International Lawyer

Volume 34
Number 2 *International Legal Developments in Review: 1999*

Article 27

2000

Cultural Property

Marilyn Phelan

Cultural Property

MARILYN PHELAN*

I. Introduction

Cultural heritage—archaeological, historical, or cultural—constitutes a fundamental part of the identity and dignity of people of a region. The great tragedy that occurred in the Balkans in 1999 caused not only great human suffering but also massive damage to the cultural heritage in Belgrade, Novi Sad, Leskovac, and Kosovo. Thefts and the international movement of illegally exported cultural property continue to threaten the survival of the cultural heritage. The U.S. Congress has not set an example for the rest of the world in recognizing an obligation to protect cultural property from thefts and military conflicts by enacting legislation to implement the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[1] and its 1999 Protocol.

Some notable advances did occur in 1999 in international cultural protection measures. The U.S. government played an active role in attempting to curb the illicit traffic of cultural property by imposing import restrictions on stolen and illegally exported cultural property when so requested by countries that are a party to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (UNESCO Convention).[2] Unfortunately, interested groups within the United States are seeking to reverse the recent attempts of the federal government to halt the importation of such property by severely restricting the circumstances under which a country can request the assistance of the United States in imposing import restrictions.

II. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

The 1954 Hague Convention[3] seeks to protect cultural property during wartime. Pursuant to the 1954 Hague Convention, cultural property bears a distinctive emblem, a blue

*Marilyn Phelan is Robert H. Bean Professor of Law, Texas Tech School of Law, and Chair of the International Cultural Property Committee.

1. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention].

2. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Apr. 24, 1972, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

3. 1954 Hague Convention, *supra* note 1.

shield, during military conflict to facilitate its recognition. The emblem is used as a means of identification of immovable cultural property under special protection and in the transport of movable cultural property. Cultural property being transported under special protection is immune from seizure or capture. The International Committee of the Blue Shield (ICBS) has called upon all parties involved in military conflict to do everything within their power to protect museums, archives, libraries, monuments, and sites that are expressions of the history and the right of existence of the people in the affected regions.

The Second Protocol to the 1954 Hague Convention was adopted in March 1999 in The Hague to clarify provisions of the 1954 Hague Convention. The Protocol makes the 1954 Hague Convention much stricter in its protection of cultural property during military conflicts. The Protocol expanded the obligations of nations in relation to peacetime preparation and training. The Protocol limits considerably what an occupying power may do in relation to cultural property within occupied territories. It places narrow limits on archaeological excavations and requires an occupying power to prohibit all illicit export, removal, or change of ownership of cultural property. The 1999 Protocol provides for a new category of "exceptional protection" for the most important sites, monuments, and institutions. It extends the obligation of nations to educate and inform the general public (not just military and cultural officials in the government) regarding the need to protect cultural property.

III. Protection of the Underwater Cultural Heritage

The UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage[4] was completed in Paris in July 1999. Parties to the Draft Convention acknowledged "the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their shared heritage. . . ."[5] Parties to the Draft Convention, concerned that underwater cultural heritage "is threatened by unsupervised activities not respecting fundamental principles of underwater archaeology,"[6] recognized that responsibility for its protection rests with all nations and "other subjects of international law."[7] The Draft Convention states that "[e]ach State Party must endeavour by educational means to create and develop in the public mind a realization of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention. . . ."[8]

The Draft Convention defines underwater cultural heritage as all traces of human existence that have been partially, totally, or periodically situated underwater for at least 100 years. This includes sites, structures, buildings, artifacts, human remains—together with their archaeological and natural contexts—and wrecks, such as vessels, aircraft, or other vehicles–together with their archaeological and natural contexts.[9]

The Draft Convention notes that the protection of cultural heritage is best achieved

4. Draft Convention on the Protection of the Underwater Cultural Heritage, U.N. Doc. CLT-961 CONF. 202/5 Rev. 2., Preamble [hereinafter Draft Convention].

