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Looting

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Rubin v. Islamic Republic of Iran: Satisfying U.S. Judgments Against Foreign Sovereigns by Seizing Museum Collections

Executive Weapons to Combat Infection of the Art Market

Meet the Artist: Susanne Slavick: The R&R (…&R) PROJECT and Animating Absence

plus

Thank You to Past CHAIG Chair, Professor Jennifer Kreder!

"Confronting Complexity in the Preservation of Cultural Property" Summary of the 2012 ASIL Annual Meeting Panel Presentation

and more!

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American Society of International Law

In this Issue...

Welcome!

Cultural Heritage & Arts Review

What do an artist, a museum director, a professor, and several lawyers have in common? They have all contributed to this issue of the *Cultural Heritage & Arts Review*. This wonderful diversity is in keeping with the mandate of the Review, which is to bring you insights from scholars and practitioners in the cultural heritage and arts field.

We've been particularly honored to contribute to this growing area of interest as Co-Editors of your review and so before we tell you about this issue we wish to acknowledge with thanks the work of the former Editor-in-Chief Ben Bauer who did such a masterful job on the previous issue. Building on this tradition, we have introduced a new innovation—the introduction of a theme for each issue.

The theme for this issue is looting, which in light of the continued prevalence of the problem is both timely and an issue desperately in need of further commentary. To do this, we have included topical commentary on the recent court decision(s), *Rubin v. Islamic Republic of Iran*, by Kimberly Alderman and Elizabeth Varner, and commentary by Professor Jennifer Kreder on the issue of "Executive Weapons" such as Civil Forfeiture as a means of combatting illicit trade.

To add to the depth of treatment on the topic of looting, on the cover and inside these pages, you will also find original artworks by Susanne Slavick and have the opportunity to meet the artist. Slavick's moving images of the reality of looting in war combine modern and traditional images in a way that can only leave you awestruck—and possibly a little reflective, as she intends.

If you look a little further into this issue you will also find an account of the Cultural Heritage and Arts Interest Group panel at last year's Annual Meeting of the American Society of International Law. Additionally, there is a tribute to the enormous energy and hard work of Professor Jennifer Kreder for building the Review and the Interest Group with which we are associated.

This issue brings together the specific theme of looting, the Review's mandate to bring you recent commentary on the issues of cultural heritage and the arts, and original artwork that makes you think. So welcome! Please open the pages and enjoy.

Betina Kuzmarov and *Elizabeth Varner*

Rubin v. Islamic Republic of Iran: Satisfying U.S. Judgments Against Foreign Sovereigns by Seizing Museum Collections[1]

by Kimberly Alderman[2] and Elizabeth Varner[3]

On September 4, 1997, three suicide bombers attacked a crowded pedestrian mall in Jerusalem.[4] The bombs contained "nails, screws, pieces of glass, and chemical poisons to cause maximum pain, suffering and death."[5] They simultaneously detonated, killing five people and injuring nearly 200 more.[6] Five of the injured people joined and became the *Rubin* plaintiffs.

Although Hamas publically claimed responsibility for the vicious attack, the *Rubin* plaintiffs named a defendant from whom they would have a better chance of collecting judgment: the Islamic Republic of Iran. In 2001, they filed suit in a Washington, DC federal court, alleging that Iran was responsible for the bombings because it provided vital training and support to Hamas.[7]

Earning a judgment was the easy part because Iran failed to appear to defend against the suit. In 2003, default judgment was entered against Iran for $71.5 million in compensatory damages, and $300 million in punitive damages.[8] The *Rubin* plaintiffs have since been attempting to enforce the judgment, targeting Iranian assets in the United States.

Preliminary collection efforts targeted bank accounts belonging to the Consulate General of Iran, as well as a former residence of the Iranian crown prince in Lubbock, Texas.[9] The bank accounts were deemed subject to attachment and execution under §201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), but the plaintiffs were unable to seize the funds due to a previous lien.[10] They were, however, able to attach and sell the Texas residence, but it yielded a mere $390,000.[11] With the vast majority of the judgment left unsatisfied, the plaintiffs set their sights on Iranian antiquities housed in museums across the United States.[12]

I. Executing the Judgment

The plaintiffs' controversial new strategy was to execute their judgment against Iran by seizing Persian antiquities held in U.S. museums. They focused on two federal jurisdictions: the Northern District of Illinois and the District of Massachusetts.[13] In 2005, they filed lawsuits asserting that the museums held antiquities belonging to Iran.[14] As judgment-creditors of Iran, the *Rubin* plaintiffs argued these antiquities should be sold to the highest bidder, and the money used to satisfy the outstanding judgment.[15]

In Illinois, the *Rubin* plaintiffs named the University of Chicago's Oriental Institute and the Field Museum of Natural History. Through these suits, the plaintiffs seek to attach the Persepolis Fortification archive, the Chogha Mish collection, and the Herzfeld Collection. [16]

The Persepolis Fortification archive consists of over 15,000 dried clay tablets dating from 509 to 494 B.C. that contain information about the Persian Empire. A University of Chicago's archeological expedition found the tablets underneath one of the fortification walls in Persepolis, modern day Iran, in 1931.[17] This expedition arranged for the University of Chicago's Oriental Institute to conserve and research the tablets pursuant to a long-term loan.[18]

The Chogha Mish collection contains artifacts that a University of Chicago expedition unearthed in the Chogha Mish plain in Iran in 1960. Iran also allows the University of Chicago to have possession of this collection on long-term loan for preservation and research.[19]

The Herzfeld Collection contains over 1,000 prehistoric Persian artifacts that German archaeologist, Ernst Herzfeld, sold to the Field Museum in 1945.[20] Herzfeld collected these objects, including prehistoric pottery, weapons, and ornaments, in a series of archeological excavations during the 1920s and 1930s. Iran has never contested the Field Museum's ownership of this collection.

After the University of Chicago and the Field Museum asserted the collections were immune from seizure under the Foreign Sovereign Immunity Act ("FSIA"), a controversy

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arose as to whether the museums could assert that the collections were immune under FSIA or whether only a foreign sovereign could assert such immunity. On March 29, 2011, the Seventh Circuit Court of Appeals held that § 1609 of FSIA provides presumptive immunity from attachment to a foreign sovereign's property in the United States.[21] The foreign sovereign does not have to appear in the action or assert the immunity.[22] Accordingly, plaintiffs seeking attachment of a foreign sovereign's property in the United States have the burden of showing the property falls under an exception to FSIA immunity.[23]

Plaintiffs first argued that the "commercial activity" exception to FSIA immunity applies.[24] Under this exception, a foreign state's property is not immune from attachment if the property is in the United States, being used for a commercial activity, and the underlying judgment "relates to a claim for which the foreign state is not immune."[25] The *Rubin* plaintiffs seek to show that Iran is engaged in commercial activity through its agent's, The University of Chicago's, use of the artifacts.[26] The *Rubin* plaintiffs are currently seeking discovery to prove their agency argument.[27]

The *Rubin* plaintiffs have also argued that the TRIA provides an exception to FSIA immunity. Under TRIA, the blocked assets of a terrorist party can be attached to satisfy a judgment obtained pursuant to FSIA's terrorism exception.[28] It is undisputed that Iran is a terrorist party under TRIA.[29] Assets are blocked under the TRIA if they are seized or frozen under §§ 202 and 203 of the International Emergency Economic Powers Act.[30] Under this act, in 1979, the President "blocked all property and interests in property of the Government of Iran . . . which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States."[31] In 1981, however, the President ordered that possessors of properties owned by Iran transfer them according to the wishes of the Iranian government,[32] which unblocked the properties. The *Rubin* plaintiffs argue, however, that the antiquities are not "properties" because properties are defined as "all uncontested and non-contingent liabilities and property interests of the Government of Iran."[33] Under § 535.333(c), the antiquities are contested if the holder reasonably believes that Iran does not have title or has only partial title to the antiquities. The *Rubin* plaintiffs seek to prove that ownership of the Persian artifacts is contested.[34]

