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International Art and Cultural Heritage

PATTY GERSTENBLITH, LAINA LOPEZ, AND LUCILLE ROUSSIN*

I. Introduction

In 2008, major steps were taken toward wider acceptance of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. Recoveries of cultural objects brought into the United States illegally continued, as did restitution of art works looted during the Holocaust. American collections voluntarily restituted classical antiquities to Italy and Greece. Litigation by the victims of terrorist attacks seeking to attach cultural objects on loan from Iran to U.S. institutions was further complicated by legislation enacted in early 2008 amending the Foreign Sovereign Immunities Act.

II. International Conventions and Agreements

A. THE 1954 HAGUE CONVENTION ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT

The 1954 Hague Convention was the first international treaty to address cultural property exclusively. Adopted in the aftermath of the cultural devastation of World War II, the Hague Convention establishes principles for protecting cultural property (including sites, monuments, and repositories of cultural objects) during armed conflict. The First Protocol, which aims to prohibit illegal export of cultural objects from occupied territory and to facilitate return of such objects at the end of occupation, was also adopted in 1954. The Second Protocol was finalized in 1999 and came into effect in 2004. The Second Protocol clarifies and strengthens several sections of the main Convention and, among other provisions, requires States Parties to create a criminal offense for violating both the Second Protocol and the main Convention. Currently, there are 121 States Parties to the main Convention; 100 States Parties to the First Protocol; and 51 States Parties to the Second Protocol. All three instruments received significant attention during the 2003 Gulf War, particularly because two of the central military powers involved in the conflict, the United

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States and the United Kingdom, were not parties to the Convention, even though they had signed it in 1954.

In January 2008, the United Kingdom began to consider a draft Cultural Property (Armed Conflicts) bill.¹ This legislation proposes to implement the main Convention and both Protocols. The most significant feature of the draft bill is that it creates two new criminal offenses. The first offense is for serious breaches of the Second Protocol. The accused commits a serious breach by intentionally committing one of the acts listed in Article 15 Section 1(a)-(e) of the Second Protocol if the accused knows that the property fits the Article 1 definition of cultural property in the main Convention.² Second, the draft bill criminalizes dealing in cultural property unlawfully exported from occupied territory where the dealer knows or has reason to suspect that the property has been unlawfully exported.³ The bill also creates forfeiture provisions for illegally exported cultural objects, either in connection with a criminal proceeding⁴ or without one.⁵ Finally, the bill includes broad provisions for immunity from seizure or forfeiture under any enactment or rule of law while the cultural objects are in the United Kingdom. These provisions apply to objects being transported from outside or through the United Kingdom that are protected under Article 12 of the Hague Convention and to objects for which the United Kingdom is acting as depositary under Regulation 18 of the main Convention.⁶

In September 2008, the New Zealand Parliament considered draft legislation to implement the Convention and two Protocols.⁷ The Cultural Property (Protection in Armed Conflict) Bill 2008 establishes the criminal offenses required by the Second Protocol for knowing serious violations of the Second Protocol, including “making enhanced protection property the object of attack; using enhanced protection property, or its immediate surroundings, in support of military action; the extensive destruction or the extensive appropriation of cultural property; making cultural property the object of attack; stealing, appropriating, or vandalising cultural property (vandalising includes marking, tagging, and defacing).” New Zealand would implement the First Protocol by creating an offense for illegally removing from occupied territory cultural property and “enhanced protection property” as defined by Articles 10-14 of the Second Protocol.⁸ This provision seems more limited than the U.K.’s proposed implementation of the First Protocol, which includes the offense of dealing in cultural property illegally removed from occupied territory.

Like the United Kingdom, the United States signed the main Convention in 1954 but did not ratify it due to military objections as Cold War tensions increased. Only with the fall of the Soviet Union did the military review the Convention and withdraw its objec-

1. DEPARTMENT OF CULTURE, MEDIA AND SPORT, DRAFT CULTURAL PROPERTY (ARMED CONFLICTS) BILL, Jan. 7, 2008, <http://www.culture.gov.uk/images/publications/culturalpropertyarmedconflictsdraftbill.pdf>.

2. *Id.* § 3(1).

3. *Id.* § 18(1).

4. *Id.* § 19.

5. *Id.* § 22.

6. *Id.* § 27.

7. See Cultural Property (Protection in Armed Conflict) Bill 2008, 2008 BILLS DIGESTS No. 1642, <http://www.parliament.nz/en-NZ/PubRes/Research/BillsDigests/7/e/6/48PLLawBD16421-Cultural-Property-Protection-in-Armed-Conflict-Bill.htm> (N.Z.).

8. *Id.*

tions. President Clinton transmitted both the main Convention and the First Protocol to the Senate Foreign Relations Committee (SFRC) in March 1999. The transmittal was accompanied by a recommendation from the State Department that the United States opt out of the first part of the First Protocol. In early 2007, the State Department listed the Convention and First Protocol on its treaty priority list. In April 2008, the SFRC held hearings on the Convention and unanimously recommended ratification to the full Senate. On September 25, 2008, the Senate voted to give its advice and consent to ratification to ratify the main Convention. Neither the SFRC nor the Senate considered either protocol.

