

2010

## International Art and Cultural Heritage

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### Recommended Citation

Patty Gestenblith, *International Art and Cultural Heritage*, 44 INT'L L. 487 (2010)  
<https://scholar.smu.edu/til/vol44/iss1/32>

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# International Art and Cultural Heritage

PATTY GERSTENBLITH\*

## I. Introduction

In 2009, the United States became a party to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. Nearly fifty-five years passed between the time the United States signed the Convention and the time it ratified it.

Several significant cases were decided concerning the restitution of art works looted during the Holocaust, which established new law and clarified existing law. Forty-six nations gathered in the Czech Republic, where they reconsidered the Washington Principles of 1998 and promulgated the Terezin Declaration. Cultural objects smuggled into the United States continued to be recovered and restituted. Also during 2009, there were new developments concerning the Convention on Cultural Property Implementation Act. Events continue to expand and test the parameters of the United States' implementation of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

## II. International Conventions and Agreements

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

On March 13, 2009, the United States deposited its instrument of ratification of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, thus becoming the Convention's 123rd High Contracting Party.<sup>1</sup> The United States' ratification became effective immediately under Article 33(3), because it is a State

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1. For the administrative and legislative developments leading up to this ratification, see Patty Gerstenblith, Laina Lopez & Lucille Roussin, *International Art and Cultural Heritage*, 43 INT'L LAW. 811, 812-13 (2009) [hereinafter Gerstenblith, et al.].

currently engaged in armed conflict or occupation of another State Party.<sup>2</sup> The United States was the only nation to ratify or otherwise join the main Convention during 2009. Four nations ratified the Second Protocol in 2009: Italy, Jordan, Bosnia and Herzegovina, and the Dominican Republic.<sup>3</sup>

New Zealand ratified the main Convention in July 2008, and has continued to consider implementing legislation for the First and Second Protocols in the Cultural Property (Protection in Armed Conflict) Bill.<sup>4</sup> The revised bill was given a second reading in Parliament in August 2009.<sup>5</sup> The original legislation was amended to clarify that there would not be universal jurisdiction for grave violation offenses.<sup>6</sup> Instead, New Zealand will prosecute individuals who commit an offense in the territory of a Party to the Second Protocol, and who subsequently enter the territory of New Zealand.<sup>7</sup>

#### B. 1970 UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY

Two nations joined the 1970 UNESCO Convention: Belgium and the Netherlands.<sup>8</sup> While the number of new State Parties is small, both of these nations are international art market nations. Thus, their entry into the international treaty regime regulating the flow of art works is significant.

In October 2008, pursuant to its bilateral agreement with Italy, Switzerland published its list of designated archaeological materials and ancient art.<sup>9</sup> This list is similar to the list in the U.S.-Italy agreement, which sets forth the art and archeology subject to import restriction.<sup>10</sup> Also in October 2008, Switzerland and Greece finalized a bilateral agreement.<sup>11</sup> Finally, eBay and Switzerland concluded an agreement under which eBay will cease offering for sale, within Switzerland, antiquities without proof of legality issued by

2. See U.N. Educ. Scientific & Cultural Org. [UNESCO], Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, The Hague, art. 33(3), May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 215.

3. See UNESCO, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=15207&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html).

4. Gerstenblith, et al., *supra* note 1, at 812.

5. Cultural Property (Protection in Armed Conflict) Bill—Second Reading, 656 Hansard 5783 (2009) (N.Z.) available at [http://www.parliament.nz/en-NZ/PB/Debates/Debates/2/0/d/49HansD\\_20090820\\_00000896-Cultural-Property-Protection-in-Armed-Conflict.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/2/0/d/49HansD_20090820_00000896-Cultural-Property-Protection-in-Armed-Conflict.htm).

6. *Id.*

7. *Id.*

8. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

9. Vereinbarung zwischen dem Schweizerischen Bundesrat und der Regierung der Republik Italien über die Einfuhr und die Rückführung von Kulturgut [Agreement between the Swiss Federal Council of the Swiss Confederation and the government of the Republic of Italy on the import and repatriation of cultural property], Apr. 7, 2008, SR 0.441.145.41, app. (Switz.).

10. The lists may be obtained at: Bundesamt für Kultur (BAK), Bilateral Agreement, <http://www.bak.admin.ch/themen/kulturguetertransfer/01985/index.html?lang=en> (last visited Feb. 5, 2010). The Swiss agreement covers all materials up to AD 800 and some up AD 1500.

11. *Id.* The list of designated materials follows the text of the agreement.

competent authorities in Switzerland and other countries.<sup>12</sup> This restriction applies, in particular, to cultural property that is subject to import restriction pursuant to a bilateral agreement, such as the agreements that the United States and Switzerland have with several other nations.<sup>13</sup>

The United States had several developments related to the 1970 UNESCO Convention. The United States implemented the UNESCO Convention under the Convention on Cultural Property Implementation Act (CPIA).<sup>14</sup> It also renewed and extended its memorandum of understanding with Honduras.<sup>15</sup> Agreements like this impose restrictions on the importation of archaeological and ethnographic materials into the United States. They last for a maximum of five years, but may be renewed an unlimited number of times. This was the second time that the United States and Honduras renewed their agreement, which continues import restrictions on Pre-Columbian archaeological materials. The renewal caused little reaction.