In Massachusetts, the *Rubin* plaintiffs named Harvard University and its constituent art museums ("Harvard"), as well as the Boston Museum of Fine Arts ("MFA") as defendants. This Massachusetts case differs from the Illinois case because in the Massachusetts case plaintiffs made a broad allegation that defendants possess Iran-owned antiquities, but were unable to name any antiquities in particular. Furthermore, the Massachusetts case is different from the University of Chicago's position in the Illinois case as Iran claims title to the artifacts currently possessed by the University of Chicago's Oriental Institute, while Iran does not claim title to the works in the Massachusetts case.[35]

Defendants in the Massachusetts case responded that they do not possess any antiquities owned by Iran and, even if they did, the objects would be immune from attachment. Like the Seventh Circuit, the U.S. District Court for the District of Massachusetts held the antiquities were immune from attachment under the FSIA. The Court ruled that the "commercial use" exception under the FSIA did not apply as the foreign sovereign, Iran, did not possess or make use of the antiquities.[36]

However, the antiquities might be reached through § 201 of TRIA because the ownership was contested.[37]

The *Rubin* plaintiffs thereafter attempted to reach the antiquities through TRIA. Because TRIA does not provide an execution mechanism, the plaintiffs turned to the trustee process under Massachusetts State law.[38] Here again, they hit a snag. Chapter 246 of the Massachusetts General Laws provides that when a trustee possesses "goods, effects or credits of the defendant," these may be "attached and held to respond to the final judgment."[39] This places the burden on the creditor to show the debtor owns the property for which he seeks attachment.[40] In this case, this means that after showing that the ownership of the antiquities was contested (in order to avail themselves to the FSIA exception under the TRIA), the *Rubin* plaintiffs had to show that Iran owned the antiquities under Chapter 246 of the Massachusetts General Laws (in order to successfully attach the antiquities).

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II. Recent Developments in the *Rubin* Cases

On September 15, 2011, the District Court of Massachusetts ruled that while ownership of the antiquities was contested for purposes of the TRIA, the *Rubin* plaintiffs had not proven that Iran owned any objects in the possession of Harvard or the Museum of Fine Arts, and therefore, Chapter 246 of the Massachusetts General Law would not permit seizure.[41]

The *Rubin* plaintiffs had argued that several works in the museums originated in Iran and that the "1930 [Iranian] Law" vested ownership of all Iranian archeological works in the government.[42] The 1930 Law mandates that antiquities may not be exported without a permit and imposes other administrative obligations on antiquities owners.[43]

The District Court employed a plain reading of Iran's 1930 Law, and, because the law did not automatically vest ownership of antiquities in the government, the court rejected the plaintiffs' argument that it was tantamount to a patrimony law. The court noted that the 1930 Law contemplates private ownership of Iranian antiquities. The court further noted that other courts have already examined the 1930 Law and found that it did not vest automatic ownership of all excavated antiquities in the government of Iran.[44]

Plaintiffs also attempted to establish patrimony through Iran's 1928 Civil Code, which mandated that government property "in use by the Government for the service of the public or the profit of the state" may not be privately owned.[45] However, the court found plaintiffs did not show any of the antiquities at issue were "in use for the service of the public or the profit of the state" when they were removed from Iran.[46]

Plaintiffs also argued that the works belonged to Iran because they had been illegally excavated and smuggled out of Iran. The court rejected this argument noting that illegal exportation is not dispositive on the issue of whether Iran owned the antiquities.[47]

While this decision was a victory for those who believe the antiquities should remain in museums, it causes concern for the security of other antiquities. The ruling hinged on the fact that the plaintiffs were unable to prove Iranian ownership, indicating that antiquities housed in museums are not untouchable for the purposes of satisfying judgments against foreign sovereigns.

The question that lingers is whether the Northern District of Illinois will follow the reasoning of the District Court of Massachusetts in resolving the issue of whether the antiquities are accessible for seizure. Currently, in the Illinois case, the *Rubin* plaintiffs are trying to show that the antiquities are accessible under the "commercial activity" and TRIA exceptions. The *Rubin* plaintiffs' attempt to use the "commercial activity" exception failed in the Massachusetts' case because the undisclosed works were not used in commercial activity. However, it is possible that the antiquities on loan to the University of Chicago will fit within the "commercial activity" exception.

The *Rubin* plaintiffs are also trying to fit within the TRIA exception in the Illinois case. In regard to the *Rubin* plaintiffs' claim against the Field Museum, Iran does not claim ownership of the antiquities at the Field Museum. Thus, if the Illinois courts follow the Massachusetts court reasoning, the Field Museum's antiquities will meet the threshold requirement of having contested ownership.

However, in regard to the University of Chicago's collections, the *Rubin* plaintiffs have the added burden of proving that ownership of the Persepolis Fortification archive and the Chogha Mish collection at the University of Chicago are contested.[48] In the previous Massachusetts litigation, the works were already deemed contested as Iran never claimed ownership of the works, but the *Rubin* plaintiffs claimed they did belong to Iran.

III. The Future of Presumptive Immunity

Both of the *Rubin* cases provide a clear view of the application of the FSIA to antiquities owned by a foreign sovereign in the United States. Both the Seventh Circuit and the U.S. District Court of Massachusetts held that the FSIA provides presumptive immunity from attachment for property located in the United States belonging to a foreign state. However, this immunity is not ironclad. Statutory exceptions may lift immunity and allow foreign property to be attached to satisfy judgment against that state. While many antiquities on loan in the U.S. are protected under Immunity from Seizure Act, there are important cultural treasures, such as

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the Persepolis Fortification archive and the Chogha Mish collection, that are at risk due to having been imported before its enactment.

Cultural advocates, archaeologists, and researchers are concerned that the Massachusetts ruling suggests that antiquities can now be taken from U.S. museums to satisfy judgments against their sovereign owners. Some argue that there should not be an exception to the FSIA when it comes to antiquities. Abbas Alizadeh, an expert on ancient Iran and senior researcher at the University of Chicago, has explained, "These [Persepolis] tablets belong to a nation. And any government in power at any given time—now, in the future, or in the past—is merely the custodian of these tablets, not the owner."[49]

If the *Rubin* plaintiffs are successful in their attachment proceedings, the antiquities will be sold at auction to satisfy the judgment against Iran. The antiquities would be treated the same as any other objects at auction, without special consideration of their scientific, historical, or cultural value. As attorney Charlene Caprio explains, "a buyer is not pre-chosen or prescreened and in the event of an auction, a wealthy private bidder may very well outbid a museum or educational institution."[50] A private owner might separate the antiquities (selling off the Persepolis tablets individually, for instance) or prevent any future access by the academic community. They might also be "altered, mismanaged, inadvertently defaced or destroyed if private owners seek to display or store the artifacts in ways that compromise their preservation."[51] Foreign sovereigns might also become hesitant to lend antiquities to American museums for fear that aggressive plaintiffs might attempt to seize them to satisfy judgments.

For now, we wait for the final ruling of the District Court of the Northern District of Illinois.

