

LEGAL AND ETHICAL CONSIDERATIONS IN THE REPATRIATION OF ILLEGALLY EXPORTED AND STOLEN CULTURAL PROPERTY: IS THERE A MEANS TO SETTLE THE DISPUTES?

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As the demand in the art market for cultural objects and the political instability in many countries continue, the smuggling of cultural property persists. All art rich countries, not just developing countries, are affected by the illicit trafficking in cultural property. The International Council of Museums has long been involved actively in the fight against this illicit trade. Still, while most museum professionals condemn the illicit trade in art and antiquities, some museum officials continue to retain within their collections objects that were either illegally exported or actually stolen from the country of origin or from individual owners, Holocaust looted art being an example. The purpose of this paper is to set out the general laws and the ethical concepts that should mandate the return/restitution of illegally and/or stolen cultural property but also to serve as a call to action to members of ICOM to initiate some form of dispute resolution to resolve difficult return/restitution issues.

A combination of laws and professional ethics is needed to provide the answers to the dilemma of how to address return/restitution issues, but professional ethics provide a higher standard of protection and preservation of cultural property than is provided by laws. The international code of professional ethics, which was adopted by ICOM in 1989 and revised in 2001, dictates certain ethical obligations for members of the museum profession. The ICOM Code of Ethics also refers to rules of mutual respect that must govern relations between museum professionals. These ethical and moral responsibilities, which call for international co-operation to end the illicit traffic in cultural property, should instill in all members of ICOM a need to return/restitute illegally exported and/or stolen cultural objects in their museum collections.

The Code of Ethics adopted by ICOM observes that the “illicit trade in objects and specimens encourages the destruction of historic sites” as well as “ethnic cultures,” that it “promotes theft at local, national and international levels,” and “contravenes the spirit of national and international patrimony.”¹ It declares that a museum professional “must warrant that it is highly unethical for a museum to support the illicit market in any way, *directly or indirectly*.”² (Emphasis added.) The ICOM Code states:

A museum should not acquire any object or specimen by purchase, gift, loan, bequest or exchange unless the governing body and responsible officer are satisfied that a valid title to it can be obtained. Every effort must be made to ensure that it has not been illegally acquired in, or exported from, its country of origin or any intermediate country in which it may have been owned legally (including the museum’s own country). Due diligence in this regard should establish the full history of the item from discovery or production, before acquisition is considered.

In addition to the safeguards set out above, a museum should not acquire objects by any means where the governing body or responsible officer has reasonable cause to

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believe that their recovery involved the unauthorised, unscientific or intentional destruction or damage of ancient monuments, archaeological or geological sites, or natural habitats, or involved a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.

The Code of Ethics adopted in 1991 and amended in 2000 by the American Association of Museums (AAM) only proposes that a museum should ensure its collections are “lawfully held, protected, secure, unencumbered, cared for, and preserved.”³ The Code’s policy on collections states that a museum must ensure that its “acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials.”⁴

Unfortunately, the AAM’s more limited statements regarding ethics in collections can cause museum professionals to overlook ethical principles in their accessioning policies. The AAM’s policy has not had the effect of discouraging some museum professionals from acquiring illegally exported and, in some instances, stolen cultural property. Indeed two recent cases in the United States illustrate that some members of the museum community posit that illegally exported cultural resources should be salable in the international market.

In *United States v. An Antique Platter of Gold*,⁵ the AAM submitted an *amicus curiae* (friend-of-the court) brief supporting the actions of an art collector (who also was a benefactor of the New York Metropolitan Museum of Art) in importing into the United States a looted third-century B.C. Philae. The Philae was taken from an archaeological site in Sicily, was exported in violation of Italian laws, and was imported into the United States in violation of its customs laws.⁶ Pursuant to a 1939 Italian law, an archaeological item is presumed to belong to the state unless its possessor can show private ownership prior to 1902.⁷ The Italian government sought the assistance of the U.S government in investigating the circumstances of the Philae’s exportation and requested that it confiscate the Philae for return to Italy. The district court ruled that the Philae must be returned to Italy. On appeal, the AAM filed its *Amicus* brief wherein it urged the appellate court not to give effect to the cultural patrimony laws of other countries. The AAM asserted: “American museums have a deep and longstanding interest in, and commitment to, the responsible collection and exhibition of cultural objects of all countries and civilizations.”⁸ It declared that “American museums have supported, and will continue to support, all responsible efforts to further the preservation and conservation of cultural objects, and to combat their destruction, looting and theft.”⁹ It then asserted that the decision of the district court (that ordered the forfeiture of the Philae and its return to Italy) “threatens the ability of U.S. museums to collect...and make available for public exhibition objects from around the world” that are “the subject of *sweeping* foreign cultural patrimony laws.” (Emphasis added.)¹⁰ It declared that these cultural patrimony laws “are, in significant respects, antithetical to fundamental principles of U.S. law and public policy.” It expressed concern that should the decision of the court below not be reversed, “countless objects” in museum collections would be in peril.¹¹ The AAM maintained that the decision of the court would “have a profound impact on the law governing all museums and their ability to collect and exhibit cultural objects.” It then declared that American museums were “compelled” to urge the court to reverse the decision of the court below.¹² The AAM took the position that the district court committed “fundamental error” in “its automatic enforcement of Italy’s patrimony law.” The AAM