In a far more controversial move, the United States concluded a memorandum of understanding with China.<sup>16</sup> This agreement had been under consideration for four years.<sup>17</sup> Items subject to import restriction include archaeological materials of the Paleolithic (beginning c. 75,000 B.C.) through the Tang Dynasty (ending A.D. 907).<sup>18</sup> Ceramic vessels, sculpture, architectural decoration and molds; stone, such as jade ornaments and jewelry, vessels and weapons, relief sculpture, cave and grotto temple art, stelae, and architectural elements; metal, including vessels, sculpture and coins; silks and textiles; lacquer and wood are all included.<sup>19</sup> The agreement also covers monumental sculpture and wall art that is at least 250 years old, the minimum age requirement for archaeological materials to come under the import restriction of the CPIA.<sup>20</sup>

12. *eBay to limit sale of cultural artifacts*, SWISSINFO.CH, Oct. 20, 2009, [http://www.swissinfo.ch/eng/travel/eBay\\_to\\_limit\\_sale\\_of\\_cultural\\_artefacts.html?siteSect=414&sid=11379715&cKey=1256106582000&ty=nd](http://www.swissinfo.ch/eng/travel/eBay_to_limit_sale_of_cultural_artefacts.html?siteSect=414&sid=11379715&cKey=1256106582000&ty=nd).

13. *Id.*

14. Convention on Cultural Property, 19 U.S.C. §§ 2601-2613 (2009).

15. Honduras, Cultural Property Agreement with the United States, <http://exchanges.state.gov/heritage/culprop/hnfact.html>. For the text of the 2004 agreement, see Memorandum of Understanding between the United States and Honduras concerning the Imposition of Import Restrictions on Archaeological Materials from the Pre-Columbian Cultures of Honduras, 69 Fed. Reg. 12267-12271 (Mar. 16, 2004), available at <http://exchanges.state.gov/heritage/culprop/hnfact/pdfs/hn2004mou.pdf>. For the text of revised Article II, see Memorandum of Understanding Concerning the Imposition of Import Restrictions on Archaeological Material from the Pre-Columbian Cultures of Honduras, U.S.-Hond., art. II, State Dept. No. 04-64, 74 Fed. Reg. 10482-10483 (Mar. 11, 2009), available at <http://exchanges.state.gov/heritage/culprop/hnfact/pdfs/hn2009mouext.pdf>.

16. Memorandum of Understanding between the United States and the People's Republic of China concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period through the Tang Dynasty and Monumental Sculpture and Wall Art at Least 250 Years Old, 74 Fed. Reg. 2838-2844 (Jan. 16, 2009), available at <http://exchanges.state.gov/heritage/culprop/chfact/pdfs/ch2009mou.pdf>.

17. Patty Gerstenblith & Bonnie Czeglédi, *International Cultural Property*, 40 INT'L LAW. 441 (2006).

18. Import Restrictions Imposed on Certain Archaeological Material from China, 74 Fed. Reg. 2838-2844 (Jan. 16, 2009), available at <http://exchanges.state.gov/heritage/culprop/chfact/pdfs/ch2009dlfrn.pdf>.

19. *Id.*

20. 19 U.S.C. § 2601(2)(C)(i) (2002).

In the first reported decision to interpret the import restrictions and the forfeiture procedures imposed under the CPIA,<sup>21</sup> a U.S. federal court ordered the forfeiture of two paintings that were illegally imported into the United States in violation of the memorandum of understanding between the United States and Peru.<sup>22</sup> Noting that forfeitures under Title 19 of the United States Code, including those under the CPIA, are exempted from the procedural requirements of the Civil Asset Forfeiture Reform Act,<sup>23</sup> the court set out the procedural steps for forfeiture under the CPIA.<sup>24</sup> The government has the initial burden of showing that the imported materials are designated ethnological materials under the CPIA pursuant to a bilateral agreement.<sup>25</sup> Once the government makes its prima facie case for forfeiture by meeting this initial burden, the burden shifts to the claimant to rebut this showing, which in this case the claimant failed to do.<sup>26</sup>

The final interesting CPIA-related development is a test case of the application of import restrictions to ancient coins originating from Cyprus and China. The Ancient Coin Collectors Guild (ACCG), an organization committed to promoting the free and independent collecting of ancient coins, has orchestrated this case.<sup>27</sup> Ancient coins became subject to import restriction for the first time when Cyprus and the United States extended and amended their MOU in 2007.<sup>28</sup> Ancient coins were also included in the MOU between China and the United States in January 2009.<sup>29</sup> The ACCG, which had previously joined a suit against the Department of State under the Freedom of Information Act, arranged for the import of un-provenanced coins of Cypriot and Chinese type that are subject to these import restrictions in April 2009.<sup>30</sup> The Department of Homeland Security, which enforces the import restrictions, seized the coins in September 2009, and litigation to test the legitimacy of the regulations is expected.<sup>31</sup>

21. *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of the "Doble Trinidad"*, 597 F. Supp. 2d 618, 625 (E.D. Va. 2009).

22. Memorandum of Understanding between the United States and Peru concerning the Imposition of Import Restrictions on Archaeological Material from the Prehispanic Cultures and Certain Ethnological Material from the Colonial Period of Peru, 62 Fed. Reg. 31,713 (1997), available at <http://exchanges.state.gov/heritage/culprop/pefact/pdfs/pe1997mou.pdf>.

23. 18 U.S.C. § 983 (2009).

24. *Eighteenth Century Peruvian Oil*, 597 F. Supp. 2d at 622-25.

25. *Id.* at 623.

26. The claimant's primary argument in rebuttal was that the paintings originated in Bolivia, rather than in Peru. Art experts concluded that both paintings originated in the Cuzco School of Art in Peru. The court concluded that any question as to whether one or both paintings originated in Peru or Bolivia was not relevant because both MOUs (the one with Bolivia and the one with Peru) impose import restrictions on Spanish colonial period religious art. *Id.* at 621, 624-25.

27. Objectives—Ancient coin Collectors Guild, <http://www.accg.us/about/objectives/> (last visited Jan. 19, 2010).

28. Cyprus 2007 Revised Designated List, 72 Fed. Reg. 38470-38474 (July 13, 2007), available at <http://exchanges.state.gov/heritage/culprop/cyfact/pdfs/cy2007dlfrn.pdf>.

