d 1132(A) (N.Y.C. Civ. Ct.) (accessible from WestLaw by searching for 18 Misc 3d 1132 and scrolling down the resulting list of decisions), at 2008 NY Slip Op 50264(U) (at http://www.nycourts.gov/reporter/slipidx/miscolo_2008_February.shtml), and in the *New York Law Journal*, March 19, 2008, at 29, col 1.

What the Lady Has Wrought:
The Ramifications of the *Portrait of Wally* Case

by Howard N. Spiegler

On July 20, 2010, on the eve of trial, the case of *United States v. Portrait of Wally*, which our firm litigated for more than ten years, was finally resolved by stipulation and order.[1] The U.S. Attorney in Manhattan commenced the case in the fall of 1999 by seizing the painting, *Portrait of Wally* by Egon Schiele ("*Wally*"), while it was on loan for exhibition at the Museum of Modern Art in New York. The case has been credited with awakening governments around the world, as well as museums, collectors, and others in the global art community, to the problem of Nazi-looted art almost seventy years after the beginning of the Nazi era in Europe. Although this case will surely be commented on and analyzed for many years to come – including in a documentary film due to be released in the spring – as the attorneys for the claimant in the case, we thought it would be helpful to provide some thoughts from our unique vantage point.

Schiele Self-Portrait. (*Public Domain, via Wikimedia Commons.*)

Basics of the Case

Herrick, Feinstein represented the Estate of Lea Bondi Jaray throughout the litigation. Ms. Bondi Jaray was a Jewish art dealer in Vienna who fled for London in 1939 after her gallery was "Aryanized" by a Nazi agent. She was also forced by him to give up a prized personal possession that she kept in her home: Egon Schiele's haunting portrait of his lover and favorite model, Wally Neuzil. After the war, *Wally* was mistakenly mixed in with the artworks of Heinrich Rieger, a collector who had perished in a concentration camp. Along with Rieger's artworks, *Wally* was transferred by Allied troops to the Austrian government. *Wally* ended up at the Austrian National Gallery (the Belvedere) despite the fact that it clearly had never been part of the Rieger collection. Ms. Bondi Jaray later asked Rudolf Leopold of Vienna, a Schiele collector, to help her get her painting back, but instead he arranged to acquire it himself and refused her demands to return it to her. Ms. Bondi Jaray died in 1969.

Eventually, Leopold established the Leopold Museum in Vienna and *Wally* became part of its collection. In the 1990s, Leopold made the fateful decision to loan several of the Museum's Schiele works, including *Wally*, to the Museum of Modern Art (MoMA) in New York. In early 1998, near the end of the exhibition, Ms. Bondi Jaray's heirs notified MoMA of their claim and then contacted the District Attorney of New York County, who subpoenaed the painting in connection with a criminal investigation that he commenced to determine if *Wally* constituted stolen property present in New York in violation of New York law. MoMA moved to quash the subpoena on the ground that New York law prohibits seizure of an artwork on loan from out of state. The case worked its way up to the state's highest court, which ruled in MoMA's favor.

Immediately thereafter, the U.S. Attorney for the Southern District of New York commenced an action to have the Leopold Museum forfeit *Wally* on the ground that it was stolen property unlawfully imported into the United States. The U.S. Customs Service seized the painting, marking the start of more than ten years of litigation during which Herrick worked closely with the U.S. government in its attempts to recover the painting and return it to the Estate of Lea Bondi Jaray.

This article, authored by Howard N. Spiegler, a partner and co-chair of the Art Law Group of Herrick, Feinstein LLP, a New York based law firm, first appeared in the Group's newsletter, Art and Advocacy, Fall 2010, Volume 7, and is reprinted with permission.

What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case (cont'd)

The case was finally settled a week before trial was scheduled to begin. Most of the issues in the case had been resolved by motion last fall and the sole remaining issue for trial was whether Leopold knew that *Wally* was stolen when he, through the Leopold Museum, imported it into the United States for the MoMA exhibition.

Ramifications of the Case and Its Settlement

Rather than attempting to analyze the many legal issues presented by the case, we highlight here several key points that concern the importance of *Wally* to Nazi-looted art claims worldwide.

1. Helping to Bring the Problem Posed by Nazi-Looted Art to the Forefront

The commencement of the New York State and federal litigation in the *Wally* case "changed everything," as a recent headline in the Art Newspaper declared. The fact that a loaned artwork at MoMA could be seized by U.S. government authorities sent shockwaves throughout the world and was a major factor in causing governments, museums, collectors, and families of Holocaust victims to focus their attention on Nazi-looted art. It helped open a global reexamination of the massive looting of art fomented by the Nazi regime, as well as the post-war policies of the U.S. and European governments that were purportedly designed to deal with looted art recovered from the Nazis but, in many cases, resulted in the failure to return it to its true owners.

A specific outgrowth of this renewed interest, and an important stimulus to its further development, was the adoption in 1998 by 44 nations of the Washington Principles concerning Nazi-looted art. One principle states that prewar owners and their heirs should be encouraged to come forward to make known their claims to art that was confiscated by the Nazis and not subsequently restituted; another states that once they do so, steps should be taken expeditiously to achieve a just and fair solution. This led several European governments to create restitution commissions to examine or reexamine claims by victims and their families. Museums all over the world, as well as governments with art collections of their own, started placing on the Internet images and information about artworks in their collections for which there was a gap in ownership history, or provenance, between the years 1933 and 1945, asking those with further information about these works to contact them and perhaps make a claim for recovery. Claims to recover Nazi-looted art have been brought all over the world over the past decade. And each year, new litigations are commenced, especially in the United States, and many settlements are announced.

2. The Role of the U.S. Government in Nazi-Looted Art Matters

What most distinguishes the *Wally* case from the many subsequent cases brought to recover Nazi-looted art is the fact that it was commenced by the U.S. government. Indeed, critics of the case repeatedly questioned why the government was committing substantial resources to what some considered to be nothing more than a title dispute between the Leopold Museum and the Bondi Jaray family – a dispute that should have been resolved in a civil lawsuit between them. Indeed, they asked why the government was involved at all.

This question is critically important because it raises the issue of whether the United States and other governments should play a significant role in trying to resolve Nazi-looted art claims. Despite the misgivings expressed by many, it is clear that this civil forfeiture action was consistent with, and fully promoted, the express public policy interests of the United States regarding Nazi-looted art. The government's complaint alleged that *Wally* was stolen by a Nazi agent from Lea Bondi in 1939, wrongfully acquired by Leopold, and then knowingly imported by the Leopold Museum into the United States in violation of the National Stolen Property Act. In other words, what was alleged against the Leopold Museum was that it knowingly trafficked stolen property in the United States. After an exhibition at one of this country's foremost museums, the Leopold was going to take this stolen property out of the country, while the heirs of the true owner, among them several U.S. citizens, stood by helplessly. The heirs could not ask a court to attach the property pending a resolution of the matter because New York State law immunizes from judicial seizure art loaned from outside New York. So the U.S. government acted to assure that the stolen property did not leave the country.

As former Chief Judge (and later Attorney General) Michael B. Mukasey determined in one of the early decisions in the case: "On its face, [the National Stolen Property Act] proscribes the transportation in foreign commerce of all property over $5,000 known to be stolen or converted. Although the museum parties and *amici* would have it otherwise, art on loan to a museum – even a 'world-renowned museum' – is not exempt." Explaining further, the court added that "if *Wally* is stolen or converted, application of [the National Stolen Property Act] will 'discourage both the receiving of stolen goods and the initial taking,' which was Congress's apparent purpose." The court concluded that "there is a strong federal interest in enforcing these laws." But the U.S. government's interest in discouraging the trafficking of stolen goods is only part of the story. The United States also led the way in urging governments around the world to develop methods to effectuate the policy of identifying Nazi-looted art and returning it to its rightful owners.

What the Lady Has Wrought: The Ramifications of the Portrait of Wally Case *(cont'd)*

It was the U.S. government that convened the 1998 conference of government officials, art experts, museum officials, and other interested parties from around the world to consider and debate the many issues raised by the continuing discovery of Nazi-looted assets including artworks, resulting in the promulgation of the Washington Principles. The U.S. government continued its participation in this area by playing a critical role in the 2009 Holocaust Era Assets Conference that took place in the Czech Republic and joining in the Terezin Declaration, which reaffirmed and expanded the Washington Principles.

One of those principles encouraged the resolution of these disputes by "alternative dispute resolution," where possible, to avoid long, drawn-out litigation. Throughout the *Wally* litigation, there was criticism that this lengthy litigation in state and federal courts was the wrong way to go about resolving Nazi-looted art claims. But alternative dispute resolution is not always possible, particularly where one of the parties is unwilling to participate in good faith. In the *Wally* case, the U.S. government brought the forfeiture action to prevent the Leopold from sending the painting to Austria, thus placing it beyond the reach of any plausible attempt at resolution. Furthermore, the Austrian government, while adopting a law in 1998 that purportedly was designed to ensure the careful review of claims for Nazi-looted artworks in the Austrian government's possession, had determined that, as a "private foundation" under Austrian law, the Leopold Museum was not covered by that statute (despite the fact that the Austrian government provided a substantial amount of its funding and appointed half of its board of directors).

In any litigation it is usually in all of the parties' interests to reach a mutually acceptable resolution as early as possible. But as is often the case, it is only after the court issues a decision resolving many of the issues in the litigation, as happened in the *Wally* case last fall, that the parties become better focused on the likely outcome of the case. But regardless of when this case was finally settled, commencing this forfeiture action and securing the artwork in the United States certainly promoted the U.S. government's interest in fairly resolving these cases and preventing the trafficking of property looted in the Holocaust.

One final note about the U.S. government's role in these cases. Although the government sometimes takes a position adverse to the claimants in these kinds of cases, especially where a foreign government is the party in possession of the disputed artwork and issues relating to sovereign immunity are involved, an important lesson of the *Wally* case for potential claimants is not to ignore the very helpful and often critical role that the U.S. government can play with respect to individual claims.

3. The Settlement Terms

Since this case involved the resolution of a government forfeiture action, there was little question that the settlement would be filed with the court and its terms open to public scrutiny and review. This is rarely the case in private civil litigations, however, where the confidentiality of the terms of settlement is almost always agreed to by both parties. As a result, the public has been made aware not only of the precise amount of monetary compensation paid to the Bondi Jaray Estate by the Leopold Museum (reflecting the painting's market value), but also of the non-monetary settlement terms, including the opening ceremony and temporary exhibition of *Wally* at the Museum of Jewish Heritage in New York before it was transported to Austria, and the specific signage that must accompany *Wally* at any exhibition sponsored by the Leopold Museum, either at the Museum or anywhere else in the world.

It is important to recognize that Nazi-looted art claims involve very deep emotions occasioned by the horrific experiences of the claimant families during the Holocaust. As a result, even where a claim can be resolved by payment of the full value of the claimed artwork, other interests of the claimant must often be satisfied before the case can be settled. These interests include "correction of the record" concerning the true provenance of the artwork, and providing public and permanent recognition of the true historical facts. The importance of exhibiting the artwork at a museum dedicated to the remembrance of the Holocaust, even temporarily, cannot be overstated. Thus, potential settlements of Nazi-looted art claims should always give heed to the importance of recognizing the emotional needs of the claimants to try to correct the historical, but still deeply felt, injustices of the Nazi era.

4. The True Impact of the Case

The real importance of the *Wally* case, however, is what it means for both claimants and possessors of Nazi-looted artwork. First, it sends a clear message throughout the world that the U.S. government will not tolerate trafficking of stolen property within its borders and will commit the resources required to see that the victims of looted art are treated appropriately. Second, it tells the families of Holocaust victims everywhere that they can stand up for their rights and persevere even in the face of intransigence and procrastination by the current possessors of their property. When their efforts seem hopeless, let them remember *Wally*.

1. *See* United States v. Portrait of Wally, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

Accounting for Bolshevik Looted Art:
Moral and Legal Imperatives

By Allan Gerson

The rightful ownership of two French impressionist paintings valued at approximately $300 million hinges on the outcome of two landmark cases currently in litigation. The first claim contests Yale's ownership of Van Gogh's *The Night Café*, which Yale University has retained since it came into its possession by virtue of a bequest in 1961. The second claim challenges the Metropolitan Museum of Art's (the "Museum") retention of Cezanne's *Madame Cezanne in the Conservatory*, which the Museum acquired by way of a similar bequest. While questions of ownership may seem conventional, some issues involving a proper understanding of the evolving nature of international law have been presented in both cases.

In 1918, the Russian Bolshevik revolutionary regime confiscated the two paintings from the Morozov family, to which Pierre Konowaloff is heir and which had theretofore retained the paintings in a museum-like setting, allowing the public full access. During 1918, Russia was engaged in civil war. Despite international law prohibiting the pillaging of art and cultural property, the Bolsheviks saw fit to lay claim to privately-owned treasures. This confiscation, without compensation and by force, mirrored the same type of theft that would occur only fifteen years later in Nazi-controlled territory during World War II. The massive public outcry that ensued over Nazi cultural theft helped to ensure that much of that property was eventually returned to its rightful owners (though identification and return of such stolen art continues to occur). The lesser-known atrocities perpetrated by the Bolsheviks have yet to strike a similar chord in the public at large. As is a common experience with art, the two Morozov family paintings changed hands over the years, ultimately coming into the possession of Yale and the Metropolitan Museum through extremely generous bequests that are nevertheless questionable as a result of their historical baggage.

Although both Yale and the Museum appear to have had reason to suspect that these paintings might not be of pure pedigree, they nonetheless accepted the valuable art. When confronted by Mr. Morozov with the Van Gogh's stolen origins, Yale reacted by filing an action to quiet title. It argued that the Act of State doctrine and the statute of limitations validated its claim of ownership. While I will not, in this paper, guess at or impugn the underlying motives of either of the specific parties in this litigation, I can speak to the issue of social responsibility and the attitudes that we, as a society, want our universities and museums to espouse. In my opinion, whether the institutions of higher learning to which we send our children for educational and personal development and in which we place valuable cultural material have an elevated duty to be especially careful about the provenance of cultural work that they acquire by purchase or gift is a proper matter of public concern.

Museums and universities aim at attracting the interest and curiosity of young minds – they exist for the benefit of the public to inspire and to educate, and they obviously should conduct themselves in keeping with the highest standards. Wholly apart from this, it is for the courts to resolve legal questions concerning the scope and definition of individual rights relating to cultural property.

The Hague Regulations of 1907 explicitly prohibited the expropriation of property not tied to military necessity during times of war. From this war-time prohibition naturally flows the presumption that international law similarly condemns the expropriation of property during times of peace without just compensation. Both scenarios arguably can be viewed as theft and thus as a basis for holding states accountable under the laws of eminent domain in connection with confiscation of private property. The protection of cultural property, specifically, has been fortified throughout the last century in the 1954 Hague Convention for the Protection of Cultural Property and additional codification recognizing the importance of cultural property as a fundamental aspect of cultural heritage. Indeed, it is arguable that its importance transcends traditional property rights and that it should be viewed by the law as a human right.

Conversely, of course, characterizing retention of cultural property as a human right might be seen as unfairly constraining the state, and that uncompensated confiscation should be treated as a state right beyond the reach of international law.

Allan Gerson is Chairman of AG International Law, PLLC, a Washington, D.C., firm specializing in complex issues of international law and politics, and serves as counsel for Mr. Pierre Konowaloff. Given the pendency of the litigation, the facts as they are presented have already appeared in publicly available court documentation. This article reflects the sole opinion of the author and is not representative in any way of any opinion held by the client in the pending litigation or co-counsel.

Accounting for Bolshshevik Art: Moral and Legal Imperatives (*cont'd*)

The Konowaloff litigation issues may bring into focus this debate, with U.S. courts called upon to choose whether in this context individual or state rights will triumph. This litigation is further complicated by whether theft by the Bolsheviks is truly demonstrative of state action; nonetheless, the overarching questions of law seems to remain the same so that the "Met" and "Yale" cases may well shape the terrain of international art law. As the courts further define cultural property rights, more avenues may open for individuals claiming to have had their rights violated by foreign states. As the landscape of international art and cultural law becomes more familiar terrain for our judiciary, there may well be renewed public demand, similar to that in the decades following World War II, for recognition of cultural property rights as an inherent human right warranting similar legal protections.

1. Peter Holquist, Making War, Forging Revolution: Russia's Continuum of Crisis (2002).
2. Greg Badisher, Documenting Nazi Plunder of European Art (1997).

Van Gogh's The Night Café. (*Public Domain, via Wikimedia Commons.*)

A Conference Report:
Human Rights and Cultural Heritage

By Lucille A. Roussin

On March 31, 2011, an all-day program sponsored by ASIL's Cultural Heritage and the Arts Interest Group and entitled "Human Rights and Cultural Heritage: from the Holocaust to the Haitian Earthquake" was held at the Benjamin N. Cardozo School of Law.[1]

To open the program, Allan Gerson, Chairman of AG Law International, a Washington law firm specializing in complex issues of international law and politics, gave a presentation entitled "Civil Litigation to Secure Cultural Property as a Human Right" that covered the continuing debate over whether there exists a recognized human right to secure restitution of cultural property or, where the victim is deprived of actual possession, the right to just compensation. Mr. Gerson included some facts about his current litigation against the Metropolitan Museum involving Cezanne's *Madame Cézanne in the Conservatory* and Yale University involving Van Gogh's *The Night Café*. Both cases involve major issues in international law, including the act of state doctrine and sovereign immunity.

The first panel of several panels that were held was entitled "Natural Disasters: Haiti and Beyond" and included Corine Wegener, the founder and President of the U.S. Committee of the Blue Shield, the organization formed under the 1954 Hague Convention on the Protection of Cultural Property During War. Ms. Wegener is a former officer of the U.S. Army and has served in Sarajevo, Iraq, and, most recently, in Haiti. Her illustrated presentation discussed what has been and is being done to preserve the cultural monuments of Haiti. She stressed that the United States cannot, on its own initiative, provide assistance; the country suffering the disaster must first request assistance. She also discussed her efforts to train local communities in conducting preservation work themselves. Also on the panel was Lisa Ackermann, Executive Vice President and Chief Operating Officer of the World Monuments Fund (New York, NY), an organization dedicated to preserving and protecting endangered ancient and historic sites around the world. Using a wonderful photo presentation, she demonstrated the evolution of heritage protection efforts in which she has been involved. In 1966, when Venice flooded, the focus was on Venice as a cultural icon and on high art. By the time Hurricane Katrina hit in 2005, however, the emphasis had shifted to include community-building, instead of just art and architecture. She drove home her point with a PowerPoint presentation about preservation efforts at the Greater Little Zion Church, which, while not an architectural gem, is the heart of a community. Her two-fold message was powerful. First, non-profit entities – even when operating on shoe-string budgets – should not be afraid to think big. Second, widespread public perception that cultural heritage preservation during times of crisis occurs at the expense of helping humans in crisis is a false dilemma. Terressa Davis, who is the Executive Director of the Lawyers Committee for Cultural Heritage Preservation and has significant experience with cultural heritage preservation – particularly in Cambodia and Sri Lanka – concluded the panel's presentation. She observed that the public tends not to realize how important cultural heritage is until after the dust settles, the floods recede, and immediate humanitarian needs are met and that cultural heritage preservation should be part of "up–front" post-war and disaster management planning.