expressed its opinion that the “unprecedented procedure permitted the U.S. government” caused the U.S. government to be a “surrogate for the Italian government.”¹³ The AAM described the “efforts of some nations to claim ownership of all objects discovered within their borders” as a “more parochial view of cultural property,” one that would “directly challenge the ‘common cultural heritage’ philosophy” upon which, it stated, “our museums and society are founded.”¹⁴ The AAM declared in its *amicus* brief that “cultural patrimony laws are fundamentally inconsistent with the United States’ treatment of its own cultural property and with our underlying system of private property.”¹⁵ It further stated that “the effect of the indiscriminate application of these laws will be to jeopardize existing museum collections and the future ability of our museums to continue to collect and exhibit cultural objects for the public.”¹⁶

Members of ICOM recognize that the looting of archaeological sites makes any interpretation of the objects impossible. Still, the substance of the AAM’s position, as set out in its *amicus curiae* brief in *Antique Platter of Gold* (*Steinhardt* decision), appears to limit restrictions on the looting of archeological sites. This astonishing position was reasserted by some leading members of the museum community, albeit not by the AAM specifically, in the most recent of the two cases.

In *United States v. Schultz*,¹⁷ respectable and prestigious members of the museum community filed an *amicus curiae* brief supporting the activities of a well known art dealer who was convicted for knowingly transporting stolen Egyptian antiquities. The art dealer, Schultz, was indicted for “conspiring to receive stolen Egyptian antiquities that had been transported in interstate and foreign commerce” in violation of the National Stolen Property Act (NSPA).¹⁸ Schultz contended that the objects he had taken were not stolen within the meaning of the NSPA because, he claimed, they were not owned by anyone and, thus, could not be stolen. The prosecution, on the other hand, showed that the Egyptian government owned the antiquities pursuant to a patrimony law known as “Law 117,” which declares that all antiquities found in Egypt after 1983 are the property of the Egyptian government. Evidence in the case showed that an individual (Parry) smuggled an ancient Egyptian sculpture (the head of Pharaoh Amenhotep III) out of Egypt by disguising the figure in plastic and plaster. Schulz later paid Parry a substantial fee to serve as his agent to sell the sculpture. The two men created a false provenance for the sculpture, claiming that it had been brought from Egypt in the 1920s and had been maintained since that time in an English private collection, which they called the “Thomas Alcock Collection.” They prepared fake labels for the sculpture, which were designed to appear as if they had been printed in the 1920s. After a jury trial in the U.S. District Court for the Southern District of New York, Schulz was convicted of conspiring to receive stolen property that had been transported in interstate or foreign commerce under the NSPA.¹⁹ The case was appealed to the Court of Appeals for the Second Circuit. *Amicus curiae* briefs supporting Schultz were filed with the Second Circuit by dealer groups and by a newly formed “Citizens for a Balanced Policy with Regard to the Importation of Cultural Property.”²⁰ The newly formed organization is a group of 27 individuals, nine of whom are, or were, curators, members of the board, directors, or counsel, to major U.S. museums.

The recent decisions in the *Steinhardt* and *Schulz* cases indicate that courts are becoming more reluctant to sanction questionable trades involving cultural property. This should cause museum professionals to concede that ethical restrictions on the acquisition and retention of illegally exported and stolen cultural property should dictate their response to claims for return/restitution

of such property. This surely is a better approach than delaying until courts impose legal sanctions to force a return of such property. In this context, it would seem that the preferable means to address the issue of ownership to artifacts in their collections would be to submit claims of ownership to those objects with questionable provenances to some form of dispute resolution.

Another example of the failure of many museums to subscribe to and follow ethical principles in their accessioning policies is the past and continuing failure of many leading museum officials to acknowledge that museums should not acquire nor retain Holocaust looted artworks. Although many museum officials have recognized a moral obligation to return Holocaust looted artworks in their museum collections and have offered to open their collections to the Jewish community to determine what works were indeed stolen and, thus, should be restituted, overall the process of returning looted Jewish cultural property has been very slow.²¹

Even though we all are aware that Holocaust looted art is illegal booty under international law and that the looting of art and cultural property by the Nazis “constituted a crime against humanity,” the victims of Holocaust plundering nonetheless have faced tremendous factual and legal hurdles in recovering their property.²² Many of these claims have been directed to the numerous museums that continue to hold these looted works in their collections.