1 This article refers to events as they were at the time this article was written in October, 2011.
2 Kimberly Alderman is a private attorney in Madison, Wisconsin. She maintains an online resource on cultural property and archaeology law at www.ArchaeoLaw.com.
3 Elizabeth Varner is Executive Director of the National Art Museum of Sport. M.A., History of Decorative Arts, Smithsonian Institute; J.D., Tulane University Law School.
4 Serge Schmemann, *Bombing in Jerusalem: The Overview*; 3 *Bombers in Suicide Attack Kill 4 on Jerusalem Street in Another Blow to Peace*, N.Y. Times, Sept. 5, 1997, at A1.
5 Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 261 (D.D.C. 2003).
6 Jenny Rubin and her mother, Deborah Rubin; Stuart Hersh and his wife, Renay Frym; Noam Rozenman and his parents, Elena and Tzvi Rozenman; Daniel Miller; and Abraham Mendelson. Rubin v. Islamic Republic of Iran, 637 F.3d 783, 786 (7th Cir. Ill. 2011).
7 *Id.*
8 *Campuzano*, 281 F. Supp. 2d at 272-77.
9 Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 Vill. L. Rev. 479, 494-95 (2008).
10 *Id.*
11 *Id.*
12 *Id.* at 495.
13 *Rubin*, 637 F.3d 783; Rubin v. Islamic Republic of Iran, 456 F. Supp. 2d 228 (D. Mass 2006).
14 *Id.*
15 *Id.*
16 *Rubin*, 637 F.3d at 786-87. These antiquities are not protected under the Immunity from Seizure Act ("IFSA"). IFSA shields antiquities imported into the United States from seizure if the importing party applies for immunity for the object. Both the Persepolis Fortification archive and Chogha Mish collection have been on loan from Iran since before enactment of IFSA in 1965, and therefore the IFSA protection does not apply.
17 Hilton, *supra* note 9, at 486.
18 *Id.* at 480.
19 *Rubin*, 637 F.3d at 787.
20 *Id.*
21 *Id.* at 785.
22 *Id.* at 799.
23 *Id.* at 785.
24 *Id.* at 787.
25 28 U.S.C. § 1610(a)(7) (2011).
26 Rubin v. Islamic Republic of Iran, No. 03 CV 9370, 2007 U.S. Dist. LEXIS 24376 *22-24 (N.D. Ill Mar. 19, 2007).
27 *Id.*
28 28 U.S.C. § 1610(a)(7) (2011).
29 *Rubin*, No. 03 CV 9370, 2007 U.S. Dist. LEXIS 24376 *11.
30 Terrorist Risk Insurance Act of 2002 , Pub. L. No. 107-297, § 201(d)(2), 116 Stat. 2322, 2339 (2002).
31 Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).
32 *See* Exec. Order No. 12,281, 46 Fed. Reg. 7,923 (Jan. 19, 1981); 31 C.F.R. § 535.215(a) (2011).
33 31 C.F.R. § 535.333 (2011).
34 Rubin v. Islamic Republic of Iran, No. 03 CV 9370, 2007 U.S. Dist. LEXIS 54983 *3 (N.D. Ill. July 26, 2007).
35 The Field Museum's position in the Illinois case is

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similar to the position taken in this case, however, in that Iran does not claim ownership of the antiquities.

36 Rubin v. Islamic Republic of Iran, 456 F. Supp. 2d 228 (D. Mass. 2006) *on reconsideration in part sub nom*. Rubin v. Islamic Republic of Iran, 541 F. Supp. 2d 416 (D. Mass. 2008).

37 Terrorist Risk Insurance Act of 2002 § 201(a), 116 Stat, at 2337; Rubin v. Islamic Republic of Iran, 810 F. Supp. 2d 402, 403 (D. Mass. 2011).

38 *See* Fed. R. Civ. P. 69.

39 Mass. Gen. Laws ch. 246, § 20 (1972).

40 *Id*.; Jordan Marsh Co. v. Hale, 107 N.E. 357, 358 (Mass. 1914).

41 *Rubin*, 810 F. Supp. 2d at 404.

42 *Id*.

43 *Id*. at 405 n.1.

44 *Id*.

45 *Id*. at 405.

46 *Id*.

47 *Id*. Note the paradox that the plaintiffs must first establish that title to the property was disputed in order to fall within FSIA, but then must prove Iran's ownership to attach the property to satisfy the judgment. Rubin, 541 F. Supp. 2d 416 (D. Mass. 2008)(discussing this paradox).

48 If the Illinois courts follow the Massachusetts court reasoning, the Field Museum's antiquities will meet the threshold requirement of having a contested ownership.

49 Golnaz Esfandiari, *Iran: Tehran, U.S. Academics Challenge Siezure of Persian Tablets*, Radio Free Eur./Radio Liberty, July 12, 2006, http://www.rferl.org/content/article/1051040.html (last visited March 11, 2012).

50 Charlene A. Caprio, *Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act*, 13 Int'l J. Cult. Prop. 285, 29 (2006).

51 *Id*. at 298.

Executive Weapons to Combat Infection of the Art Market[1]

by Jennifer Anglim Kreder[2]

We all know that criminal proceedings implicate heightened constitutional protections in comparison to civil proceedings. Many have also heard of civil forfeiture, a hybrid of criminal and civil process with roots in the first session of Congress.[3] A civil forfeiture proceeding is filed directly against real or personal property on the premise that its association with criminal activity has tainted it such that it is subject to forfeiture.[4] In the 1990s, the use of civil forfeiture in the "War on Drugs" was widely criticized, and the Supreme Court determined that certain constitutional protections applied in particular circumstances.[5] But in 1996 in *Bennis v. Michigan*,[6] the Supreme Court ruled that the seizure of property, even one's residence, when the property owner "had no knowledge of, and did not consent to, the illegal use of the property," was not prohibited by the Due Process or Takings Clauses, a ruling that drew widespread criticism from legal academia.[7] Congress responded to *Bennis* by enacting the Civil Asset Forfeiture Recovery Act of 2000 ("CAFRA"), which raised the government's burden of proof in many civil forfeiture actions filed after 2000 from "probable cause" to "preponderance of the evidence" and codified a widely, but not universally, applicable "innocent owner defense".[8]

Over the years, the executive branch has seized Nazi loot in various ways.[9] The seizure that launched the modern Holocaust-era art recovery movement was the civil forfeiture proceeding filed in 1999 against *Portrait of Wally*, a painting by Egon Schiele.[10] The seizure caused an uproar in the art world, which largely was concerned about future art loan prospects.[11] At the time, even I, a supporter of Nazi-era art restitution, worried that the controversial seizure more than fifty years after the War would hinder State Department efforts to resolve remaining Holocaust-era issues globally and would alienate museums and other possessors of tainted art, whose cooperation is essential for widespread restitution.[12] Now that some prominent museums have demonstrated the lengths to which they will go to try to prevent objective resolution of claims,[13] the issue has been cast in a new light: Should one fear governmental power to deprive obstinate possessors of Nazi-looted art of purported property rights pending resolution of colorable claims?