The second panel discussed the topic of "Holocaust Era Looted Art: Research and Restitution." Marc Masurovsky, one of the leading scholars in the field and co-founder of the Holocaust Art Restitution Project, began with an historical overview of the restitution of artworks looted during the Holocaust. Inge van der Vlies, a member of the Dutch Restitution Committee in Amsterdam and a professor of Constitutional Law and Art and Law at the University of Amsterdam, addressed the workings of the Restitution Project, its processes, and recent restitutions. Lucian Simmons, Vice President and Head of Restitution Department at Sotheby's in New York detailed the process used at Sotheby's to determine whether a work of art has questionable provenance, provided accounts of some recent restitutions and settlements, and discussed how the claims had been researched. Lawrence M. Kaye, a partner and Co-Chair of the Art Law Group at Herrick, Feinstein, LLP, spoke of some recent restitutions in the major case of the Goudstikker heirs. He also discussed the case against the Norton Simon Museum for one of the most notable pieces of the Goudstikker collection, Lucas Cranach's *Adam and Eve*, in which a petition for certiorari has been filed for the case to be heard by the Supreme Court of the United States. Mr. Kaye also discussed other art cases that the firm had handled, notably including the restitution of several paintings in the Stedlijk Museum in Amsterdam to the heirs of suprematist artist Kasimir Malevich.

One of the highlights of the program was the keynote address by Howard N. Spiegler, who is the other Co-Chair of the Art Law Group of Herrick, Feinstein, LLP. Mr. Spiegler spoke on the topic of restitution of Holocaust-era looted art, including some of the highlights of the recently settled case of *United States v. Portrait of Wally*,[2] in which Mr. Spiegler's firm represented the heirs of Lea Bondi Jaray, the rightful owner of the Egon Schiele painting *Portrait of Wally*. Mr. Spiegler related a haunting testimonial by Rabbi

A Conference Report: Human Rights and Cultural Heritage (*cont'd*)

Singer: "Himmler said you have to kill all the Jews because if you don't kill them, their grandchildren will ask for their property back."

The afternoon sessions addressed, respectively, "Libraries and Archives: Restitution of Recorded Cultural Heritage" and the "Foreign Sovereign Immunities Act: A Sword and a Shield."

Another session, entitled "Libraries and Archives: Restitution of Recorded Cultural Heritage," was moderated by Cardozo's Associate Dean for Library Services and Professor of Legal Research Lynn Wishart. This session addressed the many difficult issues involved with the restitution of written documents. Jeff Spur, Secretary and Board Member of the Sabre Foundation, discussed the contested issue of the restitution of the ancient Jewish documents rescued from the flood in the Iraq Library after the American incursion into Iraq. The Library contends they are part of the history of Iraq, but there is no longer any Jewish community in Iraq. Iraqi Jews in Israel and the United States contend that the documents should be restituted to a living Jewish community. Nathan Lewin, a partner at Lewin & Lewin, LLP (Washington, D.C.), discussed his firm's representation of the successful plaintiff, Agudas Chasidei Chabad, from the perspective of international law, under which the Russian Federation is obligated to restitute documents and books to the Chabad in New York but has refused to do so. Patricia Grimsted, Senior Research Associate at the Harvard Ukrainian Research Institute, discussed the history of looting by the Einzatzstab Reichsleiter Rosenberg (ERR) in Western Europe. She noted that while the three largest ERR concentrations of books contained works that came from both West and East, far more originated in the West. She highlighted how looted collections (estimated at 600,000 books) that came to rest in the Soviet sectors were taken back as part of the Soviet trophy brigades; thus, prospects for restitution today largely hinge on whether the books and archives came to rest in the Soviet or Allied sectors. Just six years ago, it was admitted for the first time that collections were taken to Minsk in November 1945; Dr. Grimsted herself had found scraps of evidence in card catalogues that matched up with ERR confiscation lists. She questioned how the Russian people could view the cultural materials, which were taken from Jews and written in languages not commonly used in Russia, as compensation for their War-era losses and demand compensation to return them.

The panel on the Foreign Sovereign Immunities Act presented a lively discussion on the applicability of the FSIA. Professor Jennifer Anglim Kreder from Salmon P. Chase College of Law at Northern Kentucky University conducted a roundtable discussion with four experts on FSIA litigation to explore the intersection of cultural property, human rights, and the War on Terror. The four panelists, all based in Washington, D.C., included Mark N. Bravin, a partner at Winston & Strawn, LLP; Lisa Grosh, Deputy Assistant Legal Adviser, U.S. Department of State; Laina C. Lopez, an attorney at Berliner, Corcoran & Rowe, LLP; and Stuart H. Newberger, a partner at Crowell & Moring LLP. Mr. Bravin has represented both plaintiffs and defendants in FSIA litigation, including in *McKesson v. Iran*[3] (plaintiff), which has been ongoing for 25 years, and *Orkin v. The Swiss Confederation*[4] (defendant), which concerned a Van Gogh drawing sold by the plaintiff's grandmother, who was of Jewish descent, to a Swiss collector in 1933 "to help fund her family's escape from the Nazis' persecution of German Jews."[5] Ms. Grosh, who spoke in her individual capacity, was heavily involved with litigation under the "Terrorism Amendments" to the FSIA, which expressly authorized litigation against nations identified as State Sponsors of Terrorism. Ms. Lopez's firm represents the Islamic Republic of Iran, including in the *McKesson* litigation and proceedings brought by plaintiffs who obtained default judgments against Iran under the Terrorism Amendments and who seek to seize and sell Persian antiquities in U.S. museums in an effort to execute their judgments. The panel engaged in a fascinating discussion of the mechanics of FSIA litigation, including whether forced seizure and possible auction of cultural objects should be allowed to compensate victims of terrorism and whether litigation or mass claims resolution might be a better course to secure justice for terrorism and genocide victims – and public safety.

In conclusion, the conference, which brought together new voices from the cultural heritage and human rights fields, was dynamic, informative, and thought-provoking.

1. The program was organized by The Cultural Heritage and the Arts Interest Group of the American Society of International Law, The Lawyer's Committee for Cultural Heritage Preservation, Cardozo Art Law Society, and the Hofstra Law School Art and Cultural Heritage Club. The author would like to thank the program's sponsors, the Commission for Art Recovery and Herrick, Feinstein, LLP.
2. United States v. Portrait of Wally, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).
3. McKesson Corp. v. Islamic Republic of Iran, 752 F.Supp.2d 12 (D.D.C. 2010).
4. Orkin v. Swiss Confederation, No. 09 Civ. 10013 LAK, 2011 WL 856281 (S.D.N.Y. 2011).
5. *Id.* at *1.

The Fine Art of Privacy in New York

By Jenna M. Jordan

There is a fine balance between the First Amendment and privacy rights. On the one hand, freedom of expression is a fundamental right revered by Americans. On the other, Americans expect to be free to live their lives without unnecessary invasions into their privacy.

The problem with New York's privacy laws is not that artists are given First Amendment protection, but that many plaintiffs are denied a remedy for actual harm. This is most problematic when plaintiffs are portrayed in a false light. The First Amendment entrusts artists with a great responsibility, but the lack of a remedy for false light eliminates a valuable safeguard against abuse of this public trust.

The stifling of artistic expression is not the answer. The freedom of expression is tantamount to the American way of life and lies within the bedrock of our Constitution. However, there are limitations placed on speech. Defamation is a prime example of such a limitation. Approximately two-thirds of U.S. states recognize the related cause of action for false light.[1] New York is among the one-third that does not extend privacy rights to instances where statements merely portray an individual in a false light.[2] This leaves private citizens vulnerable to invasions of privacy without the balance-shifting benefit of encouraging the free flow of ideas.

Consider also the situation where a photograph is taken of a deeply religious person whose beliefs are offended by the creation of graven images. In New York, the artist's right to take the photograph will trump the subject's right to freely exercise his or her religion.[3] This was the case for Erno Nussenzweig, a Hasidic Jew, when his picture was taken by artist Philip-Lorca diCorcia as he passed through Times Square.[4] DiCorcia was purposefully taking candid photographs (i.e., photographs taken without the subject's knowledge).[5] DiCorcia subsequently made no attempts to obtain the consent of any of the photographed persons.[6] He further refused to cease use of the image upon notice from Nussenzweig, relying on his constitutional right to free speech, a determination with which the court that subsequently heard the case agreed.[7]

A key element in the *Nussenzweig* case was the identity of the photographer. The Constitution protects only state actions that interfere with the free exercise of religion.[8] DiCorcia was merely a private citizen.[9] Therefore, without the ability to sue for portraying Nussenzweig in a "disgraceful light within his community" where "people might think he sold out for a few bucks,"[10] Nussenzweig was left completely unarmed, legally, and without an adequate remedy.

Currently, New York plaintiffs are strictly limited to statutory recovery for violations of their privacy.[11] There are no supplementary common law rights to privacy. The right of publicity protects against only unlicensed uses of one's likeness for the purposes of advertising or trade within the state.[12] Defamation actions in New York require that the plaintiff establish the following elements: (1) that the defendant made a false statement, (2) that the statement was published to a third party without privilege or authorization, (3) that the defendant was at fault, and (4) that publication of the statement caused special harm or was defamation per se.[13]

One troubling aspect of this legal deficiency is that it prevents any common law recovery for false light within the state.[14] For example, if an artist included a sketched portrait of her ex-husband in an exhibition focusing mainly on marital rape but not depicting him as committing the crime, then he would have no recourse in New York.[15] The truthful sketch of his likeness would not constitute defamation; the use of his likeness would be protected by the First Amendment; and the law would not provide an otherwise meritorious claim for false light.

Somewhat analogous to the artist's freedom of speech is the hallowed protection of the press. In a case involving an arguably more offensive invasion of privacy, the defendant published explicit photos of two deceased children.[16] The photographer snapped the pictures at the scene where the two children had suffocated inside a refrigerator, to be used in a sensationalized story he was authoring about the tragedy.[17] The pleas of the grief-stricken parents were ignored,[18] and the court bowed to the press's unfettered ability to publish that which is "newsworthy."[19]

Another issue arises when an individual has voluntarily posed for an artist and the artist uses the person's likeness in a way unanticipated by the model. For example, a fourteen-year-old model posed for a teen magazine without knowing the exact use intended for the photographs.[20] The magazine subsequently used her photographs to illustrate an anonymous letter regarding teen sexual promiscuity and alcohol abuse.[21] Specifically, the article stated that the young girl had had sexual relations with her boyfriend and his two friends while intoxicated.[22] Neither party disputed the fact that the plaintiff was not the author of the letter.[23] Nonetheless, the court held that the fourteen-year-old model did not have a cause of action in the state of New York.[24]

The conclusion to be drawn from the above-mentioned illustration is that a plaintiff should be informed about

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the intended uses of her likeness. The court's holding, however, encourages subversive tactics to elicit the consent of individuals for portrayals that would otherwise be met with staunch opposition. A remedy for false light would incentivize full disclosure without risking a chilling effect on speech. In the fourteen-year-old model's case, the magazine could have published the article without illustrative photographs. For example, it could have replaced the pictures with cartoons. Instead, the magazine concealed the facts while the law left this young girl helpless to defend against such predatory behavior.

The First Amendment is an enormous hurdle for plaintiffs alleging harm caused by a work of art to overcome. Art is, by definition, creative expression.[25] It is a means by which people disseminate ideas.[26] Some commentators interpret art as encompassing all forms of human expression.[27] New York courts have soundly established that this type of speech is unequivocally entitled to First Amendment protection.[28] Therefore, the threshold question for plaintiffs is what qualifies as art.

There are four categories of visual art that are presumptively characterized as expression in New York: (1) paintings, (2) photographs, (3) prints, and (4) sculptures.[29] This leaves quite a bit of visual art outside of the presumptively protected categories. For example, video art is excluded entirely. However, New York is generally liberal in application of these categories.[30] Do Leonardo da Vinci's drawings fit into any of these boxes? Are Jean-Michel Basquiat's graffiti works paintings? What is the difference between a vacation photograph taken by a family at the beach that catches a topless sunbather, a voyeur's photograph taken of the same sunbather, and an artist's photograph of the same?

A few plaintiffs may claim a violation of their publicity rights. The cause of action requires (1) use of the plaintiff's name, portrait, picture, or voice, (2) for advertising or trade purposes, (3) without the plaintiff's written consent. [31] For example, would a limited edition Fender guitar bearing an unauthorized painting of John Mayer[32] be a work of art?[33] Or would it be an invasion of the musician's right of publicity? The painting would most certainly qualify as a portrait, and it was created without Mayer's approval. But is it being used for purposes of trade? What if instead of John Mayer it was the image of President George Washington? This distinction is critical because the right of publicity is only at issue if the painting is for the purposes of trade rather than artistic expression.

The New York courts have developed a test to help determine whether a work of art falling outside of the presumptively protected categories[34] is shielded by the First Amendment. This test focuses on the predominant purpose of the piece.[35] A plaintiff will be unsuccessful with a privacy right claim if the offending object has a "predominantly expressive purpose"[36] because the courts have stated that the right of privacy "must fall to the constitutionally protected right to freedom of speech."[37] This is the price society must be prepared to pay for the free flow of ideas.[38]

The predominant purpose of the art does not fail to qualify as having a predominately expressive purpose simply because it is sold.[39] Even reproductions of items to be sold in a museum gift shop will not forfeit First Amendment protection.[40] However, the speech exception will be lost where the "essential nature" of the "artistic expression" is changed.[41] Therefore, the boundary between protected art and mere unlicensed commercial use of a person's likeness lies where the commercial nature overcomes the expressive purpose of the work. But even if a plaintiff succeeds in establishing that an offensive work is not art protected by the First Amendment, he or she will still be left with only two causes of action under New York privacy law, defamation and the right of publicity.

Adding a false light cause of action would not threaten an artist's ability to create. Artists will continue to be afforded great leeway under the "public interest" exception traditionally associated with the press.[42] The First Amendment will protect instances where a photograph is taken of a person passing through a public place.[43] Videographers may still record the happenings around them.[44] Autobiographers will still be free to recount their stories.[45] They will merely have to be sure that they are producing honest commentary.

The tension between individuals' rights to privacy and the safeguard of the First Amendment could be tempered with a right of action for false light. Artists would still be free to exercise their freedom of expression, but the public would be given a weapon to guard against reckless and malicious invasions of privacy. Art would still be recognized as speech. The First Amendment would still protect matters of public interest. Commentary on real events would be fair game. But there would be an aspect of responsibility ensuring the protection of individuals.

There is no rational need to extend the freedom of expression to false speech masquerading as art. Such speech threatens the integrity of creative expression and subjects individuals to unnecessary harm. Protection against such opportunistic expression is, therefore, necessary to preserve the public's faith in true artistic expression.

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1. Rasmussen, Kristen, Comment, *Shedding (False) Light: How the Florida Supreme Court's Rejection of the Tort Falsely Implies Protection for Media Defendants*, 61 Fla. L. Rev. 911, 914 n.19 (2009).
2. *See* Brockman v. Frank, 149 Misc. 2d 399, 402 (N.Y. Sup. Ct. 1991).
3. Kenneth Schacter, one of DiCorcia's lawyers, was so bold as to state that DiCorcia's "First Amendment rights . . . trump his religious beliefs." *Judge Dismisses Lawsuit Over Orthodox Jew's Times Square Photo*, Worldwide Religious News, Feb. 14, 2006, http://wwrn.org/articles/20434/?&place=united-states&section=judaism.

The Fine Art of Privacy in New York (cont'd)

4. Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832 (N.Y. Sup. Ct. Feb. 8, 2006).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Judge Dismisses Lawsuit Over Orthodox Jew's Times Square Photo, *supra* note 3.
11. Arrington v. N.Y. Times Co., 55 N.Y.2d 433, 440 (N.Y. 1982).
12. Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832 (N.Y. Sup. Ct. Feb. 8, 2006).
13. Dillon v. City of New York, 261 A.D.2d 34 (N.Y. App. Div. 1999).
14. *Arrington*, 55 N.Y.2d at 442.
15. *Cf.* Bonome v. Kaysen, No. 032767, 2004 WL 1194731 (Mass. Super. Ct. Mar. 3, 2004), in which the author of a semi-autobiographical book included a character based on her previous boyfriend. Enough of the facts remained unchanged regarding his character that he was easily recognizable to those that knew the couple. Scenes in the book suggested unsubstantiated claims of sexual aggression and even rape on the part of the plaintiff, yet he was denied an action for false light. *See also* Gaeta v. Home Box Office, 645 N.Y.S.2d 707 (N.Y. Civ. Ct. 1996) (denying recovery to a woman who was filmed while watching a nude photo shoot in an erotic documentary).
16. Costlow v. Cusimano, 34 A.D.2d 196 (N.Y. App. Div. 1970).
17. *Id.*
18. *Id.*
19. *Id.*
20. Messenger v. Gruner + Jahr Printing & Publ'g, 94 N.Y.2d 436 (N.Y. 2000).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Black's Law Dictionary (9th ed. 2009).
26. Goldstein, Ariella, Comment, *Privacy From Photography: Is There A Right Not To Be Photographed Under New York State Law?*, 26 Cardozo Arts & Ent. L.J. 233 (2008).
27. Roberta Rosenthal Kwall, The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis, 70 Ind. L.J. 47, 67 (1994) (stating that "all different art forms embodying human expression").
28. Hoepker v. Kruger, 200 F. Supp. 2d. 340, 349 (S.D.N.Y. 2002).
29. Mastrovincenzo v. City of New York, 435 F.3d 78, 81 (2d Cir. 2006).
30. *See* Simeonov v. Tiegs, 602 N.Y.S.2d 1014 (N.Y. Civ. Ct. 1993); Hoepker v. Kruger, 200 F. Supp. 2d. 340 (S.D.N.Y. 2002).
31. Burck v. Mars, Inc., 571 F. Supp. 2d 446, 451 (S.D.N.Y. 2008). New York's right of publicity is codified in N.Y. Civ. Rights §§ 50-51 (2011).
32. John Mayer is an internationally recognized pop musician and guitarist. See John Mayer, http://www.johnmayer.com/ (last visited June 28, 2011).
33. Fender's "Marilyn Monroe" Stratocaster is an example of a similar use of a celebrity's image on an instrument. See http://www.strat-central.com/c2.htm.
34. The categories are as follows: (1) paintings, (2) photographs, (3) prints, and (4) sculptures. *Mastrovincenzo*, 435 F.3d at 93-94.
35. *Id.* at 96.
36. *Id.*
37. Simeonov v. Tiegs, 602 N.Y.S.2d 1014, 1018 (N.Y. Civ. Ct. 1993). *See also* Creel v. Crown Publishers, 496 N.Y.S.2d 219 (N.Y. App. Div. 1985) (plaintiff's photograph on a nude beach was published in a travel guide without her consent. The photographs were not art, but were nonetheless given First Amendment protection under the "public interest" exception).
38. Arrington v. N.Y. Times Co., 55 N.Y.2d 433, 442 (N.Y. 1982) ("an inability to vindicate a personal predilection for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow freely").
39. *Simeonov*, 602 N.Y.S.2d at 1018. *See also* Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832 , at *6 (N.Y. Sup. Ct. Feb. 8, 2006) (stating that even a "profit generating motive will not convert an otherwise newsworthy use" to that of trade); Dworkin v. Hustler, 867 F.2d 1188 (9th Cir. 1989).
40. Hoepker v. Kruger, 200 F. Supp. 2d. 340, 354 (S.D.N.Y. 2002) (recognizing that art may maintain its artistic character even after being sold).
41. *Id.*
42. *See Creel*, 496 N.Y.S.2d at 219.
43. Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832 (N.Y. Sup. Ct. Feb. 8, 2006).
44. Gaeta v. Home Box Office, 645 N.Y.S.2d 707, 710 (N.Y. Civ. Ct. 1996) (permitting footage of the plaintiff stopping to watch a nude photo shoot on a public street to be included in an erotic documentary over the plaintiff's objections on the basis that her presence at the event constituted a "matter of some public interest" and was therefore within the ambit of the First Amendment).
45. *See* Anonsen v. Donahue, 857 S.W.2d 700 (Tex. App. 2003) (holding that a grandmother was permitted to use her name and likeness when she exposed her family's secret regarding the fact that her son was actually her grandson – the child had been conceived as a result of the rape of her daughter by a previous marriage committed by her second husband).