United States ratification was subject to four understandings and one declaration.⁹ The first understanding states that the level of protection to be accorded to property under special protection is consistent with existing customary international law. Under the second understanding, the action of any military commander or other military personnel must be judged based on the information reasonably available when an action was taken. The third understanding clarifies that the Convention applies only to conventional weapons and does not affect other international law concerning other types of weapons, such as nuclear weapons. The fourth understanding states that the provisions of Article 4(1) requiring Parties “to respect cultural property situated within their own territory” means that the “primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.”¹⁰ The declaration states that the Convention is self-executing, which means that it operates “of its own force as domestically enforceable federal law.”¹¹ Thus, ratification does not require any implementing legislation. But the declaration also notes that the Convention does not confer any private rights enforceable in U.S. courts.

Ratification of the Convention may have relatively little direct impact on the conduct of the U.S. military because the U.S. government took the position that its military already complies with the core provisions of the Convention. But ratification raises the status and awareness of cultural property within the military. Thus, preservation concerns should be incorporated into earlier stages of military planning. Article 7 of the Convention also requires States Parties to train their military in cultural heritage preservation and to maintain cultural heritage professionals within their military forces. The United States may seek to recruit such professionals into the military as a result. Finally, ratification demonstrates to other nations that the United States will take cultural heritage preservation more seriously when planning and conducting future military operations.

B. UNESCO CONVENTIONS

Four new nations ratified the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. Twenty states are now parties. This paves the way for the

9. S. REP. NO. 110-26, at 8 (2008), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=fer026.pdf.

10. *Id.*

11. *Id.*

Convention to come into force on January 2, 2009, for those nations that have deposited their instrument of ratification or acceptance by October 2, 2008.¹²

The United States renewed and broadened its Memorandum of Understanding (MOU) with Cambodia under the U.S. ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the Convention on Cultural Property Implementation Act.¹³ Such agreements, which provide for import restrictions on designated categories of archaeological and ethnological materials, must be renewed every five years. The new MOU protects earlier archaeological materials of the Bronze and Iron Ages. It also continues to protect Khmer period sculptures, architectural fragments, and ceramic and metal artifacts of the sixth through sixteenth centuries A.D. covered under the earlier MOU.¹⁴

In April 2008, the United States imposed import restrictions under the CPIA and the Emergency Protection for Iraqi Cultural Antiquities Act¹⁵ on illegally exported Iraqi cultural materials,¹⁶ consonant with UNSCR 1483, which requires nations to prohibit trade in Iraqi cultural materials illegally removed from Iraq any time after August 1990. The import restrictions apply to objects of "archaeological, historical, cultural, rare scientific, and religious importance. . . ."¹⁷

III. Recoveries, Restitutions, and Claims

A. RESTITUTIONS

The U.S. Department of Homeland Security (DHS) returned several groups of previously seized archaeological artifacts to their country of origin. The largest group consisted of over 1,000 Iraqi antiquities, which had been seized in four separate investigations conducted by Immigration and Customs Enforcement (ICE) of DHS dating back to 2001.¹⁸ In addition, ICE returned sixty pre-Colombian artifacts, seized in Miami, to Colombia.¹⁹ Eight items illegally excavated at burial sites in northern Afghanistan and recovered in 2005 during an undercover investigation conducted by the television show, *Dateline NBC*, were returned to the Afghan national museum director.²⁰ In January 2008, a marble sculpture of the Roman Emperor Marcus Aurelius was returned to Algeria. The

12. UNESCO, Convention on the Protection of the Underwater Cultural Heritage, <http://portal.unesco.org/la/convention.asp?KO=13520&language=E> (last visited Apr. 2, 2009).

13. 19 U.S.C. §§ 2601-13 (1983).

14. Extension of Import Restrictions Imposed on Archaeological Material from Cambodia, 73 Fed. Reg. 54,309 (Sept. 19, 2008) (to be codified at 19 C.F.R. pt. 12), available at <http://culturalheritage.state.gov/Cambodia2008FRN.pdf>.

15. Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, §§ 3001-03, 118 Stat. 2434 (2004); see Patty Gerstenblith & Bonnie Czeglédi, *International Cultural Property*, 40 INT'L LAW. 441, 443 (2006).

16. Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq, 73 Fed. Reg. 23,334-42 (Apr. 30, 2008) (to be codified at 19 C.F.R. pt. 12).

17. *Id.*

18. Press Release, Dept. of Homeland Security, ICE Returns More Than 1,000 artifacts to Iraq (Sept. 15, 2008), <http://www.ice.gov/pi/nr/0809/080915washington.htm>.

19. U.S. Immigration and Customs Enforcement, Fact Sheet: Cultural Heritage Investigations, <http://www.ice.gov/pi/news/factsheets/cultural-artifacts-repatriation.htm>.