Since *Wally*, the executive branch has used civil forfeiture to retrieve four other Nazi-looted paintings and has negotiated other settlements without filing proceedings.[14] First, it initiated *United States v. One Oil Painting Entitled* Femme en Blanc by *Pablo Picasso* after the purchaser moved the painting to Chicago, seemingly to avoid jurisdiction in California.[15] Next, in December 2010 (and while the Supreme Court continued to consider petitions for certiorari in some pending cases brought by private litigants[16]), the Immigration and Customs Office of Homeland Security initiated a civil forfeiture proceeding to seize two recently resurfaced paintings by Julian Falat that the Nazis looted from the Polish National Museum.[17] Last, in November 2011, the same agency filed another civil forfeiture proceeding to seize a painting by Girolamo Romano that was on display in the Mary Brogan Museum of Art & Science; the painting is alleged to have been taken and auctioned off by the Vichy government in 1941.[18] The underlying premises for the forfeitures are failures to declare the paintings to customs,[19] generally importing property contrary to law,[20] smuggling,[21] and/or violations of the National Stolen Property Act ("NSPA").[22] The first two grounds fall under Title 19 of the U.S. Code, which pertains to customs. The criminal smuggling and NSPA violations fall under Title 18, which pertains to crimes.

A criminal smuggling prosecution requires that the defendant have knowingly conspired or attempted to sneak the property across the border or "in any manner facilitate[d] the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law."[23] A person violates the NSPA if he or she (1) "transports, transmits, or transfers in interstate or foreign commerce" property "knowing [it] to have been stolen, converted or taken by fraud"[24] or (2) "receives, possesses, conceals, stores, barters, sells, or disposes" of property that has "crossed a State or United States boundary after being stolen, unlawfully converted, or taken."[25]

Civil forfeiture under either title results in property forfeiture, not potential jail time and fines, provided that the

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preponderance of the evidence supports the government's case that someone violated one of the listed provisions in connection with the property.[26] Title 18 forfeitures are now subject to the CAFRA innocent owner defense, whereas customs forfeitures fall beyond the scope of CAFRA.[27] Seizure power under the NSPA is vast, particularly since the 1986 amendments foreclosed defenses premised on the grounds that the goods "came to rest" in a jurisdiction and thus were no longer in interstate commerce.[28] Thus, the NSPA has the power to trump time-bar defenses that museums and other present-day possessors currently are using to defeat private litigants' civil claims for conversion and replevin.[29]

In contrast to seizures of Rebel property after the Civil War under the Confiscation Acts,[30] customs seizures implicate Fourth, Fifth,[31] and Eighth[32] Amendment protections but the CAFRA innocent owner defense is unavailable. Customs law is designed primarily for at-the-border seizures.[33] Although the seizures in *Wally*, *One Julian Falat Painting*, and *Painting Known as Cristo Portacroce Trascinato Da Un Mangoldo* were not made at the border, the readily moveable nature of chattels is one justification for swift process.[34]

Perhaps the paintings in *One Julian Falat Painting* were smuggled into the country; certainly muted Holocaust-era art has been.[35] The Verified Complaint in *One Julian Falat Painting* states that Homeland Security agents "have conducted a search of all available importation records and have not been able to find any records documenting that the painting was lawfully imported into the United States."[36] In contrast, neither *Portrait of Wally*, nor *Painting Known as Cristo Portacroce Trascinato Da Un Mangoldo* were brought into the country secretly; they were on public view for all to see at the Museum of Modern Art, and the Mary Brogan Museum of Art & Science, respectively. Thus, a question remains: Should Title 19 customs grounds (or Title 22 grounds as originally pled in *Wally*[37]) be used when Title 18 criminal grounds (with the CAFRA defense) could be?

While the executive has power to decide how best to unwind Nazi looting,[38] constitutional shortcuts, even during wartime or after to address crimes committed during war, should not be accepted lightly.[39] Just ends do not justify unjust means, but it seems fair to utilize civil forfeiture to fulfill the executive branch's commitment to restitute Holocaust-era art. That commitment dates back to 1943.[40] Civil forfeiture is an essential post-war executive tool because it "would overstrain governmental resources to prosecute the *people involved*, rather than looking to their property…."[41]

The due process philosophical underpinnings of CAFRA are seductive. Most would agree that we should allow possessors of property facing forfeiture to demonstrate that they were bona fide purchasers for value without any knowledge of prior taint. However, in the civil context under our law, bona fide purchaser status does not matter much. That one cannot obtain title from a thief is the common law rule in this country, although statutes of limitations and other doctrines may bar a claim.[42] The common law protects theft victims over commercial certainty in part due to the philosophy that whereas original owners were unwillingly robbed of the art's possession, subsequent purchasers made the choice to buy the art from the thief (albeit perhaps in good faith).[43] Thus, if the government were forced to overcome a CAFRA defense, it very well could be in a position worse than the original theft victim in bringing civil litigation.

The Washington Principles,[44] Vilnius Declaration[45] and Terezín Declaration,[46] although "soft law," dictate that time-bar and other technicalities should not trump the merits of a claim. If technicalities are allowed to trump the merits in Holocaust-art disputes, then we are allowing our courts to be manipulated to support a corrupted, infected market that gave financial support to a genocidal regime. The deceptive conduct of the thieves, smugglers, and many purchasers who should have suspected the origin of the art (if they did not have outright knowledge of it), and some museums' and collectors' misuse of our courts to shut down claims on technical grounds justify the government's use of civil forfeiture to seize the art.

In conclusion, without governmental power to seize tainted art, corrupt dealers will continue to thrive. When it comes to true downstream innocents, the point is not to punish, but rather to protect the market from further infection and to assist claimants in accordance with the Washington Principles, Vilnius Declaration, and Terezín Declaration. Thus, the philosophies that have supported asset forfeiture in the customs context, without the same constitutional protections and without the CAFRA innocent owner defense, seem to be correct in the Holocaust-era art context. While the upshot is deprivation of purported property rights with due process protections less than those afforded criminal defendants, the

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deprivation is not on par with that which was the impetus for much of the outrage in the 1990s about the implementation of civil forfeiture as a "tactical nuclear weapon".[47] We are not depriving innocents of roofs over their heads to line the public purse; we are taking art into custody until its ownership can be established–and then returning it to the true owner. Although we must vigilantly guard against unbridled governmental power, given the miserable state of affairs for claimants seeking justice in civil proceedings,[48] we must put some faith in the executive branch to exercise prosecutorial discretion in effectuating executive policy to restitute Holocaust-era art.[49] Perhaps the executive branch will find a way to reinvigorate civil litigation brought by claimants. Otherwise, those who have trafficked in Holocaust-era art will have successfully forced us into a false choice between private civil litigation and government-initiated civil forfeiture proceedings when there are other options. If all civil options ultimately prove ineffectual at securing restitution and cleaning up today's art market, then we may reach the point where, as in the antiquities arena, the executive's hand is forced to initiate criminal prosecutions.[50]

1 A prior version of this article was published at 83 Wash. U. L. Rev. 1353 (2011).

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3 E.*g.*, Terrence G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. Sch. L. Rev. 255, 256 (1994). The first criminal forfeiture statute was the RICO Act passed in 1970. *Id.* at 264.

4 E.*g.*, Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911, 916–17 (1991).

5 *See, e.g.*, Matthew P. Harrington, *Rethinking* In Rem: *The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 Yale L. & Pol'y Rev. 281, 282 (1994).

6 Bennis v. Michigan, 516 U.S. 442 (1996).

7 *See* Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed By the Federal Government*, 89 Ky. L.J. 653, 654 (2001).

8 18 U.S.C. § 983(d) (2006).

9 *See, e.g.*, United States v. Herce, 334 F. Supp. 111 (S.D.N.Y. 1971) (interpleader action following seizure).

10 *See* United States v. Portrait of Wally, 105 F. Supp. 2d 288, 290 (S.D.N.Y. 2000) (filed pre-CAFRA).

11 *See, e.g.*, Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DePaul-LCA J. Art of Ent. L. & Pol'y 11, 13 (1999).