PERVERSE SEA CHANGE:
Underwater Cultural Heritage in the Ocean is Facing Chemical and Physical Changes

By Mark J. Spalding

Is the loss of our Underwater Cultural Heritage accelerating?

The term "underwater cultural heritage"[1] (UCH) refers to all remnants of human activities lying on the seabed, on riverbeds, or at the bottom of lakes. It includes shipwrecks and artifacts lost at sea and extends to prehistoric sites, sunken towns, and ancient ports that were once on dry land but now are submerged due to manmade, climatic, or geological changes. It can include works of art, collectable coinage, and even weapons. This global underwater trove forms an integral part of our common archaeological and historical heritage. It has the potential to provide invaluable information about cultural and economic contacts and migration and trade patterns.

The saline ocean is known to be a corrosive environment. In addition, currents, depth (and related pressures), temperature, and storms affect how UCH is protected (or not) over time. A lot of what once was considered stable about such ocean chemistry and physical oceanography is now known to be shifting, often with unknown consequences. The pH (or acidity) of the ocean is changing — unevenly across geographies — as is salinity, because of melting ice caps and freshwater pulses from flooding and storm systems. As the result of other aspects of climate change, we are seeing rising water temperatures overall, shifting global currents, sea level rise, and increased weather volatility. Despite the unknowns, it is reasonable to conclude that the cumulative impact of these changes is not good for underwater heritage sites. Excavation is usually limited to sites that have immediate potential to answer important research questions or which are under threat of destruction. Do museums and those responsible for making determinations about the disposition UCH have the tools for assessing and, potentially, predicting the threats to individual sites that come from changes in the ocean?

What is this ocean chemistry change?

The ocean absorbs substantial amounts of the carbon dioxide emissions from cars, power plants, and factories in its role as the planet's largest natural carbon sink. It cannot absorb all such CO2 from the atmosphere in marine plants and animals. Rather, the CO2 dissolves in the ocean water itself, which decreases the pH of the water, making it more acidic. Corresponding with the increase in carbon dioxide emissions in recent years, the pH of the ocean as a whole is falling, and as the problem becomes more widespread, it is expected to adversely affect the ability of calcium-based organisms to thrive. As the pH drops, coral reefs will lose their color, fish eggs, urchins, and shellfish will dissolve before maturation, kelp forests will shrink, and the underwater world will become gray and featureless. It is expected that color and life will return after the system re-balances itself, but it is unlikely that mankind will be here to see it.

The chemistry is straightforward. The forecasted continuation of the trend towards greater acidity is broadly predictable, but it is hard to predict with specificity. The effects on species who live in calcium bicarbonate shells and reefs are easy to imagine. Temporally and geographically, it is harder to predict harm to oceanic phytoplankton and zooplankton communities, the basis of the food web and thus of all commercial ocean species harvests. With regard to UCH, the decrease in pH may be small enough that it has no substantial negative effects at this point. In short, we know a lot about "how" and "why" but little about "how much," "where," or "when."

In the absence of a timeline, absolute predictability, and geographic certainty about the effects of ocean acidification (both indirect and direct), it is challenging to develop models for present and projected effects on UCH. Moreover, the call by members of the environmental community for precautionary and urgent action on ocean acidification to restore and promote a balanced ocean will be slowed by some who demand more specifics before acting, such as what thresholds will affect certain species, which parts of the ocean will be most affected, and when these consequences are likely to occur. Some of the resistance will come from scientists who want to do more research, and some will come from those who want to maintain the fossil-fuel-based status quo.

One of the world's leading experts on underwater corrosion, Ian McLeod of the Western Australian Museum, noted the potential effects of these changes on UCH:

> All in all I would say that increased acidification of the oceans will most likely cause increased rates of decay of all materials with the possible exception of glass, but if the temperature increases as well then the overall net effect of more acid and high-

Mark J. Spalding, J.D., M.P.I.A., is President of The Ocean Foundation in Washington, D.C. He wishes to thank Lea Howe for research assistance.

PERVERSE SEA CHANGE (cont'd)

er temperatures would mean that conservators and maritime archaeologists will find that their underwater cultural heritage resources are diminishing.[2]

We may not yet be able to evaluate fully the cost of inaction on affected shipwrecks, submerged cities, or even more recent underwater art installations. We can, however, begin to identify the questions that we need to answer. And we can start to quantify the damages that we have seen and that we expect, which we have already done, for example, in observing the deterioration of the USS Arizona in Pearl Harbor and the USS Monitor in the USS Monitor National Marine Sanctuary. In the case of the latter, NOAA accomplished this by pro-actively excavating items from the site and seeking ways to protect the hull of the vessel.

Changing ocean chemistry and related biological effects will endanger UCH

What do we know about the effect of ocean chemistry changes on UCH? At what level does change in pH have an impact on artifacts (wood, bronze, steel, iron, stone, pottery, glass, etc.) in situ? Again, Ian McLeod has provided some insight:

> With regard to underwater cultural heritage in general, the glazes on ceramics will deteriorate more rapidly with faster rates of leaching of the lead and tin glazes into the marine environment. Thus, for iron, increased acidification would not be a good thing as artifacts and the reef structures formed by concreted iron shipwrecks would collapse faster and would be more prone to damage and collapse from storm events as the concretion would not be as strong or as thick as in a more alkaline microenvironment.
>
> Depending on their age, it is likely that glass objects might fare better in a more acidic environment as they tend to be weathered by an alkaline dissolution mechanism that sees the sodium and calcium ions leach out into the sea water only to be replaced by acid resulting from hydrolysis of the silica, which produces silicic acid in the corroded pores of the material.
>
> Objects such as materials made from copper and its alloys will not fare so well as the alkalinity of the seawater tends to hydrolyze acidic corrosion products and helps to lay down a protective patina of copper(I) oxide, cuprite, or Cu2O, and, as for other metals such as lead and pewter, the increased acidification will make corrosion easier as even the amphoteric metals such as tin and lead will not respond well to increased acid levels.

An example of damage from shipworms.
(Courtesy of Rygel, M.C., via Wikimedia Commons.)

> With regard to organic materials the increased acidification may make the action of wood boring mollusks less destructive, as the mollusks will find it harder to breed and to lay down their calcareous exoskeletons, but as one microbiologist of great age told me, . . . as soon as you change one condition in an effort to correct the problem, another species of bacterium will become more active as it appreciates the more acidic microenvironment, and so it is unlikely that the net result would be of any real benefit to the timbers.

Some "critters" damage UCH, such as gribbles, a small crusta-

An actual shipworm.
(Courtesy of the U.S. Geological Survey, via Wikimedia Commons.)

PERVERSE SEA CHANGE (*cont'd*)

cean species, and shipworms. Shipworms, which are not worms at all, are actually marine bivalve mollusks with very small shells, notorious for boring into and destroying wooden structures that are immersed in seawater, such as piers, docks, and wooden ships. They are sometimes called "termites of the sea."

Shipworms accelerate UCH deterioration by aggressively boring holes in wood. But, because they have calcium bicarbonate shells, shipworms could be threatened by ocean acidification. While this may be beneficial for UCH, it remains to be seen whether shipworms will actually be affected. In some places, such as the Baltic Sea, salinity is increasing. As a result, salt-loving shipworms are spreading to more wrecks. In other places, warming ocean waters will decrease in salinity (due to melting freshwater glaciers and pulse freshwater flows), and thus shipworms that depend on high salinity will see their populations will decrease. But questions remain, such as where, when, and, of course, to what degree?

Are there beneficial aspects to these chemical & biological changes? Are there any plants, algae, or animals that are threatened by ocean acidification that somehow protect UHC? These are questions for which we have no real answers at this point and are unlikely to be able to answer in a timely fashion. Even precautionary action will have to be based on uneven predictions, which might be indicative of how we proceed going forward. Thus, consistent real-time monitoring by conservators is of crucial importance.

Physical ocean changes

The ocean is constantly in motion. The movement of water masses due to winds, waves, tides, and currents has always affected underwater landscapes, including UCH. But are there increased effects as these physical processes become more volatile due to climate change? As climate change warms the global ocean, the patterns of currents and gyres (and thus heat redistribution) change in a way that fundamentally affects the climate regime as we know it and accompanies the loss of global climate stability or, at least, predictability. The basic consequences are likely to occur more rapidly: sea-level rise, alterations of rainfall patterns and storm frequency or intensity, and increased siltation.

The aftermath of a cyclone that hit the shore of Australia in early 2011[3] illustrates the effects of physical ocean changes on UCH. According to the Principal Heritage Officer of the Australian Department of Environment and Resource Management, Paddy Waterson, Cyclone Yasi affected a wreck called the *Yongala* near Alva Beach, Queensland. While the Department is still assessing the impact of this powerful tropical cyclone on the wreck,[4] it is known that the overall effect was to abrade the hull, removing most soft corals and a significant amount of hard corals. This exposed the surface of the metal hull for the first time in many years, which will negatively affect its conservation. In a similar situation in North America, the authorities of Florida's Biscayne National Park are concerned about the effects of hurricanes on the 1744 wreck of the *HMS Fowey*.

Currently, these issues are on track to worsen. Storm systems, which are becoming more frequent and more intense, will continue to disturb UCH sites, damage marking buoys, and shift mapped landmarks. In addition, debris from tsunamis and storm surges can easily be swept from the land out to sea, colliding with and potentially damaging everything in its path. Sea level rise or storm surges will result in the increased erosion of shorelines. Siltation and erosion may obscure all sorts of nearshore sites from view. But there may be positive aspects as well. Rising waters will change the depth of known UCH sites, increasing their distance from shore but providing some added protection from wave and storm energy. Likewise, shifting sediments may reveal unknown submerged sites, or, perhaps, sea level rise will add new underwater cultural heritage sites as communities are submerged.

In addition, the accumulation of new layers of sediment and silt will likely require additional dredging to meet transportation and communication needs. The question remains as to what protections should be afforded to in situ heritage when new channels have to be carved or when new power and communication transmission lines are installed. Discussions of implementing renewable offshore energy sources further complicate the issue. It is, at best, questionable whether the protection of UCH will be given priority over these societal needs.

What can those interested in international law expect in relation to ocean acidification?

In 2008, 155 leading ocean acidification researchers from 26 countries approved The Monaco Declaration.[5] The Declaration may provide the beginning of a call to action, as its section headings reveal: (1) ocean acidification is underway; (2) ocean acidification trends are already detectable; (3) ocean acidification is accelerating and severe damage is imminent; (4) ocean acidification will have socioeconomic impacts; (5) ocean acidification is rapid, but recovery will be slow; and (6) ocean acidification can be controlled only by limiting future atmospheric CO2 levels.[6]

Unfortunately, from the perspective of international marine resources law, there has been an imbalance of equities and insufficient development of facts relating to UCH protection. The cause of this problem is global, as are the potential solutions. There is no specific international law related to ocean acidification or its effects on natural resources or submerged heritage. Extant international marine resources treaties provide little leverage to force large CO2

emitting nations to change their behaviors for the better.

As with broader calls for climate change mitigation, collective global action on ocean acidification remains elusive. There may be processes that can bring the issue to the attention of the parties to each of the potentially relevant international agreements, but simply relying on the power of moral suasion to embarrass the governments into acting seems overly optimistic, at best.

Relevant international agreements establish a "fire alarm" system that could call attention to the ocean acidification problem at the global level. These agreements include the UN Convention on Biological Diversity, the Kyoto Protocol, and the UN Convention on the Law of the Sea. Except, perhaps, when it comes to protecting key heritage sites, it is difficult to inspire action when the harm is mostly anticipated and widely dispersed, rather than being present, clear, and isolated. Damage to UCH may be a way to communicate the need for action, and the Convention on the Protection of the Underwater Cultural Heritage may provide the means for doing so.

The UN Framework Convention on Climate Change and the Kyoto Protocol are the main vehicles for addressing climate change, but both have their shortcomings. Neither refers to ocean acidification, and the "obligations" of the parties are expressed as voluntary. At best, the conferences of the parties to this convention offer the opportunity to discuss ocean acidification. The outcomes of the Copenhagen Climate Summit and the Conference of the Parties in Cancun do not bode well for significant action. A small group of "climate deniers" have devoted significant financial resources to making these issues a political "third rail" in the United States and elsewhere, further limiting political will for strong action.

Similarly, the UN Convention on the Law of the Sea (UNCLOS) does not mention ocean acidification, although it does expressly address the rights and responsibilities of the parties in relation to protection of the ocean, and it requires the parties to protect underwater cultural heritage under the term "archaeological and historical objects." Articles 194 and 207, in particular, endorse the idea that parties to the convention must prevent, reduce, and control pollution of the marine environment. Perhaps the drafters of these provisions did not have harm from ocean acidification in mind, but these provisions may nevertheless present some avenues to engage the parties to address the issue, especially when combined with the provisions for responsibility and liability and for compensation and recourse within the legal system of each participating nation. Thus, UNCLOS may be the strongest potential "arrow" in the quiver, but, importantly, the United States has not ratified it.

Arguably, once UNCLOS came into force in 1994, it became customary international law and the United States is bound to live up to its provisions. But it would be foolish to argue that such a simple argument would pull the United States into the UNCLOS dispute settlement mechanism to respond to a vulnerable country's demand for action on ocean acidification. Even if the United States and China, the world's two largest emitters, were engaged in the mechanism, meeting the jurisdictional requirements would still be a challenge, and the complaining parties likely would have a hard time proving harm or that these two largest emitter governments specifically caused the harm.

Two other agreements bear mentioning, here. The UN Convention on Biological Diversity does not mention ocean acidification, but its focus on conservation of biological diversity certainly is triggered by concerns about ocean acidification, which have been discussed at various conferences of the parties. At the very least, the Secretariat is likely to monitor actively and report on ocean acidification going forward. The London Convention and Protocol and the MARPOL, the International Maritime Organization agreements on marine pollution, are too narrowly focused on dumping, emitting, and discharge by ocean-going vessels to be of real assistance in addressing ocean acidification.

The Convention on the Protection of the Underwater Cultural Heritage is nearing its 10th anniversary in November 2011. Not surprisingly, it did not anticipate ocean acidification, but it does not even mention climate change as a possible source of concern — and the science was certainly there to underpin a precautionary approach. Meanwhile, the Secretariat for the UNESCO World Heritage Convention has mentioned ocean acidification in relation to natural heritage sites, but not in the context of cultural heritage. Clearly, there is a need to find mechanisms to integrate these challenges into planning, policy, and priority setting to protect cultural heritage at the global level.

Conclusion

The complex web of currents, temperatures, and chemistry that fosters life as we know it in the ocean is at risk of being irreversibly ruptured by the consequences of climate change. We also know that ocean ecosystems are very resilient. If a coalition of the self-interested can come together and move quickly, it is probably not too late to shift public awareness toward promotion of the natural re-balancing of ocean chemistry. We need to address climate change and ocean acidification for many reasons, only one of which is UCH preservation. Underwater cultural heritage sites are a critical part of our understanding of global maritime trade and travel as well as the historic development of technologies that have enabled it. Ocean acidification and climate change pose threats to that heritage. The probability of irreparable harm seems high. No mandatory rule of law triggers reduction of CO2 and related greenhouse gas emissions. Even the statement of international good intentions expires in 2012. We have to use existing laws to urge new international policy, which should address all of the ways and means we have at our disposal to accomplish the following:

- Restore coastal ecosystems to stabilize seabeds and shorelines to reduce the impact of climate change consequences on nearshore UCH sites;
- Reduce land-based pollution sources that reduce marine resilience and adversely affect UCH sites;
- Add evidence of potential harm to natural and cultural heritage sites from changing ocean chemistry to support existing efforts to reduce CO2 output;
- Identify rehabilitation/compensation schemes for ocean acidification environmental damage (standard polluter pays concept) that makes inaction far less of an option;
- Reduce other stressors on marine ecosystems, such as in-water construction and use of destructive fishing gear, to reduce potential harm to ecosystems and UCH sites;
- Increase UCH site monitoring, identification of protection strategies for potential conflicts with shifting ocean uses (e.g., cable laying, ocean-based energy siting, and dredging), and more rapid response to protecting those in jeopardy; and
- Development of legal strategies for pursuit of damages due to harm to all cultural heritage from climate-change-related events (this may be tough to do, but it is a strong potential social and political lever).

In the absence of new international agreements (and their good faith implementation), we have to remember that ocean acidification is just one of many stressors on our global underwater heritage trove. While ocean acidification certainly undermines the natural systems and, potentially, UCH sites, there are multiple, interconnected stressors that can and should be addressed. Ultimately, the economic and social cost of inaction will be recognized as far exceeding the cost of acting. For now, we need to set in motion a precautionary system for protecting or excavating UCH in this shifting, changing ocean realm, even as we work to address both ocean acidification and climate change.

1. For additional information about the formally recognized scope of the phrase "underwater cultural heritage," *see* United Nations Educational, Scientific and Cultural Organization (UNESCO): Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40.
2. All quotations, both here and throughout the remainder of the article, are from email correspondence with Ian McLeod of the Western Australian Museum. These quotations may contain minor, non-substantive edits for clarity and style.
3. Meraiah Foley, *Cyclone Lashes Storm-Weary Australia*, N.Y. Times, Feb. 3, 2011, at A6.
4. Preliminary information about the effect on the wreck is available from the Australian National Shipwreck Database at http://www.environment.gov.au/heritage/shipwrecks/database.html.
5. Monaco Declaration (2008), *available at* http://ioc3.unesco.org/oanet/Symposium2008/MonacoDeclaration.pdf.

UNESCO to Recommend a New Approach for Protecting Historic Cities:
Bringing Technocracy to the People?

By Maggie Gardner

A new train station complex with high-rise office towers; an eye-catching skyscraper on the outskirts of town; an urban redevelopment project that replaces crowded neighborhoods with wide boulevards; a new bridge across a major river – such development projects are typical responses by cities to global economic forces and the modern demands of citizenry.[1] But what happens if the city has such "outstanding universal value" that its current form must, according to an international treaty regime, be "preserved as part of the world heritage of mankind as a whole"?[2]

The pressures of development have been colliding with preservation efforts in historic cities with increasing regularity over the last ten years. In 2009, the World Heritage Committee took the extreme step of removing Dresden Elbe Valley (Germany) from the World Heritage List after a major bridge was built in the middle of the protected cultural landscape.[3] In an attempt to avoid further dramatic confrontations, the World Heritage regime has developed a new framework to help all levels of government – local, regional, national, and international – balance the tensions between economic development and historic preservation.