20. *Id.*

statue had been stolen, along with eight other sculptures, from an Algerian museum in the town of Skikda in 1996. The sculpture of Marcus Aurelius was seized from Christie's auction house, where it had been offered for sale.²¹

Edward George Johnson, a U.S. army pilot, was arrested on charges of selling 370 Egyptian antiquities stolen from the Ma'adi Museum near Cairo, Egypt. Johnson was charged with one count of transportation of stolen property and one count of wire fraud. He later pleaded guilty to possession of stolen property. Johnson was sentenced to eighteen months of probation and ordered to make restitution to the antiquities dealer to whom he had sold the objects.²²

Italy and Greece have claimed classical antiquities in the collections of several U.S. museums based on evidence relating to the commercial dealings of an Italian dealer, Giacomo de Medici. Swiss and Italian authorities raided de Medici's Geneva warehouse in 1995. Over the past few years, the J. Paul Getty Museum in Malibu, California, the Metropolitan Museum of Art in New York, the Boston Museum of Fine Arts, and the Princeton Museum of Art have returned artifacts to both Italy and Greece.²³ This year, the private collector Shelby White returned nine antiquities to Italy (with a tenth to be returned in 2010)²⁴ and two objects to Greece (the upper part of a sixth century B.C.E. grave stele, the lower part of which was excavated in Greece, and a bronze calyx krater).²⁵ Two sixth century B.C.E. marble sculptures formerly in the collection of New York businessman Maurice Tempelsman were returned to Italy. The sculptures were likely looted from the Greek settlement site of Morgantina in Sicily. Tempelsman turned the sculptures over to the University of Virginia in 2002. Once the university gained full title under an agreement with Tempelsman,²⁶ it returned the sculptures to Italy. Finally, the Cleveland Museum of Art agreed to return thirteen antiquities and a late Gothic processional cross to Italy. Italy agreed to lend comparable objects to the Museum for renewable periods of twenty-five years. The Museum and Italy will establish a commission to study a bronze sculpture of Apollo acquired by the Museum in 2004 and a small bronze chariot ornament to determine their origins.²⁷

B. IRAN V. BARAKAT

In 2007, a British trial court held that Iran could not sue to recover artifacts allegedly looted from the Jiroft region and in the possession of a London dealer, Barakat.²⁸ At the end of 2007, the appellate court reversed, holding that Iranian law established ownership of archaeological artifacts and that a claim based on national ownership laws is justiciable in British courts.²⁹

21. *Id.*

22. *Id.*

23. Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 733-34 (2008) [hereinafter *International Cultural Property* 2008].

24. Elisabetta Povoledo, *Collector Returns Art Italy Says Was Looted*, N.Y. TIMES, Jan. 18, 2008, at B1.

25. Julie Bloom, *Collector to Return Antiquities to Greece*, N.Y. TIMES, Jul. 12, 2008, at B8.

26. Elisabetta Povoledo, *Tempelsman Sculptures Return to Italy*, N.Y. TIMES, Feb. 26, 2008, at E2.

27. Steven Litt, *Cleveland Museum of Art Strikes Deal with Italy to Return 14 Ancient Artworks*, CLEVELAND PLAIN DEALER, Nov. 20, 2008, at 1.

28. Islamic Republic of Iran v. Barakat Galleries Ltd., [2007] EWHC (QB) 703 (Eng.).

29. Islamic Republic of Iran v. Barakat Galleries Ltd., [2007] EWCA Civ. 1374.

The appellate court held that, under conflict of laws principles, ownership of the antiquities should be determined by the law of the *lex situs* (Iran). The court found that Iran's 1979 Legal Bill denies ownership rights in antiquities to finders. Instead, it confers both ownership and an immediate right to possession on the nation. The appellate court also concluded that Iran's national ownership law was not the type of public law that precluded British courts from recognizing the ownership rights it created, thus distinguishing between the question of recognition and that of enforcement. In reaching this conclusion, the court relied in part on the U.S. precedent established in *United States v. Schultz*, which recognized Egypt's national ownership law as vesting an ownership interest in undiscovered antiquities in the nation.³⁰ Finally, the court held that even if Iran's ownership law were a public law, there was no reason to view it as a non-justiciable attempt to enforce the public law of another nation in U.K. courts.

Citing to international conventions to which the United Kingdom is a party, including the 1970 UNESCO Convention, the court concluded that it is consistent with British public policy to recognize the ownership claim of a foreign nation to antiquities that are part of its cultural heritage. The decision is significant for the legal regime that aims to protect the world's archaeological heritage and harmonizes the U.S. and U.K. judicial approaches to the status of national ownership of antiquities.

C. MUSEUM POLICIES FOR ACQUIRING ANTIQUITIES

Museums in the United States have come under criticism for acquiring antiquities that were possibly looted and obtained in violation of national ownership laws. The two main U.S. museum associations, the Association of Art Museum Directors (AAMD) and the American Association of Museums (AAM), both adopted guidelines for their members concerning the acquisition of antiquities.³¹ While similar in some regards, the two guidelines differ in some of their important and more interesting details.

Both guidelines offer a sharp contrast to the positions previously taken by many U.S. museums. The most significant change is that museums are now expected to trace the ownership history of any potential acquisition back to 1970. At the same time, both guidelines allow a museum to proceed with an acquisition even if it cannot satisfy this standard. Both policies require a museum to make its acquisition policy publicly available and make information about new acquisitions publicly accessible. Museums must include provenance background and an image.

In a somewhat novel step, the AAMD established a web site where any object whose provenance history cannot be traced either to 1970 or to legal export from the country of origin should be posted along with available documentation and an image.³² Under the AAM guidelines, museums are supposed to research the background of artifacts currently in their collection for possible restitution to the country of origin.

30. *United States v. Schultz*, 333 F.3d 393, 398 (2d Cir. 2003).