12 Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 Vand. J. Transnat'l L. 1199, 1251–52 (2005).

13 *See, e.g.*, United States v. Portrait of Wally, 663 F. Supp. 2d 232 (S.D.N.Y. 2009). This case took eleven years just to pass the summary judgment stage. *Id.* at 246.

14 E.*g.*, Press Release, U.S. Immigration and Customs Enforcement, Porcelain Masterpiece to Be Returned to Heirs of Former German Prime Minister (Dec. 23, 2010), *available at* http://www.ice.gov/news/releases/1012/101223newyork.htm.

15 *See* United States v. One Oil Painting Entitled *Femme en Blanc* by Pablo Picasso, 362 F. Supp. 2d 1175, 1179 (C.D. Cal. 2005).

16 Jennifer A. Kreder, *Chart of Federal Holocaust-era Art Claims Since* 2004 (Mar. 16, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636295 (entries 2 & 4) [hereinafter *Chart*].

17 Verified Complaint, United States v. One Julian Falat Painting Entitled *Off to the Hunt* and One Julian Falat Painting Entitled *The Hunt*, No. 1:10-cv-09291-PAC (S.D.N.Y. Dec. 13, 2010); Press Release, U.S. Att'y, S. Dist. of N.Y., United States Seizes Two Julian Falat Paintings Stolen By the Nazis During World War II From the National Museum in Warsaw, Poland (Dec. 16, 2010), *available at* http://www.justice.gov/usao/nys/pressreleases/December10/falatcivilforfeiturecomplaintpr.pdf.

18 Gary Fineout, *US Authorities Seize Painting From Fla. Museum*, The Huffington Post, Nov. 2, 2011, *available at* http://www.huffingtonpost.com/2011/11/07/us-authorities-seize-pain_n_1080185.html; *see also* US Attorney Reveals Legal and Factual Claims in Forfeiture Lawsuit Against Cristo Poracroce – Argues That Painting Loaned to The Brogan by The Brera Was Stolen, Smuggled, and War Material, Cultural Heritage Lawyer Rick St. Hilaire, *available at* http://culturalheritagelawyer.blogspot.com/2011/11/part-i-of-ii-us-attorney-reveals-legal.html.

19 *See* 19 U.S.C. § 1497(a) (2006).

20 *See* 19 U.S.C. § 1595a(c)(1)(A) (2006).

21 *See* 18 U.S.C. § 545 (2006).

22 Verified Complaint, *supra* note 17; National Stolen Property Act, 18 U.S.C. §§ 2314–15 (2006).

23 18 U.S.C. § 545.

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24 18 U.S.C. § 2314.

25 18 U.S.C. § 2315.

26 *See, e.g.*, United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999).

27 *See* United States v. Painting Known as Hannibal, No. 08 Civ. 1511(RJS), 2010 WL 2102484, at *4 (S.D.N.Y. May 18, 2010); United States v. An Antique Platter of Gold, 991 F. Supp. 222, 230 (S.D.N.Y. 1997) (citing Bennis v. Michigan, 516 U.S. 442, 450 (1996)) (noting the absence of an innocent owner defense before CAFRA); United States v. One Lucite Ball Containing Lunar Material, 252 F. Supp. 2d 1367, 1377 n.4 (S.D. Fla. 2003) (customs seizures exempt from CAFRA).

28 *See* Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. Rev. 123, 135 (2010).

29 *See Chart*, *supra* note 16 (entries 2, 4, 7, 8, & 9); *see also* United States v. Portrait of Wally, 663 F. Supp. 2d 232, 275 (S.D.N.Y. 2009) (citing United States v. Summerlin, 310 U.S. 414, 416 (1940) (holding that laches may not be asserted against the government)).

30 Miller v. United States, 78 U.S. (11 Wall.) 268 (1870); *see also* Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589, 590 ("Confiscation Acts"); Reed, *supra* note 3, at 261 ("That a majority of the Court would, during the Reconstruction Era, strain to uphold the Confiscation Acts as a permissible exercise of Congress's war powers should not be surprising.").

31 *See* Boyd v. United States, 116 U.S. 616, 634–35 (1886) (characterizing customs seizure as "quasi-criminal").

32 *See* Austin v. United States, 509 U.S. 602 (1993).

33 *E.g.*, United States v. Sandoval Vargas, 854 F.2d 1132, 1139 (9th Cir. 1988) ("The customs search statutes were designed to implement [the right of the sovereign to protect itself] by giving special powers to customs officials at the border, beyond those exercised by ordinary law enforcement agents.").

34 *Cf., e.g*, George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archeological Materials: Criminal and Civil Approaches*, 6 Syracuse J. Int'l L. & Com. 77, 89–91 (1978).

35 Milton Esterow, *Europe Is Still Hunting Its Plundered Art*, N.Y. Times, Nov. 16, 1964, at 36 (noting the recovery of nearly 4,000 pieces of art by the State Department between 1945 and 1962); Ardelia R. Hall, *U.S. Program for Return of Historic Objects to Countries of Origin*, 1944-1954, 31 Dep't St. Bull. 493, 496 (1954).

36 Verified Complaint, *supra* note17, ¶ 18, United States v. One Julian Falat Painting Entitled *Off to the Hunt* and One Julian Falat Painting Entitled *The Hunt*, No. 1:10-cv-09291-PAC (S.D.N.Y. Dec. 13, 2010).

37 *See* United States v. Portrait of Wally, 663 F. Supp. 2d 232, 250 (S.D.N.Y. 2009).

38 Jennifer Anglim Kreder, *Guarding the Historical Record from the Nazi-looted Art Litigation Tumbling Toward the Supreme Court*, 160 U. Pa. L. Rev. PENNumbra 253 (2011) (detailing executive policy and *Bernstein* case).

39 *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *Ex Parte* Quirin, 317 U.S. 1, 25 (1942).

40 Kreder, *supra* note 38.

41 Piety, *supra* note 4, at 952. I must note that Professor Piety's quote is taken out of context in that she was not promoting this idea as philosophically supporting the use of the civil forfeiture doctrine in any way; the whole point of her article was to criticize the doctrine.

42 United States v. Portrait of Wally, 663 F. Supp. 2d 232, 265 n.24 (S.D.N.Y. 2009) ("Laches is a defense, not a means by which title is positively established.")(citing Halcon Int'l, Inc. v. Monsanto Australia, Ltd., 446 F.2d 156, 159 (7th Cir. 1971) ("The doctrine of laches … is a shield of equitable defense rather than a sword for the investiture or divestiture of legal title or right.")); A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd., No. 88 CIV. 4500 (MJL), 1989 WL 115941, at *2 (S.D.N.Y. Sept. 27, 1989); *see also* Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 Fordham L. Rev. 49, 50 (1995).

43 *See* Hawkins, *supra* note 40, at 50.

44 Washington Conference Principles on Nazi-Confiscated Art, (Dec. 3, 1998), *available at* http://www.state.gov/p/eur/rt/hlcst/122038.htm.

45 Vilnius Forum Declaration, Comm'n for Looted Art in Eur. (Oct. 5, 2000), *available at* http://www.lootedartcommission.com/vilnius-forum.

46 Terezín Declaration (June 30, 2009), *available at* http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf.

47 Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. Sch. L. Rev. 95, 95 (1994) (quoting Michael deCourcy Hinds, *States Seek Tougher Drug Forfeit Laws*, N.Y. Times, July 16, 1990, at A11) (quoting Richard M. Wintory, Director of the National Drug Prosecution Centers)).