At its thirty-sixth session this fall, the General Conference of UNESCO is expected to adopt this framework as a new Recommendation on the Historic Urban Landscape (HUL). While the Recommendation will be non-binding "soft" law (and is intended for use by all historic cities, whether or not they are inscribed on the World Heritage List), it will further institutionalize a normative shift in the World Heritage regime away from static preservation efforts and toward a more complex concept of "living" heritage in a "layered" landscape, in which change is not necessarily a bad word.[4]

In practical terms, the Recommendation will encourage states to increase stakeholder participation in heritage preservation decision-making, a trend that should improve the democratic legitimacy of the World Heritage regime. The challenge for the World Heritage Centre and Committee, however, will be to accept whatever consensuses are reached locally through these decentralized decision-making processes.

I. The World Heritage Regime

The proposed HUL Recommendation reflects the long-term evolution of the World Heritage regime. Although the regime is based on a separate treaty which provides for largely autonomous decision-making, it is situated under the UNESCO umbrella and effectively operates as a sub-organ.[5] The 187 states that are parties to the World Heritage Convention comprise the General Assembly of States Parties, a fully representational body that nevertheless has very narrow competencies: to set the budget and to elect the members of the World Heritage Committee.[6]

The World Heritage Committee, with twenty-one members drawn from the States Parties, performs the core functions of the World Heritage regime. It inscribes sites onto the World Heritage List (and can delist sites, as in the Dresden Elbe Valley case); maintains a "list of World Heritage in Danger"; decides on requests for assistance for the "protection, conservation, presentation, or rehabilitation" of inscribed heritage sites; and adopts rules of procedure and statements of general policy and priorities.[7]

In making these decisions under tight time constraints at its annual sessions, the Committee relies heavily on several expert advisory bodies, specifically the International Council of Monuments and Sites (ICOMOS), the International Union for Conservation of Nature and Natural Resources (IUCN), and the International Centre for the Preservation and Restoration of Cultural Property (ICCROM). As a result, these official advisory bodies "regularly predetermine" the ultimate decisions of the Committee.[8]

The Convention provides that the UNESCO Director-General appoint a Secretariat to assist the Committee, and in 1992, the World Heritage Centre was established within the UNESCO structure to provide greater assistance. This Centre, with its permanent staff, has arguably increased the autonomous and technocratic nature of the World Heritage regime.

States still play a pivotal role, however, in initiating the two key functions of

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the World Heritage Committee: sites for the World Heritage List must be nominated by the territorial state and the territorial state must submit the request for financial assistance to help preserve a particular site.[9] There is also no real enforcement mechanism under the Convention. If the Committee is displeased by the territorial state's actions, it can only threaten to delist the site – an outcome that is generally a lose-lose situation – or move the site to the list of World Heritage in Danger, a "naming and shaming" tool that has proven fairly effective.[10]

Thus the World Heritage regime can be criticized as an autonomous technocracy removed from the oversight of states – or it can be lauded as a complex system of checks and balances that builds consensus and ensures state consent on key decisions while insulating much decision-making from political pressure.[11]

Even if the latter view is taken, there is one key component of democratic legitimacy lacking in the World Heritage regime, as it is currently implemented: that of stakeholder participation at the State level.

To be sure, the Committee has recognized that "partners" in nominating and managing protected sites include "individuals and other stakeholders, especially local communities, governmental, non-governmental and private organizations and owners." It also modified its Operating Guidelines in 1999 to call explicitly on States to prepare their nominations for the World Heritage List "with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties and partners."[12]

But these are not enforceable *requirements*, and so far most states have not implemented open procedures for the nomination of sites. Although the World Heritage regime has thus evolved toward a more participatory ethos, it is still criticized for the closed processes used at the national level.[13] The proposed HUL Recommendation may help close that gap.

II. Shifting Norms and Their Legal Implications

Two trends mark the evolution of the World Heritage regime. First is this shift from reliance on technocratic expertise towards broader participation in decision-making, particularly in regard to the determination of relevant values. The second is a parallel shift from a static preservation perspective, with a focus on protecting particular monuments or buildings (indeed, one of the major impetuses for the World Heritage Convention was the construction of Aswan Dam in Egypt and the international effort in the 1960s to save important archaeological heritage[14]), toward a more contextual view of heritage and the safeguarding of "cultural significance."[15]

UNESCO's earliest Recommendation regarding the preservation of urban landscapes – the 1962 *Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites* – generally treated landscape as static, "to be conserved and restored as if it were a monument."[16] The struggle to balance the preservation of urban areas with growing industrial and economic development is reflected in (but was not fully resolved by) the 1968 UNESCO *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*. Likewise, the World Heritage Convention notes in its preamble the increasing threat posed to cultural and natural heritage "not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction."

By the time of the Convention's adoption in 1972, however, it was already recognized that cultural heritage can be embodied not just in great monuments, but also in modest and mundane aspects that have, over time, developed cultural significance. This 1972 *Recommendation Concerning the Protection, at National Level, of the Cultural and Natural Heritage* also emphasized the need to consult with local authorities and residents regarding urban redevelopment in historic districts.

Finally, the 1976 *Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas* defines urban areas as cohesive settings which include not only buildings, but also human activities, spatial organization, and the surrounding context. UNESCO has not, however, issued any other Recommendation that touches on the management of historic urban areas since 1976.

In the meantime, conceptions of cultural heritage preservation have continued to develop toward a more "layered"

"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."

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approach, with a greater appreciation for the urban setting's interrelationship with intangible heritage and cultural diversity. And the World Heritage regime has progressively increased its emphasis on continuous monitoring, buffer zones, and participatory processes. The new HUL Recommendation is intended to bring urban management back in line with these conceptual developments.

This evolution of the World Heritage regime has been possible because the Convention itself is purposefully vague and delegates wide authority to the Committee to define key terms and criteria, to establish implementing procedures, and to determine operational priorities.[17] The Committee has thus established a complex set of Operational Guidelines, which not only clarify and rationalize its processes, but also institutionalize changing substantive and procedural norms.[18]

The Guidelines, revised through a process involving both state comment and advisory body recommendations, are treated as binding rules by the Committee, and over time they can influence domestic legislation and processes.[19] The proposed HUL Recommendation can be expected to have a similar "soft" law effect: to increase over time the pressure on national authorities to comply normatively and procedurally with the Recommendation's standards.

III. The Historic Urban Landscape Initiative

In 2003, the World Heritage Committee found itself embroiled in a contentious debate over the planned construction of a railway station and office complex in the center of Vienna, a historic city inscribed on the World Heritage List. From this debate grew an international conference on World Heritage and Contemporary Architecture – Managing the Historic Urban Landscape, held in Vienna in May 2005. That conference produced the "Vienna Memorandum," which the General Assembly of States Parties adopted as part of its *Declaration on the Conservation of Historic Urban Landscapes* (Resolution 15 GA 7) in October 2005.[20]

The Vienna Memorandum, however, proved to be just a starting point. With similarly heated debates arising during every Committee session, a new consensus was clearly needed on such fundamental questions as what qualities should be protected in historic cities, and how those values could best be retained.[21] Repeat hot button issues included high-rise iconic buildings, transportation infrastructure projects, and unsustainable tourism; at the same time, historic cities were grappling with new pressures, like increased urbanization and environmental degradation, climate change, and tensions between globalization and local development needs.[22]

The World Heritage Committee thus decided in July 2005 to recommend that the UNESCO General Conference adopt a new Recommendation on the preservation of HUL. Five regional expert meetings were held around the world, and three expert planning meetings were held at UNESCO headquarters in Paris. Meanwhile, the UNESCO General Conference in July 2009 confirmed its intention to adopt a new Recommendation on HUL.[23]

Based on the expert opinion, research, and discussion gathered over the last five years, a preliminary report with a proposed Recommendation has now been circulated to member states for their comments.[24] These comments will be integrated into a final draft Recommendation to be submitted for adoption at the next session of the General Conference in the fall of 2011.

The draft Recommendation defines "historic urban landscape" as "the urban area understood as a historic layering of cultural and natural values, extending beyond the notion of 'historic centre' or 'ensemble' to include the broader urban context and its geographical setting."[25] It calls on states to integrate HUL conservation principles into development plans through regulation, community engagement, environmental impact assessments, and other technical tools and to ensure the financial sustainability of traditional neighborhoods (e.g., through micro credit and public-private partnerships).[26]

The proposed Recommendation includes a six-step action plan for states.[27] First, the relevant authority should map the city's natural, cultural, and human resources.[28] Second, authorities should undertake consultative, participatory processes to gather stakeholder input and reach a consensus as to which values to protect, and what aspects of the city transmit those values.[29] Third, the potential vulnerability of those aspects should be assessed, particularly in terms of socio-economic stresses and the impact of climate change.[30]

Fourth, with this background information compiled and consensus over values established, the relevant authority should draw up a city development or conservation strategy "to integrate urban heritage values and their vulnerability status into a wider framework of city development."[31] In particular, the action plan recommends establishing which areas of the city, for development purposes, are "strictly no-go," which are "sensitive

areas" that will require careful attention and planning, and which are spaces where a greater range of development (including high-rise construction) may occur.[32]

Finally, governing authorities should prioritize actions for conservation and development, and establish partnerships and local management frameworks to enable coordination among the relevant actors.[33]

IV. Evaluating the Proposed UNESCO Recommendation

What is notable about this proposed Recommendation is its emphasis on decentralized, consultative processes and consensus-building. Of course, expert input will still be sought and considered as part of these localized processes, but ideally from a bottoms-up instead of a top-down perspective. While the expertise provided by the advisory bodies has been invaluable to the formation and development of the World Heritage regime, what is at stake are not just technical questions, but questions of value – a distinction underemphasized by the World Heritage regime until recently.[34] The HUL Recommendation tries to correct for this old bias by putting values – as articulated by local stakeholders – first.

The addition of a UNESCO Recommendation to the weight of the World Heritage Committee's Operating Guidelines hopefully will push States to implement more participatory processes for nominating and managing heritage sites. With the inclusion of local consultation and consensus-building early in the process, confrontations like the Dresden Elbe Valley bridge fiasco, which resulted primarily from parallel but disconnected decision-making at the local-regional and national-international levels, can be avoided.

One must question, however, whether UNESCO, the World Heritage Committee, and the World Heritage Centre are assuming that the preservation instinct will always inform the values, and particularly the prioritization of values, identified through these local consultative processes. The technocrats have accepted, even embraced, the fact that change is a necessary component of urban life. The question now is how much change can be accepted.[35] It is not hard to imagine that in some instances, the international experts may not like the local stakeholders' answers.

1. These examples are drawn from the recent experiences of Vienna, St. Petersburg, Lhasa, and Dresden, respectively. *See* UNESCO World Heritage Centre, Managing Historic Cities 121-29 (2010), *available at* http://whc.unesco.org/documents/publi_wh_papers_27_en.pdf.
2. Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 Nov. 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, pmbl. [hereinafter "World Heritage Convention"].
3. *See, e.g.*, Sabine Schorlemer, *Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge*, 51 Ger. YB. Int'l L. 321 (2009).
4. *See* Ron van Oers, *Managing Cities and the Historic Urban Landscape Initiative – An Introduction*, in Managing Historic Cities, *supra* note 1, at 7, 13-14; *see also* UNESCO World Heritage Centre, A New International Instrument: The Proposed UNESCO Recommendation on the Historic Urban Landscape 3, *available at* http://whc.unesco.org/uploads/activities/documents/activity-47-21.pdf [hereinafter "Preliminary Report"].
5. *See* World Heritage Convention, *supra* note 2, arts. 8(1) & 14. The following summary of the structure of the World Heritage regime is drawn from Diana Zacharias, *The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution*, 9 Ger. L.J. 1834, 1841-46 (2008).
6. *See* Convention Concerning the Protection of the World Cultural and Natural Heritage, *supra* note 2, arts. 8(1), 16(1).
7. UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention, WHC 08/01 ¶ 24 (2008), [hereinafter "Operational Guidelines"] (listing Committee's main functions).
8. Zacharias, *supra* note 5, at 846, 853; *see also* Thomas M. Schmitt, *Global Cultural Governance, Decision-Making Concerning World Heritage Between Politics and Science*, 63 Erdkunde 103, 107-08 (2009).
9. World Heritage Convention, *supra* note 2, arts. 11 & 19.
10. Schmitt, *supra* note 8, at 117-18; Zacharias, *supra* note 5, at 1856, 1863. The Convention does specify a sanction, however, for a state's failure to contribute to the fund for international assistance – that the state is not eligible to serve on the World Heritage Committee while it is in arrears. World Heritage Convention, *supra* note 2, art. 16(5).
11. *See* World Heritage Convention, *supra* note 2, art. 7 (defining the regime as "a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage"); Zacharias, *supra* note 5, at 1861-62 (noting consultative and cooperative nature of the regime).
12. Operational Guidelines, *supra* note 7, ¶¶ 13, 39-40, 64. *See also* Natasha Affolder, *Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance*, 24 Pace Envt'l L. Rev. 35, 53 (2007).
13. Zacharias, *supra* note 5, at 1852; Affolder, *supra* note 12, at 47.
14. Zacharias, *supra* note 5, at 1835. *See also* Francesco Fran-

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cioni, *Thirty Years On: Is the World Heritage Convention Ready for the 21st Century?*, 12 It. Y.B. Int'l L. 13, 15 (2002).

15. *See* van Oers, supra note 4, at 13.
16. The following summary of past Recommendations draws from UNESCO Executive Board, Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on the Conservation of the Historic Urban Landscape, 181EX/29 ¶¶ 6-9 (2009) [hereinafter "Preliminary Study"].
17. *See*, *e.g.*, World Heritage Convention, *supra* note 2, arts. 10(1), 11(5), 13(4).
18. For examples, *see* Francioni, *supra* note 14, at 28-29 (regarding cultural landscapes, biodiversity, and monitoring schemes); Affolder, *supra* note 12, at 54 (regarding buffer zones, the list of World Heritage in Danger, and natural resource management).
19. *See* Zacharias, *supra* note 5, at 1848-51.
20. van Oers, *supra* note 4, at 8.
21. *Id.* at 14.
22. *See* Preliminary Study, *supra* note 16, at ¶¶ 12-18.
23. *See*, *e.g.*, van Oers, *supra* note 4.
24. Preliminary Report, *supra* note 4.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Preliminary Report, *supra* note 4.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See* Affolder, *supra* note 12, at 64. *See also* Jochen von Bernstorff, *Procedures of Decision-Making and the Role of Law in International Organizations*, 9 Ger. L.J. 1939, 1947 (2008) ("[M]ost regulatory decisions involve normative assumptions and trigger redistributive outcomes that cannot be reduced to seemingly objective scientific inquiries; each time someone wins and someone loses.").
35. van Oers, *supra* note 4, at 14-15.

Beyond Protection:
Cooperation as a Tool to Cope with Unresolved Cultural Heritage Issues in Post-Conflict Cyprus

By Alessandro Chechi

I. Introduction

Cyprus has had a long history. Owing to its strategic position in the Eastern Mediterranean,[1] the island has been conquered by various powers, such as the Greeks, Egyptians, Phoenicians, Romans, Byzantines, and Venetians.[2] In 1571, it was captured by the Ottoman Empire and remained under its control for over three centuries.[3] In 1878, the island was placed under British administration, under which it remained until it was granted independence in 1960.[4] Given the resultant diverse cultural influence, the archaeological, historical, artistic, and traditional heritage of Cyprus is unique. Unfortunately, the country's heritage has been victimized and threatened as a result of longstanding clashes between Greek and Turkish Cypriots.

One of the Ottomans' crucial legacies is having brought numerous Muslim settlers to the island, creating a significant ethnic minority. They established a system of "ethnarchy," under which the population was divided by religious affiliation, which allowed Cypriots of Greek descent and the Greek-Orthodox faith to co-exist with Cypriots of Turkish descent and the Muslim faith. However, the system eventually became the breeding grounds for the Greek Cypriots' struggle to unite the island with Greece. Turkish Cypriots, in turn, demanded the partition of the island between Greece and Turkey.[5]

Beginning in the mid-1950s, tensions between Greek and Turkish Cypriots intensified, and they escalated dramatically in the years following the independence from British rule in 1960.[6] Through the 1960s, Greek Cypriots became increasingly estranged from the Turkish Cypriots.[7] The tensions erupted July 1974, when Turkish military forces invaded Cyprus.[8] Turkish troops landed on the north coast of Cyprus and advanced to Nicosia. By late August, Turkish forces had extended their control over the northern 38% of the island,[9] effectively making 160,000 Greek Cypriots refugees. Similarly, over 40,000 Turkish Cypriots left their homes in the south. The island was hence divided, geographically, ethnically, and politically.[10] In 1983, the Turkish military established the "Turkish Republic of Northern Cyprus" (TRNC), but no country except Turkey has recognized the TRNC.[11] Today, Cyprus is divided by a long tract of barbed wire known as the Green Line that is under the control of U.N. troops.[12]

The invasion created deep and lingering wounds that affected both communities: the death and disappearance of relatives and friends. Greek Cypriots estimate that they lost 6,000 lives from the conflict, with an additional 3,000 people missing.[13] Turkish Cypriots estimate their death count to be 1,500, with an additional 2,000 wounded.[14] On top of these losses, emotional wounds have deepened and passed to new generations by one-sided teachings in schools, propaganda, and nationalistic perceptions of history.[15]

Although the fate of objects should always be secondary to that of human beings, another grave consequence of the

Mosaic, House of Eustolios, Cyprus. (By Wknight94 *talk*, CC-BY-SA-3.0 [*www.creativecommons.org/licenses/by-sa/3.0*], *via* Wikimedia Commons.)

Turkish invasion has been the loss of large part of Cyprus's cultural heritage. Since 2003, when the Turk-Cypriot government allowed Greek Cypriots to cross the border between the Republic of Cyprus and the area under Turkish control,[16] the country's chief cultural institutions have been monitoring the state of the cultural heritage in that part of the island.[17] This survey demonstrated that the island's cultural patrimony is in large part lost or crumbling.[18] The damages are grave and in many cases irreversible. Museums have been looted and so have many private collections

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of antiquities. Archaeological sites have suffered theft and despoliation.[19] Some churches have been demolished or vandalized, whereas others are currently being used as stables, mosques, nightclubs, or army barracks, if they have not simply been abandoned.[20] In addition, various churches have had ecclesiastical icons stolen, and frescoes and mosaics have been removed.[21]

Some of the most significant recognition of the degradation of the cultural heritage of the occupied part of the island has come from the Parliament of the European Union. In its declaration of September 2006 on the protection and preservation of the religious heritage in the northern part of Cyprus,[22] the Parliament acknowledged that, since the Turkish invasion of 1974, 133 churches have been desecrated, 78 have been transformed into mosques, 28 are being used as military hospitals, and 13 are being used as deposits. Countless ecclesiastical items, including more than 15,000 icons, have been illegally removed and their locations remain unknown.[23] The Parliament condemned the pillage of Greek Orthodox churches and monasteries and the removal of their ecclesiastical items, and it called on the EU Commission and the EU Council to take the necessary actions to ensure the protection and restoration of the cultural heritage of Cyprus. This article contributes to the literature about the so-called "Cyprus problem" by analyzing one of its facets – the necessity to rescue and safeguard the fragile cultural patrimony of the island – in the light of the international law applicable in the event of armed conflict and military occupation. The main argument herein is that international cultural heritage law is imperfect, and, hence, the proper resolution of unsettled issues requires neutralizing its flaws through a shift from overly legalistic and adversarial solutions towards more collaborative approaches. The article begins by discussing the seminal *Goldberg* case, which illustrates the dynamic and magnitude of the cultural losses suffered by Cyprus and exemplifies the obligations owed by the States Parties[24] to the treaties adopted by UNESCO (the United Nations Educational, Scientific, and Cultural Organization) for the protection of cultural heritage in times of war. Against this backdrop, the article continues with a critical examination of the pertinent practices of states and of international and domestic courts in order to emphasize the customary nature of three key principles: the principle prohibiting acts of violence against cultural heritage in wartime, the principle prohibiting the exportation of cultural assets from occupied territories, and the corresponding principle establishing the obligation to return wrongfully taken objects to the country of origin. The final portion of this article looks to the future, discussing how Cypriot heritage can be restored and safeguarded through the development of cooperative solutions based on such standards.