Most civil law countries provide a means for a good faith purchaser to obtain good title to stolen merchandise; thus, laws in these States can validate ownership of Holocaust looted art. While property law in the United States and other common law countries does not recognize a good faith purchaser in the context of stolen goods, nonetheless victims of Holocaust looting have faced burden of proof and statute of limitation problems as they have sought redress in U.S. and other courts. Museum officials often force victims of the Holocaust to seek restitution of their property through expensive litigation. Those museum professionals who continue to maintain Holocaust looted art in their collections must recognize that they are recipients of the booty of a dreadful war, described appropriately as a “crime against humanity.” All museum officials should acknowledge that they have a moral and ethical obligation to return war loot to the rightful owners. There surely is a violation of substantive ethical principles when museum officials, rather than seeking means to return stolen property in their possession, employ legal technicalities to serve as barriers to victims who seek recovery of their property. States, individuals, and the museum community cannot rectify the past injustice of World War II and the corresponding illegal takings of victims’ property short of an immediate total return of looted property taken during that war. States should provide for legislative changes to ease the legal hurdles to a total return of such property. Statutory limitation periods should be extended or completely removed with respect to Holocaust looted property. Those responsible for collections should be given immunity from actions for breach of duty for returning such property. States should eliminate export controls, and the anti-seizure statutes, which provide protection from court actions for works on loan, should be relaxed.²³

There are two important cases currently before United States courts involving rights of possession to Holocaust looted art. Both illustrate the current thinking of many courts that society can no longer sanction the use of legal theories to justify the continued possession of property taken illegally by the Third Reich. Thus, the legal system itself eventually may force museum officials to return Holocaust looted artworks in their collections.

In *U.S. v. Portrait of Wally*,²⁴ the United States is seeking forfeiture of an Egon Schiele painting, *Portrait of Wally*, which was brought into the United States to be exhibited at the Museum of Modern Art in New York and which was on loan from the Leopold Foundation in Vienna. The facts in the case established that the painting was taken from Lea Bondi Jaray, a Viennese Jew, when Germany annexed Austria in 1938 as part of the “aryanization” of property owned by Austrian Jews.²⁵ Bondi went to the Belvedere after the war and claimed *Wally* as hers, but received no reply. She asked Dr. Rudolph Leopold to help her recover the painting from the Belvedere. Dr. Leopold, a collector of Schiele paintings, visited Bondi in London to ask for her help in buying Schiele paintings and mentioned that *Wally* was hanging in the Belvedere even though it belonged to her. Bondi then asked Dr. Leopold to explain to the Belvedere on her behalf that the painting was her property. Later, Dr. Leopold acquired *Wally* from the Belvedere and did not tell Bondi. She discovered he had obtained *Wally* in or about 1957 when the painting was featured in a catalogue for an exhibition and Dr. Leopold was listed as the owner. In 1994, Dr. Leopold sold *Wally* to the Leopold of which he is a director. A federal district judge has ruled, in *Portrait of Wally*, that the United States can pursue its claim that the Leopold violated American law by bringing a stolen painting into the United States and, thus, that the painting is subject to civil forfeiture.

In *Republic of Austria v. Altmann*,²⁶ the U.S. Supreme Court affirmed a decision of the Ninth Circuit Court of Appeals that U.S. courts have jurisdiction to hear a claim of a victim of the Holocaust as against the Republic of Austria. Maria Altmann brought a claim against the Republic of Austria for the recovery of six Gustav Klimt paintings the Nazis took from her now deceased Jewish uncle, Ferdinand Bloch.²⁷ The Republic of Austria contended it was immune from the jurisdiction of U.S. courts under a federal statute, the Foreign Sovereign Immunities Act (FSIA), which was enacted in 1976.²⁸ The Ninth Circuit Court of Appeals court affirmed the decision of the district court that a foreign state is not immune from the jurisdiction of U.S. courts when the issue is whether rights in property were taken in violation of international law. The Ninth Circuit decided that Austria could not expect immunity in light of its complicity in, and perpetuation of, the discriminatory expropriation of the Klimt paintings. It noted that the seizures violated both Austria’s and Germany’s obligations under the 1907 Hague Convention on the Laws and Customs of War on Land and that Austria’s Second Republic officially repudiated all Nazi transactions in 1946. Although the U.S. Supreme did not endorse the reasoning of the Court of Appeals, it affirmed the Ninth Circuit’s judgment because it determined that the FSIA “clearly applies to conduct,” like the Republic of Austria’s alleged wrongdoing that occurred prior to the Act’s enactment in 1976.²⁹

