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# Cultural Property

DANIEL W. ECK AND PATTY GERSTENBLITH\*

## I. Introduction

The looting of cultural institutions and archaeological sites in Iraq dominated international cultural property law news in 2003. The Second Circuit Court of Appeals confirmed the conviction of a New York antiquities dealer on charges related to stolen Egyptian antiquities. There were also some major new additions to the States Parties of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>1</sup> (UNESCO Convention) and continued bilateral agreements between the United States and other countries pursuant to the Convention on Cultural Property Implementation Act (CPIA).<sup>2</sup>

## II. International Legal Reactions to the Destruction and Looting in Iraq

In March 2003, the United States launched its war on Iraq. During the weeks of active hostilities, the United States and its allies avoided intentionally targeting cultural sites and monuments, in compliance with the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.<sup>3</sup> The United States and its allies, however, were unable to prevent the mid-April looting of the National Museum in Baghdad, along with other museums, archives, and libraries, as well as numerous government buildings. It is estimated that a total of 13,000 to 15,000 objects were stolen from the National Museum,

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1. 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.

2. Convention on Cultural Property Implementation Act, 19 U.S.C. § 2601 (2001).

3. The Hague Convention of 1954, *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (May 14, 1954), available at <http://www.icomos.org/hauge/hague.convention.html> (last visited Apr. 7, 2004).

including approximately thirty from the main display areas of the museum, which are still missing. Looting of archaeological sites throughout Iraq, particularly in the south, increased dramatically and continues despite attempts by the Coalition Provisional Authority to protect them.

The international community reacted quickly to the news of the looting. On May 22, 2003, the United Nations Security Council passed Resolution 1483, stating that:

all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed . . .<sup>4</sup>

Several nations, including those most involved in the art and antiquities market, have taken steps to implement this Resolution. On May 28, 2003, the Swiss Federal Council imposed a ban that

covers importation, exportation and transit, as well as selling, marketing, dealing in, acquiring or otherwise transferring Iraqi cultural assets stolen in Iraq since 2 August 1990, removed against the will of the owner, or taken out of Iraq illegally. It includes cultural assets acquired through illegal excavations. Such assets are presumed to have been exported illegally if they can be proved to have been in the Republic of Iraq after 2 August 1990.<sup>5</sup>

The British enacted Statutory Instrument 2003 No. 1519, which prohibits the import or export of illegally removed Iraqi cultural property and created a criminal offense for “[a]ny person who holds or controls any item of illegally removed Iraqi cultural property . . . unless he proves that he did not know and had no reason to suppose that the item in question was illegally removed Iraqi cultural property.”<sup>6</sup> The United States left its sanctions in place for illegally-removed Iraqi cultural materials, while lifting the sanctions on most commercial goods.<sup>7</sup>

The U. S. Congress introduced three bills in response to the Iraqi situation, two in the House (H.R. 2009 and H.R. 3497) and one in the Senate (S. 1291).<sup>8</sup> All three bills would impose a ban on the import of illegally removed Iraqi cultural materials. In H.R. 2009, this ban would be of unlimited duration; in H.R. 3497, the ban would last until six months after the UN Security Resolution is rescinded; and in S. 1291, the ban would last until one year after U.S.-Iraq relations are normalized or September 2004; whichever occurs sooner. In addition, both House bills would amend the CPIA in several ways, primarily allowing the President to impose an import restriction in emergency situations on behalf of foreign nations (whether parties to the 1970 UNESCO Convention or not), without a request from

4. UNSCR 1483, para. 7, available at <http://www.un.org/News/dh/iraq/iraq-blue-res-052103en.pdf> (last visited May 21, 2003).

5. Ordinance on Economic Measures against the Republic of Iraq of 28 May 2003, SR 946.206, available at [www.kultur-schweiz.admin.ch/arkgt/kgv/e/e\\_iraqinfo.htm](http://www.kultur-schweiz.admin.ch/arkgt/kgv/e/e_iraqinfo.htm) (last visited Apr. 7, 2004).

6. The Iraq (U.N. Sanctions) Order 2003, No. 1519, available at [www.hmso.gov.uk/si/si2003/20031519.htm](http://www.hmso.gov.uk/si/si2003/20031519.htm) (last visited June 9, 2004).

7. 31 C.F.R. 575.533 (b)(4) (2004).

8. U.S. Congress *Thomas Legislative Information on the Internet*, at: <http://thomas.loc.gov/cgi-bin/query> (last visited Mar. 3, 2004).

the foreign nation, and without consulting the Cultural Property Advisory Committee. All three bills have been referred to the appropriate committees, but no further actions have been taken.