31. Ass'n of Art Museum Dir. [AAMD], *New Report on Acquisition of Archaeological Materials and Ancient Art* (June 4, 2008), <http://aamd.org/newsroom/documents/2008ReportAndRelease.pdf>; Ass'n of Museums [AAM], *Standards Regarding Archaeological Material and Ancient Art* (July, 2008), <http://www.aam-us.org/museumresources/ethics/upload/Standards%20Regarding%20Archaeological%20Material%20and%20Ancient%20Art.pdf>.

32. AAMD Object Registry, <http://aamobjectregistry.org/>.

D. INVESTIGATIONS OF ANTIQUITIES SMUGGLING AND MUSEUMS IN SOUTHERN CALIFORNIA

An undercover investigation carried out over several years by several U.S. federal agencies culminated in a series of raids to execute search warrants on four southern California museums (the Los Angeles County Museum of Art, the Pacific Asia Museum in Pasadena, the Bowers Museum in Santa Ana, and the Mingei International Museum in San Diego); the Malter Gallery in Encino; the Silk Road Gallery owned by Jonathan and Cari Markell in Los Angeles; and the home of Barry MacLean, a private collector in Chicago and trustee of the Art Institute of Chicago.³³ The affidavits submitted to obtain the warrants alleged an elaborate scheme in which the undercover agent, posing as a collector, was taken to the storerooms of an alleged smuggler who sold artifacts stolen and smuggled out of several Asian and Southeast Asian countries, including China, Thailand, Cambodia, and Myanmar. The artifacts were given a valuation just below \$5,000. \$5,000 is the threshold that requires more documentation of an object's value for tax purposes and also triggers a violation of the National Stolen Property Act.³⁴ The "collector" would then donate the objects to various museums for a charitable gift deduction.

E. CLAIMS FOR HOLOCAUST-RELATED ART WORKS

1. *The Goudstikker Collection*

Jacques Goudstikker was one of the most renowned Jewish art dealers in Europe in the 1930s. Forced to flee when the Nazis invaded Holland, he died in a tragic accident. In his pocket, however, was a small notebook inventorying most of his collection of over 1,000 paintings. In 2006 his heirs, Marei and Charlene von Saher, recovered 200 paintings from the Dutch government, many of which were exhibited this year at the Bruce Museum in Greenwich, Connecticut.³⁵ They will be at the Jewish Museum in New York in the spring.³⁶ Several other paintings have been restituted to the family from various collections in Germany and the United States.³⁷ Marei von Saher filed a claim in the Central District of California to recover Lucas Cranach the Elder's life-size paintings of Adam and Eve from the Norton Simon Museum in Pasadena, California. The court granted the museum's motion to dismiss on the grounds that the statute of limitations had expired. The court held that California's statute extending the statute of limitations for the recov-

33. Bruce Zagaris, *U.S. Tax Investigation Turns Up Apparently Stolen Cultural Artifacts*, 24 No. 4 INT'L ENFORCEMENT L. REP. 149, (2008); Edward Wyatt, *Four California Museums Are Raided*, N.Y. TIMES, Jan. 25, 2008, at A14; Edward Wyatt, *Papers Show Wider Focus in Inquiry of Artifacts*, N.Y. TIMES, Jan. 30, 2008, at A11.

34. 18 U.S.C. §§ 2314-15 (1994).

35. Patty Gerstenblith & Lucille A. Roussin, *International Cultural Property*, 41 INT'L LAW. 613, 619 (2007).

36. PETER C. SUTTON, *RECLAIMED: PAINTINGS FROM THE COLLECTION OF JACQUES GOUDSTIKKER*, 11 (Yale University Press) (2008).

37. Clemens Toussaint, *How to Find One Thousand Paintings*, in *RECLAIMED: PAINTINGS FROM THE COLLECTION OF JACQUES GOUDSTIKKER* 68 (Peter C. Sutton ed., 2008).

ery of Holocaust-era looted art was unconstitutional.³⁸ The decision is on appeal to the Ninth Circuit.

2. *The Max Stern Collection*

The Max Stern Collection, which last year recovered two of the paintings that were sold in a forced sale at the Lempertz Auction House in Cologne, has recovered another painting from this important collection.³⁹ The painting, *Girl from the Sabiner Mountain*, by Franz Xavier Winterhalter, has been in the possession of Maria-Louise Bissonette, who inherited it from her stepfather, a high-ranking member of the Nazi party. The district court in Rhode Island awarded the painting to the Stern estate in 2007, and Bissonette appealed on the grounds of laches.⁴⁰ On appeal, the court held that Max Stern's efforts to recover his confiscated art after the war were sufficiently diligent to preclude laches. Stern died in 1987 and bequeathed his art collection to McGill University, Concordia University, and Hebrew University of Jerusalem. In his will, he specifically included any works of art that might yet be recovered. In 2004 the Stern Estate contacted the Art Loss Register and listed the painting with Germany's Lost Art Internet Database. The First Circuit found that Bissonette had failed to carry her burden of proving the delay caused the prejudice necessary to find laches and awarded the painting to the Stern Estate.⁴¹