29. *Import Restrictions Imposed on Certain Archaeological Material from China*, 74 Fed. Reg. 2838-2844.

30. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, No. 07-2074, 2009 WL 4250776, at \*1 (D.D.C. 2009) (granting defendant's motion for summary judgment).

31. *Wall Street Collectors Challenge U.S. State Department Bureaucrats After Baltimore Seizure*, WSJ MARKET WATCH, Sept. 15, 2009, available at <http://www.marketwatch.com/story/collectors-challenge-us-state-department-bureaucrats-after-baltimore-seizure-2009-09-15>.

### III. Legal Developments concerning Art Works Looted during the Holocaust

#### A. PRAGUE CONFERENCE AND TEREZIN DECLARATION

The Prague “Holocaust Era Assets” conference took place from June 26-30, 2009.<sup>32</sup> The Czech Republic and six institutions sponsored the conference, and representatives of forty-six nations attended.<sup>33</sup> The conference goals were to assess the progress made since the 1998 Washington Conference on Holocaust Era Assets in the areas of restitution of looted art and other cultural objects, property restitution, and financial compensation; to review current practices regarding provenance research and define new instruments to improve these efforts; and to discuss new approaches to education, social programs and cultural initiatives related to the Holocaust.<sup>34</sup> The conference closed with the issuance of the Terezin Declaration.<sup>35</sup> In the area of art and cultural property confiscated and looted by the Nazis, the Declaration calls for additional support for intensified systematic provenance research, and urges all stakeholders:

to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.<sup>36</sup>

The Declaration also specifically calls for greater efforts to identify and catalogue Judaic and Jewish cultural property, including sacred scrolls, ceremonial objects, and libraries, manuscripts, archives and records of the Jewish communities; to return such items to their rightful owners and other appropriate individuals and institutions; to provide for preservation of such materials; and to restore sacred scrolls and objects to synagogue use.<sup>37</sup> The Declaration establishes the European Shoah Legacy Institute in Terezin as a forum for interested parties to conduct research, and to develop and share best practices and guidelines.<sup>38</sup>

Both before and after the Prague Conference, the U.S. Department of State held town hall meetings to discuss what more the United States could do to fulfill the promise of the Washington Principles and to encourage restitution of art works found within the United States. One suggestion is to establish a panel to rule on Nazi-looted art disputes and to encourage examining the evidence, rather than relying on procedural bars such as the statute of limitations and the doctrine of laches.<sup>39</sup> Stuart Eizenstadt, the leader of the U.S.

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32. Holocaust Era Assets Conference, <http://www.holocausteraassets.eu/> (last visited Jan. 19, 2010).

33. *Id.*

34. *Id.*

35. Terezin Declaration, June 30, 2009, *available at* <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>.

36. *Id.* at 4.

37. *Id.* at 5.

38. *Id.*

39. Catherine Hickley, *Eizenstat Favors U.S. Nazi Loot Panel to Advise on Disputed Art*, BLOOMBERG, June 28, 2009, [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aB\\_A3zMb02Ko](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aB_A3zMb02Ko).

delegation to Prague, reportedly favors establishing such a panel, modeled on the U.K. Spoliation Advisory Panel.<sup>40</sup>

#### B. UNITED KINGDOM RESTITUTION STATUTE

The British Parliament enacted a new law, the Holocaust (Stolen Art) Restitution Act 2009, which was given Royal Assent on November 12.<sup>41</sup> British museums are normally forbidden to remove any works from their collections.<sup>42</sup> Therefore, even if a work was proven to have been stolen during the Holocaust, it still could not be returned to its rightful owner. Instead, museums have paid compensation. This legislation allows works stolen during the Holocaust to be deaccessioned and returned to their rightful owner upon the recommendation of the Spoliation Advisory Panel. The Act applies to works stolen between 1933 and 1945 by or on behalf of the Nazi regime and held by a national institution in England or Scotland.<sup>43</sup>

#### C. LITIGATION

##### 1. *Foreign Sovereign Immunity*

Claude Cassirer sued the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation<sup>44</sup> to recover a painting, *Rue Saint-Honoré, après midi, effet de pluie*, by Camille Pissarro. The Ninth Circuit dismissed the appeal as to personal jurisdiction, standing, and the existence of a justiciable case or controversy because there had been no final judgment on these issues.<sup>45</sup> The court did consider the question of whether the Foreign Sovereign Immunities Act (FSIA) permitted a suit against a foreign state under the FSIA's expropriation exception even when the foreign state being sued did not affect the expropriation.

Claude Cassirer's grandmother, Lilly Cassirer, owned the painting. In 1939, when she sought to leave Germany because of Nazi persecution, she was forced to sell the painting, but was never paid.<sup>46</sup> The painting was ultimately confiscated by the Gestapo, later sold through several hands (including a New York gallery), and finally purchased by Baron Thyssen-Bornemisza sometime after 1976.<sup>47</sup> In an arrangement between the Baron and Spain, his collection is displayed at the Thyssen-Bornemisza Museum in Madrid. In 2000, Cassirer learned the location of the painting and requested its return. In 2005, without having pursued any judicial proceedings in Spain, Cassirer, a U.S. citizen and resident of California, filed suit in federal district court in California against the Foundation and Spain.<sup>48</sup> In 2006, the district court denied motions to dismiss brought by Spain and the Foundation.<sup>49</sup>

40. *Id.*

41. Holocaust (Stolen Art) Restitution Bill, 2009, Bill [35] (Eng.), available at <http://www.publications.parliament.uk/pa/cm200809/cmbills/035/2009035.pdf>.