In 1999, the Parliamentary Assembly of the Council of Europe unanimously adopted a resolution that recognized that while there were moves early after the end of the second world war to find and return Jewish looted property, much still remains in private and public hands. The resolution stated that new attempts were being made to complete the process and “to advance the recovery of looted Jewish cultural property before the last of those persons from which it was taken has died.”³⁰ The Assembly invited the parliaments of all member states to give immediate consideration to ways in which they could facilitate the return of looted Jewish cultural property. It specifically stated that attention should be given “to the removal of all impediments to identification such as laws, regulations or policies which prevent access to relevant information in government or public archives, and to records of sales and purchases, customs and other import and export records.”³¹ It provided specifically that entities “in receipt of government funds which find

themselves holding Jewish cultural property should return it.”³² In the Vilnius Forum Declaration, issued at the conference of European nation States, which was held in Vilnius, Lithuania in October, 2000, governments were asked “to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs.”³³ It asked governments, museums, the art trade and other relevant agencies to provide all information necessary to such restitution. The international community should have responded by an immediate advancement of the recovery of Holocaust looted property. It now should give consideration to a means that would assure the repatriation of all remaining stolen Jewish cultural property in museum collections. The question before museum professionals today is whether they are permitting the issue to “fade away.”³⁴

Unfortunately, there is no legal regime in place to address adequately issues relating to return/restitution of illegally exported and/or stolen cultural property. While the law is evolving to provide for blanket legal protection for cultural treasures and, as part of this protection, a halt to the illegal trafficking in cultural property, there currently are numerous problems. The legal issues relating to claims for restitution of illegally exported cultural property, as well as for Holocaust looted art, are complex and difficult to administer, principally because of their fragmented nature. There not only are differences in laws in civil law countries from those in common law countries, but there also are differing laws within the civil law and the common law countries. Further, some countries have adopted the international conventions that protect cultural property in whole or in part whereas others have not.³⁵ When a country or victim brings a claim for restitution of stolen or illegally exported property, legal principles can become barriers to a just and fair solution. One example is the initial problem of deciding which country’s laws apply.

Common law countries have more effective legal means of preventing the illicit trafficking in cultural property than do civil law countries. The common law, the English *nemo dat* rule,³⁶ which is codified in the United States in Article 2 of the Uniform Commercial Code,³⁷ provides that one who purchases property from a thief, no matter how innocently, acquires no title to the property.³⁸ The title remains with the true owner. One U.S. court commented that this law “stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors.”³⁹ The effect of this rule is that purchasers of stolen cultural property potentially are exposed indefinitely in the United States to claims of true owners. This is equally a problem for museums that have looted property in their collections.

The common law rule contrasts with most civil law states where a possessor can obtain title through a limitations period. Countries whose legal systems are based on Roman law generally permit a period of five years after a theft for a legal owner to recover the goods from an innocent purchaser. After that period of time, the purchaser has good title to the property. Still, the person or entity who purchased the property must have been a “good faith” or “innocent” purchaser for the limitations period to begin to run. Further, even if a State determines that a current possessor of stolen cultural property has good title to such property, the rightful owners or their heirs may be successful in bringing a claim for return of the property, or payment of the property’s value, in a court in the United States, the *Altmann* case being an example.

In the United States, in all states except New York and California, a purchaser of stolen

cultural property also can acquire good title to the stolen property at the expiration of a statute of limitations on the true owner's claim.⁴⁰ However, the statute of limitations does not begin to run until the true owner knew or by the exercise of due diligence, should have known, of the possessor's identity.⁴¹ Thus, there can be a cut-off of a victim's title after a certain number of years as is the case is in civil law countries if a court decides an owner has not exercised due diligence in pursuing the owner's claim.⁴²

In New York, and in California by statute,⁴³ limitation on the time during which a rightful owner can bring a claim to recover stolen property does not begin until the rightful owner asserts a claim to the property and the current possessor refuses to return the property.⁴⁴ Courts in New York have decided that this rule is preferable to the discovery rule, which is applicable in other states, because it "gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser."⁴⁵

Laws in the United States have not in the past prevented purchasers from acquiring good title to illegally exported artifacts.⁴⁶ A purchaser's possession of an illegally exported artifact generally was not disturbed in the past if the artifact was not stolen.⁴⁷ Still, many countries now have patrimony laws that declare State ownership of all property found at their archaeological sites.⁴⁸ After a country enacts such a patrimony law, U.S. courts have applied the National Stolen Property Act (NSPA)⁴⁹ to punish encroachments upon what then becomes legitimate and clear ownership rights to imported artifacts, as noted in *United States v. Schulz*.⁵⁰ If a foreign country asserts legal title to artifacts located within its boundaries, U.S. courts may apply the NSPA to the illegal importation of such artifacts into the United States even though agents of the foreign nation may never have physically possessed the artifacts.