Sanctuary of Apollo Hylates, Cyprus. (By *Wknight94 talk*, CC-BY-SA-3.0 [*www.creativecommons.org/licenses/by-sa/3.0*], *via* Wikimedia Commons.)

II. The Violation of the Obligation to Safeguard Cultural Heritage in Occupied Territory Exemplified: The Goldberg *Case*

One of the most telling examples of the fate of the cultural heritage of Cyprus' turbulent history is provided by the *Goldberg* case.[25] In this case, an Indiana appellate court ruled that the defendant, art dealer Peg Goldberg, must surrender possession of four Byzantine mosaics, which had been illicitly removed from Cyprus, to the plaintiffs, the Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus.

The mosaics were affixed to the apse of the Church of the Panagia Kanakaria (Kanakaria Church) in the village of Lythrankomi, in the early 6th century A.D. The mosaics, made of small bits of colored glass, depicted Jesus Christ as a young boy in the lap of his mother, the Virgin Mary, who was seated on a throne. Jesus and Mary were attended by two archangels and surrounded by a frieze depicting the twelve apostles.

The mosaics had been displayed in the Kanakaria Church for centuries, where they became sanctified as a holy relic.

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Over the centuries, the mosaics survived the period of iconoclasm and the passage of time. However, by 1960, all that remained of the original Kanakaria mosaics was the figure of Jesus, the bust of the North Archangel, and nine of the twelve apostles. Between 1959 and 1967, the mosaics were restored under the sponsorship of the Department of Antiquities of the Republic of Cyprus, the Church of Cyprus, and Harvard University's Dumbarton Oaks Center for Byzantine Studies.

Sadly, the mosaics were not spared by the pillage that followed the 1974 Turkish invasion. At some point between 1976 and 1979, the interior of the Kanakaria Church was vandalized and the mosaics were removed. Immediately upon learning that the mosaics were missing, the Autocephalous Church of Cyprus and the Republic of Cyprus informed several entities seeking their assistance: UNESCO, the International Council of Museums (ICOM), the International Council of Museums and Sites (ICOMOS), the Council of Europe, and Europa Nostra.[26] The Republic of Cyprus also contacted European and American museums and international auction houses. As a result of these efforts, in 1989, the Autocephalous Church of Cyprus and the Republic of Cyprus located the mosaics, which by then had come into the possession of Indianapolis art dealer Peg Goldberg. She had purchased the mosaics in 1988 in the free-port area of the Geneva airport from a Turkish art dealer, Aydin Dikman, for about $1 million. Goldberg had proceeded with the purchase even though she was aware that the mosaics came from an area occupied by foreign military forces. Moreover, Goldberg received no convincing evidence – as was alleged by the seller – that the mosaics had been found in the rubble of an extinct church or that Turkish Cypriot officials had authorized their export.[27]

The Church of Cyprus offered Goldberg reimbursement for the purchase price in exchange for the restitution of the mosaics. When Goldberg refused, the claimants filed suit to recover the mosaics and prevailed, and the mosaics were returned to Cyprus in 1991. They are now in the Byzantine Museum of the Archbishop Makarios III Foundation, in Nicosia.

The Indiana appellate court resolved the case on grounds of domestic law, as it concluded that law of Indiana governed every aspect of the action, from the statute of limitations to the application of substantive law. However, it is interesting to note that the court also emphasized the relevance of two treaties adopted under the aegis of UNESCO: the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the "1954 Convention"),[28] and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "1970 Convention").[29] Both these treaties address illicit transfers of cultural property, but only the 1954 Convention seems relevant to the return of the Kanakaria mosaics because the 1970 Convention is not retroactive and primarily targets peacetime impoverishment of cultural heritage. While one of the 1970 Convention's provisions deals with the problem of war-time looting,[30] the provision can be seen merely as an adjunct to the much more detailed requirements of the 1954 Convention and both its First Protocol of 1954[31] (the "1954 Protocol") and Second Protocol of 1999[32] (the "1999 Protocol").

III. The Return of Cultural Objects Removed as a result of War and Occupation under Contemporary International Law

Throughout history, armies have attacked the territories of other tribes, cities, or nations, often with the defeated enduring the pillage of their cultural patrimony. Objects representing important values of the defeated peoples, such as religious articles, military symbols, works of art, and archives, often have been removed by the victors. But the significance of plunder does not necessarily reside in the economic value of the seized works. Art plunder has also been a symbolic dimension of war by which victors demonstrate their superiority over the vanquished. However, the concept of sparing cultural heritage from the direct and indirect effects of armed conflict has gained increasing acceptance since the end of the 19th century. In effect, over the last hundred years the laws of war relating to the protection of cultural patrimony have evolved from a status of lawlessness to a rather elaborate system of humanitarian law, including cultural heritage norms applicable in armed conflict.[33]

A. The Development of International Cultural Heritage Law and the Customary Nature of the Obligation to Protect Cultural Heritage in Time of War: Treaty and Diplomatic Practice

The principle of prohibiting acts of violence against immovable cultural heritage during armed conflict has developed through a consistent and unambiguous treaty practice that has its roots in the "Lieber Code"[34] of the 19th century, which was designed to regulate the conduct of the Union forces in the American Civil War. The influence of the Lieber Code's treatment of cultural property can be traced through the Brussels Declaration of 1874,[35] the Oxford Manual of 1880,[36] the Hague Conventions of 1899 and 1907 and their annexed Regulations,[37] and the Roerich Pact of 1935.[38] The Hague Convention of 1907 declared that buildings dedicated to reli-

gion, art, science, education, and historic monuments should not to be attacked or bombarded absent military necessity.[39] The Roerich Pact proclaimed that museums, monuments, and scientific and cultural institutions are to be considered as "neutral and as such respected and protected by belligerents."[40]

The first substantial anti-art-plunder effort of the modern era occurred even earlier, though: the Final Act of the Congress of Vienna of 1815, whereby the victorious European Powers decided that all the artworks looted during Napoleon's campaigns of 1796 and 1797 must be returned to their countries of origin. Since then, other international law instruments have reinforced the rule that the plunder of cultural property is unlawful and that all looted works should be returned for the sake of the integrity of the cultural heritage of every country. In this sense, the provisions of the Regulations annexed to the Hague Convention of 1907 merit closer examination. Article 56 of the Regulations states that all cultural objects, including state property, are to be treated as private property and, hence, can neither be confiscated (Article 46) nor be subjected to plunder (Article 47) by occupying forces. The obligation to return cultural property was reaffirmed in the post-First World War peace treaties and in other treaties relating to the redistribution of cultural objects following the dissolution of empires and the recognition of newly independent states.[41]

State practice further developed during and in the aftermath of the Second World War, primarily as a reaction to the widespread damage and destruction during the war and Nazi confiscations. The Allies took steps to prevent spoliation before the end of the war by adopting the "London Declaration,"[42] which warned enemy states and neutral countries that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the [Nazis]" and reserved the right to annul transfers or dealings, not only for those that took the form of open looting and plunder, but also for forced sales and other "sham" transactions designed to disguise the true nature of the underlying transfers.

After the War, UNESCO adopted the Hague Convention of 1954.[43] In its preamble, the 1954 Convention states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world" and that "the preservation of the cultural heritage is of great importance for all peoples of the world."[44] Cultural property is thus given special legal protection under the Convention. In essence, the 1954 Convention obligates the "High Contracting Parties" (countries that have both signed and ratified the agreement) to take special care to avoid damage to "movable or immovable property of great importance to the cultural heritage of every people."[45] The Convention further provides that "States Parties" must respect the cultural property located both in their own territory and in other states, and it prohibits the destruction of cultural property during armed conflict and during periods of belligerent occupation.[46] Other provisions focus on the removal of cultural assets from occupied territories. States Parties must prohibit, prevent, and, if necessary, put a stop to any form of theft, pillage, or misappropriation of cultural property;[47] an occupying force is obliged to aid the occupied state in the preservation of its patrimony.[48] The Convention does not directly address the issue of restitution of wrongfully removed objects, which is regulated by the 1954 Protocol. The 1954 Protocol obligates occupying powers to prevent and avoid exportation of cultural objects from occupied territories, and, in the event that such exportation occurs, to provide restitution.[49]

More recently, the looting and destruction endemic to the Gulf Wars and the Yugoslav war have led to three further developments. The first is the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY statute establishes personal liability for violations of the laws and customs of war, which include the "destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and the sciences, historic monuments and works of art and science."[50] The statute establishing the International Criminal Court (ICC) also contains provisions concerning crimes against cultural heritage,[51] which apply to both international and non-international armed conflicts and classify as a war crime any attack directed against buildings that are dedicated to religion, education, art, or science or that are historic monuments. Article 7 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea is also noteworthy. It states that the Extraordinary Chambers in the Courts of Cambodia (ECCC) will have "the power to bring to trial all suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention . . . ."[52] Quite clearly, the ICTY, the ICC, and the ECCC follow the precedent established by the Nuremberg Tribunal a half-century earlier,[53] which provided for the conviction Nazi officials for plundering artworks in occupied lands and held that the 1907 Hague Convention was recognized by all civilized nations as being declaratory of the laws and customs of war.[54]

The second development is the adoption of the 1999 Protocol, which (i) extends the scope of the regime to non-international armed conflicts;[55] (ii) defines clearly and restrictively the limits of "military necessity";[56] (iii) introduces the new system of "enhanced protection";[57] (iv) establishes individual criminal responsibility;[58] and (v) sets up a permanent committee to

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supervise the operation of the Protocol.[59] The 1999 Protocol contains two specific provisions concerning the removal of cultural assets, but it leaves the issue of restitution to existing treaty and customary norms. Article 9 of the 1999 Protocol states that an occupying state "shall prohibit and prevent . . . any illicit export, removal or transfer of ownership of cultural property; any archaeological excavation . . ."; and "any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence."[60] Article 21 provides that "each Party shall adopt such legislative, administrative or disciplinary measures . . . to suppress . . . any illicit export, other removal or transfer of ownership of cultural property from occupied territory . . . ."[61]

The third development is the shift of the prohibition against looting and the obligation of restitution into U.N. Security Council Resolutions 686 (1991)[62] and 1483 (2003).[63] Adopted under Chapter VII of the U.N. Charter, the latter Resolution specifically addresses Iraqi looting in the wake of the first Gulf War: "[]Member States shall take appropriate steps to facilitate the safe return . . . of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the National Museum of Iraq, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 2 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed . . . ."[64]

One final example of treaty practice, the Declaration Concerning the Intentional Destruction of Cultural Heritage of 2003, bears mentioning. The Declaration was adopted unanimously by the UNESCO General Conference to condemn the gratuitous destruction of the Buddhas of Bamiyan by the Taliban in 2001. Although the Declaration is not binding (i.e., it only creates a moral or political commitment), it is important because it establishes (i) that the deliberate destruction of important items of cultural heritage constitutes a breach of customary international law and (ii) that state and individual criminal liability derive from both intentional destruction and failure to take appropriate protective measures. Furthermore, it targets state treatment of cultural property located within its own borders, thereby furthering the erosion of the shield of territorial sovereignty even in situations other than war or military occupation.[65]

In addition to "hard law," "soft law" efforts relating to the mass looting of Jewish cultural property during the Second World War signal that restitution is considered the proper remedy for wrongful acquisitions. The first of such initiatives is the Principles on Nazi-Confiscated Art (the "Washington Principles"), adopted by forty-four states as part of the 1998 Washington Conference on Holocaust-Era Assets.[66] Although non-binding, the Washington Principles call for a "just and fair solution" and impose upon nations a moral commitment to identify and publicize stolen artworks to assist their return to their original owners.[67] For these reasons, the Washington Principles could serve as a foundation for the production and interpretation of national substantive law.[68] Another such effort is Resolution 1205 on Looted Jewish Cultural Property of the Parliamentary Assembly of the Council of Europe, adopted on November 4, 1999, which calls member states to give consideration to ways in which they may be able to facilitate the return of looted assets.[69] In 2000, the Vilnius International Forum on Holocaust Era Looted Cultural Assets was convened in order to bring the Washington Principles and the Council of Europe Resolution into effect.[70] Lastly, in the 2009, the Holocaust Era Assets Conference, convened under the auspices of the European Union and of the Czech Presidency, adopted the Terezin Declaration.[71]

B. The Development of International Cultural Heritage Law and the Customary Nature of the Obligation to Protect Cultural Heritage in Time of War: Judicial Practice

Jurisprudence, both in domestic U.S. courts and abroad, likewise prohibits acts of violence against immovable works of cultural heritage and the exportation of works of art from occupied territories. This case law strengthens the binding nature of these principles, and, generally, it supports restitution to the country of origin as a preferred remedy.

In the renowned case of *Menzel v. List*,[72] a New York trial court ordered the restitution of a painting by relying on the Regulations annexed to the 1907 Hague Convention and on foreign case law, such as the Nuremberg Tribunal judgments and the *Mazzoni c. Finanze dello Stato* decision.[73] Significantly, the *Menzel* Court recognized that there was a general consensus in international law on the subject of restitution of looted materials.[74]

Another important U.S. case is *Altmann v. Republic of Austria*,[75] which involved six Gustav Klimt paintings confiscated by the Nazis in 1938 that eventually became part of the collection of the state-owned Belvedere Museum of Vienna. The case is important for its treatment of sovereign immunity. In 1998, Maria Altmann, an heir to the rightful owner, formally requested the restitution of the paintings, but the Austrian Gallery denied her request. Due to the high filing

fee required by Austrian law, Altmann sought recovery in the Central District of California, alleging expropriation of property in violation of international law. In a decision affirmed at both the federal appellate and U.S. Supreme Court levels, the district court denied Austria's sovereign immunity defense and determined that it had jurisdiction on the grounds that (i) the paintings were taken in violation of international law; (ii) the paintings were in possession of an agent of the Austrian government at the time of the case; and (iii) the museum was engaged in commercial activity in the United States (publishing and advertising activities of the Klimt paintings).

Outside the United States, the need to safeguard archaeological sites in occupied territories has been emphasized at various times by the Israeli Supreme Court. In the *Kandu* case,[76] the Court held that the occupying power is bound under customary international law to protect and preserve archaeological treasures. This ruling was confirmed in the *Hess* case,[77] in which the Court also relied on the 1954 Convention to support its reasoning. In the *Shahrur* case, the Court relied on the obligation imposed on the occupying power by Article 56 of the Regulations annexed to the 1907 Hague Convention to approve the prosecution before military courts of offenders under Jordanian antiquities law.[78]

In 2008, the Italian *Consiglio di Stato* closed litigation over the Venus of Cyrene by reshaping the foundation of the obligation to return objects removed as a result of war and colonization. The Court affirmed that Italy was under an obligation to return the sculpture to Libya by virtue of a general and autonomous customary principle. According to the Court, this principle is the corollary of the interplay between the principle prohibiting the use of force and the principle of self-determination of peoples. The Court explained that the right to self-determination has come to include the right to protect both the cultural identity and the material cultural heritage linked either to the territory of a sovereign state or to peoples subject to a foreign government. Consequently, the restitution of artworks was dictated by the safeguarding of such cultural ties whenever these had been jeopardized or wiped out by acts of war or the use of force during colonial domination.[79]

Contrary to this copious domestic jurisprudence, international courts and tribunals have rarely adjudicated questions of restitution. For example, the International Court of Justice (ICJ) was called on to adjudicate a restitution claim in the case *Liechtenstein v. Germany*, but the case was dismissed on technical grounds of lack of jurisdiction *ratione temporis* before reaching discussion of the merits.[80] In the case concerning the Temple of Preah Vihear, the issue of restitution of cultural property was incidental to that of the delimitation of national boundaries. The case resulted from the war

The Old Town of Dubrovnik. (By *gari.baldi* |*http://www.flickr.com/photos/gari-baldi/328544470/*| CC-BY-SA-2.0 |*www.creativecommons.org/licenses/by-sa/2.0*|, *via Wikimedia Commons*.)

of 1958 between Cambodia and Thailand and was centered on the issue of territorial sovereignty with regard to the area where the temple of Preah Vihear is located. Eventually, the ICJ found that the temple belonged to Cambodia, and, accordingly, it determined that "sculptures, stelae, fragments of monuments, sandstone model and ancient pottery which might . . . have been removed from the Temple or the Temple area by the Thai authorities" should be returned.[81] In the *Genocide* case the ICJ addressed, *inter alia*, the problem of the destruction of historical, religious, and cultural property during the Balkan war. It concluded that the targeting of representative cultural assets cannot be considered to be a genocidal act within the meaning of the Genocide Convention.[82]

The European Court of Human Rights (ECtHR) dealt with a restitution claim in the *Beyeler* case.[83] The ECtHR found a violation of the right to property as set forth in Protocol No. 1 to the European Convention on Human Rights (ECHR) and hence allowed the applicant to retain the Van Gogh painting at stake. Importantly, the ECtHR has also rendered various judgments in respect to the dispossession of private property in the northern part of Cyprus.[84] However, this complex jurisprudence does not aim to protect cultural heritage per se, that is, with the aim of safeguarding its inherent qualities. Rather, these decisions demonstrate that the ECHR system sees human rights as individual rights, not as petitions for common goods. Thus, the ECtHR seems unprepared to accommodate non-economic, collective interests.[85]

The ICTY has handed out various convictions for crimes arising out of the post-1991 destruction and profanation of mosques, churches, and other sites of educational, religious, and cultural relevance. In *Strugar*, the commander of the Yugoslav Peoples Army forces received an eight-year sentence under the principle of "command responsibility" for hav-

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ing ordered attacks on targets in the Dubrovnik region and failing to prohibit attacks on the Old Town of Dubrovnik.[86] The ICTY Trial Chamber placed significant weight on the fact that Old Town is included on the World Heritage Convention list.[87] The ICTY also established that the targeting of cultural assets belonging to a culturally distinct group constituted an element of crimes against humanity, specifically of the crime of persecution, if the act is committed with discriminatory intent. The ICTY acknowledged the essential connection between the intent to destroy a group of people and the destruction of cultural works and religious sites that form part of that group's heritage and identity.[88] Moreover, the ICTY affirmed that the 1907 Hague Convention and its Regulations as well as the 1954 Convention codify customary international law in various occasions.[89]

The 2004 decision of the Eritrea-Ethiopia Claims Commission (EECC) concerning the destruction of the Stela of Matara is also relevant to the present survey of case law. Eritrea's Central Front brought a claim against Ethiopia concerning the (alleged) deliberate destruction of the Stela of Matara – one of the most significant archaeological sites in Eritrea – during the Ethiopian occupation of Eritrea from 1998 to 2000. The Commission held that Ethiopia was liable under customary international humanitarian law for the destruction of the stela.[90] The decision confirmed that the protection of cultural property in the event of armed conflict properly belongs in customary international law and that, as such, it is binding even on non-signatory States.