42. *Id.*

43. *Id.*

44. *Cassirer v. Spain*, 580 F.3d 1048 (9th Cir. 2009), *remanded to* 580 F.3d 1048 (9th Cir. 2009).

45. *Id.* at 1064.

46. *Id.* at 1052.

47. *Id.*

48. *Id.*

49. *Id.* at 1162-63.

Because all parties agreed that Spain had not been involved in expropriating the painting, the main question on appeal was whether the FSIA's expropriation exception applied in this situation.<sup>50</sup> Relying on both the language of the statute and Congressional intent as expressed in the legislative history, the Ninth Circuit held that "the plain language of § 1605(a)(3) does not require that the foreign state (against whom the claim is made) be the entity who expropriated the property in violation of international law."<sup>51</sup>

Noting that the FSIA's requirement of commercial activity is determined by the "nature of the course of conduct or particular transaction or act, rather than by reference to its purpose" and that the question is whether the activity is of a kind in which private individuals might engage,<sup>52</sup> the Ninth Circuit also affirmed the District Court's holding that the Foundation had engaged in commercial activity in the United States.<sup>53</sup> Among those activities that the court cited as commercial in nature were: transacting in business as both a purchaser and seller of goods and services; advertising and distributing marketing and other commercial promotional materials; purchasing books, posters, post cards and related materials; purchasing books about Nazi expropriation of art works, Pissaro, and museum acquisition policies; licensing reproduction of images to U.S. businesses; purchasing goods to be sold in the Museum gift shop; selling a poster of the painting at issue to individuals in California; assisting in the production of a film featuring the painting, which would be presented on in-flight Iberia Airlines flights to and from the United States; lending its art works to U.S. institutions and borrowing art works from U.S. institutions to display in the Foundation museum.<sup>54</sup>

On the final issue—the question of whether Cassirer is required to exhaust local remedies by bringing an action in Spain—the Ninth Circuit held that Congress did not impose an absolute requirement to exhaust remedies in the FSIA.<sup>55</sup> However, on remand, the District Court has to conduct a prudential exhaustion analysis.<sup>56</sup>

Another decision, *Westfield v. Federal Republic of Germany*,<sup>57</sup> addressed the FSIA but focused on the commercial activity exception to sovereign immunity.<sup>58</sup> The plaintiff is the estate representative of Walter Westfeld, who owned a significant art collection in Germany before World War II.<sup>59</sup> Beginning in 1933, he was persecuted as a Jew, forced to sell his collection, and ultimately killed. The plaintiff alleged that the collection was wrongfully converted and sought to impose a constructive trust.<sup>60</sup>

The plaintiff asserted that the conversion and subsequent sale of art works that Westfeld had intended to transfer to the United States fit the statutory criterion of commercial

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50. *Id.* at 1056.

51. *Id.*

52. *Id.*

53. *Id.* at 1058.

54. *Id.* at 1059.

55. *Id.* at 1062.

56. *Id.*

57. *Westfield v. Germany*, No. 3:09-0204, 2009 Dist. LEXIS 65133 (M.D. Tenn. 2009).

58. This exception provides "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . (2) in which an action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (2008).

59. *Westfield*, 2009 Dist. LEXIS 65133, at \*2.

60. *Id.*

activity having a “direct effect in the United States.”<sup>61</sup> The court rejected this characterization of Nazi Germany’s actions as commercial in nature and held that acts of expropriation or nationalization are uniquely sovereign.<sup>62</sup> Subsequent commercial use of the property, after its expropriation, does not render the expropriation itself a commercial act.<sup>63</sup>

## 2. *California Holocaust Art Recovery Statute of Limitations*

In 2002, California enacted specific legislation to extend the statutory period in which art works looted during the Holocaust could be recovered to December 31, 2010.<sup>64</sup> Works are protected by this date, regardless of whether the statutory period had expired earlier.<sup>65</sup> In 2007, Marei von Saher, heir to the collection of Jacques Goudstikker, a renowned Dutch-Jewish art dealer of the 1930s, sued the Norton Simon Museum in Pasadena, California, to recover a diptych, *Adam and Eve*, by the sixteenth-century artist Lucas Cranach the Elder.<sup>66</sup> The District Court granted the Museum’s motion to dismiss without leave to amend.<sup>67</sup> The court held that California’s statute extending the limitation period to recover Holocaust-era looted art was unconstitutional and that its generic statute of limitations had already expired.

The Ninth Circuit affirmed,<sup>68</sup> holding that the California statute was unconstitutional because the state government had interfered with foreign relations, an area committed to exclusive federal jurisdiction. The Ninth Circuit rejected the museum’s argument, however, that California’s extension of the statute of limitations conflicted with the Executive Branch’s policy of external restitution, as embodied in the London Declaration of 1943 and the procedures established immediately after the war to return art works to nations, rather than to individuals, because the policy of external restitution was no longer in effect.<sup>69</sup> Even though the state law did not directly conflict with federal policy, the court still held that the California statute was preempted because it infringed on the federal government’s exclusive power to conduct foreign affairs, and it was not primarily concerned with rights to property located within California.<sup>70</sup> The Ninth Circuit then remanded the case to the District Court for a determination of whether the Von Saher claim was barred under California’s general statute of limitations.<sup>71</sup> The plaintiff has filed a petition for rehearing en banc.

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61. *Id.* at \*8.

62. *Id.* at \*16-17.

63. *Id.*

64. CAL. CIV. PROC. CODE § 354.3(c) (West 2010).

65. *Id.*

66. Gerstenblith, et al., *supra* note 1, at 817-18.

67. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 2007 U.S. Dist LEXIS 95757 (C.D. Cal. 2007).

68. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009).

69. *Id.* at 1023-25.

70. *Id.* at 1025-29.