To solve the predicament of how to apply laws of different States to the return/restitution of illegally and/or stolen cultural property, ethical considerations should predominate and should be applied in the context of a dispute resolution mechanism established by the international museum community to resolve ownership issues of artworks and other cultural property in museum collections. Alternative dispute resolution is the most effective means of resolving conflicts without one party becoming subject to another party's national court system, which may be unfamiliar, slow, and expensive. An alternative dispute resolution mechanism can provide a more effective system of discipline and procedures. If initiated and utilized effectively, it would provide the most fair and equitable manner of addressing the issues of return/restitution. Such a process may be vital to the long-term preservation of the cultural heritage of humanity. It also is the "right thing to do."

The question members of ICOM should address is whether they can initiate effectively some form of dispute resolution to resolve return/restitution issues. The possibilities are: an international court of arbitration established through the United Nations, an international arbitration process, or some form of international mediation. While an international court of arbitration established through the United Nations would be a appropriate forum to address these issues, as a practical matter, it probably would be impossible to create such a court. Any one member of the Security Council could veto the establishment of such an international court. (Many countries would not agree to subject their museums to an international court wherein its decisions could result in a loss of part of their collections.) International arbitration is probably the most effective way to secure an

impartial resolution of ownership disputes. The parties involved must consent to the process and procedures to be utilized, and parties to arbitration would agree by contract to be bound by the decision of the arbitrators. There are other means of dispute resolution---negotiation, mediation, and consultation. These means are less costly than arbitration, but they are limited in that decisions are nonbinding on the parties. These alternative dispute resolution mechanisms may be utilized, however, if the parties involved will not consent to binding arbitration.

The members of ICOM should focus, I think, on the possibility of establishing an international arbitration panel on cultural property. Such a panel can acquire enforcement authority as parties agree to binding arbitration through a contract between themselves. In establishing an international arbitration mechanism to settle disputes regarding return/restitution of illegally and/or stolen cultural property, several questions must be resolved initially to make such a system of dispute resolution effective. There must be a framework related to international arbitration. Rules must be established which would include dispute settlement procedures. If some form of global arbitration can be initiated, there are questions concerning the breadth of the coverage. Should mandatory (or nonbinding) arbitration be limited to questions of ownership only as to current acquisitions (and, if so, how current?), should it extend to acquisitions within the last 100 years, for example, or should it apply to all acquisitions?

Members of ICOM must focus on the following issues. Should it (or can it) mandate that its members be subject to a panel of arbitrators that would decide issues relating to alleged illegally and/or stolen cultural property in their collections? Who would qualify as arbitrators? Members of such an arbitration panel must be made aware of the differences in the legal systems between the country of the claimant and the country in which the museum is located. A database, which includes a summary of the laws in the various countries relating to cultural property, would provide this awareness.

The success of international arbitration or some other means of dispute resolution depends on whether museums will deem the process worthy. Perhaps ICOM can set the stage by imposing the notice of “fairness” and “justice” on the parties and the process. It can educate museums to the advantages of arbitration by pointing them to the long-term benefits of a process which eventually will not only provide more international opposition to the illicit trade in cultural property but, in addition, will produce among the international museum community a recognition of an ethical duty to return those objects in museum collections that were acquired unlawfully as a result of that illicit trade and, thus, will foster the mutual respect that must govern relations between museum professionals.

1. ICOM Code of Ethics for Museums, 3.2.
2. Id.
3. Code of Ethics for Museums 2000, American Association of Museums, Collections.
4. Id.
5. 184 F.3d 131 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000).
6. The country of origin of the Phiale was listed on Customs Form 3461 as “CH,” the code for Switzerland.
7. Protection of Works of Artistic and Historical Interest, law June 1, 1939, n. 1089 (law n. 1089/39).
8. Brief of *Amici Curiae* American Association of Museums, et. al. In Support of the Appeal of Claimant Michael Steinhardt, prepared by Weil, Gotshal, & Manges, LLP, New York, attorneys for *Amici Curiae*, i and ii.
9. Id.
10. Id.
11. Id., ii.
12. Id., iii.
13. Id., v.
14. Id., viii.
15. Id. xiv.
16. Id., xxxiii.
17. 333 F.3d 393 (2nd Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).
18. 18 U.S.C. § 2315.
19. Schultz met Jonathan Tokeley Parry (Parry), a British national, through a mutual friend in 1992. Parry showed Schultz a photograph of an ancient sculpture of the head of Pharaoh Amenhotep III, and told Schultz that he had obtained the sculpture in Egypt earlier that year from a man who represented himself to be a building contractor. Parry had used an Egyptian middle-man named Ali Farag (Farag) to facilitate the transaction. Parry had smuggled the