### III. New States Parties to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

Parties to the UNESCO Convention agree to adopt the necessary measures to protect cultural property. Such measures include: (1) preventing their museums from acquiring cultural property, which was illegally exported from its country of origin; (2) prohibiting the import of cultural property stolen from a museum, public monument, or site; and (3) recovering and returning any such cultural property, if requested. With the additions of Switzerland, Denmark, Gabon, Morocco and Sweden, there are now 102 states parties to the Convention.

Switzerland, a country with sometimes controversial connections to the illegal and illicit international art and antiquities market, ratified the 1970 UNESCO treaty in October 2003.<sup>9</sup> Ratifying legislation will take effect in early 2005. The Federal Act on the International Transfer of Cultural Property<sup>10</sup> permits the Swiss Federal Council to enter into agreements with other nations that are party to the UNESCO Convention to protect “cultural and foreign affairs interests and to secure cultural heritage.”<sup>11</sup> Also, the Federal Council may take additional measures when a “state’s cultural heritage [is] jeopardized by exceptional events.”<sup>12</sup>

Other significant changes to Swiss law include the Act’s definition of “due diligence.” Article 16 sets forth the following definition:

In the art trade and auctioning business, cultural property may only be transferred when the person transferring the property may assume, under the circumstances, that the cultural property:

- a. was not stolen, not lost against the will of the owner, and not illegally excavated;
- b. not illicitly imported.<sup>13</sup>

A clear definition of due diligence under Swiss law is significant in light of the Swiss good faith purchaser doctrine, which permits the transfer of good title even of stolen goods to a good faith purchaser. Article 16 imposes additional obligations on those who are active in the art trade to maintain written records concerning their acquisition of cultural property, to acquire a written declaration from sellers concerning their right to dispose of the object,

9. See Press Release, Switzerland becomes the 101st State Party to the Convention of 1970, available at [http://portal.unesco.org/culture/en/ev.php@URL\\_ID=14939&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php@URL_ID=14939&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited May 21, 2004).

10. Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA) (June 2003), available at [http://www.kultur-schweiz.admin.ch/arkgtv/files/kgtg2\\_e.pdf](http://www.kultur-schweiz.admin.ch/arkgtv/files/kgtg2_e.pdf) (last visited May 21, 2004).

11. *Id.* art. 7.

12. *Id.* art. 8.

13. *Id.* art. 16, § 1.

and to inform customers of existing import and export regulations of other nations that are UNESCO Convention parties.<sup>14</sup> Finally, this Swiss law significantly extends the length of time an owner of antiquities must possess an object that was acquired in “good faith” in order to establish clear title. The length of time ranges from five to thirty years.<sup>15</sup>

The United Kingdom joined the UNESCO Convention in 2002, but did not enact any new implementing legislation until late 2003. At that time, the English Parliament enacted the Dealing in Cultural Objects (Offences) Act 2003, which creates a new offense for dealing in “tainted cultural objects.”<sup>16</sup> One commits this offense if he or she “dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted.”<sup>17</sup> The statute designates a cultural object as tainted if “after the commencement of this Act-(a) a person removes the object in a case falling within subsection (4) or he excavates the object, and (b) the removal or excavation constitutes an offence.”<sup>18</sup> Subsection 4 refers to objects removed from “a building or structure of historical, architectural or archaeological interest” or from an excavation.<sup>19</sup> For purposes of the statute, it does not matter whether the excavation or removal takes place in the United Kingdom or in another country or whether the law violated is a domestic or foreign law.<sup>20</sup>

#### IV. UNESCO Declaration Concerning the Intentional Destruction of the Cultural Heritage

In November of 2003, UNESCO adopted a Declaration Concerning the Intentional Destruction of the Cultural Heritage. Initiated in response to the 2001 destruction of the Bamiyan Buddhas in Afghanistan, the purpose of the new declaration is to address the “growing phenomenon” of intentional acts of destruction of cultural heritage, particularly in situations not covered by existing conventions, and to urge countries to take appropriate measures to prevent, avoid, stop, and suppress acts of intentional destruction.<sup>21</sup>

#### V. Cultural Property Implementation Act Developments

Enacted in 1983 to address concerns regarding the import into the United States of looted and stolen archaeological and ethnological materials, the CPIA represents a limited ratification of the UNESCO Convention.<sup>22</sup> The United States has entered into bilateral agreements pursuant to the CPIA in an attempt to reduce the number of illicitly exported works entering the United States. These bilateral agreements last for a maximum of five years, but are renewable indefinitely.<sup>23</sup>

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14. *Id.* § 2.