71. *Id.* at 1029-31. The court noted the split in opinion among California state appellate courts as to whether California’s general statute of limitations for recovery of stolen property, CAL. C. CIV. P. § 338, operates with an actual notice or a constructive notice element.

### 3. *Portrait of Wally*

The Egon Schiele painting, *Portrait of Wally*, has been embroiled in litigation in New York: first in state court and now in federal court, since early 1998, when it was on loan from the Leopold Museum in Vienna to the Museum of Modern Art. When the state court proceedings ended, the federal government seized the painting and brought a forfeiture action on the grounds that it was stolen property that had crossed a state or international boundary.<sup>72</sup> After three prior federal district court opinions, the district court for the Southern District of New York finally issued an opinion denying both parties' motions for summary judgment and clearing the way for a trial to resolve the remaining issue.

The Museums (the Leopold and the Museum of Modern Art) argued that the government's complaint should be dismissed under the act of state doctrine and principles of international comity. The court rejected both arguments as inapplicable. In terms of the substantive arguments, the government needed to establish three elements under a standard of probable cause. First, the Leopold Museum was involved in the importation of the painting; second, the painting was stolen and remains stolen; and finally, Dr. Leopold knew the painting was stolen and that his knowledge could be imputed to the Leopold Museum under agency principles. On the first two points, the court held that the government met its initial burden of proof and that the Leopold Museum had failed to meet its burden to refute the government's showing.<sup>73</sup> On the third point, the government also met its initial burden of proof, but a triable issue of fact remained as to whether Dr. Leopold knew or consciously avoided learning that the painting was stolen.<sup>74</sup>

### 4. *Claims of Seger-Thomschitz*

Two claims brought by Claudia Seger-Thomschitz to recover Oskar Kokoschka paintings, originally owned by the Viennese collector, Oskar Reichel, were decided. After the *anschluss* in March 1938, the Viennese art dealer, Otto Kallir-Nirenstein, transferred his gallery to his secretary, who was not Jewish, and moved to Paris, where he opened a new gallery, Galerie St. Etienne. In February 1939, Reichel transferred five Kokoschka paintings to Kallir in Paris. Kallir subsequently moved to New York where he opened a Galerie St. Etienne. He brought the Kokoschka paintings and other works with him. Seger-Thomschitz, the legatee under the will of one of Reichel's sons, sought to claim *Two Nudes (Lovers)*, currently in the collection of the Boston Museum of Fine Arts,<sup>75</sup> and *Portrait of a Youth*, possessed by Sarah Blodgett Dunbar.<sup>76</sup> In both cases, the current possessors of the paintings initiated a lawsuit for declaratory judgment. Seger-Thomschitz counterclaimed, alleging that the transfer of the paintings to Kallir was the last step in a confiscation by the

72. *United States v. Portrait of Wally*, 2009 U.S. Dist. LEXIS 91464 (S.D.N.Y. 2009). For the facts and prior procedural history, see *id.* at \*7-33. The government sought forfeiture of the painting under both 19 U.S.C. § 1595a(c) and 18 U.S.C. § 545 on the ground that the Leopold knowingly imported the painting "contrary to law" in violation of the National Stolen Property Act. *Id.* at \*43.

73. *Id.* at \*103.

74. *Id.* at \*103-17.

75. *Museum of Fine Arts v. Seger-Thomschitz*, 2009 U.S. Dist. LEXIS 58826, at \*1-2 (D. Mass. 2009). Sarah Reed Blodgett, the mother of the plaintiff in the companion case, donated the painting in this case to the Museum at her death in 1972.

76. *Dunbar v. Seger-Thomschitz*, 638 F. Supp. 2d 659 (E.D. La. 2009).

Nazis, or in the alternative, that the transfer to Kallir was forced and any subsequent sale was therefore invalid.<sup>77</sup>

In the *Museum of Fine Arts, Boston* case, the court rejected Seger-Thomschitz's argument that the court should apply a federal statute of limitations for her claim and applied the Massachusetts statute of limitations instead. The state statute allows three years for tort actions, subject to a discovery rule exception that does not allow the statutory period to run until the plaintiff knew or reasonably could have known about the harm or injury.<sup>78</sup> The court concluded that the Reichel family knew that Kallir had the Kokoschka painting and was aware of its subsequent sale. In addition, it had known the whereabouts of the painting since at least 1945. Kallir's gallery in New York kept records of its transfer. The painting was on display at the Boston Museum of Fine Arts almost consistently since its acquisition, but the Reichel family did not make a claim for compensation for the Kokoschka paintings, although it had made claims following the war for other property, including other art works.<sup>79</sup> The court also concluded that Seger-Thomschitz was on notice of her possible claim to the painting and could have located the painting more than three years before she pursued her claim.<sup>80</sup>

While the outcome of the *Dunbar* litigation<sup>81</sup> was essentially the same as that in the *Museum of Fine Arts, Boston* case, the analysis in *Dunbar* was quite different. Under the Louisiana civil code, a possessor of movable property can obtain title after ten years' possession through acquisitive prescription.<sup>82</sup> Defendant's counterclaims in quasi-contract and unjust enrichment were also subject to a ten-year period for liberative prescription. While a discovery rule is incorporated into this time period, the court held that defendant's ascendants (the Reichel family) had failed to pursue any potential claim for recovering the painting.<sup>83</sup>

##### 5. *Settlement of Schoeps Claim*

In February 2009, a lawsuit filed by the Museum of Modern Art and the Solomon R. Guggenheim Museum against a claimant, Julius Schoeps, was suddenly settled on the eve of trial.<sup>84</sup> Schoeps, the heir of Paul von Mendelssohn-Bartholdy, asserted that two Picassos, *Boy Leading a Horse*, donated to the Museum of Modern Art in 1964, and *Le Moulin de la Galette*, donated to the Guggenheim in 1963, were sold under duress in Germany some time before 1935. The Museums will retain the paintings, but the parties have kept the other terms of the settlement confidential even though the trial judge urged them to disclose the amount of payment made to the heirs.