sculpture out of Egypt by coating it with plastic so that it would look like a cheap souvenir. He removed the plastic coating once the sculpture was in England. Schultz offered Parry a substantial fee to serve as the agent for the sale of the Amenhotep sculpture. Parry and Schultz then set out to create a false provenance for the sculpture so that they could sell it. They decided they would claim the sculpture had been brought out of Egypt in the 1920s by a relative of Parry and had been kept in an English private collection since that time. Parry and Schultz invented a fictional collection, the "Thomas Alcock Collection," and represented to potential buyers that the sculpture came from this collection. With Schultz's knowledge, Parry prepared fake labels, designed to look as though they had been printed in the 1920s and affixed the labels to the sculpture. Parry also restored the sculpture using a method popular in the 1920s. Parry later sold the sculpture to Schultz for \$800,000, and Schultz sold it to a private collection in 1992 for \$1.2 million. Parry and Schultz became partners in an effort to bring more Egyptian antiquities into the United States for resale, smuggling them out of Egypt disguised as cheap souvenirs, assigning a false provenance to them, and restoring them with 1920s techniques. Parry was arrested in Great Britain in 1994 and Schultz was arrested in Egypt. Each was charged with dealing stolen antiquities. Although Parry was arrested, he, with Schultz, continued to obtain Egyptian antiquities. A jury found Schultz guilty, and he was sentenced to a term of 33 months imprisonment. He appealed his conviction. Upon appeal, three organizations filed *amicus curiae* briefs in his defense: the National Association of Dealers in Ancient, Oriental & Primitive Art, Inc., the International Association of Professional Numismatists, the Art Dealers Association of America, the Antique Tribal Art Dealers Association, the Profession Numismatists Guild, the American Society of Appraisers, and an *ad hoc* group called Citizens for a Balanced Policy with Regard to the Importation of Cultural Property. These groups contended in their briefs that permitting Schultz's conviction to stand would threaten the ability of legitimate American collectors and sellers of antiquities to do business.

20. *Amici* brief was prepared by James F. Fitzgerald, of counsel to Arnold Porter, Washington, D.C., Attorney for *Amici Curiae*.

21. The AAM has promulgated guidelines for museums concerning Holocaust looted property. See American Association of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, <http://www.aam-us.org/nazi_guidelines.htm>. The guidelines request museums to allocate the necessary funds to conduct research on items in their collection that may have changed hands during the period of 1933-1945 and encourage museums to publicize the provenance of these artifacts. Further, several U.S. museums have websites that list works in their collection with gaps in provenance for the years 1933-1945. See American Association of Museums, Nazi Era Provenance, <<http://www.aam-us.org/nazierapro.htm>>. The AAM now has established a Nazi-Era PROVENANCE LIST, which is a new e-mail discussion group for World War II-era provenance research. The list was created to speed the process of identifying objects in U.S. museums that may have changed hands in Europe during the Nazi era by connecting museums professionals working directly on Nazi-era provenance questions and permitting them to exchange information and share best practices. Membership in the list is limited to museum professionals working in this field

Recently, the Virginia Museum of Fine Arts gave back the "Portrait of Jean d'Abon" by Corneille de Lyon, to art collector Julius Priester's sole heir, Karl Schlinder of Hampshire,

England. Schlinder presented evidence, which included a photograph of the painting and a 1950 police report, to show the painting was stolen by the Nazis in 1944 and to prove his claim of ownership of the painting. The museum acquired the painting in 1950 from a gallery in New York. Upon learning the painting was stolen, the museum willingly returned it to Schlinder. The museum board concluded that returning the painting was “simply the correct thing to do.” Schlinder’s claim was handled by the New York State Banking Department’s Holocaust Claims Holocaust-era assets at no cost. Discussion at <http://www.vmfa.state.va.us>.

In *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029 (W.D. Wash. 1999), heirs of Paul Rosenberg filed a complaint against the Seattle Art Museum for return of a \$1 million Matisse, which was donated to the museum by the Estate of Bloedel. The Bloedels purchased the painting from a gallery in New York in 1954. Heirs of Rosenberg, a Parisian art collector and gallery owner prior to World War II, alleged the painting was stolen by the Nazis and later possessed by the museum. Upon research into the provenance of the painting, the Seattle Art Museum agreed the Rosenberg heirs were the rightful owners of the painting and returned it to them. The museum then filed a third party complaint against the gallery, which sold the painting to the Bloedels, for breach of title, fraud, and negligent misrepresentation. The court initially ruled the museum did not have standing to sue the gallery for defrauding the Bloedels. It noted the law in Washington provides that transferring ownership of personal property does not transfer thereby a claim for fraud associated with the purpose of that property. However, it agreed to hear the museum’s complaint after the museum obtained an assignment of the Bloedels’ fraud claim from the Bloedel heirs. The case then was settled.