15. *See id.* art. 32 (amending provisions of other Swiss statutes).

16. Dealing in Cultural Objects (Offences) Act 2003, Ch. 27, available at <http://www.hmso.gov.uk/acts/acts2003/20030027.htm> (last visited May 21, 2004).

17. *Id.* § 1, (1).

18. *Id.* § 2, (2).

19. *Id.* § 2, (4).

20. *Id.* § 2, (3).

21. U.N. Educational, Scientific and Cultural Organization, available at [http://portal.unesco.org/culture/en/ev.php@URL\\_ID=17126&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php@URL_ID=17126&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited May 21, 2004).

22. 19 U.S.C. § 2602 (2003).

23. *Id.*

On September 19, 2003, the United States and Cambodia signed a Memorandum of Understanding restricting the importation of designated categories of Khmer archaeological material into the United States. The agreement replaces emergency restrictions imposed by the United States in December 1999 on the import of Khmer stone sculpture.<sup>24</sup> In addition, emergency import restrictions imposed on Byzantine ecclesiastical and ritual ethnological material from Cyprus, in 1999, were extended for three years from September 4, 2003.<sup>25</sup> Absent an export permit or satisfactory evidence of export prior to the date of designation, importing designated materials into the United States is illegal.

## VI. Recent Cases or Controversies Involving Cultural Property

### A. STATE DEPARTMENT SUPPORTS LOS ANGELES COUNTY MUSEUM OF ART IN OBTAINING WITHDRAWAL OF SUIT OVER ARTWORK ON LOAN FROM RUSSIA'S PUSHKIN MUSEUM

In November of 2003, the Los Angeles County Museum of Art (LACMA) obtained the withdrawal of a lawsuit attempting to prevent the display of twenty-five works by artists such as Van Gogh, Picasso, Matisse, Monet and Degas, that were included in an exhibition titled *Old Masters, Impressionists, and Moderns: French Masterworks from the State Pushkin Museum, Moscow*.<sup>26</sup> The plaintiff, Andre Marc Delocque-Fourcaud, a French citizen, had spent over fifty years unsuccessfully attempting to assert ownership of an art collection, which included the twenty-five works named in his suit against LACMA. He alleges the collection belonged to his grandfather but was nationalized by Russia, in 1918, following the Russian Revolution. According to LACMA, the plaintiff first asked LACMA to pay him a share of the ticket revenues from the exhibition. LACMA refused, and the plaintiff filed suit.

Because an application for immunity was filed and granted pursuant to the U.S. Immunity from Seizure Act,<sup>27</sup> the U. S. Attorney intervened on behalf of the State Department. The Immunity from Seizure Act prohibits the issuance of any judicial process, judgment, or order that would deprive a museum in the United States of custody or control of a work of art on loan from an owner in another country, provided that the State Department agrees that the works are of cultural significance and the exhibition is in the national interest.

After the intervention by the U. S. Attorney's office, which voiced the strong support of the State Department for the statutory grant of immunity, the plaintiff moved to withdraw the lawsuit, which was subsequently dismissed with prejudice by stipulation of the parties.

### B. *ALTMANN v. REPUBLIC OF AUSTRIA*

In 2003, the U. S. Supreme Court agreed to hear the appeal of the Ninth Circuit Court of Appeals' decision of *Altmann v. Republic of Austria*, which held that the Austrian Gallery

24. See U.S. Dep't of Homeland Security, Import Restrictions Imposed on Archaeological Materials From Cambodia, available at <http://exchanges.state.gov/culprop/cb03fr01.txt> (last visited May 21, 2004).

25. See U.S. Dep't of Homeland Security, Extension of Emergency Import Restrictions Imposed on Ethnological Material From Cyprus, available at <http://exchanges.state.gov/culprop/cy03fr02.txt> (last visited May 21, 2004).

26. Delocque-Fourcaud v. Los Angeles County Museum of Art, U.S.D.C., No. CV03-5027 R (CTx) (C.D. Cal. 2003) (dismissed with prejudice).