77. *Museum of Fine Arts*, 2009 U.S. Dist. LEXIS 58826, at \*13-14.

78. *Id.* at \*18-23.

79. *Id.* at \*23-25.

80. *Id.* at \*28-30.

81. *Dunbar*, 638 F. Supp. 2d at 663-65.

82. *Id.* at 663 (citing Louisiana Civ. Code article 3491, that, regardless of good or bad faith, "one who has possessed a movable as owner for ten years acquires ownership by prescription").

83. *Id.* at 663-64.

84. Benjamin Weiser, *Heirs' Secrecy in Settlement over Picassos Baffles Judge*, N.Y. TIMES, Mar. 24, 2009, at A25.

## 6. *Max Stern Estate Recoveries*

After the First Circuit Court of Appeals held in *Vineberg v. Bissonnette* that forced sales from the collection of Max Stern in Germany in 1937 were the equivalent of thefts,<sup>85</sup> several additional paintings have been recovered for the Stern Estate. These include: a Dutch Old Master painting, *Portrait of a Musician Playing a Bagpipe* by an unknown artist and dated to 1632, which was seized from the New York gallery, Lawrence Steigrad Fine Arts;<sup>86</sup> and an Italian baroque painting, *St. Jerome*, attributed to Ludovico Carracci (1555-1619), which the New York dealer Richard Feigen purchased at the Lempertz Auction House in 2000 and voluntarily relinquished.<sup>87</sup> Another painting recovered was *Flight from Egypt*, attributed to the sixteenth century Dutch master Jan Wellens de Cock and formerly in the collection of German Chancellor Konrad Adenauer. Another thirty to forty paintings have reportedly been located in Germany, Netherlands and the United States and are the subject of negotiations with the Stern estate.<sup>88</sup>

## 7. *Other Restitutions*

On November 9, 2009, the anniversary of Kristallnacht, a two-volume Bomberg/Pratensis Rabbinic Bible of the sixteenth century was returned to Vienna's Jewish community, Israelitische Kultusgemeinde Wien.<sup>89</sup> The Bible was illegally imported into the United States in March 2009. It was offered for sale at the Kestenbaum & Company auction house, which voluntarily returned it to the rightful owner.

The Hearst Castle, former home of William Randolph Hearst and now a museum owned by California State Parks located in San Simeon, California, returned three paintings by Venetian artists of the sixteenth century to the heirs of the Oppenheimer estate.<sup>90</sup> Hearst purchased all three paintings from a gallery in Berlin in 1935. Jacob and Rosa Oppenheimer had owned the paintings, but were forced to sell their assets by the Nazis without compensation. They both perished in the Holocaust, but have eight living descendants. Two of the three paintings will be returned to the heirs. A third painting will remain on loan to the museum for educational purposes.

85. *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008).

86. Catherine Hickley, *U.S. Seizes Old Master Lost in Nazi-Era Forced Sale*, BLOOMBERG, Apr. 21, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601120&sid=a1Yq.7LgKdJU&refer=muse>.

87. Catherine Hickley, *Art Dealer Returns Painting to Heirs*, BLOOMBERG, May 6, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601088&sid=aGmKfOjE2uO4>.

88. James Adams, *Two Paintings Stolen by Nazis Returned to Montrealers Estate*, GLOBE AND MAIL, Dec. 11, 2008, at A7.

89. Press Release, U.S. Immigration and Customs Enforcement, ICE Returns 16th Century Hebrew Bible Looted by Nazis (Nov. 9, 2009), available at <http://www.ice.gov/pi/nr/0911/091109newyork.htm>.

90. News Release, California Department of Parks and Recreation, Paintings from Hearst Castle Returned to Family of Holocaust Victims (Apr. 6, 2009), available at [http://www.hearstcastle.org/whats\\_new/press\\_releases/paintings.asp](http://www.hearstcastle.org/whats_new/press_releases/paintings.asp).

#### IV. Recoveries, Restitutions, and Claims

##### A. CLAIMS

###### 1. *Peruvian Artifacts at Yale University*

In late 2008, after the parties failed to negotiate an agreement,<sup>91</sup> Peru filed a claim to recover ancient artifacts that were excavated by Hiram Bingham in 1912 and 1915 at the Inca site of Machu Picchu. The artifacts have been housed at Yale University since that time. Peru is seeking the return of these artifacts.<sup>92</sup> In October 2009, Yale filed its answer to Peru's complaint.<sup>93</sup> Both parties agree that Bingham removed the artifacts from Peru with permission. The dispute centers on whether Peru gave Yale the artifacts to own or whether it loaned them. Yale asserts, however, that even if Peru loaned the artifacts, the statute of limitations bars Peru's attempt to recover them now.

###### 2. *Claim for van Gogh Painting at Yale*

Yale filed suit to quiet title to Vincent van Gogh's painting, *The Night Café*, in anticipation of a claim by Pierre Konowaloff. Konowaloff counterclaimed and Yale filed a motion to dismiss the counterclaims. The painting had been in the collection of Konowaloff's great-grandfather, Ivan Morozov. The collection was nationalized in 1918 following the 1917 Russian Revolution.<sup>94</sup> The painting was originally placed in the Museum of Modern Western Art in Moscow. It was sold in 1933 and eventually purchased by Stephen C. Clark. The Yale University Art Gallery received the painting as a bequest from Clark in 1960. According to Yale, the painting was widely publicized, exhibited, and published while it was owned by Clark and subsequently by Yale.<sup>95</sup>

While the case involves the question of whether the statute of limitations has run on the several claims asserted by Konowaloff,<sup>96</sup> the more interesting issue from an international law perspective is whether Konowaloff's claims are barred under the act of state doctrine.<sup>97</sup> This doctrine states that U.S. courts will not:

examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal

91. Patty Gerstenblith & Lucille Roussin, *Art and International Cultural Property*, 42 INT'L LAW. 729, 734-35 (2008).

92. Original Complaint, filed by Republic of Peru v. Yale University, 1:08-cv-02109-HHK (D.D.C. Dec. 5, 2008).

93. Yale University's Memorandum in Support of Motion to Dismiss Peru's Amended Complaint for Failure to State a Claim, Case No. 3:09-cv-01332 (AWT) (D. Conn. Oct. 16, 2009).