C. An Appraisal

The numerous examples of international practice examined above provide evidence that the principles considered herein – the principle prohibiting acts of violence against cultural heritage, the principle prohibiting the exportation of cultural assets from occupied territories, and the corresponding principle establishing their restitution to the country of origin – have achieved the status of customary international law.[91] Quite clearly, the rationale underlying this special protection regime is one of key principles of general international law, namely the principle prohibiting the use of force, an obligation which is rooted in Article 2, paragraph 4, of the Charter of the United Nations.

Furthermore, the legal instruments adopted in order to safeguard cultural heritage in the event of armed conflict and occupation emphasize that the failure to protect cultural heritage is a violation of the laws and customs of war and hence is a war crime – though not as serious as crimes involving human rights – and that the destruction, seizure, and illicit exportation of artworks from occupied territories entails state responsibility as well as individual criminal responsibility. International norms against plundering or destroying cultural materials have become clearer and more specific, to the point that individual violators have been convicted in international courts for war crimes. A positive obligation to prevent or halt the looting by non-state actors fits the pattern of development and is consistent with the need to protect the property at stake.[92]

When viewed within this framework, it appears that the actions and omissions of the Turkish government and of Turkish officials with respect to the heritage of the Greek Cypriot community after 1974 constitute interferences of the sort contemplated by the 1954 Convention. The Turkish government and Turkish commanders were under the obligation to prevent any attack against cultural sites and monuments and the pillage or misappropriation of cultural assets, not only by their own soldiers, but also by the civilian population. They also failed to comply with the obligation, as set forth in the 1954 Protocol, to prevent the exportation of cultural assets from the occupied part of the island. Turkey was certainly bound by the 1954 Convention and its First Protocol at the time of the invasion.[93] Further, in all events, much of the Convention can be considered binding as customary international law.

Of note, similar allegations were made against the United States with respect to the ransacking of the Iraqi National Museum in April 2003. Looters and vandals took advantage of the void created by the sudden collapse of the Iraqi infrastructure to break in the museum and carry away thousands of priceless items. U.S. soldiers were not ordered to protect the museum and archaeological sites from looting during the invasion or the occupation, but they were ordered to protect the Oil Ministry. Accordingly, many commentators maintained that the United States had violated the customary international law norms embodied in the 1954 Convention by failing to prevent the looting.[94]

However, there are obvious differences between the two cases. At the time of the Turkish invasion, cultural heritage law was still in its infancy, and the international community did not place much emphasis on the violation of the norms involving the protection of the monuments and sites located in the occupied part of the island. By way of contrast, in 2003 cultural heritage law constituted an established branch of international law, encompassing clear and widely recognized obligations. Moreover, the United States had received pre-invasion warnings from leading experts

and specialized organizations that cultural sites in Iraq would need protection from bombing and looting.[95] Regrettably, such warnings were ignored. The international outcry that followed the looting of the National Museum confirmed that the international norms prohibiting attacks and seizure of cultural assets and imposing an affirmative obligation to prevent others from carrying out such assaults have gained acceptance.

The two cases also present an important commonality, however, as they reveal some of the weaknesses of the existing legal framework governing cultural heritage. The first problem is that the 1954 Convention and its Protocols are not retroactive, a problem embodied in the doctrine of inter-temporal law. This doctrine maintains that juridical facts must not be assessed based on currently applicable international law rules, but only on the law in force at the respective time. Second, the system of the 1954 Convention lacks compliance mechanisms and a binding mechanism for settling disputes regarding its interpretation and implementation. Third, customary norms may be vague and treaty provisions may not be self-executing. Consequently, adjudicators may dismiss claims based on this legal framework because of the lack of guidance for their application on the national plane.[96]

In spite of such shortcomings, international practice demonstrates that international cultural heritage law in general, and the rules codified in the 1954 Convention and its Protocols in particular, have contributed substantially to the safeguarding of objects of cultural heritage. More precisely, the body of law relating to the protection of cultural heritage in wartime has actually acted as a catalyst for the affirmation and dissemination of a cooperative approach to the problems of protection and restitution. In effect, many rules have been employed to guide the production and interpretation of national substantive law and to shape collaborative solutions.

Two aspects of cooperative approaches bear mentioning here. First, cooperative approaches aim to recognize and protect the "human dimension" of cultural heritage. This is a composite notion that springs from the unique nature of cultural assets. On the one hand, it stands for the special feelings that cultural heritage evokes from people because of its symbolic, emotional, religious, and historical qualities: "Works of art become the visible medium for the identity of the group concerned which is reflected in the care lavished on them, the ceremonies in which they are paraded, and the memory in which they are held when removed from the group by a foreign power."[97] On the other hand, such symbiotic dialectic between tangible and intangible elements explains why many states struggle to have their masterpieces returned.[98] It follows that protection of the human dimension of cultural heritage requires that disputes be dealt with through systems that take into account the specificity of art and culture and of the unique features of the international art market – which could balance the parties' interests against the concerns of justice and fairness – and attempt to reconcile the various moral, historical, cultural, financial, and legal issues involved. The safeguarding of the values enfolded in cultural assets requires more than definite and enforceable rulings based on the interpretation of the imperfect legal regime by a neutral judge.

Second, cooperative endeavors aim to attain specific results. In effect, the international practice surveyed above demonstrates that cooperation may serve as a mechanism for (i) the physical protection of cultural assets; (ii) the re-contextualization of materials in their original cultural context; (iii) the strict assessment of the possessors' title in the light of reasonable due diligence requirements;[99] and (iv) the non-application of cumbersome domestic norms – such as statutes of limitations and anti-seizure statutes – that normally impede restitution claims.

IV. Cultural Cooperation as a Tool for Post-Conflict Reconciliation in a Divided Cyprus

Given the existing diplomatic, political, and social enmity deriving from the 1974 military invasion, it is tempting to conclude that peace between the Greek and Turkish communities in Cyprus is unattainable. For example, the most recent attempt to solve the Cyprus division, the Annan Plan, was overwhelmingly accepted by the Turkish Cypriots but rejected by Greek Cypriots in a 2004 referendum.[100] In some instances, personal bias can also be a factor. There are those who believe that the current situation is the fault of Turkey, that Cyprus is essentially Greek, and that the will of the majority was denied through the invasion. Others believe the trouble started because the Greek Cypriots viciously attacked and drove the Turkish Cypriots into enclaves in the 1960s, where they suffered a ten-year economic embargo that ended when Turkey intervened in 1974. But biased perspectives only prolong the Cyprus problem. The leaders of the two communities, as well as the states and the organizations involved in the post-conflict and peace-building processes in Cyprus, should endeavor to address the underpinning beliefs that stand in the way of moving toward resolution.[101] In this respect, Amadou-Mahtar M'Bow, the former Director-General of UNESCO, called on states to return stolen art treasures and understand "the affliction a nation can suffer at the spoliation of the works it has created" and the "resentment and discord which prejudices the establishment of lasting peace and harmony between nations."[102]

In this respect, it is worth emphasizing that, in the last decade, both the Greek and Turkish Cypriot communities have increasingly resorted to cooperative endeavors. It is important to mention that, since 2003, when accession of the Re-

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public of Cyprus to the European Union became imminent, there has been an agreement between the two governments to open crossing points to allow Cypriots from either side to visit their former homes and participate in each other's economies. Trade is now allowed across the Green Line and there is cooperation between municipalities in relation to issues such as sewerage and power.[103] The increased cooperation extends to cultural heritage protection as well. The examples that follow confirm that cooperative efforts in this field originate from the rules codified in existing treaties. Furthermore, these examples illustrate that the aim to safeguard cultural heritage – because of its significance for a given people or nations – entails the attainment of specific results, such as the preservation and the re-contextualization of wrongfully-removed cultural assets. It is important, however, to distinguish the cooperative efforts between the two communities on the island from initiatives involving foreign entities.

As far as the former are concerned, the first example of cooperation of note is the well-known Master Plan for Nicosia. Initiated in 1979 by the two mayors of Nicosia, it aimed to revitalize the city and to develop tourism. Implementation of the plan began in 1989 with the development of a series of bi-communal projects, funded by a variety of sources, including the United Nations High Commissioner for Refugees, the United States Aid Agency, the United Nations Development Programme, and, since 2004, the European Union. As a result of the Master Plan, many cultural heritage sites common to both communities within Nicosia have been conserved and have won numerous Europa Nostra awards.[104] Perhaps the greatest achievement of the Nicosia Master Plan, though, has been the development of a continuous dialogue by the planners of the two communities.[105]

Another example concerns the heritage of the city of Famagusta. Founded as early as the 3rd century B.C. and located on the east coast of Cyprus, which is currently under Turkish control, this city has played a pivotal role in the cultural relations between the Christian and Islamic worlds. The treasures of this city combine medieval Christian churches, Venetian gateways, Ottoman mosques and baths, and some of the most impressive city walls to be seen anywhere in the world. This beautiful historic city is now in a severe state of deterioration. Major threats come from insufficient management, inappropriate construction, and neglect. While several world organizations have tried to draw attention to the importance of the ancient heritage of Famagusta, TRNC officials have shown little interest in giving a special status to the city.[106] In 2008, Greek and Turkish Cypriot leaders reached an agreement in an attempt to raise the awareness of the international community about the plight of their city in an effort to save its heritage.[107]

Also of note is the first official meeting between the religious leaders of the two communities, Chrysostomos II, Orthodox Archbishop of Cyprus, and Ahmed Yonluer, religious head of Turkish Cypriots, which, because of the efforts of the President of the Parliamentary Assembly of the Council of Europe, included discussion of the threats to the churches on the northern part of the island. Indeed, the safeguarding of the churches and monasteries located in the north of the island has been a contentious issue between the two communities.[108]

The Orthodox Church hierarchy has been increasingly frustrated by the lack of response from the government controlling the northern part of the island to its call for better care of such heritage. The Orthodox faith is central to Greek Cypriot identity, which is expressed physically in the churches and monasteries scattered throughout the island. Regrettably, there have been little efforts to safeguard them. However, the Turkish government cannot continue to ignore this problem if it intends to obtain European Union membership. Furthermore, it has become a human rights issue as the Church of Cyprus has made an appeal to the ECtHR against Turkey. The Church alleged the violation of the freedom of religion and discrimination on grounds of religion – for the continuing refusal to allow access to the Christian Orthodox places of worship in the occupied areas – and demanded damages for being denied use of property.[109]

Three further examples demonstrate that the Church and the Republic of Cyprus have taken proactive action in order to protect the integrity of the national heritage through cooperation with foreign entities. The first relates to the bilateral agreement with the United States in 1999. Pursuant to this agreement, the United States and the Republic of Cyprus have engaged in a fruitful cooperation aimed to reduce the incentive to pillage and to protect the integrity of sites for scientific study. Essentially, by signing this agreement, the United States recognized Cyprus's import restrictions on a large number of designated materials, which include Byzantine mosaics and frescoes, ethnological materials, and archaeological objects.[110]

The second example concerns the agreement concluded between the Church of Cyprus and the Menil Foundation of Texas regarding the return of thirty-eight 13th century pieces removed from the church of Agios Eufemianos in the village of Lyssi. Exhibited today in the Foundation's

museum in Houston, where they have been recomposed and restored, the frescoes depicting Christ Pantocrator and the Virgin are scheduled to be returned to Cyprus by 2012.[111]

The last example relates to the involvement of foreign experts and non-governmental organizations in the safeguarding of the national patrimony. This aspect is noteworthy because it emphasizes that civil society may play a pivotal role in the recognition and promotion of general public interests. The participation of these stakeholders is essential in the definition and implementation of public policies, for raising awareness among decision-makers and among the public at large and for stimulating grass-root initiatives.

These initiatives demonstrate that cooperation in the field of cultural heritage is crucial for the success of post-conflict processes and for boosting national and regional reconciliation. As a carrier of collective memory, cultural heritage forms the basis of collective identity and fosters the political and social stability of states. The past is transmitted into the present through monuments, libraries, and historical landmarks as well as through myths, fables, music, language, and so forth.[112] As mentioned above, the symbolic significance of cultural heritage helps motivate efforts to restore national identities and collective memories through the repatriation of art treasures despoiled in the past.[113] Moreover, the development of cooperative endeavors proves that cultural heritage can be associated with development policies as an invaluable resource to provide adequate responses to many economic and social challenges.

With respect to the issue of post-conflict reconciliation, it is worth recalling the words of Johan Galtung, who noted that peace-building strategies invariably require three basic conditions: (i) empathy, i.e., willingness to understand the underlying reasons of the respective positions; (ii) openness, i.e., willingness to enter into dialogue with the other party; and (iii) creativity, i.e., willingness to explore alternative solutions.[114] Galtung's position is in line with that of this author and this paper: encouraging a shift from overly legalistic and adversarial solutions toward a principled approach to post-conflict processes that puts greater emphasis on cooperation and builds on the principles and standards enshrined in the existing legal framework, regardless of the inherent deficiencies in international cultural heritage law. This alternative approach requires a firm commitment to dialogue among individuals, communities, and countries, which entails recognizing "the value of each civilizing experience as an invaluable and integral part of the commonly shared human experience."[115]

V. Concluding Remarks

Interior of Lazarus Church, Larnaca, Cyprus. (By Hannes Grobe/BHV CC-BY-3.0 [*www.creativecommons.org/licenses/by/3.0*], *via* Wikimedia Commons.)

This paper has sought to emphasize that Cyprus' cultural heritage can be rescued and protected as a whole only by building on existing international cultural heritage law. Consequently, it has analyzed the current state of normative law applicable to destroying and removing cultural materials during wartime and military occupation, which gives customary status to principles prohibiting attacks against cultural heritage, prohibiting the exportation of cultural assets from occupied territories, and establishing their restitution. However, these principles are not always followed. Accordingly, this paper has proposed a shift from overly legalistic and adversarial solutions towards a widespread use of cooperative means. But this approach does not require the rejection of legal norms. To the contrary, this paper has advocated viewing the existing legal framework not only as a container of binding rules but also as a catalyst for the affirmation and dissemination of a cooperative approach to the problems of restitution, protection, and conservation of cultural assets.

Available international practice demonstrates that – even when it is not binding law or is not otherwise directly applicable – international cultural heritage law contributes to defining standards that have been adopted willingly by state and non-state actors alike in order to cope with difficult post-conflict issues, and the stakeholders in such situations should pursue cooperative efforts in attempting to comply with these standards. To act otherwise would perpetuate the causes of the conflict. Such standards call for (i) the physical protection of cultural assets; (ii) the re-contextualization of materials; (iii) the strict assessment of the possessors' title; and (iv) the non-application of the domestic norms that impede access to courts and restitution. Furthermore, it has been emphasized that cooperative endeavors also facilitate the recognition and protection of the "human dimension" of cultural heritage, that is, the symbolic, emotion-

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al, religious, and historical qualities of the items of cultural heritage that are treasured by individuals and peoples. In practical terms, this means that cooperative efforts call for restitution of art objects when (i) they were removed illegitimately, i.e., taken by force or theft; (ii) there is a "cultural context" to which they can return; and (iii) the country to which the items are to be returned has the capacity to house, protect, and display them.

1. U.S. Agency for International Development, Cyprus, http://www.usaid.gov/locations/europe_eurasia/countries/cy/ (last visited July 8, 2011).
2. U.S. Dep't of State Bureau of European & Eurasian Affairs, Background Note: Cyprus, http://www.state.gov/r/pa/ei/bgn/5376.htm (last visited July 8, 2011).
3. *Id.*
4. *Id.*
5. B. O'Malley, *Victims and Villains: The Influence of Foreign Military Interests and Ethnic Fighting on the Division of Cyprus*, *in* Cyprus & Europe. The Long Way Back, (V. K. Fouskas & H. A. Righter, eds. 2003).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. U.S. Agency for International Development, Cyprus, http://www.usaid.gov/locations/europe_eurasia/countries/cy/ (last visited July 8, 2011).
12. The troops are known as the United Nations Peacekeeping Force in Cyprus (UNFICYP) and act under the authority of United Nations Security Council Resolution No 186 (1964).
13. O'Malley, *supra* note 5.
14. *Id.*
15. *Id.*
16. U.S. Agency for International Development, Cyprus, http://www.usaid.gov/locations/europe_eurasia/countries/cy/ (last visited July 8, 2011).
17. Giovanni Ricciardi, *A Heritage to Save*, 02-2007 30Days, (2007), http://www.30giorni.it/articoli_id_13541_l3.htm.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. OJ EU C 305 E/92, Dec. 14, 2006, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:305E:0092:0093:EN:PDF.
23. *Id.*
24. States Parties are states that have ratified and adhere to a treaty or convention.
25. Autocephalous Greek Orthodox Church of Cyprus v. Goldberg, 717 F. Supp., 1374, (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).
26. Europa Nostra is a European non-governmental organization interested in the conservation of the architectural heritage of Europe. Europa Nostra, What We Do, http://www.europanostra.org/what-we-do/ (last visited July 8, 2011).
27. As revealed by testimony in the *Goldberg* case, Dikman was the "mastermind" of the depredation of Cypriot heritage. He combed the occupied part of island to collect materials "upon orders from people from Holland, the United States, Greece, and other countries". After his arrest in 1997 in Germany, police found in apartments rented by him frescoes, mosaics, and icons estimated to be worth more than $40 million. M. Rose, *From Cyprus to Munich*, Archaeology, Apr. 20, 1998.
28. May 14, 1954, 249 U.N.T.S. 215 (hereinafter "1954 Convention").
29. Nov. 17, 1970, 823 U.N.T.S. 231 (hereinafter "1970 Convention").
30. "The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit." 1970 Convention, art. 11.
31. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, May 14, 1954, 249 U.N.T.S. 358.
32. Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. (1999) 769.
33. Von Schorlemer, *Cultural Heritage Law: Recent Developments in the Laws of War and Occupation* in Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce 137-58 (J. A. R. Nafziger & A. M. Nicgorski, eds. 2009).
34. Instructions for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land, General Orders No.100 of Apr. 24, 1863, arts. 34-36.
35. International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874 (not ratified), AJIL (supp.), 1907, p. 96.
36. *Laws and Customs of War on Land of the Institute of International Law*, reproduced in The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents 36 (Schindler & Toman, eds. 1988).
37. Hague Convention (II) with respect to the Laws and Customs of War on Land, July 29, 1899, AJIL, 1907, 66; and Hague Convention (IV) respecting the Laws and Customs of War on Land, Oct. 18, 1907, AJIL, 1908, 165.
38. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, (Roerich Pact), Apr. 15, 1935, 167 L.N.T.S. 279.
39. Article 56 of the Regulations provides that "[D]estruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." Article 23(g) establishes that, during hostilities, monuments and buildings dedicated to art and science ought not to be attacked or bombarded, unless necessary for military reasons. Moreover, Article 27 indicates that during war, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, and historic monuments.
40. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), art. 1, Apr. 15, 1935, 167

L.N.T.S. 289.