3. *Bakalar v. Milos Vavra and Leon Fischer*

A drawing by Egon Schiele titled *Seated Woman with Bent Left Leg (Torso)*, dated 1917, was part of the collection of Fritz Grunbaum, a well-known cabaret performer in Vienna, who died in the concentration camp at Dachau. At issue is the fate of the Grunbaum collection after 1938, and the Schiele drawing specifically. The drawing next appears in a catalogue of the Galerie Gutekunst & Klipstein in Bern, Switzerland, which acquired it from Grunbaum's sister-in-law, Mathilde Lukacs. The drawing was then sold to the Galerie St. Etienne in New York, from whom Mr. Bakalar bought it in 1963. Bakalar consigned the drawing to Sotheby's for sale in 2004. Sotheby's offered it for sale in London in February 2005. Sotheby's froze the sale when the Grunbaum heirs put in a claim. Both parties brought suit in federal court in New York seeking a declaratory judgment.⁴²

The judge awarded the drawing to Bakalar based on Swiss law, which he deemed controlling. Under Swiss law, one who acquires an object in good faith becomes the owner, "even if the seller was not entitled or authorized to transfer ownership."⁴³ The judge based his decision on the fact that Lukacs possessed the drawing and other Schiele works, which she sold to Kornfeld, the gallery owner. Thus Kornfeld was entitled to presume she owned them. The defendants will likely appeal the decision.⁴⁴

38. *Von Saher v. Norton Simon Museum of Arts at Pasadena*, 2007 U.S. Dist. LEXIS 95757 (C.D. Cal. 2007); Suzanne Muchnic, *Norton Simon to Keep Pair of Prized Paintings*, L.A. TIMES, Oct. 19, 2007, at B3.

39. *International Cultural Property* 2008, *supra* note 23, at 736.

40. *Vineberg v. Bissonette*, 529 F. Supp. 2d 300 (D.R.I. 2007).

41. *Vineberg v. Bissonette*, 448 F.3d 50, 58 (1st Cir. 2008).

42. *Bakalar v. Vavra*, 2008 U.S. Dist. LEXIS 66689 (S.D.N.Y. 2008).

43. *Id.* at *18-19.

44. William D. Cohan, *A Decision—But Doubts Remain*, ARTNEWS, Nov. 2008, at 92.

4. *Museum of Modern Art and the Guggenheim Foundation v. Julius S. Schoeps.*

This case concerns two iconic paintings by Pablo Picasso, *Boy Leading a Horse* (1906) and *Le Moulin de la Galette* (the Paintings).⁴⁵ The museums received a demand seeking restitution of the Paintings on November 1, 2007, which they refused on December 7, 2007. They then filed a complaint for declaratory judgment in the Southern District of New York. The paintings were in the collection of Paul von Mendelssohn-Bartholdy until his death in 1935. Julius Schoeps is the grandson of one of von Mendelssohn-Bartholdy's sisters. The Museum of Modern Art acquired *Boy Leading a Horse* from William S. Paley as a gift in 1963. Paley acquired the painting through art dealer Justin Thannhauser in August 1935. *Moulin de la Galette* was in Thannhauser's possession when he immigrated to New York in 1940. Thannhauser bequeathed and transferred it to the Guggenheim in 1963 as part of a larger gift that became permanent when he died in 1978.

Schoeps, joined by the heirs of Mendelssohn-Bartholdy's second wife, asserted that Mendelssohn-Bartholdy sold the painting under duress after sustaining catastrophic financial losses under Nazi persecution. The case is expected to go to trial in 2009.

5. *Museum of Fine Arts, Boston v. Dr. Claudia Seger-Thomschitz*

This is another peremptory suit filed to quiet title to a painting. In 1973, the museum acquired *Two Nudes (Lovers)*, by Oskar Kokoschka, by bequest of Sarah Reed Platt, who had acquired it from an art gallery in 1948 or 1949.⁴⁶ Sieger-Thomschitz is the sole heir of Oskar Reichel, a Jewish doctor and art collector-gallerist in Vienna whose assets were confiscated in 1939. Viennese art dealer Otto Kallir acquired the painting in or about 1939 in what Seger-Thomschitz characterizes as a forced sale.

Seger-Thomschitz, a nurse with no connection to or knowledge of the art world, was unaware of the artworks and other property confiscated from Oskar Reichel until 2003, when a Vienna museum contacted her about restitution of four paintings that had been confiscated by the Nazis. A number of prominent historians of the Holocaust have criticized the Museum of Fine Arts for its stance on Seger-Thomschitz's restitution claim. Deborah E. Lipstadt, a prominent historian of the Nazi era, has said: "To suggest, at that period in Vienna, that there was no pressure is ridiculous. . . . It's ludicrous."⁴⁷

6. *Westfield v. Federal Republic of Germany*

In an unusual case, the heirs of Walter Westfeld, a Jewish art dealer killed at Auschwitz, have filed suit in state court in Tennessee. Plaintiffs are suing the Federal Republic of Germany for damages resulting from the confiscation of Westfeld's art collection.⁴⁸ The collection, which included works by many famous artists, was sold at a forced sale at the Lempertz Auction House in Cologne on December 12-13, 1939. The family contends

45. *Museum of Modern Art v. Schoeps*, No. 07 Civ. 11074 (S.D.N.Y. Dec. 7, 2007).

46. *Museum of Fine Arts v. Seger-Thomschitz*, No. 08 Civ. 10097 (D. Mass. Jan. 22, 2008).