27. 22 U.S.C.A. § 2459 (West 2002).

and Austria could be sued in California for appropriations of Nazi-era artworks in Austria.<sup>28</sup> The argument, scheduled for February 25, 2004, is limited to the applicability of the Foreign Sovereign Immunities Act<sup>29</sup> (FSIA), which provides the only basis upon which U.S. courts may obtain jurisdiction over a foreign state and its agencies and codifies exceptions to sovereign immunity. The Ninth Circuit rejected Austria's argument that the FSIA exceptions to sovereign immunity could not be retroactively applied to conduct that occurred before 1952.<sup>30</sup>

#### C. DEALER PLEADS GUILTY TO ARCHAEOLOGICAL RESOURCES PROTECTION ACT VIOLATION

A Virginia-based dealer, Taddeo Barchitta, pled guilty to violating the Archaeological Resources Protection Act<sup>31</sup> (ARPA) by dealing in stolen antiquities from Peru. His collection included colorful textiles from the Huari culture dated to 800 A.D. and ceramics of the Inca culture, dated to about 1400 A.D. Barchitta attempted to sell twenty-nine Pre-Columbian artifacts to an undercover agent for \$150,000. While much of ARPA focuses on the protection of archaeological sites on federally-owned or controlled land, the section at issue in this case, 16 U.S.C. § 470ee(c), prohibits trafficking in archaeological resources "in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law."<sup>32</sup>

#### D. SIGNIFICANT RETURNS AND REPATRIATIONS

In September of 2003, officials at the U. S. Bureau of Immigration and Customs Enforcement (ICE) returned 279 pre-Columbian artifacts to Honduras. The artifacts included Mayan figurines, bowls, and pottery dated between approximately 600 and 900 A.D. An Ohio shopkeeper who bought the objects in Honduras and smuggled them to the United States in 1998 was convicted of conspiring to illegally import items, receiving illegally imported items, and submitting false paperwork to U. S. border inspectors.<sup>33</sup>

ICE also returned a fourteenth century Hebrew manuscript to the Jewish Community Organization of Vienna. The manuscript had been stolen from the Austrian Jewish Community by the Nazis during World War II, and is one of the oldest versions of the Kabalistic text known as *Sepher Yetzirah*. ICE intervened when it learned that a New York auction house was going to sell the manuscript, and discovered that a U. S. citizen bought it in Israel and smuggled it into the United States.<sup>34</sup>

28. *Altmann v. Austria*, 317 F.3d 954, (9th Cir., 2002). For a summary of this case, see Daniel W. Eck & Patty Gerstenblith, *International Cultural Property*, 37 INT'L LAW. 565 (2003).

29. 28 U.S.C. § 1602 *et seq.* (1994).

30. 317 F.3d 954.

31. 16 U.S.C. §§ 470aa *et seq.* (2002).

32. 16 U.S.C. § 470ee (c).

33. See Press Release, U.S. Immigration and Customs Enforcement, ICE Returns 1,400-Year-Old Precious Artifacts to the Government of Honduras (Sept. 2, 2003), available at <http://exchanges.state.gov/culprop/custpr5.html> (last visited Mar. 3, 2004).

34. See Press Release, U.S. Immigration and Customs Enforcement, 14th Century Hebrew Manuscript Returned to Vienna Jewish Community (Nov. 18, 2003), available at <http://exchanges.state.gov/culprop/custpr4.pdf> (last visited Mar. 3, 2004).

## E. APPEAL OF ART DEALER—RECEIVING AND POSSESSING ARTWORKS STOLEN FROM EGYPT

On June 25, 2003, the U.S. Court of Appeals for the Second Circuit issued its opinion in Frederick Schultz's appeal<sup>35</sup> from his conviction of conspiring to deal in antiquities stolen from Egypt in violation of the National Stolen Property Act (NSPA).<sup>36</sup> Egypt's Law 117 vests ownership of antiquities discovered after its enactment in 1983 in the Egyptian nation. Antiquities taken in violation of this law are, therefore, stolen property under Egyptian law. The main issue on appeal was whether such antiquities retained their characterization as stolen property in the United States. The first issue that the Second Circuit addressed was whether Egypt's Law 117 was truly a national ownership law. The criteria that the court established to determine the proper characterization of a foreign ownership law focused on two elements: (1) whether the law on its face was an ownership law; and (2) whether the law was internally enforced within Egypt as an ownership law. The first element was satisfied by the court's inspection of the wording of the statute, which on its face vested ownership of newly-discovered antiquities in the nation and permitted private possession to continue only for those antiquities discovered before the effective date of the statute.<sup>37</sup> The second element required the court to examine the operation of the law, the investigation and prosecution of individuals who traffic in antiquities within Egypt, the various fines and prison sentences available for violations of the law, and the government's seizure and retention of all newly-discovered antiquities.<sup>38</sup> Having determined that the law is a true ownership law, the court then confronted Schultz's substantive arguments.