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.* art. 15.

9. *Id.* art. 1.

through *in situ* preservation.[10] "[A]ctivities directed at underwater cultural heritage shall be authorized by the competent authority of the concerned State only when they make a significant contribution to knowledge, protection, and [/or] enhancement of underwater cultural heritage."[11] The Draft Convention provides that the "commercial exploitation of underwater cultural heritage for trade . . . or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of the underwater cultural heritage."[12] Underwater cultural heritage must not be traded, sold, bought, or bartered as items of commercial value. Persons involved in activities directed at underwater cultural heritage "must use non-destructive techniques and prospection and [limited] sampling in preference to recovery of objects."[13] Those engaged in such activities must "avoid the unnecessary disturbance of human remains or venerated sites."[14]

The Draft Convention would apply to underwater cultural heritage found at sea irrespective of its location and to activities that affect or endanger it.[15] Parties to the Draft Convention are required to report to their competent authorities any discovery relating to underwater cultural heritage occurring in their exclusive economic zone or on their continental shelf.[16] The parties to the Draft Convention may regulate activities directed at underwater cultural heritage in their exclusive economic zone and on their continental shelf.[17] Each party to the Draft Convention must take reasonable measures to ensure that activities are avoided that adversely affect known underwater cultural heritage in its internal waters, territorial sea, exclusive economic zone, or continental shelf.[18] A party to the Draft Convention must be notified of any activity or discovery relating to underwater cultural heritage occurring in its exclusive economic zone or on its continental shelf.[19]

IV. Legislation to Amend the Convention on Cultural Property Implementation Act

The United States implemented the 1970 UNESCO Convention[20] in 1982 when it enacted the Convention on Cultural Property Implementation Act.[21] At that time, members of Congress noted that the demand for cultural artifacts had "resulted in the irremedial destruction of archaeological sites and articles" and, thus, was "depriving the situs countries of their cultural patrimony and the world of important knowledge of its past."[22] Members of Congress recognized that the United States had become a principal market "for articles of archaeological or ethnological interest and of art objects, [and] the discovery here of stolen and illegally exported artifacts in some cases severely strain[ed the United States'] relations with the countries of origin, which often included close allies."[23] The Convention

10. *Id.* Annex (I) General Principles.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* art. 2.
16. *Id.* art. 7.
17. *Id.* art. 5(2).
18. *Id.* art. 7(1).
19. *Id.* art. 5(1).
20. UNESCO Convention, *supra* note 2.
21. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601 *et seq.* (1994).
22. Act of Jan. 12, 1983, Pub. L. No. 97, 446, 4 U.S.C.C.A.N. 4098, 4100.
23. *Id.*

on Cultural Property Implementation Act provides that when a participating nation of the UNESCO Convention makes a request to the United States for import restrictions on cultural property from that nation because the requesting nation contends the cultural patrimony of the nation is in jeopardy from the pillage of its cultural properties, the president may enter into a bilateral agreement with that nation to apply import restrictions.[24]

In September 1999, the Italian government submitted a request to the United States under the Convention on Cultural Property Implementation Act for the U.S. government to enact import restrictions on a broad range of Italian antiquities from the 5th millennium B.C. to the 5th century A.D. At the urging of antiquities dealers, Senators Patrick Moynihan, Charles Schumer, and William Roth have introduced legislation entitled the Cultural Property Procedural Reform Act,[25] which would severely restrict the ability of the U.S. government to comply with the request from Italy as well as from other countries seeking protection of their cultural patrimony from illegal exportation and importation into the United States.

The Moynihan bill would require a country requesting import restrictions from the U.S. government to set out the particular objects of that country's cultural patrimony in jeopardy from pillaging. A country could not ask for blanket import restrictions on all its cultural property. The bill would require the committee to undertake both a fact-finding investigation and a deliberative review with respect to requests for import restrictions. It would require the committee to provide notice and an opportunity for comment to all interested parties in the fact-finding phase. The committee would be required to publish the results of its investigation and findings in the *Federal Register*.