94. Memorandum in Support of Motion to Dismiss Amended Counterclaims by Plaintiff-Counterclaim Defendant Yale University at 1-5, *Yale Univ. v. Konowaloff*, Case No. 3:09-CV-00466 (AWT) (D. Conn., Oct. 5, 2009) [hereinafter *Yale Memorandum*].

95. *Id.* at 5-8.

96. *Id.* at 9-25.

97. *Id.* at 25-34. The act of state doctrine "reflect[s] 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co., Inc. v. Evtl. Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)).

principles, even if the complaint alleges that the taking violates customary international law.<sup>98</sup>

Yale finally alleges that even if the act of state doctrine does not preclude a U.S. court from examining Russia's title to the painting, the Russian nationalization of the painting did not violate international law.<sup>99</sup>

### 3. *China's Claim to Zodiac Animals*

In February 2009, Christie's auctioned a large portion of the personal collection of the designer Yves Saint Laurent. Included in the auction were two of the twelve animal figures, the rat and the rabbit, from the zodiac fountain at Emperor Qianlong's Summer Palace in Beijing. British and French forces looted the palace in 1860.<sup>100</sup> The two bronze figures, made in the mid-eighteenth century, were sold over strenuous objection from China. Chinese lawyers sued to prevent the sale but a French court rejected the suit. The winning bidder was a Chinese collector and auctioneer, Cai Mingchao. Mingchao bid approximately \$18 million for each figure, but then later refused to pay. This case illustrates the difficulty of finding a viable legal basis for the restitution of art works stolen, looted, or otherwise taken before the advent of the current legal and treaty regime.

## B. RESTITUTIONS AND SEIZURES

In January 2009, the FBI returned a collection of more than 100 ancient artifacts to Panama that had been recovered in Portland, Oregon. The artifacts included a number of pottery pieces and gold works, including jewelry. Experts date many of the objects to the pre-Columbian period of 1100-1500 A.D. The objects were removed from Panama and brought to the United States in the late 1980s. The 1972 Panama Constitution and a 1982 Panamanian law make it illegal for anyone to own antiquities.<sup>101</sup>

In June 2009, the FBI announced the return of approximately 1600 objects found in the home of a collector, John Sisto, in a suburb of Chicago. The objects included books, parchments, manuscripts, art works, and antiquities. The collector's heirs voluntarily turned them over. They were subsequently returned to Italy.<sup>102</sup>

In February 2009, the Department of Homeland Security Immigration and Customs Enforcement (ICE) and Customs and Border Protection in Laredo, Texas, returned 334 Pre-Columbian artifacts to Peru that had been seized in 2007.<sup>103</sup> The artifacts included ceramic figures, wood sculptures, textiles, and metal and stone art. The seller pled guilty to one count of fraudulently importing goods and selling stolen property; he received three years of probation and paid a \$2000 fine.

98. *Sabbatino*, 376 U.S. at 428.

99. Yale Memorandum, *supra* note 94, at 34-40.

100. Mark McDonald & Carol Vogel, *Twist in Sale of Relics has China Winking*, N.Y. TIMES, Mar. 3, 2009, at A5.

101. Federal Bureau of Investigation, Recoveries—Panamanian Artifacts, <http://www.fbi.gov/hq/cid/arttheft/northamerica/us/panama/panamaartifacts.htm> (last visited Feb. 5, 2010).

102. Federal Bureau of Investigation, *Arrivederci—Recovered Italian Artifacts Headed Home*, June 11, 2009, <http://www.fbi.gov/page2/june09/artifacts061109.html>.

103. Immigration and Customs Enforcement, Cultural Heritage Investigations and Repatriations, <http://www.ice.gov/pi/news/factsheets/cultural-artifacts-repatriation.htm>.

British authorities repatriated approximately 1500 artifacts to Afghanistan. About half of the artifacts date to the pre-Islamic period and the rest to the Islamic up to the modern era. They were confiscated at Heathrow Airport, having passed through other countries over the past six years, including Pakistan and the United Arab Emirates. They were returned to the Afghan National Museum.<sup>104</sup>

In December 2008, Christie's planned to auction a pair of Neo-Assyrian earrings of the 8th to 7th centuries B.C.E. from northern Iraq. The earrings were recognized as likely coming from one of the royal graves discovered and excavated at Nineveh in 1989.<sup>105</sup> The only provenance information given in Christie's catalogue was the year "1969." A few days before the auction, Christie's removed the earrings from sale. An investigation is apparently ongoing.<sup>106</sup>