After reviewing earlier case law,<sup>39</sup> the appellate court examined whether the property taken in violation of a national ownership law was "stolen property" for purposes of the NSPA. The court held that the NSPA should be interpreted broadly, and that it makes no difference whether the owner is foreign or whether the property was stolen in the United States or a foreign country.<sup>40</sup> Furthermore, the court is not limited to common law definitions of stolen property.<sup>41</sup> Property that is stolen in a foreign country is still stolen property after it is brought to the United States.<sup>42</sup> The court analogized theft from a foreign sovereign to any other type of theft of property and stated that:

Although we recognize the concerns raised by Schultz and the amici about the risks that this holding poses to dealers in foreign antiquities, we cannot imagine that it "creates an insurmountable barrier to the lawful importation of cultural property into the United States." Our holding does assuredly create a barrier to the importation of cultural property owned by a

35. *U.S. v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003).

36. 18 U.S.C. §§ 2314–15 (2004) (prohibiting the knowing receipt, possession, concealment, sale, or transport of goods worth \$5000 or more "which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken").

37. *Schultz*, 333 F.3d at 399–402.

38. *Id.* at 400–02, 407–08.

39. Both the Fifth Circuit, in *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) and *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979), and the Ninth Circuit, in *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), had previously held that antiquities taken in violation of a foreign national ownership law were stolen property. District court opinions had also adopted this reasoning in civil contexts. *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544 (N.D. Ill. 1993); *Turkey v. OKS Partners*, No 89–3061-WJS, 1994 U.S. Dist. LEXIS 17032 (D. Mass. June 8, 1994).

40. *Schultz*, 333 F. 3d at 402–03.

41. *Id.* at 409–10.

42. *Id.* at 402–03.

foreign government. We see no reason that property stolen from a foreign sovereign should be treated any differently from property stolen from a foreign museum or private home. The *mens rea* requirement of the NSPA will protect innocent art dealers who unwittingly receive stolen goods, while our appropriately broad reading of the NSPA will protect the property of sovereign nations.<sup>43</sup>

Finally, the court turned to the argument that enactment of the CPIA<sup>44</sup> was inconsistent with the government's interpretation of the NSPA. The Second Circuit also rejected this argument, noting that the legislative history of the CPIA clearly states that the CPIA was not intended to preempt or change in any way any pre-existing remedies available under either federal or state law.<sup>45</sup> Furthermore, there is no inconsistency between the CPIA and the NSPA results. The CPIA is a civil, customs statute; its only enforcement mechanism is through forfeiture of the illegally imported property. The NSPA is a criminal statute requiring proof of *mens rea*.<sup>46</sup> While there are some circumstances in which both statutes might apply, overlapping jurisdiction of statutes is not uncommon and does not invalidate application of either statute.

Schultz attempted to argue, in particular, that the concept of "stolen property" should be limited to that property described in the CPIA provision, which prohibits import of stolen cultural objects that had been documented in the inventory of a museum or similar public or religious institution.<sup>47</sup> The court rejected this argument, however, because it would mean that one who deals in cultural objects stolen from a private collection could not be prosecuted under the NSPA—a result that Congress surely would not have intended when it enacted the CPIA.<sup>48</sup> The decision is significant, because it establishes the law on this issue for the Second Circuit, the heart of the antiquities trade in the United States. The fact that three influential circuit courts of appeal now follow this approach dramatically increases the likelihood that this will be considered the established law throughout the nation.<sup>49</sup>

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43. *Id.* at 410.

44. 19 U.S.C. §§ 2601–13 (2004). The CPIA was the means by which the United States implemented its ratification of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property, Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971).

45. 333 F.3d. at 408 (citing the Senate Report on the CPIA that the CPIA "affects neither existing remedies available in state or federal courts nor laws prohibiting the theft and the knowing receipt and transportation of stolen property in interstate and foreign commerce (e.g., National Stolen Property Act., S. Rep. No. 97–564, at 33 (1982)).

46. *Schultz*, 333 F.3d at 412–14. The Second Circuit also affirmed the trial court's jury instruction on "conscious avoidance" regarding proof of the defendant's criminal intent.

47. 19 U.S.C. § 2607 (2004).

48. *Schultz*, 333 F.3d at 408–09.

49. The Supreme Court denied Schultz's petition for certiorari. *Schultz v. United States*, 124 S. Ct. 1051 (2004).