V. Exemption of Loan Exhibitions from Seizure

A painting on loan to a New York museum from a foundation in Austria was subpoenaed by the New York district attorney's office pursuant to a grand jury investigation into the theft of the painting during the German annexation of Austria.[26] The museum moved to quash the subpoena on the ground that it was invalid pursuant to section 12.03 of the New York Arts and Cultural Affairs Law,[27] which provides for an exemption from seizure any work of fine art while en route to or from, or while on exhibition at, any museum, college, university, or cultural organization. Although the highest court in New York, discussion *infra*, granted the museum's motion, the federal government commenced a forfeiture proceeding in September 1999, immediately following the ruling of the New York court. The painting would have been protected from seizure had the museum applied for and received immunity under federal law.[28]

Since the New York district attorney's office served the museum with the subpoena in January 1998, there has been a significant increase in the number of museums applying for exemption from seizure of their loan exhibitions under the Federal Immunity from Seizure

24. 19 U.S.C. § 2601 (1994).

25. Cultural Property Procedural Reform Act, S. 1696, 106th Cong. (1999).

26. See *In re* Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 719 N.E.2d 897 (N.Y. 1999).

27. N.Y. Arts and Cultural Affairs Law § 12.03 (McKinney 2000).

28. The museum relied on the New York statute and did not apply for immunity under the Federal Immunity from Seizure Act, 22 U.S.C. § 2459 (2000).

Act.[29] The Department of State now processes these applications and requires each applicant to submit a certification that the applicant has undertaken professional inquiry into the provenance, or chain of title, of the objects proposed for determination of cultural significance and national interest. The applicant further must certify that it does not know or have reason to know of any circumstances with respect to any of the objects in the loan that would indicate the potential for competing claims of ownership. The question of the legal consequences of filing such a certification arises if a museum does not obtain an independent, multi-source inquiry as to provenance of objects on loan. Protection of the exemption may be forfeited because of a false filing.

The Texas legislature has enacted a bill that would prohibit a court from seizing any work of fine art "while it is en route to an exhibition; . . . or in the possession of the exhibitor or on display as part of the exhibition."[30] However, the exemption from seizure does not apply if "theft of the work of art from its owner is alleged and found proven by the court."[31]

VI. AAM/ICOM Nazi Loot Guidelines

The American Association of Museums (AAM) Board of Directors and the International Council of Museums (ICOM) formed a joint working group in 1999 to study issues of cultural property, particularly the Nazi looting of cultural property. The AAM has published its Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era (Guidelines). The Guidelines state the position of the AAM that museums should take all reasonable steps to resolve the Nazi era provenance status of objects before acquiring them for their collections—whether by purchase, gift, bequest, or exchange. Research on objects being considered for acquisition and for incoming loan should include a request that sellers, donors, estate executors, or lenders provide as much provenance information as is available, with particular regard to the Nazi era. The Guidelines do state that in the absence of unlawful appropriation without subsequent restitution, a museum may proceed with an acquisition or loan. The Guidelines provide that museums should conduct an initial review of their collections to identify objects whose characteristics or provenance suggest that research be conducted to determine whether they were unlawfully appropriated during the Nazi era without subsequent restitution. Museums are to contact established archives, databases, art dealers, auction houses, donors, scholars, and researchers who may be able to provide Nazi era provenance information.

The Guidelines reaffirm the fiduciary obligations of museums that they hold collections in the public trust and that their stewardship duties and responsibilities to the public require that decisions to acquire, borrow, or dispose of objects in their collections be taken only after the completion of appropriate steps and careful consideration.

VII. Recent Cases Involving Stolen or Illegally Exported Cultural Property

Five especially significant cases involving legal issues relating to stolen and illegally exported cultural property were litigated in 1999 and will be the subject of further litigation or appeal in 2000. Final decisions rendered in these cases will provide important precedent in this field of law.