22. See discussion by Owen C. Pell at the 2003 Spring meeting of the Section of International Law and Practice entitled “The Special Responsibilities of States with Regard to Holocaust-Looted Art,” in which he cites *The Nurnberg Trial*, 6 F.R.D. 69, 122, 157-58 (1946). Pell contends that there is a consensus among scholars and States that a significant amount of Holocaust-looted art remains in the hands of governments, public institutions, and museums throughout Europe and the United States and that Holocaust-looted art continues to be transferred in the art market without identification or notice of Holocaust-related gaps in provenance. Pell notes that victims of Holocaust looting have faced special and significant factual and legal hurdles in identifying and recovering looted art.

See also Owen C. Pell, “The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted during World War II,” 10 Depaul J. Art & Ent. L. 27, 42 and “Nazi Stolen Art: An Overview of Legal Issues,” 20 Whittier L. Rev. 67, 72-86 (1998) and Howard N. Spiegler, “Recovering Nazi-Looted Art; Report from the Front Lines,” 16 Conn. J. Int’l L. 297 (2001).

23. These anti-seizure statutes may not apply to works that were stolen. For example, the New York anti-seizure statute, N.Y. Arts & Cult. Aff. Law § 12.03, was amended in 2000 to limit its provisions to civil proceedings. Texas adopted anti-seizure legislation in 1999. See Tex. Civ. Prac. & Rem. Code § 61.081-2, which provides that works of fine art on loan or en route to an exhibition may not be seized. However, the statute excepts stolen artworks from its anti-seizure provisions. The Department of State processes applications for exemption from seizure of loan exhibitions under the Federal Immunity from Seizure Act, 22 U.S. C. § 2459, but an applicant must certify that it does not, 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. Although the State Department generally does not ascertain the accuracy of the applicant's certification, it would seem that exemption protection would be lost if an applicant falsely certifies that there are not competing claims of ownership.

The Federal Immunity from Seizure Act recently was invoked to dismiss a lawsuit filed against the Los Angeles County Museum of Art. A suit by a Russian collector to block a loan exhibition to twenty-five works from the Pushkin Museum in Moscow was dismissed when the federal government filed a motion on behalf of the museum. (See IFAR Journal, Vol.6, no. 4.) In addition, an El Greco painting was returned to Crete after a New York court dismissed a claim of a Holocaust survivor because the painting was granted immunity under the federal act. (See IFAR Journal, Vol.6, no. 4, p. 7.)

24.105 F. Supp. 2d 288 (S.D.N.Y. 2000) and 2002 WL 553532 (S.D.N.Y. 2002).

25. An art gallery owned by Lea Bondi Jaray was confiscated and given to Friedrich Welz. In 1939 Welz joined the Nazi party and visited Jaray at her apartment. He saw the painting hanging on a wall and "insisted" that the 1938 aryanization of Jaray's gallery entitled him to it. Jaray later turned over the painting and fled to London. After WWII, Welz was interned on suspicion of having committed war crimes and his possessions, including artworks, were seized by U.S. forces in Austria.

26.317 F.3d 954 (9th Cir. 2002), 327 F.3d 1246 (9th Cir. 2003), and 124 S.Ct.2240 (2004).

27. Maria Altmann, who resides in Los Angeles, California, filed her claim in a federal court in California in 2000. She alleged the wrongful taking of six Gustav Klimt paintings, valued at \$135 million.

28.28 U.S.C. §§ 1602-1611.

29. The U.S. Supreme Court emphasized the "narrowness" of its holding. It stated that its holding does not prevent the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity. It pointed out that should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular persons or entities in connection with the alleged conduct, "that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy."

It is interesting that Austrian authorities recently seized an Egon Schiele painting that was to be sold at auction at Vienna's largest auction house, the Dorotheum, when the Jewish community of Austria registered a complaint that the heirs of a Viennese Jew, Dr. Heinrich Rieger, were the rightful owners of the painting.

The heirs of Kazimir Malevich have filed a complaint in the U.S. District Court for the District of Columbia against the City of Amsterdam for its alleged wrongful possession of fourteen artworks of Malevich. (*Malewicz et. al. v. City of Amsterdam*, Civil Action No. 04-0024 in the U.S. District Court for the District of Columbia) They allege the City of Amsterdam should not be immune from suit pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§

1603(a) and 1605(a)(3). The complainants alleged that Malevich entrusted his works to several friends in Germany, including Gustav von Riesen, Hans Richter, Dr. Alexander Dorner, and Hugo Haring. All the works he had brought to Berlin were shipped to a Hannover museum where they later were concealed in the museum's basement when the Nazis' ascended to power and began their attacks against "degenerate art." Dorner fled Nazi Germany to the United States and brought two of Malevich works with him. When he died in 1957, he had bequeathed these to Harvard University's Busch-Reisinger Museum in Cambridge, Massachusetts to be held on loan and for the benefit of the "rightful owners." Dorner shipped some of them to the Museum of Modern Art (MoMA) in New York to be held by it on loan. After receiving a demand from the heirs of Malevich for the Malevich works, MoMA returned one of the works to the heirs. The Busch-Reisinger Museum returned all the works Dorner had bequeathed to it. The post-World War II director of the Stedelijk in Amsterdam met with Haring who later agreed to a loan of the Malevich works to the Stedelijk. The works came to the Stedelijk on loan in 1957. In 2001 Amsterdam responded to the heirs' claims for the paintings that its acquisition of the Malevich Collection was valid and that, at any rate, it became the owner of the Malevich Collection in 1993 through acquisitive prescription under Article 3:105 of the Dutch Civil Code. It issued its decision in 2001 that it would not continue to negotiate with the heirs to try to achieve a settlement. The Malevich Collection continues to be housed at the Stedelijk. Over the years, its value has increased significantly.