47. Geoff Edgers, *Holocaust Historians Blast MFA Stance in Legal Dispute*, BOSTON GLOBE, May 28, 2008, at A1.

48. *Westfield v. Federal Republic of Germany*, No. 08-2202-1 (Tenn. Ch. Ct., Davidson 2008).

that the works must now be scattered around the world and would be difficult to find.⁴⁹ Westfeld, who never married and had no children, wrote a will while he was in prison naming his fiancée as his heir. She was declared his wife and heir by a Dusseldorf court in 1956 and was compensated by the German government. Her heirs are also seeking restitution of art works.⁵⁰ A spokeswoman for the German Foreign Ministry said the lawsuit is “in very early stages of the process[,] . . . the big question here is sovereign immunity.”⁵¹

7. *Portrait of Amalie Zuckerkandl*

The Austrian Supreme Court denied a petition by the Bloch-Bauer heirs to reverse a decision of an arbitration board for restitution of Gustave Klimt's *Portrait of Amalie Zuckerkandl*. The portrait was in Ferdinand Bloch-Bauer's house when he fled to Switzerland, and the house was seized by the Nazis in 1939. Zuckerkandl's non-Jewish son-in-law, who had no right or title to the painting, sold it in or about 1939 to an Austrian art dealer who donated it to the Austrian Gallery well after the war.

8. *Other Restitutions*

The Jewish Museum in Prague, acting on a proposal of the National Gallery, will retribute thirty-two paintings and drawings to the heirs of Emil Freund, who died in the Lodz Ghetto in Poland after being deported from Prague. The collection includes valuable works by André Derain, Paul Signac, and Maurice Vlaminck. Thirteen of the works have been declared national treasures under Czechoslovakia's Heritage Protection Act and may not be taken out of the country. The museum and the American heirs are negotiating the fate of the rest of the collection. The Jewish Museum appealed the decision of the National Gallery, but the appeal was denied.⁵²

The Minneapolis Institute of Arts (MIA) will retribute Ferdinand Leger's painting *Smoke Over Rooftops*, to the heirs of Alphonse Kann. The painting was donated to the MIA by Minneapolis businessman Putnam Dana McMillman in 1961. McMillman acquired it from the Buchholz Gallery in New York. It is valued at \$2.8 million. The heirs of Alphonse Kann made the demand in 1997. Provenance research took ten years and was the subject of a French lawsuit. This one is not one of the Kann paintings confiscated by the Nazis and moved to the Jeu de Paume in 1940. The Nazis kept lists of those paintings. The painting at issue remained in Kann's house until 1942 when the French government auctioned the house's contents at the behest of the Nazis. It is not known what the heirs intend to do with the painting, but the MIA has said it will not seek to buy it back if it is offered at auction.⁵³

The heirs of Jewish artist Eduard Einschlag have received restitution of one or more works painted by him before his deportation and death in the Treblinka death camp. The

49. Catherine Hickey, *Nazi Victims Family Sues Germany for Looted El Greco, Pissarro*, BLOOMBERG.COM, Oct. 27, 2008, <http://www.bloomberg.com/apps/news?pid=20670001&refer=home&sid=agZqCvEhgE3o>.

50. *Id.*

51. *Id.*

52. Provenance Research & Restoration: Artworks from the Former Collection of Dr. Emil Freund, <http://www.jewishmuseum.cz/en/arestit.htm>.

53. Mary Abbe, *MIA Send Nazi 'Loot' Home to Paris*, MINNEAPOLIS STAR TRIB., Oct. 30, 2008, available at http://www.startribune.com/templates/Print_This_Story?sid=33551004.

family's lawyer, Yoel Levi of Tel Aviv, said this restitution took years of wrangling with the Leipzig officials, who claimed that the paintings might even have been a gift of the artist.⁵⁴

A Matisse painting stolen by the Nazis will be restituted to Israel's Magen David Adom (Israel's "Red Cross"). The painting, *Le Mur Rose*, was stolen in 1941 from Henry Fuld, Jr., who had fled Nazi Germany in 1937. The painting was found among the possessions of an SS officer in 1948. It was given to the Centre Pompidou in 1949 when it remained among the unclaimed artworks restituted by the Allies. Fuld died in 1963 and bequeathed his estate to a woman named Gisela Martin, about whom nothing more is known. She in turn left her estate to the Magen David Adom, which is now working to find and recover parts of the Fuld collection.⁵⁵

An 18th century silver gilt Torah Finial (*Rimmon*) was restituted to the heirs of Ernst Levite of Mönchsroth, Germany. The Finial was made by master silversmith Johann Conrad Weiss and had been in the family for generations when it was confiscated on Kristalnacht (the Night of Broken Glass), on November 9, 1938. It was among the Judaica found by the Jewish Restitution Successor Organization and Jewish Cultural Reconstruction after the war and was loaned to the surviving Jewish Community of Nuremberg. It was possible to make an exact identification because the Torah Finial was published in an inventory of Jewish property in 1928.