29. *Id.*
30. TEX. CIV. PRAC. & REM. CODE ANN. § 61.081(a) (West 2000).
31. *Id.* § 61.081(d).

A. *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*

In *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*,[32] the New York Museum of Modern Art moved to quash a subpoena issued by the New York district attorney for a painting by the Austrian artist Egon Schiele, entitled "Portrait of Wally."[33] The painting was among 150 works of art displayed at the museum in a collection on loan from the Leopold Museum in Austria. Henri Bondi had sent a letter to the Museum of Modern Art, in which he contended that the painting was taken from his aunt's collection by Nazi agents or collaborators; that neither his aunt nor her family had consented to the sale or transfer of the painting; and that his aunt had died in 1969, having three years earlier attempted to regain the painting. The Museum responded that it had a contractual obligation to return the entire Leopold collection to the lender. A grand jury was convened to investigate whether the painting was stolen by Nazi agents. The Museum was served with a grand jury subpoena duces tecum in which the district attorney demanded the production of "Portrait of Wally." Pursuant to section 12.03 of New York's Arts and Cultural Affairs Law, works of art on loan are exempt from seizure.[34] The New York district attorney contended that the exemption from seizure law is limited to civil proceedings. The highest court in New York ruled, in September 1999, that the exemption from seizure statute applied both to civil and criminal proceedings, stating that the statute did not create "a criminal proceeding 'loophole.'"[35] It granted the Museum's motion to quash. Justice Smith, in a dissenting opinion, expressed concern that the majority ruling would adversely affect society as a whole, whose "'interest is best served by a thorough and extensive investigation' into potential crimes."[36] Justice Smith stated that "the Legislature could not have intended that New York assist the free flow of stolen art under an umbrella of complete immunity from civil and criminal processes."[37]

The U.S. Justice Department moved to bar return of the Schiele painting in late September 1999, immediately following the decision of the New York court. The U.S. Attorney's office in Manhattan has now commenced a forfeiture proceeding to require any claimant, including the Leopold Foundation, to prove ownership of the painting.

The AAM has filed an *amicus curiae* brief in the case. It contends a decision that the painting be retained in the United States will set a "dangerous precedent" in which museum objects could be seized in forfeiture proceedings if they are subject to competing claims, and that such a decision "could jeopardize the flow of artwork internationally and within the United States."[38]

B. *United States v. An Antique Platter of Gold*

In *United States v. An Antique Platter of Gold*,[39] the Second Circuit Court of Appeals affirmed a decision of the U.S. district court ordering the forfeiture of a "Phiale," an antique

32. Museum of Modern Art, 719 N.E.2d at 897.
33. *Id.*
34. N.Y. Arts and Cultural Affairs Law § 12.03.
35. Museum of Modern Art, 719 N.E.2d at 904.
36. *Id.* at 909.
37. *Id.*
38. *Id.*
39. United States v. An Antique Platter of Gold, 184 F.3d 131 (2nd Cir. 1999) *cert. denied*, 120 S. Ct. 978, 145 L. Ed. 2d 929 (2000).

gold platter. The Phiale, of Sicilian origin and dating from the 4th century B.C., was brought to the attention of an art dealer from New York who traveled to Sicily to examine the Phiale. The art dealer informed a client, Michael Steinhardt, of the piece. The Phiale was a twin to a piece in the Metropolitan Museum of Art in New York City. The art dealer finalized an agreement to purchase the Phiale for Steinhardt for approximately $1 million, and it was sent to New York in 1991. The importer listed Switzerland on the customs form as the country of origin. The Phiale was displayed in Steinhardt's home from 1992 until 1995. In 1995, the Italian government asked the U.S. government to assist it in confiscating the Phiale and having it returned to Italy. Under article 44 of Italy's law of June 1, 1939, an archaeological item is presumed to belong to the state unless its possessor can show private ownership prior to 1902. The United States filed a civil forfeiture action claiming that forfeiture was proper because of false statements on customs forms. The Second Circuit ruled that the Phiale was imported into the United States in violation of customs laws.