41. *See*, *e.g.*, Treaty of Versailles between the Allied Powers and Germany (1919) and Treaty of Saint-Germain between the Allied Powers and Austria (1919).
42. Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, Jan. 5, 1943 (8 Dep't of State Bulletin 21) (signed by seventeen governments and by the Comité National Français).
43. To date, 123 states are parties to the 1954 Hague Convention, 100 states to the First Protocol, and 56 states to the Second Protocol. For the current list, see http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html (last visited July 8, 2011).
44. 1954 Convention, preamble.
45. 1954 Convention , art. 1(a).
46. 1954 Convention, arts. 4, 5.
47. 1954 Convention, art. 4(3).
48. 1954 Convention , art. 5.
49. 1954 Protocol, art. I(1)-(4). Nevertheless, it has been argued that the obligation to return illicitly taken cultural objects is customary because it is inherent in the obligation to respect cultural property and in the prohibition on seizing and pillaging of cultural property. Clearly, if cultural objects should not be seized, then, a fortiori, they should be returned in case they have been wrongfully exported. 1 Customary International Humanitarian Law 137 (Henckaerts & Doswald-Beck, eds. 2005).
50. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3(d), July 7, 2009, *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.
51. Rome Statute of the International Criminal Court, As Corrected, arts. 8(2)(b)(ix) & 8(2)(e)(iv), Jan. 16, 2002, *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm .
52. The Extraordinary Chambers are a hybrid criminal court established by the Cambodian government and the UN to try members of the Khmer Rouge for crimes against humanity which took place between 1975 and 1979. The ECCC are a part of the Cambodian court system, and apply both international law and the Cambodian penal law in force during the relevant period.
53. *See* Charter of the International Military Tribunal, art. 6(b), Aug. 8, 1945, *available at* http://avalon.law.yale.edu/imt/imtconst.asp.
54. *See* J.A.R. Nafziger, *The Present State of Research Carried Out by the English-speaking Section of the Centre for Studies and Research*, *in* Hague Academy of Int'l Law, The Cultural Heritage of Mankind, 228 (2007).
55. 1999 Protocol, art. 22.
56. 1999 Protocol, art. 6.
57. 1999 Protocol, arts. 10-14.
58. 1999 Protocol, arts. 15-21.
59. 1999 Protocol, art. 24.
60. 1999 Protocol, art. 9.
61. 1999 Protocol, art. 21.
62. Resolution 686 (UN Doc S/RES/686, Mar. 2 1991, 30 I.L.M. 568) imposed to "return all Kuwait property seized by Iraq."
63. UN Doc S/RES/1483, May 22, 2003, 43 I.L.M. 1016.
64. *Id.* at ¶ 7.
65. J.P. Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, 35 Yale J. Int'l L., 347-404 (2010).
66. U.S. State Dep't, *Washington Conference Principles on Nazi-Confiscated Art*, *in* Washington Conference on Holocaust-Era Assets Proceedings 971 (1998), *available at* http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf.
67. *Id.* at 972.
68. E. Jayme, *Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a Model for Uniform Rules?*, 2 Kunstrechtspiegel 47-51 (2007).
69. Parliamentary Assembly of the Council of Europe, Resolution 1205, Looted Jewish Cultural Property (1999), *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/ERES1205.htm.
70. Lootedart.com, Vilnius International Forum on Holocaust-Era Looted Cultural Assets, 3-5 October, 2000, http://www.lootedart.com/MG8D3S66604 (last visited July 8, 2011).
71. U.S. State Dep't, Prague Holocaust Era Assets Conference: Terezin Declaration, *available at* http://www.state.gov/p/eur/rls/or/126162.htm (last visited July 8, 2011).
72. 267 N.Y.S.2d 804 (N.Y. County Super. Ct. 1966).
73. *Id.* at 811.
74. *See* Menzel v. List, 267 N.Y.S.2d 804, 809-12 (N.Y. County Super. Ct. 1966).
75. Altmann v. Republic of Austria, 142 F. Supp. 2d 1187 (C.D. Cal.1999), *aff'd*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 U.S. 677 (2004). The *Altmann* case was used as precedent in Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322 (D.D.C. 2007) and in Cassirer v. the Kingdom of Spain, 461 F. Supp. 2d 1157 (C.D. Cal. 2006). Despite the U.S. Supreme Court decision, the proceedings before U.S. courts did not continue as Maria Altmann and the Austrian counterparts entered into arbitration in 2005, which resulted in a judgment requiring Austria to return the paintings to the claimant. U.S. courts have ordered the restitution of looted works of art in other Holocaust-related disputes. *See*, *e.g.*, Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 301 (D.R.I. 2007); Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973); Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).
76. Halil Shahin Kandu v.Ministry of Defence et al., HCJ 270/87, 43(1) PD 738, 742.
77. Hess et al. v. IDF Commander of the West Bank et al., HCJ 10356/02, 58(3) PD 443, 464.
78. Shahrur v. Military Commander of Judea & Samaria et al., HCJ 560/88, 44(2) PD 233, 234.
79. *Associazione nazionale Italia Nostra Onlus c. Ministero per i beni e le attività culturali et al., Consiglio di Stato*, No.3154, June 23, 2008.
80. *Certain Property* (Liechtenstein v. Germany), Preliminary Objections, ICJ Reports, 2005, p. 4. The ICJ dismissed the action for lack of jurisdiction *ratione temporis* because the 1957 European Convention for the Peaceful Settlement of Disputes (ETS, No.23), upon which Liechtenstein based the Court's jurisdiction, entered into force between the two states only in 1980, that is, long after the time when the cause of action accrued.
81. *Temple of Preah Vihear* (Cambodia v. Thailand), Merits, ICJ Reports, 1962, p. 6, 34.
82. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia & Montenegro), Feb. 26 2007, ¶¶ 194 & 344.
83. Beyeler v. Italy, Application No. 33202/1996, Jan. 5, 2000.
84. *See*, *e.g.*, Loizidou v. Turkey, Application No. 1518/89, Dec. 18, 1996, whereby the ECtHR found Turkey (and not the TRNC) guilty of obstructing Titania Loizidou from returning her property in north Cyprus.
85. *See also* Prince Hans-Adam II of Liechtenstein v. Germany (Ap-

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plication No. 42527/98, July 21, 2001); Kozacio lu v. Turkey (Application No. 2334/03, Feb. 19, 2009, ¶ 67).

86. Prosecutor v. Strugar, IT-01-42-PT, Jan. 31, 2005, ¶¶. 232, 279, 285, 302.
87. World Heritage Convention, Old City of Dubrovnik, http://whc.unesco.org/en/list/95 (last visited July 8, 2011); *see also* Prosecutor v. Joki , IT-01-42/1-S, Judgment, Mar. 18, 2004, ¶ 53.
88. *See*, *e.g.*, Prosecutor v. Kordic & Cerkez, IT-95-14/2-T, Feb. 26, 2001.
89. *See*, *e.g.*, *id.* at ¶ 206) and Prosecutor v.Tadi (IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, ¶ 98).
90. Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8, & 22 between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Apr. 28, 2004, I.L.M., 2004, 1270, ¶¶ 112-13. The EECC was established as an arbitral tribunal with the Peace Agreement signed in Algiers in 2000 with the task of resolving question of state responsibility for violations of international law.
91. With regard to the two latter principles, *see* F. Francioni, *Au-delà des Traités: L'émergence d'un Nouveau Droit Coutumier pour la Protection du Patrimoine Culturel*, *in* Revue Générale de Droit International Public 19-41 (2007); T. Scovazzi, Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Properties (Sept. 2010), p. 14 (paper presented at the 16th session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, Paris); W. Sandholtz, Prohibiting Plunder. How Norms Change 9, 223, 256-57 (2007); M. Frigo, La Circolazione Internazionale Dei Beni Culturali 84 (2001); K. Siehr, 243 International Art Trade and the Law 120 (1993); *contra*, G. Carducci, La Restitution Internationale des Biens Culturels et des Objets D'Art 123-24 (1997).
92. *See* Sandholtz, *supra* note 91 at 256-57 (citing the works by Colwell-Chanthaphonh & Piper, Kastenberg, Birov, Roberts & Guelff, & Meyer).
93. Cyprus and Turkey accessed to the 1954 Convention on Sept. 9, 1964 and Dec. 15, 1965, respectively. Moreover, it appears from the UNESCO Database of National Cultural Heritage Laws that neither Cyprus nor Turkey have adopted domestic measures to implement the Convention.
94. Sandholtz, *supra* note 91 at 258-59. Given the customary value of the rule under consideration, it is immaterial that the United States was not a party to the 1954 Convention in 2003. The Convention was ratified only on Mar. 13, 2009.
95. M. E. O'Connell, *Occupation Failures and the Legality of Armed Conflict: The Case of Iraqi Cultural Property*, *in* 4 Art Antiquity & Law 323-62.
96. The case, *Autocephalous Greek Orthodox Church in Cyprus v. Willem Lans*, is illustrative (District Court, Rb Rotterdam, Feb. 4, 1999, NJkort 1999/37, conf'd on appeal, Hof Den Haag, Mar. 7, 2002, 99/693 (unpublished)). The church brought an action in a Dutch court against the possessor of four icons that had been looted from the *Antiphonitis* church, which is situated in the northern part of Cyprus. At the time that the suit was filed, the Netherlands was a party to the 1954 Convention and its First Protocol. Yet, the Dutch court did not apply the norms of the 1954 Protocol on restitution because it found that they were not self-executing, that is, that they were unqualified to grant rights and obligations to non-state actors, such as natural and legal persons. Accordingly, the court determined that it was unable to order the defendant to return the icons.
97. K. Pomian, Speech, Feb. 5, 2007, *in* Witnesses to History. A Compendium of Documents and Writings on the Return of Cultural Objects 48-49 (L. Prott, ed. 2009).
98. D. Shapiro, *Repatriation: A Modest Proposal*, 31 N.Y.U. Int'l J. L. & Politics 95-98 (1998).
99. Article 4(4) of the Convention on Stolen or Illegally Exported of Cultural Objects of the International Institute for the Unification of Private Law (UNIDROIT) of June 24, 1995 (I.L.M., 1995, 1322) constitutes a useful codification of an international standard of diligence: "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances."
100. In spite of the referendum's result, the European Union accepted the entry of Cyprus as a State including the north of the island.
101. O'Malley, *supra* note 5, at 51.
102. *Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It*, Museum 58 (1979).
103. S. Balderstone, *Cultural Heritage and Human Rights in Divided Cyprus*, *in* Cultural Diversity, Heritage & Human Rights 226-42 (M. Langfield et al., eds. 2010).
104. *See* Europa Nostra, Heritage Awards, http://www.europanostra.org/heritage-awards/ (last visited July 8, 2011).
105. Balderstone, *supra* note 103, at 239.
106. Global Heritage Fund, Saving Our Vanishing Heritage, http://www.globalheritagefund.org/vanishing (last visited July 8, 2011).
107. The meeting of the parties was held in Paris, under the auspices of the United Nations, at the Representation of the European Commission in France, on April 4, 2008. *See* Press Release, Europa Nostra, *available at* http://www.europanostra.org/OS/lang_en/index.html.
108. Ricciardi, *supra* note 17.
109. A. Muezzinler, *Appeal from Greek Orthodox Church against Turkey* in Echr, J. Turkish Weekly, Nov. 25, 2009.
110. *See* U.S. Dep't of State Bureau of Educational & Cultural Affairs, Import Restrictions List & Chart: Cyprus, http://exchanges.state.gov/heritage/culprop/cyfact.html? (last visited July 8, 2011).
111. Ricciardi, *supra* note 17.
112. K. Odendahl & M. Peters, *The Significance of Cultural Heritage for State Stability and Its Protection by Public International Law*, *in* Facets and Practices of State-Building 263-79 (J. Raue & P. Sutter, eds. 2009).
113. A. Jakubowski, Human and Cultural Heritage Aspects of State Succession: The Balkan Lesson (forthcoming).
114. J. Galtung, Transcend and Transform 180-88 (2004).
115. Message from Ohrid ("Ohrid Declaration"), adopted by the Regional Forum on the Dialogue among Civilisations, August 2003.

Book Review:

Protecting Cultural Property in Armed Conflict (An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict),

edited by Nout van Woudenberg and Liesbeth Lijnzaad, International Humanitarian Law Series, Volume 29, Martinus Nijhoff Publishers; Leiden, Boston; 2010, 245 p.

Reviewed by Jan Hladík

The relatively limited number of scholarly publications on the Second Protocol to the Hague Convention[1] has been supplemented with the addition of *Protecting Cultural Property in Armed Conflict (An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict)*, edited by Nout van Woudenberg and Liesbeth Lijnzaad, and published in 2010 by Martinus Nijhoff Publishers as Volume 29 of the International Humanitarian Law Series.

To a large degree, this publication reflects the proceedings of the symposium held on the tenth anniversary of the adoption of the Second Protocol, March 26, 2009, at the Peace Palace at The Hague, which was organized by the Netherlands Ministry of Foreign Affairs in joint cooperation with the Netherlands Ministry of Defence and Ministry of Education, Culture, and Science.[2] In short, the publication presents (i) a summary of the evaluation of the implementation of the Hague Convention and the reasons for elaborating the Second Protocol (Chapter 1); (ii) an assessment of the main features of the Second Protocol (Chapter 2); (iii) analyses of specific features of the Hague Convention and the Second Protocol, namely, military necessity (Chapter 3), enhanced protection (Chapters 4 and 5), protection of cultural property in non-international armed conflicts (Chapter 8) and military aspects of the protection of cultural property (Chapters 9 and 11); (iv) the penal aspects of the protection of cultural property (Chapters 6 and 7); (v) two cases of national implementation of the Second Protocol concerning the Netherlands and the former Yugoslav Republic of Macedonia (Chapters 10 and 12); (vi) the state of the protection of cultural property in Iraq (Chapter 13); and (vii) the 1954 (First) Protocol to the Hague Convention (Chapter 14). In addition, the publication's seven annexes contain, *inter alia*, the June 2003 Netherlands International Crimes Acts, the March 2007 Netherlands Cultural Property Originating from Occupied Territory (Return) Act, and excerpts from the ICTY case *Prosecutor v. Pavle Strugar*.

While each chapter of the book is important for providing insight to the different aspects of the implementation of the Hague Convention, the 1954 (First) Protocol and, most prominently, the 1999 (Second) Protocol, I particularly recommend a few specific chapters: Chapter 1 (summary of reasons leading to the elaboration and adoption of the Second Protocol), Chapter 2 (the main features of the Second Protocol), Chapters 4 and 5 (enhanced protection under the Second Protocol), Chapter 8 (protection of cultural property in non-international armed conflicts) and Chapter 14 (the 1954 Protocol).

Written by Professor Ji í Toman, a UNESCO consultant and author of the authoritative commentaries on the Hague Convention[3] and the Second Protocol,[4] Chapter 1 discusses the development of international humanitarian law since the adoption of the Hague Convention, up to and through the contribution of the Second Protocol to the protection of cultural property in the event of armed conflict. The chapter begins with concrete examples of conflicts addressed during the initial period of implementation of the Hague Convention (e.g., the

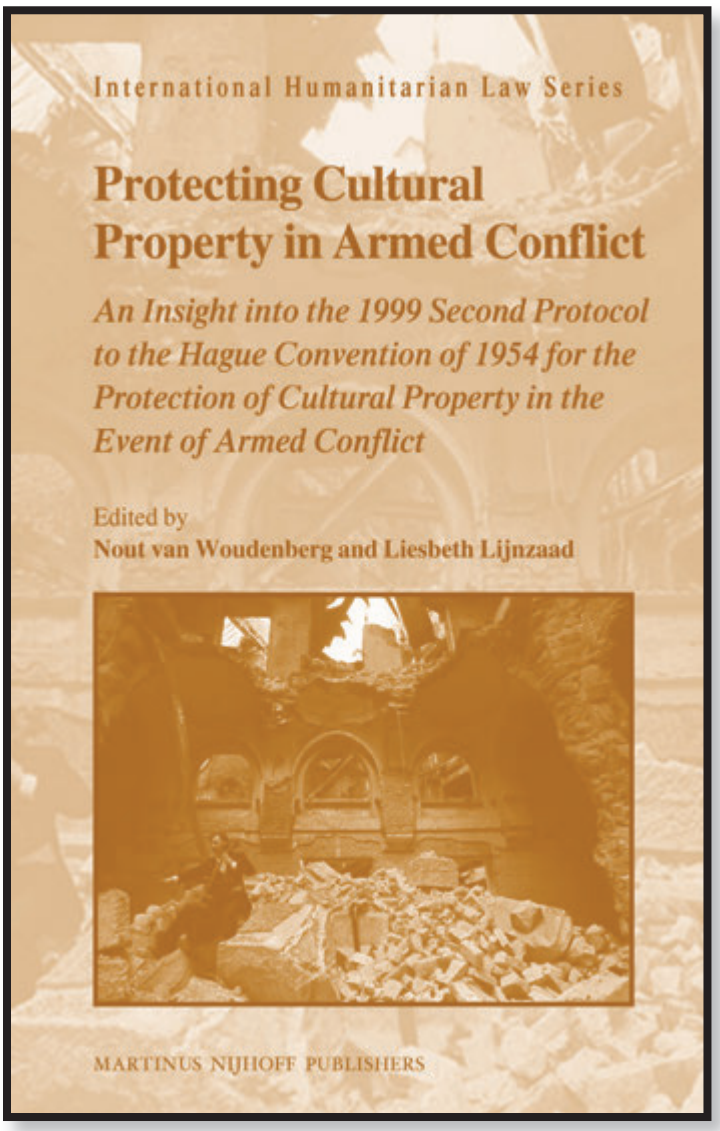
Jan Hladík is Acting Chief, Cultural Heritage Protection Treaties Section, Division for Cultural Expressions and Heritage, UNESCO. The author is responsible for the choice and presentation of the facts contained in this article and for the opinions expressed therein, which are not necessarily those of UNESCO and do not commit the Organization.

Book Review: *(cont'd)*

Middle East conflict, Cambodia) and goes through the Iran-Iraq, the Yugoslav, the Afghan and the two Gulf conflicts.

Chapter 2, written by Jean-Marie Henckaerts, Legal Advisor in the Legal Division of the International Committee of the Red Cross, analyzes the main features of the Second Protocol. The chapter focuses on provisions related to the respect for cultural property and, in particular, clarification on the following issues: military necessity, precautions in attack and against the effects of hostilities, enhanced protection, individual criminal responsibility (including both the provision of jurisdiction for and criminalization of violative acts), and the scope of application of the Second Protocol. The chapter concludes by describing the main achievements of the Second Protocol (p. 41). I would note one more achievement: the contribution of the Second Protocol to the interpretation of the Hague Convention (e.g., the chapeau of Article 6 of the Second Protocol).