48 *See Chart*, *supra* note 16.

49 *But see* Deborah Duseau & David Schoenbrod, *Overbroad Civil Forfeiture Statutes Are Unconstitutionally Vague*, 39 N.Y.L. Sch. L. Rev. 285, 285-86 (1994) (expressing the view that faith in prosecutorial discretion not to bring overreaching cases is "insufficient comfort").

50 *E.g.*, Press Release, U.S. Dep't Interior, U.S. Federal News, Federal Agents Bust Ring of Antiquities Thieves Looting American Indian Sites for Priceless Treasures, (Jan. 2, 2010), 2010 WLNR 73184.

Meet the Artist: Susanne Slavick[1]: The R&R (…&R) PROJECT and Animating Absence

by Elizabeth Varner[2] and Betina Kuzmarov[3]

Elizabeth Varner: Susanne, thank you for meeting with us to discuss your art project *R&R (…&R)*. Our readers will be fascinated to learn about your artworks, which focus on cultural heritage loss. Can you please explain the background of your project to our CHAR readers?

Susanne Slavick: The costs of war are many and ongoing. Lives are lost, infrastructure incinerated, lands despoiled, and cultures assaulted. Artists can condemn or condone these disasters of war; and in the imaginary realm, they can also resurrect, rebuild, replace, or repair. My project, *R&R (…&R)*, counters art historical and contemporary media representations of war with restorative interventions. Its title converts the military abbreviation for "rest and recuperation" to words like "regret and restitution". I cull images from the art and architecture of both the invader and the invaded. I choose those that might suggest evidence of a life force or the possibility of regeneration. Referring to ancient manuscripts, paintings from the workshops of Persian miniaturist Bihzâd, and the arts of the Safavid and Timurid dynasties as well as from the larger Islamic Empire[4] that once stretched from Spain to India, I extract scenes of construction, cultivation, healing, or simply life itself. I paint these images of vitality and resurgence over scenes of devastation across current zones of conflict in Afghanistan, Iraq, and the Middle East.

Betina Kuzmarov: That is fascinating. Where do you get the components to form your works?

SS: Sources for these scenes are "documentary" photographs found on the internet—from military, news media and photo-sharing sites, and blogs by soldiers and others in the midst of war.[5] Immersed in these sites, the extent of war's impact seems limitless and its consequences profound, even when one is far from the fray. Decisions concerning whom and what to protect leave entire realms defenseless and exposed.

Roaring at the Raid, 2007, *gouache on archival digital print/Hahnemühle paper, 7" x 10"*
Source photo by Joanne Farchakh-Bajjaly in Iraq (2002 - 2004), *http://oi.uchicago.edu/OI/IRAQ/dbfiles/farchakh/farchakh_049.htm*

In scouring the internet, I came across countless stories and images of the ransacked National Museum of Iraq and National Museum of Modern Art in Baghdad, decimated by simple vandalism and organized theft alike.[6] Toppled sculptures, canvases cut from their frames, and stolen antiquities erased key chapters of the material record of both ancient and modern Iraq.[7] Many of the missing artifacts have since been recovered, from vaults and warehouses to items offered on eBay.[8] But the losses are still great.

Some of the lost and damaged artifacts were identified, such as the icon of Phoenician art, the ivory Lion of Nimrud, from 720 BCE, and a terra cotta statue of a lion from Tell Harmal dating from the Old Babylonian period (ca. 1800 BC).[9]

EV: Can you give CHAR readers a glimpse into the meaning behind some of your works included in this publication?

SS: There were multitudes of images of anonymous works, so shattered that

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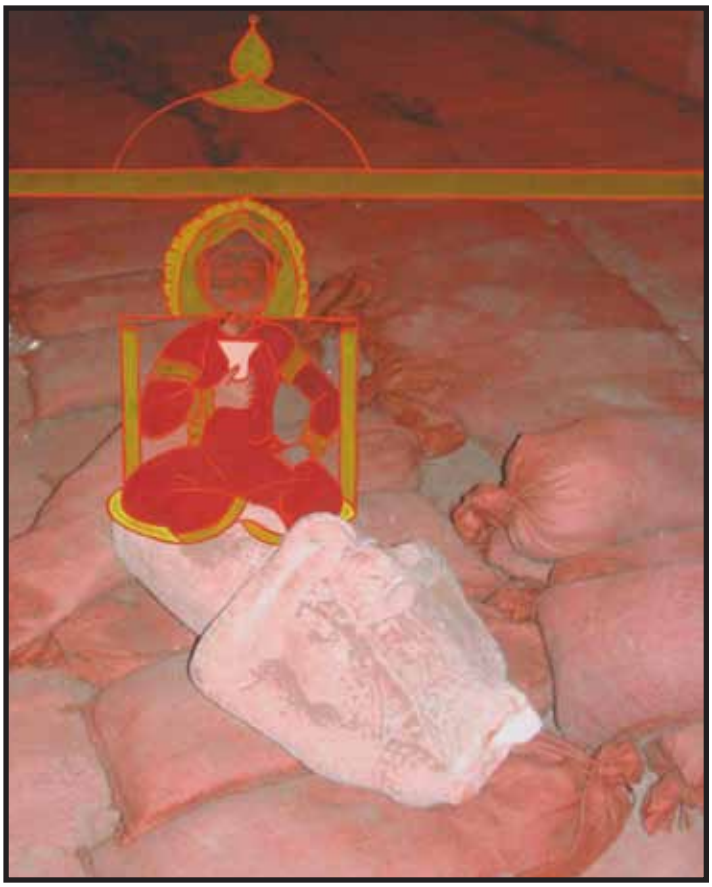
one had to guess at their original form. Such was the source image for *Roaring at the Raid* that shows only the clawed stumps of a beast's feet on a pedestal.[10] I surmised that they had belonged to a lion, a powerful animal silenced. I often select images found on the internet because they click with certain motifs or images from the world of painting; through juxtaposition, meaning shifts and dialogues are created. A roaring lion from a 14th century Iraqi manuscript seemed a perfect vehicle to express outrage at the damage.[11] Roaring at the raid, it revitalizes the vacancy, even if it is with a furious energy. Whereas the invaded space of the source photograph is drained of color, the lion is hand-painted in yellow and red gouache, animating it against the absence.

BK: In "Roaring at the Raid" you show images of a cultural heritage repository. What about exterior archeological sites?

SS: Not all the losses have occurred in urban centers. With security and military resources focused elsewhere, more remote archeological sites are often left unsecured—an open invitation to thieves.

In *Regenerate (Gardening the Robber Hole)*[12], a gardener from the 12th c. *Kitab al-Diriyaq* (*Book of Antidotes)* of 'Pseudo Galen,' in the style of the first school of Baghdad, breaks earth with his shovel.[13] He digs in an Iraqi field of "surface scatter," the term for remnants left after raids on archeological sites. The bare triangle of sand surrounding him indicates a "robber hole," where raiders excavated, sometimes locating and absconding with priceless treasure. These holes are subsequently filled by windblown sand. The gardener begins cultivating anew; his action is a kind of "antidote" to war.

Regenerate (Gardening the Robber Hole), 2007, *gouache on archival digital print/Hahnemühle paper, 7.625" x 10.125".*
Source photo by Joanne Farchakh-Bajjaly in Iraq (2002-2004), http://oi.uchicago.edu/OI/IRAQ/dbfiles/farchakh/farchakh_169.htm.