The AAM filed an *amicus curiae* brief in the Steinhardt case in which it expressed its opinion that the Customs Service circumvented the Convention on Cultural Property Implementation Act of 1983. The AAM has referred to Steinhardt as a good-faith purchaser.

C. *Rosenberg v. Seattle Art Museum*

The heirs of Paul Rosenberg filed a complaint against the Seattle Art Museum for the return of a $2 million Matisse, which was donated to the Museum by the estate of Bloedel.[40] The Bloedels purchased the painting from a gallery in New York City in 1954. The heirs of Rosenberg, a Parisian art collector and gallery owner prior to World War II, alleged that the painting was stolen by the Nazis and later possessed by the Museum. The Seattle Art Museum has agreed that the Rosenberg heirs are the rightful owners of the painting and have returned it to the Rosenbergs. The Museum filed a third-party complaint against the gallery that sold the painting to the Bloedels for breach of title, fraud, and negligent misrepresentation. It alleged that the gallery defrauded the Bloedels when it sold them the painting by lying to them about the painting's provenance. The district court in Washington recently granted the gallery's motion for summary judgment, ruling that the museum did not have standing to sue the gallery for defrauding the Bloedels.[41]

D. *Spanierman Gallery v. University of California at Los Angeles*

In a highly publicized civil action,[42] Spanierman Gallery of New York sued the University of California at Los Angeles (UCLA) over ownership of an Arthur Dow painting. The painting was stolen from UCLA in 1994, purchased by Spanierman, and then resold. Three men have been convicted of stealing the painting from UCLA and await sentencing. Spanierman has reimbursed its client the $317,000 it received on sale of the painting. Spanierman has filed suit against UCLA contending that UCLA had a duty to immediately report the theft of the painting to the Art Loss Register, which Spanierman checked prior to acquiring the painting. UCLA contends that it had no duty to report the theft to a particular database.

40. Rosenberg v. Seattle Art Museum, 42 F. Supp. 2d 1029 (W.D. Wash. 1999).

41. Rosenberg v. Seattle Art Museum, 70 F. Supp. 2d 1163 (W.D. Wash. 1999).

42. For a discussion of the facts of the case, see Kaelen Wilson-Goldie, *Civil Suits to Follow Conviction in Stolen Dow Case*, Art & Auction, Oct. 1, 1999, at 20.

It cited as authority *Guggenheim Foundation v. Lubell*,[43] in which the highest court in New York placed the burden of investigating the provenance of a work of art on the potential purchaser and rejected the possessor's contention that a theft victim must contact certain databases to locate a stolen painting. The Spanierman case is scheduled for trial in June 2000.

E. *United States v. Tidwell*

Congress enacted the Native American Graves Protection and Repatriation Act (NAGPRA)[44] to protect Native American human remains, funerary objects, sacred objects, and cultural patrimony objects, and to repatriate such objects currently held or controlled by federal agencies and museums. To "give teeth" to this mission, Congress amended Title 18 of the United States Code[45] "to criminalize trafficking in Native American human remains and cultural items, in an effort to eliminate the profit incentive perceived to be a motivating force behind the plundering of such items."[46] In *United States v. Tidwell*,[47] the Ninth Circuit ruled that NAGPRA is not unconstitutionally vague and upheld the conviction of a person who attempted to sell eleven Hopi masks, also called Kwaatsi or Kachina, and a set of priest robes from the Pueblo of Acoma.