F. *Settlement of Malewicz v. City of Amsterdam*

After protracted litigation, the heirs of Kazimir Malevich and the Stedelijk (City) Museum of Amsterdam reached a settlement. In 2005, when fourteen Malevich paintings were on display at the Guggenheim Museum in New York and the Menil Collection in Houston, the heirs brought suit for restitution of the paintings. In 2007, the court rejected the City's renewed motion to dismiss under the Foreign Sovereign Immunities Act (FSIA), finding that sufficient contacts existed to establish jurisdiction under the FSIA's expropriation exception and that the City's loan of the art works to U.S. institutions was commercial in nature, thus constituting a basis for jurisdiction under the FSIA.⁵⁶ Under the settlement, five of the fourteen paintings were deemed the property of the heirs, and the City received title to all of the many Malevich paintings remaining there.⁵⁷ The most famous of the restituted paintings, *Suprematist Composition*, sold for over \$60 million at Sotheby's on November 3, 2008.⁵⁸

54. Moti Katz, *Leipzig Mayor Hand Delivers Nazi-era Art to Painter's Heirs*, HA'ARETZ, Oct. 28, 2008, available at <http://www.haaretz.com/hasen/spages/1031942.html>.

55. *Matisse Painting Stolen by the Nazis to be Returned*, ARTINFO.COM, Nov. 25, 2008, <http://www.artinfo.com/news/story/29607/matisse-painting-stolen-by-the-nazis-to-be-returned>.

56. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005); *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007); see *International Cultural Property* 2008, *supra* note 23, at 741-42.

57. David D'Arcy, *If This Picture Could Talk: A Malevich Painting's Long Route to the Auction Block*, WALL STREET J., Nov. 1, 2008, at W18.

58. Sotheby's, *Impressionist and Modern Evening Sale*, Nov. 3, 2008, http://www.sothebys.com/app/live/lot/LotDetail.jsp?lot_id=159505088.

IV. Litigation Concerning Iranian Artifacts on Loan to U.S. Institutions and Related Developments

The plaintiffs in *Rubin v. Iran*⁵⁹ are attempting to attach ancient Persian artifacts housed at U.S. museums to satisfy their multi-million dollar default judgment against Iran for allegedly providing material support to Hamas to carry out an act of terrorism in Israel.⁶⁰ Iran has opposed these attempts, arguing that Iran's assets are immune from attachment. There were several significant developments in 2008 in that case and in the area of foreign sovereign immunity generally.

A. THE RUBIN PROCEEDING IN CHICAGO

In Chicago, the *Rubin* plaintiffs brought suit against the University of Chicago's Oriental Institute (OI) and the Field Museum (FM)⁶¹ alleging that those institutions had in their possession Iranian artifacts that were subject to attachment under the FSIA⁶² or Section 201 of the Terrorism Risk Insurance Act (TRIA).⁶³ In 2006, after the court ruled that the OI and the FM could not raise the defense of immunity on Iran's behalf,⁶⁴ Iran entered the case and moved for summary judgment to declare the artifacts immune from attachment.⁶⁵ The plaintiffs opposed, citing the need to take discovery pursuant to Fed. R. Civ. P. 56(f).⁶⁶ The court granted the plaintiffs' requested discovery, but Iran continues to contest two issues.

First, Iran contests discovery related to one of the artifact collections, the Chogha Mish Collection. To prove a title contest⁶⁷ between Iran and the OI (or the United States, on the OI's behalf) regarding the Chogha Mish Collection, plaintiffs requested documents from the arbitration pending before the Iran-U.S. Claims Tribunal.⁶⁸ The magistrate permitted this discovery even though Iran and the United States agree that there is no such title contest and even though the Tribunal's Co-Registrars stated that arbitration documents cannot be produced to third parties.⁶⁹ In August 2008, Iran filed objections to the magistrate's ruling before the district court judge.⁷⁰ Those objections remain pending.

59. *Rubin v. Islamic Republic of Iran*, No. 03 Civ. 9370 (N.D. Ill. Dec. 29, 2003).

60. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003).

61. *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108 (N.D. Ill. 2004).

62. 28 U.S.C. §§1330, 1602-1611.

63. Terrorism Risk Insurance Act, Pub. L. No. 107-297, Title II, §201, 116 Stat. 2322 (Nov. 26, 2002).

64. See *Rubin v. Islamic Republic of Iran*, 436 F. Supp. 2d 938 (N.D. Ill. 2006).

65. See Renewed Motion to Declare Property Exempt, *Rubin v. Islamic Republic of Iran*, No. 03 Civ. 9370 (N.D. Ill. Sept. 26, 2006).

66. Rule 56(f) provides in relevant part that if an opponent of a summary judgment motion can show that it requires fact-finding to justify its opposition, the court may continue the motion to allow for discovery.

67. Plaintiffs claim that, if there is a title contest, the artifacts are attachable under TRIA § 201 as "blocked assets." See Renewed Motion to Declare Property Exempt, *supra* note 65.

68. The Tribunal, located in The Hague, was created in 1981 by the Algiers Accords—the agreement that resolved the 1979 hostage crisis.

69. See Notice of Filing by Islamic Republic of Iran, *Rubin v. Islamic Republic of Iran*, No. 03 Civ. 9370 (N.D. Ill. July 15, 2008).

70. See Objections of Islamic Republic of Iran, *Rubin v. Islamic Republic of Iran*, No. 03 Civ. 9370 (N.D. Ill. Aug. 21, 2008).

Second, Iran contests plaintiffs' request for documents and a deposition as to all of Iran's assets nationwide. Iran moved to quash this "general assets" discovery on three main grounds: the Algiers Accords, comity, and foreign relations. The United States generally agreed with Iran.⁷¹ In 2008, Iran appealed the district court's order requiring Iran to produce general assets discovery pursuant to U.S. Code Section 1291,⁷² arguing that, under the collateral order doctrine, the court could review the order as an infringement on Iran's sovereign immunity. The Seventh Circuit has not yet ruled whether it has jurisdiction to hear the appeal.