At the time of the June auction sales in New York, ICE agents recovered a Corinthian column krater, dating to 580-570 BCE, from Christie's auction house.<sup>107</sup> A few months later, ICE retrieved two additional pots, an Apulian situla and an Attic pelike, stolen from Italy and apparently sold by Christie's in June.<sup>108</sup> All three pieces seem to be connected to the operations of the Italian dealer, Giacomo Medici, which have been the subject of investigations and prosecutions by Italian authorities for several years. Medici's conviction for receiving stolen antiquities and conspiracy was upheld, although his conviction for smuggling antiquities was reversed as falling outside the statute of limitations.<sup>109</sup> His sentence was reduced to eight years. Medici will also pay a \$14 million fine. The Cleveland Museum of Art returned thirteen antiquities and a Gothic processional cross that had been illegally excavated or exported, apparently as part of the Medici conspiracy, to Italy.<sup>110</sup> Italy and the museum will form a joint commission to research the *Apollo Sauroktonos*, which the museum acquired in 2004, and a small bronze winged chariot ornament. Finally, Italy will lend thirteen objects comparable to those returned beginning in 2010, for renewable twenty-five year terms.<sup>111</sup> In another success, Italy recovered 251 ancient artifacts worth approximately \$2.7 million from an anonymous gallery in Geneva.<sup>112</sup>

At the time of the June New York auction sales, with the help of the Art Loss Register, ICE recovered seven Egyptian artifacts from the Manhattan auction house, Christie's.

104. Gloria Galloway, *Hundreds of Afghan Antiquities Repatriated from Britain*, GLOBE AND MAIL, Apr. 7, 2009.

105. Jane Arraf, *Iraq bids to stop Christie's sale of ancient earrings*, CHRISTIAN SCIENCE MONITOR, Dec. 4, 2008, at 7.

106. Jane Arraf, *Christie's takes disputed earrings off auction block*, CHRISTIAN SCIENCE MONITOR, Dec. 5, 2008, at 25.

107. Press Release, Immigration and Customs Enforcement, *Stolen Italian Artifact Smuggled into the United States Found at Auction House* (June 1, 2009) available at <http://www.ice.gov/pi/nr/0906/090601newyork.htm>.

108. *ICE Agents Recover Stolen Italian Artifacts Smuggled into the United States*, ART KNOWLEDGE NEWS, Oct. 29, 2009, <http://www.artknowledgenews.com/2009-10-29-21-07-31-ice-agents-recover-stolen-italian-artifacts-smuggled-into-the-united-states.html>; Posting of David Gill to Looting Matters, <http://lootingmatters.blogspot.com/search?q=pots+seized+in+NYC> (Nov. 4, 2009 21:16 EST).

109. Steve Scherer, *Rome Court Upholds Conviction of Antiquities Dealer*, BLOOMBERG, July 15, 2009.

110. Steven Litt, *Cleveland Museum of Art Will Return Tainted Antiquities to Italy Wednesday*, PLAIN DEALER, Apr. 21, 2009.

111. *Id.*

112. Adam L. Freeman, *Swiss Gallery Surrenders EU2 Million in Antiquities to Italy*, BLOOMBERG, May 19, 2009.

The artifacts had been stolen from the Bijbels Museum in Amsterdam in 2007.<sup>113</sup> ICE agents recovered from Christie's a wall fresco fragment that was reported stolen from the site of Pompeii twelve years ago and identified by the Art Loss Register.<sup>114</sup> At its December 2008 and June 2009 sales, Christie's sold Egyptian artifacts that had been stolen from Long Island University's Hillwood Museum by its former director.<sup>115</sup>

Both the Louvre and the Metropolitan Museum of Art agreed to return archaeological objects to Egypt. The Louvre will return five painted wall fragments from a tomb looted in the 1980s, which it acquired in 2000 and 2003.<sup>116</sup> Under pressure from Dr. Zahi Hawass, the head of the Egyptian Supreme Council of Antiquities, the Louvre agreed to return the fragments. In contrast, two curators at the Metropolitan Museum of Art identified a fragment from a pharaonic shrine that had been on loan from a private collector for many years. The Metropolitan acquired the fragment from the owner and voluntarily returned the fragment to Egypt.<sup>117</sup>

Sweden's Museum of National Antiquities in Stockholm returned twenty-two skulls taken from Native Hawaiian cemeteries in Hawaii in the nineteenth century. In 2005, the Swedish government directed the return of looted human remains. Sweden has repatriated bones to Australian aborigines and a totem pole to a tribe in Canada.<sup>118</sup>

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113. *ICE Recovers Egyptian Artifacts Stolen from a Museum in the Netherlands*, ARTDAILY.ORG, May 29, 2009, [http://www.artdaily.org/index.asp?int\\_sec=2&int\\_new=31133](http://www.artdaily.org/index.asp?int_sec=2&int_new=31133).

114. Press Release, Immigration and Customs Enforcement, ICE Seizes a Cultural Artifact Reported Stolen in Italy almost 12 Years Ago (June 1, 2009), available at <http://www.ice.gov/pi/nr/0906/090601newyorkcity.htm>.

115. Kati Cornell & Joe Mollica, *LI's Pharaoh 'Pbraudster'*, N.Y. POST, Sept. 16, 2009, available at [http://www.nypost.com/p/news/local/li\\_pharaoh\\_pbraudster\\_6M0V9X3dvSWivSV8PuWcpL](http://www.nypost.com/p/news/local/li_pharaoh_pbraudster_6M0V9X3dvSWivSV8PuWcpL).

116. *The Met Returns Egyptian Artifact*, DAILY NEWS EGYPT, Oct. 28, 2009.

117. Press Release, Metropolitan Museum of Art, Metropolitan Museum of Art Returns a Granite Fragment to Egypt, Oct. 28, 2009, available at [http://www.metmuseum.org/press\\_room/full\\_release.asp?prid=%7B768AF8B3-20A5-4EB6-820F-2DECCBC8854D%7D](http://www.metmuseum.org/press_room/full_release.asp?prid=%7B768AF8B3-20A5-4EB6-820F-2DECCBC8854D%7D).

118. *Sweden Returns Skulls to Hawaii*, BBC NEWS, Nov. 14, 2009, available at <http://news.bbc.co.uk/2/hi/8361011.stm>.