VIII. Due Diligence Investigations by Purchasers of Cultural Property

Critical current legal issues relating to the national and international movement and collection of cultural property render it imperative that attorneys recognize problems their clients can incur if they acquire cultural property or have it in their collections. The international market in art and historical properties should be open, stable, and free of the uncertainty that it may be trading in works whose provenance are tainted by claims of individuals and that were properties either stolen or exported illegally from other nations. Stolen art currently pervades the legitimate U.S. marketplace. Without a documented record of appropriate inquiries, legal ownership rights in stolen or illegally exported objects cannot be secured. Collectors and their professional advisors must conduct due diligence investigations for valuable art objects and collectibles. Unless collectors can demonstrate that they took appropriate precautions against trading in stolen and illegally exported property, they may not be positioned to defeat potential judicial claims brought by former owners. Under U.S. commercial law, good title to stolen property never can be acquired regardless of the innocence or good faith of subsequent purchasers.[48] Existing law entails an affirmative duty of investigation for buyers and sellers of cultural property, not only to assure they will acquire good title to such property, but also to curtail the international theft of cultural property. Courts in New York, which is the center of the art and cultural property market in the United States, have imposed an affirmative obligation upon buyers and collectors of cultural property to investigate the background of cultural property in

43. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991).
44. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 *et seq.* (2000).
45. 18 U.S.C. § 1170(b) (2000).
46. United States v. Kramer, 168 F.3d 1196, 1202 (9th Cir. 1999).
47. United States v. Tidwell, 191 F.3d 976 (9th Cir. 1999).
48. *See* U.C.C. § 2-714(2) (1989); Guggenheim Found., 569 N.E.2d 426.

their possession.[49] The current availability of investigative resources that consistently have identified stolen and illegally exported cultural property now can define the appropriate scope of inquiry for cultural property purchasers and collectors.[50]

IX. Cultural Property as Asset of Estate or Trust

The substantive fiduciary responsibilities of professional trustees and executors to safeguard the property of their clients and to identify potential adverse ownership claims to estate and trust assets make it imperative that such fiduciaries address the issue of stolen or illegally exported cultural property to their clients. The presence of stolen cultural property in an estate or trust will cloud an estate and can damage it substantially.[51] If estate taxes are paid on the value of such property (generally at fifty-five percent of the value), and claims of ownership are not resolved during the administration of the estate, the claims may not be permitted as deductions in determining the estate tax.[52] Further, if a successful claim is brought against the estate after the statute of limitations has run on a claim for refund of the estate taxes, the heirs will lose the property and will not be able to recover the estate tax paid on its valuation in the estate.

The particular risks faced by fiduciaries include the risk of breach of trust, for which possible penalties include surcharge, appointment of a receiver, or removal. If a breach of trust results in a loss to the trust or estate, the fiduciary is subject to a surcharge in the amount of the loss.[53] A trustee commits a breach of trust if he or she violates any duty owed to the beneficiaries. Fiduciary duties relevant to holding cultural property include preserving assets, defending claims, and identifying the assets.[54] All of these duties can be fulfilled only by taking reasonable precautions to insure good title. The Prudent Investor Rule[55] brings modern theories of risk management to bear on common-law fiduciary duties and thus demands that a fiduciary take informed steps to identify any possible adverse claims to title. Most institutional fiduciaries and counsel can be expected to be held to a higher standard of care and diligence by courts and the press.

49. *See Guggenheim Found.*, 569 N.E.2d 426; Martin v. Briggs, 663 N.Y.S.2d 184 (N.Y. 1997).

50. *See* Marilyn Phelan, *Scope of Due Diligence Investigations in Acquiring Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 100 (2000).

51. As noted in Robert Madden, *Steps to Take When Stolen Art Work is Found in An Estate*, 24 ESTATE PLANNING 459 (1997), a stolen work is treated as an asset of the estate when in fact it is a potential future liability.

52. *See* Peter Spero, *Asset Protection Aspects of Art*, 3 J. ASSET PROTECTION 58 (1998). As Spero noted, in Ltr. Rul. 9152005, where stolen art was included in an estate, costs associated with a claim that arose seven years later were not deductible.

53. *See* SCOTT ON TRUSTS § 205 (1998).

54. *Id.* § 201.

55. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 227–29 (1992).