Repast: Antidote, 2008, *gouache on archival digital print on Hahnemühle paper, 10" x 8".*
Source photo by Joanne Farchakh-Bajjaly in Iraq (2002 - 2004): Assyrian Gallery: torso of broken statue (copy) of god holding flowing vase (from Khorsabad).
http://oi.uchicago.edu/OI/IRAQ/dbfiles/farchakh/farchakh_057.htm

Ruler with Royal Cup was also selected from illustrations to the *Book of Antidotes*. In *Repast: Antidote*, it sits atop what one could interpret as its fallen sculptural counterpart. I cannot know if this sculpture was damaged prior to or during the looting at the National Museum of Iraq or if it was carefully laid on the sandbags afterwards by museum staff who sometimes use them for buffering.[14] Proceeding with artistic license, I suffused the interior with an iron-oxide red, further concentrated in the red robes of the ruler. Its hue suggests blood—spilled or sacrificed—or the fluid of life. The ruler sits facing us as if immortal, insisting on the survival of a culture. Perhaps his cup holds an antidote to war.

EV: What is the message you want to convey to your public when they see your works?

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SS: Creative and redemptive impulses can merge in mending our wounds from incomprehensible and self-inflicted destruction. Through these works, I strive to act as witness and agent of empathic unsettlement and symbolic restitution. If only we could conjure replacements more concrete.

BK: Thank you again for meeting with us and sharing your projects with our readership. It has been a pleasure to share your work with our audience.

1 Susanne Slavick is the Andrew W. Mellon Professor of Art at Carnegie Mellon University. B.A., Yale University; M.F.A., Tyler School of Art, Philadelphia and Rome. She is the author and curator of *Out of Rubble*, a book and traveling exhibit presenting works by international artists who respond to the aftermath of war.

2 Elizabeth Varner is Executive Director of the National Art Museum of Sport. B.A., University of North Carolina, Chapel Hill; M.A., History of Decorative Arts, Smithsonian Institute; J.D., Tulane University Law School. Co-Editor-in-Chief, *Cultural Heritage & Arts Review*. Vice-President, Lawyer's Committee for Cultural Heritage Preservation.

3 Betina Kuzmarov is an Instructor II in the Department of Law and Legal Studies, Carleton University. Hon. B.A, University of Toronto, LL.B., Osgoode Hall Law School of York University, LL.M., Faculty of Law, McGill University and Ph.D. Law School, University of Hull. Co-Editor-in-Chief of the *Cultural Heritage & Arts Review*.

4 For example, one work refers to the Mughal mausoleum of Ghaus Mohammed in Gwailor.

5 For example, some of the artist's source images come from a Webshots album by "johndrummer16" or "ArmyofDude," a contributor to FLICKR. Others come from sites by organizations like Christian Peacemakers Team or more personal sites like habeeb.com. which is normally dedicated to recipes and and photos of all things Lebanese but also posted horrific photographs of the 2006 war with Israel.

6 *Casualties of War: The Looting of the Iraq Museum by Matthew Bogdanos*, Museum News (Mar./Apr. 2006), http://www.aam-us.org/pubs/mn/MN_MA06_casualties.cfm.

7 Catastrophe! The Looting and Destruction of Iraq's Past (Geoff Emberling & Katharyn Hanson eds., Oriental Inst. of the Univ. of Chicago, 2008), *available at* http://oi.uchicago.edu/pdf/oimp28.pdf.

8 *Id*.

9 *Casualties Of War*, *supra* note 6.

10 *Id*.

11 Kathleen Seidel, *A Fabulous Animal*, *in* Serving the Guest: A Sufi Cookbook & Art Gallery, *available at* http://www.superluminal.com/cookbook/gallery_fabulous_animal.html (last visited Jan. 15, 2012).

12 *Regenerate* was reproduced in black and white in Frontiers: A Journal of Women Studies, Volume 32, Number 3, 2011, p. 99.

13 Mount Holyoke Coll., http://www.mtholyoke.edu/courses/mtdavis/Art100/Images/271/attitudes/antidotes2.jpg (last visited Jan. 15, 2012).

14 Francis Deblauwe, *Archive One in*, The Iraq War & Archaeology Blog Archive, *available at* http://iwa.univie.ac.at/iraqarchive1.html (last visited Jan. 15, 2012).

Corrections To Previous Issue

In CHAR's last issue the article by the Honorable Justice Barbara Jaffe, "What's a Renoir Authenticity Case Doing in a Small Claims Court Like This," contained the sentence "The authenticity of a work of fine art is usually litigated in Federal court or in the state appellate courts, for, after all, large sums of money and important issues are often at stake." In fact, the sentence should have read: "The authenticity of a work of fine is usually litigated in federal court or in the higher state trial courts, for, after all, large sums of money and important issues are often at stake." Additionally, in the "Book Review: Protecting Cultural Heritage in Armed Conflict" by Jan Hladík, the author of Chapter 1 of the book under review should have read Professor Jiři Toman.

Thank You to Past CHAIG Chair, Professor Jennifer Kreder!

by Irina Tarsis and Kelly Y. Fanizzo

The Cultural Heritage and the Arts Interest Group (the "Interest Group" or "CHAIG") launched this publication, *Cultural Heritage & Arts Review* (the "Review"), in the spring of 2010. Our former, indefatigable chair, Professor Jennifer A. Kreder, was one of the forces behind both the Interest Group and the Review. Professor Kreder is currently the Associate Dean for Faculty Development and Professor of Law at Northern Kentucky University Salmon P. Chase College of Law, teaching property, remedies, and civil procedure alongside art and cultural property law courses.

During the few short years of our operation, the membership of our Interest Group has grown to more than 100 attorneys and scholars worldwide, to include members from Angola, Canada, France, Guyana, Kenya, Netherlands, Switzerland, Tunisia, United States, and many other countries. Professor Kreder's direction and encouragement, together with help from tireless partners such as Cristian DeFrancia, helped establish this terrific network and bring greater attention to art and cultural property law issues. Some of the programs organized under Professor Kreder's leadership of the CHAIG included a 2012 panel on the subject of "Confronting Complexity in the Preservation of Cultural Property: Monuments, Art, Antiquities and Archives" (Washington, DC) and a 2011 international conference on "Human Rights and Cultural Heritage: from the Holocaust to the Haitian Earthquake" (New York, NY).

The new leadership team of CHAIG and the editorial board of the Review would like to thank Professor Kreder and her colleagues for their hard work in promoting the issues related to cultural heritage protection and in raising the profile of this Interest Group. For example, some of the key legal developments that have been of interest to CHAIG and have defined the field include the long-awaited settlement of the *Portrait of Wally* case, *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000), *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009); the ongoing developments in Chabad's enforcement of their judgment against the Russian Federation for return of the religious movement's archives and library, *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 798 F. Supp. 2d 260, 264 (D.D.C. 2011); the looting of archeological sites in Egypt following the 2011 uprising; the return of antiquities from the Getty Museum and the Metropolitan Museum of Art, and dissolution of authentication committees for works of Andy Warhol and Jean-Michel Basquiat.

Following Professor Kreder's example, our aim is to engage diverse individuals and inspire students and young professionals to get involved in the cultural heritage and the arts-related fields of international law. We are eager to grow our membership base and provide programs and publications that would highlight threats to our common cultural patrimony and shape international law to hinder the impermissible theft and destruction of cultural heritage and deter the ongoing violations of cultural heritage rights.

As always, we welcome your participation and wish to collaborate with partners on sponsoring panels and lectures on related topics.