Also this year, the plaintiffs in *Peterson v. Islamic Republic of Iran*⁷³ successfully intervened in the Chicago *Rubin* proceedings.⁷⁴ The *Peterson* plaintiffs argued that their alleged right to attach the artifacts supersedes any rights of the *Rubin* plaintiffs.⁷⁵ That issue also remains pending before the district court.

B. NATIONAL DEFENSE AUTHORIZATION ACT SECTION 1083 AND THE RUBIN PROCEEDING IN THE DISTRICT OF COLUMBIA

On January 28, 2008, President Bush signed into law the National Defense Authorization Act.⁷⁶ Section 1083 of the Act created *inter alia* a new "terrorism exception to immunity" in the FSIA. The new Section 1605A⁷⁷ and the amended Section 1610 provide exceptions to immunity from attachment and execution.⁷⁸

The Act is landmark for several reasons. First, Section 1605A provides a private right of action against a foreign nation for materially supporting an act of terrorism and permits an award of punitive damages against that nation. Second, filing under Section 1605A automatically establishes a lien of *lis pendens* upon "any real property or tangible personal property" that is subject to execution under the amended Section 1610.⁷⁹ Iran has argued that such a lien, to the extent it covers Iranian assets pending before the Tribunal, violates the Algiers Accords.⁸⁰

Third, under new Section 1610(g), property of foreign states and of their agencies and instrumentalities is subject to attachment regardless of the foreign state's level of economic control over the property, including profits, day-to-day management, and other factors. Certain plaintiffs have argued that there is no requirement that the property be

71. See Third Statement of Interest of United States of America, *Rubin v. Islamic Republic of Iran*, No. 03 Civ. 9370 (N.D. Ill. Aug. 21, 2008).

72. Section 1291 provides for appellate jurisdiction over "appeals from all final decisions of the district courts of the United States. . . ." 28 U.S.C. § 1291.

73. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003).

74. See Minute Entry before Blanche M. Manning, *Rubin v. Islamic Republic of Iran*, No. 03 Civ. 9370 (N.D. Ill. Oct. 16, 2008).

75. See *Id.* at 2-3.

76. National Defense Authorization Act, 110 Pub. L. No. 181, 122 Stat. 3 (2008).

77. 28 U.S.C. §1605A.

78. Section 1605A applies to those nations designated by the U.S. Department of State as "state sponsors of terrorism"—Cuba, Syria, Iran, and Sudan. In fall 2008, the United States removed North Korea from the list and achieved a settlement with Libya (removed in 2006) regarding all terrorism cases pending against that nation.

79. 28 U.S.C. § 1605A(g)(1).

80. See Memorandum by Islamic Republic of Iran in Support of Motion to Clarify, *Rubin v. Islamic Republic of Iran*, No. 03 Civ. 9370 (N.D. Ill. Sept. 18, 2007).

used for “commercial activity” at all and that all assets, including those with no U.S. connection, may be attached.

In 2008, the *Rubin* plaintiffs convinced the federal court in Washington, D.C.—which issued the underlying default judgment against Iran—to amend their judgment to include a claim for Section 1605A relief.⁸¹ But the four institutions with claims pending against them—the OI, the FM, HU, and the MFA—moved to intervene in that proceeding and for reconsideration,⁸² arguing that retroactive application of Section 1605A should not be permitted based on *Plaut v. Spendthrift Farm, Inc.*⁸³ The court has not yet decided whether to permit intervention.

V. International Application of the National Historic Preservation Act

The National Historic Preservation Act⁸⁴ applies primarily to federal undertakings within the United States that might have an adverse impact on historic properties listed or eligible for listing on the National Register of Historic Places.⁸⁵ Under a provision added when the United States ratified the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, the NHPA applies to historic properties that are World Heritage Sites or that are listed on a foreign nation’s equivalent to the U.S. National Register.⁸⁶ In an earlier decision, the District Court for the Northern District of California held that the NHPA applies to a decision of the U.S. Department of Defense to build a naval base near Okinawa, Japan. The construction might have an adverse impact on the dugong, a sea mammal listed on Japan’s Register of Cultural Properties.⁸⁷ The District Court held that the Department of Defense failed to follow the procedures in the NHPA for determining whether the new naval facility would have an adverse impact and failed to take those adverse effects into account for the purpose of avoiding or mitigating adverse effects to the dugong.⁸⁸

81. See Memorandum Order Replacing Memorandum Order Granting the Government’s Motion to Vacate Plaintiff’s Writ of Attachment and Execution, *Rubin v. Islamic Republic of Iran*, No. 01-1655 (D.D.C. June 3, 2008).

82. See Motion to Intervene, *Rubin v. Islamic Republic of Iran*, No. 01-1655 (D.D.C. June 16, 2008).

83. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995).

84. 16 U.S.C. §§ 470-470w-6.

85. 16 U.S.C. § 470(f).

86. 16 U.S.C. § 470a-2.

87. *Dugong v. Rumsfeld*, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. Mar. 1, 2005) (No. 03-4350); see also Gerstenblith & Czegledi, *supra* note 15, at 450-52.

88. *Dugong v. Gates*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008).