Chapters 4 and 5 deal with "enhanced protection," a fundamentally new category of protection provided for by Chapter 3 of the Second Protocol. Each of Chapters 4 and 5 tackles the problem of enhanced protection from a different angle. Chapter 4, written by Nout van Woudenberg, Legal Counsel at the International Law Division of the Netherlands Ministry of Foreign Affairs, analyzes weaknesses in the system of special protection under the Hague Convention, main components of enhanced protection (i.e., the three essential conditions of Article 10 of the Second Protocol,[5] the granting of enhanced protection by the Committee for the Protection of Cultural Property in the Event of Armed Conflict and the loss, suspension, or cancellation of enhanced protection), and the reasons for elaborating on the new concept of enhanced protection. Chapter 5, written by Ariel W. Gonzales, Counsellor of the Permanent Mission of Argentina to the United Nations in Vienna, focuses on the analysis of Article 10(a) of the Second Protocol, the relationship between the Second Protocol and the 1972 Convention and the progressive interpretation of Article 10(a) in other fora. Finally, the chapter provides some interesting proposals concerning the link between the Second Protocol and the 1972 Convention, such as "the limitations on introducing amendments to either the 1972 World Heritage Convention or the Second Protocol," "the problem of 'natural and mixed heritage,' which is included on the World Heritage List but is in principle alien to the Second Protocol," and "the status under the Second Protocol of a World Heritage Property that has been removed from the World Heritage List and thus ceased to be 'of the highest importance to the international community as a whole.'"[6]



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Chapter 8 on the protection of cultural property in non-international armed conflicts, written by Jean-Marie Henckaerts, deals with the extension of the application of the rules protecting cultural property to non-international armed conflicts both under the Hague Convention and the Second Protocol, provides reference to the Convention on Certain Conventional Weapons and the Statute of the International Criminal Court, and concludes by analyzing the enforcement of the rules applicable to cultural property in non-international armed conflicts.

Chapter 14, written by Liesbeth Lijnzaad, Legal Adviser and Head of the International Law Division at the Netherlands

Nout van Woudenberg is legal counsel at the International Law Division, Ministry of Foreign Affairs of the Kingdom of the Netherlands, where he has worked since 1998. Within the Division, he is amongst others responsible for the international legal aspects of cultural property and its protection. Since 2007, the Netherlands is one of the members of the Committee for the Protection of Cultural Property in the Event of Armed Conflict under the 1999 Second Protocol; Van Woudenberg currently acts as vice-Chairman of this Committee.

Liesbeth Lijnzaad is the Legal Adviser, Head of the International Law Division, Ministry of Foreign Affairs of the Kingdom of the Netherlands, where she has worked since 1994. She participated in the Diplomatic Conference of March 1999, where the 1999 Second Protocol was adopted. She is an expert on international humanitarian law.

Ministry of Foreign Affairs, provides a valuable analysis of the 1954 (First) Protocol. In particular, it focuses on the trilateral relationship (i.e., the relationship between the occupying power, the occupied state, and the third State) that may arise when applying the 1954 Protocol,[7] deals with the protection of the new owner, analyzes the national implementation of the 1954 Protocol in the Netherlands, and provides an overview of difficulties in the implementation of this instrument.[8] When reading this chapter, the reader may wish to subsequently read the March 2007 Netherlands Cultural Property Originating from Occupied Territory (Return) Act (included in annex of the publication), which implements the 1954 Protocol in the Netherlands.

To conclude, the publication *Protecting Cultural Property in Armed Conflict (An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict)* is an important reference for any lawyer specializing in international legal protection of cultural property in peacetime or wartime. It is my hope that this work will contribute to better implementation of the Second Protocol, encourage those States which are not yet party to this instrument to become Parties, and stimulate interest in the Second Protocol, the Hague Convention, and the 1954 (First) Protocol in general.

1. *E.g.*, Jiří Toman, Cultural Property in War: Improvement in Protection (Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict) (2009); Roger O'Keefe, The Protection of Cultural Property in Armed Conflict (2006); Kevin Chamberlain, War and Culture Heritage (An Analysis of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two Protocols) (2004).
2. Protecting Cultural Property in Armed Conflict (An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict) xi (Nout van Woudenberg & Liesbeth Lijnzaad eds., 2010).
3. Jiří Toman, The Protection of Cultural Property in the Event of Armed Conflict (Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May in The Hague, and on other instruments of international law concerning such protection) (1996).
4. *See* Toman, *supra* note 2.
5. The text of Article 10, "Enhanced Protection," is as follows:

   > Cultural property may be placed under enhanced protection provided that it meets the following three conditions:
   >
   > (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 historic value and ensuring the highest level of protection;
   >
   > (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 prop erty, confirming that it will not be so used.

   Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 10, Mar. 26, 1999, 2253 U.N.T.S. 172.
6. *See* pp. 66–67 of the publication.
7. *See* pp. 150 & 151 of the publication.
8. *See* pp. 154, 155, & 156 of the publication.

Arts & Antiquities: Trafficking News Notes

By CHAR Staff Editors & Melissa A. Arnold, Thomas J. Dall, & Douglas Williams

November 2010

- Eleven sculptures by artists condemned as "degenerate" by the Nazis were discovered during the excavations before the construction of a new underground line in Berlin, Germany. The unearthed sculptures include works from Edwin Scharff, Marg Moll, and Karl Knappe.
- The Netherlands returned an oil painting by Jan Brueghel the Younger to the heirs of a Jewish art dealer persecuted by the Nazis and forced to flee Germany more than seventy years ago.
- A new online database created by the Conference of Jewish Material Claims against Germany and the U.S. Holocaust Memorial Museum seeks to reunite lost artworks with the families of their owners. The database relies on the recently digitized spoliation records meticulously kept by the Nazis.
- A commission of Austria's Ministry of Culture decided that the Leopold Museum should return seven Nazi-looted paintings by Egon Schiele and Anton Romako to their rightful owners. However, the decision is non-binding.
- Polish state lawyers have begun working to get one of the masterpieces of Aleksander Gierymski back into the country. The painting, *Jewish Woman with Oranges*, had been stolen by the Nazis during the Second World War and turned up at a small auction house in Hamburg.

December 2010

- A WikiLeaks cable revealed that the U.S. ambassador to Spain, Eduardo Aguirre, attempted to use recovered sunken treasure as a bargaining chip in a dispute involving the return of artwork stolen by the Nazis. The ambassador offered to return over $300 million in recovered gold coins from a Spanish shipwreck in exchange for Spain's help in getting the stolen artwork back to its rightful owners.
- Pierre Konowaloff filed suit in federal court in Manhattan alleging that a Cezanne painting in the permanent collection on the Metropolitan Museum of Art was stolen from his great-grandfather in 1918 following the Bolshevik takeover of Russia. (For more information about this case and Mr. Konowaloff's claim against Yale University for Van Gogh's The Night Café, please see Allan Gerson's article *Accounting for Bolshevik Looted Art: Moral and Legal Imperatives*, in this issue.)
- The Supreme Court of the United States has been asked to review a ruling that allowed a lawsuit to proceed against the Republic of Spain and the Thyssen-Bornemisza Collection over art alleged to have been looted by the Nazi regime. Spain contends that the suit should not proceed because the U.S. statute that allows foreign governments to be sued over wrongful property takings does not apply in cases where the allegedly stolen property was taken by a foreign sovereign itself.
- Federal authorities seized two Julian Falat paintings, which were stolen by Nazis during the Second World War, from New York auction houses.
- The Czech Republic's Constitutional Court overturned decisions from lower courts that had awarded half ownership of twenty valuable paintings to the descendants of a Jewish owner of a button factory that was seized by the Nazis in 1939 and nationalized in 1945.
- Britain's Spoliation Advisory Panel ruled that a painting of the Virgin Mary by Peter Paul Rubens will remain with its current owner, the Courtauld Institute in London. The Spoliation Advisory Panel heard arguments from the descendents of a Jewish banker who sold the painting in 1930 when he was forced to flee Germany during the Nazi rise to power.
- The United States has entered into a settlement agreement with the Toledo Museum of Art that provides for the return of the *Nereid Sweetmeat Stand*, a famed Swan Service collection's centerpiece to a royal family in Germany. The centerpiece, valued at over $1 million dollars, was stolen during the Second World War.
- Sotheby's Art Auction House scrapped a February sale of a controversial ivory mask believed to have belonged to an ancient Nigerian King. The mask may have been looted by British forces from 19th-century West Africa. Online protests against the sale emerged on social networking sites in mid-December.

January 2011

- Reports of widespread looting of antiquities filtered in from Egypt during the country's revolutionary unrest, most notably in Abusir and Saqqara. Looters allegedly entered tombs that had been sealed, destroyed them, and took artifacts. The Egyptian Museum in Cairo also experienced looting, where at least two Pharaonic mummies were destroyed.
- Italian police arrested a man with an eight-foot-tall ancient statue not far from Rome. Police believe the statue may be of Caligula and may have come from his tomb, which has eluded discovery to date.
- British pop singer Boy George returned a precious painting to its rightful home, in a church on the other side of Europe. A church Bishop saw the battered painting hanging from the wall of the singer's home while watching a documentary about the singer on Dutch television.
- Rutgers University returned a Renaissance-era painting to its rightful owners after learning that the painting had been looted by the Nazis in Holland.
- A 900-year-old religious manuscript that had been looted in Italy during the Second World War was returned by the British Library to its rightful owners in the southern Italian town of Benevento after a decade-long legal battle.

February 2011

- The heirs of Baron Mor Lipot Heerzog filed a suit in the United States seeking the return of works of art from Hungary.
- In Seattle, an art dealer was sentenced to four years in prison for conspiring to steal art.
- Works by Monet, Marquet, and Boudin that had been stolen in 1999 were recovered in Buenos Aires after they were posted on an Interpol database.
- The St. Louis Art Museum took the offensive and sued the federal government in an attempt to preclude it from initiating a forfeiture claim against the Ka-Nefer-Nefer mask, which the museum had acquired in 1998 for a reported $500,000. The museum contends that U.S. officials were party to communications in 2005 and 2006 that gave them knowledge of a potential claim at that time and triggered the running of the five-year statute of limitations period under 19 U.S.C. § 1621, thus precluding a forfeiture action.
- On February 11, 2011, Yale University signed an agreement with Peru over the disposition of objects removed from Machu Picchu nearly a century ago. The agreement will avoid continued litigation and will create a joint center for the study of Inca culture in Cusco, Peru.
- The painting *The Girl with a Dove* by Polish artist Antoine Pesne, which had been stolen during the Second World War, was discovered in Moscow.
- In what is regarded by many as the last unresolved Holocaust-related claim of its magnitude – the claim by the heirs of the Herzog family against Hungary for over 40 works with a combined value of over $100 million – Hungary argued for dismissal of the case because compensation for the works was covered by a 1973 agreement between itself and the United States.
- The United States Court of Appeals for the Sixth Circuit dismissed Holocaust-era theft claims against the German government because of lack of jurisdiction.
- Philippa Calnan, the purported sole heir to *St. Catherine of Alexandria* by Bernardo Strozzi, was denied an export license by Italian courts to bring the painting back to the United States. The courts held that the period for applying for an export license had expired in 2004, at which time the whereabouts of the painting were still unknown. Calnan plans to appeal her case to Italy's highest court.
- The German Government has agreed to amend its constitution to enable the free return of Nazi-looted art. The provision will affect all claims brought to German state collections and should lead to rapid resolutions of successful claims.
- Artworks worth tens of millions of pounds and registered as "disappeared" or "stolen" have been seized from the Wildenstein Institute in Paris. Among the items seized are works by Degas and Manet.

March 2011

- Victims of a 1997 bombing in Jerusalem have encountered an obstacle in enforcing their $90 million judgment against Iran. The United States Court of Appeals for the Seventh Circuit held that the antiquities were presumed to be immune from attachment.
- The U.S. Attorney's office in Delaware returned twenty-five ancient Iraqi artifacts that were recovered as part of a recent investigation into art smuggling. Assistant U.S. Attorney David L. Hall indicated that the items were recovered from a California antiquities dealer in July 2010.
- French investigators found jewels valued at $25 million hidden in a Paris rain sewer. The jewels were part of the spectacular 2008 heist from luxury jeweler Harry Winston's boutique and were found in a drain at a house belonging to one of the nine people charged in the heist.
- An Australian panel rejected a claim relating to Johannes Vermeer's painting, *The Art of Painting*. The claim was asserted by the heirs of Jaromir Czerin, who sold the painting to Adolf Hitler in 1940.

Arts & Antiquities: Trafficking News Notes (cont'd)

The panel said that there was no evidence that the sale was forced or that the seller was persecuted.

- The Getty Museum is the first museum in North America to agree to return a painting to the heir of Jaques Goudstikker, a noted Dutch-Jewish art dealer whose huge collection was dispersed after he fled the 1940 Nazi invasion of Holland.
- A porcelain sea nymph worth about $1 million was returned to the German city of Dresden on March 24, 2011, more than 70 years after it disappeared from a box in a castle where it was kept for safekeeping during the Second World War.
- Egypt's Supreme Council of Antiquities issued a revised list of objects stolen from Cairo's Egyptian Museum in January. Fifty-four pieces were stolen, twelve of which were later recovered.
- A bronze erotica piece by 1920s sculptor Bruno Zach was stolen from an antiquities dealer in Germantown, PA. It was recovered about a month later in Lancaster, PA.
- The Mexican government has branded a monumental Maya statue that sold for almost 3m a fake. In a widely circulated statement, the Mexican Ministry of Foreign Affairs and its National Institute of Anthropology and History said that the Classic period (550-950 AD) piece was "manufactured recently."
- National Trust member Geoffrey Harkin was sentenced to nine years in prison after stealing antiques from various stately homes that he visited during guided tours. In total, he stole antiques worth more than £1.2 million from mansions across the country. The items have never been recovered.
- Yale University filed suit in U.S. federal district court to quiet title to Van Gogh's *The Night Café* in response to a claim against the painting by Pierre Konowaloff. Mr. Konowaloff is also involved in litigation with the Metropolitan Museum of Art over a Cezanne painting.

April 2011

- Federal prosecutors in Salt Lake City, Utah, have added additional counts of trafficking in archaeological resources, conspiracy, and theft of tribal and government property against Joseph M. Smith, Meredith Smith, Reece Laws, and Tad Kreth.
- The Swiss Carabinieri recovered Italian antiquities and paperwork that had been stowed away in the trunk of a car driven by a Swiss-Italian man.
- Antiques owned by Hussein Salem, an escaped Egyptian mogul, were seized by airport customs at Cairo Airport while in route to Jeddah, Saudi Arabia.
- Europe's most notorious art thief, Stephanie Breitwieser, was recently arrested again in France. The French art trafficking squad searched both his and his mother's homes, finding stolen art and $87,000 in cash.
- Federal agents recovered 99 pre-Columbian artifacts on April 27, 2011 during a Department of Homeland Security investigation. The artifacts have been returned to Panama.

May 2011

- Egypt will receive from the Museum of Basel in Switzerland a stela that is over four thousand years old and portrays its owner hunting. The stela dates back to Egypt's Old Kingdom period.
- At the Palace Museum inside the Forbidden City in Beijing, seven works of 20th century art that were covered with jewels and made of gold were stolen by a thief who law enforcement believed gained access by opening a hole in a wall of the museum. The stolen artwork was on loan from Liangyicang, a private Hong Kong collection.
- Romania recovered 232 ancient artifacts that were stolen from the archaeological site of Sarmisegetusa Regia years ago, including two iron shields, a gold bracelet, and gold and silver coins.
- The U.S. Customs and Border Protection agency and the U.S. Immigration and Customs Enforcement agency recovered Peruvian artifacts during a Homeland Security investigation in Denver and New York. The antiquities were returned to Peru's embassy in Washington, D.C.
- In an effort to prevent theft of cultural relics, China's police and heritage protection authorities have united together on an eight-month campaign to "tackle the underground market and decisively reverse the high-rate of crime." Vice-minister of public security Zhang Xinfeng stated that, as of May 1, 2011, China's criminal law removed the death penalty as a potential punishment for robbing ancient tombs, which may give rise to more tomb robberies.
- In New York, five Indonesian hand-carved human skulls dating from the 18th and 19th centuries were discovered during a search by U.S. immigra-

tion and customs officials. The skulls, each uniquely decorated, were considered trophy skulls and date back from the headhunting days of the Dayak Tribe, which resided on the Indonesian island of Borneo.

- A man was arrested for possession of a stolen 1,147-pound metal ring that he bought from an ad on the online "classifieds" website Craigslist. The piece had been broken off of its concrete base a few days before the theft.
- Lothar Senke and Herbert Schulte, the heads of an organization selling fake sculptures that were advertised as original works by Alberto Giacometti, were arrested at the Hotel Steigenberger at the Frankfurt Airport in Germany. The same day, police detectives in Mainz searched a 200-square-meter storage facility rented by Herbert Schulte where large stores of forged sculptures were uncovered.
- Art loans between the United States and Russia have been placed on hold due to ownership disputes between Russia and an Orthodox Jewish group over holy texts seized by the Soviet Union.
- The fourth and final lot of Korean ancient royal books, looted by the French army in the late 19th century, were returned to South Korea. Since April 14th, a total of 273 royal books have been delivered in four separate flights from the National Library of France in Paris.
- A rhinoceros head was stolen by burglars from a museum in Surrey in the United Kingdom. Julia Tanner, the museum's curator, said the burglars had forced an entry, setting the alarms off. The rhinoceros head was the only item stolen. Similar thefts have occurred elsewhere in Europe where the animal heads were eventually found with their horns removed.
- A group of young New Zealanders has been accused of taking a treasured painting from a Rarotonga museum after they were allowed in just before closing time. After the group left the museum, officials discovered that the painting was missing.
- UNESCO is considering adding eleven Middle Eastern sites to its World Heritage List, but it has rejected Palestine's proposal to add the Church of the Nativity in Bethlehem because only countries recognized by the United Nations as sovereign states can make nominations to UNESCO.
- Israeli officials detained John Lund, a retired university lecturer and Mormon tour guide, as he attempted to leave the country with ornate oil lamps and 100 bronze coins. He had purchased the antiquities from street vendors in Bethlehem, which is under Palestinian control, and therefore needed to obtain an exit visa in order to transport the artifacts out of the country legally.
- The U.S. Forest Service is investigating the vandalizing of a popular cave in central Oregon, the Hidden Forest Cave in the Deschutes National Forest. The damage included extensive spray-painting both outside and inside the cave, covering native pictographs.
- Three human skulls and a 2,000-year-old mummy from the Paracas culture on Peru's coast were recovered by customs agents at Argentina's central post office.

We welcome submissions for upcoming issues. Please contact the CHAR editorial board at eic.char@gmail.com for more information. Submissions should generally be limited to 3000 words and should focus on a topic relating to art or cultural property law. Preference is generally given to articles that address international issues.

Authors are welcome to select a topic of interest and prepare a piece specifically for the Review. If you are interested in writing but do not have a topic, the editorial board may be able to assist you in finding a topic, as we continually seek articles that fit within the theme of each issue.

Space is limited in each issue, and it is best to provide as advanced notice as possible to the editorial board if you intend to submit an article for publication consideration. This facilitates planning for upcoming issues and ensures that the editorial board will have adequate time to review and process your article.

We hope you have enjoyed this issue of the Review, and we would like to thank everyone who helps to make this publication possible, especially our sponsors and the dedicated authors, board members, and support volunteers who work diligently to make each issue a success. And we cannot forget to thank you, our readers, for your continued interest and support.

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