Irina Tarsis
Chair
Cultural Heritage and
the Arts Interest Group

Kelly Fanizzo
Senior Advisor
Cultural Heritage &
Arts Review

"Confronting Complexity in the Preservation of Cultural Property"
Summary of the 2012 ASIL Annual Meeting Panel Presentation*

by Nicole Baumgartner

The following is a summary of a panel presentation organized by the Cultural Heritage and the Arts Interest Group (CHAIG) for the 2012 Annual Meeting of the American Society of International Law (ASIL). CHAIG provides a network and forum for practitioners and scholars interested in the intersection of law, cultural heritage, and the arts. The panel focused on the role of international law in protecting monuments, artifacts, and archives.

At the 2012 ASIL Annual Meeting, CHAIG presented a panel addressing the worldwide challenges of preserving cultural heritage, such as antiquities, buildings, and fossils, and focusing on specific case studies in Afghanistan, Canada, Cyprus, and Egypt. The program provided an opportunity to discuss the effectiveness of international responses to the destruction of cultural material in countries struggling with civil wars and the illicit trade of art and antiquities.

The panel included Bonnie Czegledi, J.D., Barrister and Solicitor (Toronto, Canada), Professor Patty Gerstenblith, Distinguished Research Professor of Law and Director of the Center for Art, Museum, & Cultural Heritage Law, DePaul University College of Law (Chicago, IL), Jan Hladík, Acting Chief of the Cultural Heritage Protection Treaties Section, Division for Cultural Expression and Heritage, UNESCO (Paris, France), and Thomas R. Kline, attorney, Andrews Kurth LLP (Washington, DC). The panel was organized and moderated by the new CHAIG Chair, Irina Tarsis, Adjunct Associate Professor, Benjamin N. Cardozo School of Law (New York, NY).

Jan Hladík began the panel presentation by discussing how cultural property is threatened by armed conflict, human and natural disasters, negligence, and other aspects of human activities. He described the destruction of the Bamiyan Buddhas by the Taliban regime in March 2001, noting it impoverished not only the cultural heritage of Afghanistan, but also the cultural heritage of humanity as a whole. In response to the events in Afghanistan, the thirty-second session of the General Conference of UNESCO in 2003 unanimously adopted the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, which addresses intentional destruction of cultural heritage, including cultural heritage linked to a natural site.

Mr. Hladík described other UNESCO tools, such as conventions, recommendations, and declarations on the protection of cultural property. He also provided background on the penal sanctions detailed in Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the relevant provisions of Chapter 4 (entitled "Criminal Responsibility and Jurisdiction") of the Second Protocol to the Hague Convention.

The second panelist, Patty Gerstenblith, focused her remarks on the U.S. policy regarding the protection of cultural property. She began by discussing the threat posed by the international trade in looted and illegally exported objects. After explaining the basis for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the "1970 Convention"), Professor Gerstenblith stated

*__Summary of the 2012 ASIL Annual Meeting Panel Presentation__ was edited by Irina Tarsis and Kelly Fanizzo.

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"Confronting Complexity in the Preservation of Cultural Property"
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that the United States was one of the first market nations to ratify the 1970 Convention and implemented it through the Cultural Property Implementation Act (the "CPIA").

Professor Gerstenblith explained two provisions of the CPIA: first, import restrictions that are placed on the broad category of documented cultural property that has been stolen from a public secular or religious institution, and second, the implementation of Article 9 through bilateral agreements between the United States and other States Parties to the 1970 Convention. Professor Gerstenblith summarized the scope and application of the CPIA and the process by which a country that has ratified the 1970 Convention can request assistance from the United States. She also talked about the role of the Cultural Property Advisory Committee, whose members are appointed by the President. Professor Gerstenblith explained the four statutory criteria necessary to establish a bilateral agreement under the CPIA and how the United States enters into bilateral agreements with other countries. Professor Gerstenblith also discussed the rare emergency situations that may arise in the context of the CPIA. Professor Gerstenblith noted the many criticisms of the CPIA; however, she argued that the benefits of the bilateral agreement process are significant. These agreements help preserve archaeological and ethnographic items by creating a two-way street of education, training, and public awareness between the United States and the partner nation.

The third panelist, Thomas Kline, described how Cyprus has effectively used international tools to recover stolen cultural property. Mr. Kline

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"Confronting Complexity in the Preservation of Cultural Property"
Summary of the 2012 ASIL Annual Meeting Panel Presentation —*continued from page 17*

represented Cyprus in a groundbreaking and successful recovery case, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*. First, Mr. Kline outlined the details of the 1974 invasion of parts of Cyprus by Turkey, an act that divided the country and resulted in mass looting and the theft of cultural property in the Turkish-occupied area. He then discussed a very significant case concerning smuggled frescoes from a Church in Lysi, which were smuggled out of Cyprus and apparently ended up in the hands of a smuggler in Munich. Dominique De Menil, a French-American and Founder of the Menil Foundation, discovered the fresco fragments and bought them with the intention to return them to Cyprus, restored them and exhibited them at the Menil Collection in Houston, Texas. Mr. Kline praised this exchange as a success story, showing cooperation between a nation with limited resources and an American museum motivated to recover, preserve, and display stolen objects of cultural heritage in a workable arrangement with the owner.

Mr. Kline discussed industrial looting that centered on the export of thousands of objects, including mosaics from the wall of the 11th century Church of Panagia Kanakana in northern, occupied Cyprus. Mr. Kline described the movement of the mosaics to Germany and then to Indiana, and the linkage between the smuggling of the mosaics and the frescoes from the Church in Lysi. Additionally, Mr. Kline discussed how the 1989 case against Peg Goldberg, an art dealer, sparked efforts by German authorities to recover other looted objects located on its territories and placed Cyprus at the forefront in protecting and recovering its archeological treasures. In conclusion, Mr. Kline observed that coins have become very popular collectors' items, and the protection of ancient coins has become a controversial subject in the United States.

The fourth speaker, Bonnie Czegledi, addressed issues affecting the Canadian art trade. Ms. Czegledi gave multiple examples of art theft in Canada and described how the government's reaction has been inadequate. Ms. Czegledi asserted that Canadian galleries and museums do not report thefts in a timely fashion, which is an important step to preventing or halting theft.

Ms. Czegledi commented on the theft of world's most celebrated fossils, the Burgess Shale Fossils, the looting of an aboriginal burial in the Province of Alberta, and other significant instances of cultural heritage destruction. Ms. Czegledi also explained that paintings attributed to the Group of Seven, dating from the 1920's, have been the frequent subject of theft over the last few decades because of the growing demand for these paintings and their increased commercial value.

As a result, Ms. Czegledi suggested several best practice guidelines in cases of art theft, for example, filling specific police reports, registering losses with the FBI, Interpol, and customs officials, publicizing the theft, and undertaking public relations campaigns. She praised the Interpol database that was designed to halt the trafficking of cultural property. Ms. Czegledi concluded by identifying several problems in the handling and treatment of such cases in Canada. Ms. Czegledi is now working to educate law enforcement personnel about these types of transactions and procedures. To this effect, she organized Canada's first international Symposium on Criminality in the Art and Cultural Property World held at The Law Society of Upper Canada, Osgoode Hall, in Toronto, last June.

In closing, the panel brought together world-renowned experts to discuss international tools to protect cultural property. As a result, audience members learned about international treaties, declarations, and conventions and how they have been successfully or unsuccessfully applied in nations such as Cyprus and Canada. The overall message of the panel was that there must be greater international responsibility and steps taken to protect one another's cultural property. Many valuable tools exist to protect cultural property; however, each nation must be more proactive in using those tools, as well as in implementing national legislation and measures to protect its own cultural property.

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