30. Council of Europe Resolution 1205 (November 1999), 5.

31. *Id.*, 11.

32. *Id.*, 12.

33. Vilnius Forum Declaration, 1.

34. See discussion by Stuart E. Eizenstat in "Art, Gold and Slave Labor: The U.S. Government's Efforts on Behalf of Holocaust Victims," *IFAR Journal*, Vol. 6. no. 3, 18-29 (2003).

35. The United States has ratified in part the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It enacted implementing legislation in 1980 for U.S. participation in the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage. [16 U.S.C. § 470a-1. The implementing legislation was part of 1980 amendments to the National Historic Preservation Act. Pub. L. No. 96-515, 1980 U.S.C.C.A.N. (94 Stat.) 6406.] The United States has not ratified the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict nor the 2002 UNESCO Convention for the Protection of the Underwater Cultural Heritage.

Switzerland recently enacted a law, the Federal Act on the International Transfer of Cultural Goods, which was a prerequisite for Swiss ratification of the 1970 UNESCO Convention. The federal government will create an inventory listing cultural property belonging to the Swiss Confederation (wherein exportation will be prohibited) and an inventory of the 26

individual cantons. The law will lengthen the time in which a foreign government can make a claim for an illegally exported object that was brought into Switzerland. The statute of limitations, which was only five years, now will be 30 years. If the object was acquired in good faith, the person who brought the object and is forced to return it must be reimbursed the purchase price and other costs and can retain the object until the purchaser receives the reimbursement.

36. *Nemo dat qui non habet*—He who hath not cannot give.

37. The *nemo dat* rule is set out in original Article 2 at 2.403.

38. See *Menzel v. List*, 267 N.Y.S.2d 804, 819-20 (N.Y. 1966), in which a New York court stated that the “principle has been basic in the law that a thief conveys no title as against the true owner.”

39. *Id.*

40. In *O’Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980), the Supreme Court of New Jersey commented that a possessor has the right to retain property except as against the true owner. As the court stated, the only imperfection on a bona fide purchaser’s claim is the original owner’s right to repossess the property. According to the New Jersey Supreme Court, once that imperfection is removed, the possessor should have good title for all purposes.

In New York, case law has long protected the rights of owners whose property has been stolen, allowing recovery even if it is the possession of a good faith purchaser. As the court ruled in *Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y. 1991), the statute of limitations does not begin to run against a true owner’s claim until the true owner makes demand of a good faith purchaser for return of the property and the possessor refuses to return it.

41. In *O’Keeffe v. Snyder*, cited in note 40, the New Jersey Supreme Court ruled that the statute of limitations on a suit to recover stolen paintings would begin to run when the true owner “discovers, or by exercise of reasonable diligence and intelligence should have discovered,” facts that form the basis of rights of owners whose property has been stolen to recover property even if it is in possession of a good faith purchaser.

42. In *O’Keeffe v. Snyder*, cited in note 40, the court decided that an innocent purchaser should be protected from an owner who “sleeps on his rights.” 416 A.2d at 857. Thus, the New Jersey Court would place “due diligence” requirements on the true owner. In more recent court decisions, courts have shifted the “due diligence” requirement to the purchaser of valuable cultural property. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278, 294 (7th Cir. 1990) and *Guggenheim Foundation v. Lubell*, cited in note 40.

43. California has adopted a three-year statutory limitation period that begins to run at “the discovery of the whereabouts of the article by the aggrieved party...” Cal. Civ. Proc. Code § 338.

44. *Guggenheim Foundation v. Lubell*, cited in note 40.

45. *Guggenheim*, 569 N.E.2d at 431.

46. Discussion in *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1977).

47. Id. In *Peru v. Johnson*, 720 F. Supp. 810, 814 (C.D. Cal. 1989), the court noted that restriction on the export of certain artifacts are concerned with protection of such artifacts and that such restrictions do not imply ownership. The court commented that possession of such artifacts is allowed to remain in private ownership and that such objects may be transferred. The court characterized an export restriction as an exercise of the police power of the state. It stated that such restrictions do not create ownership in the state. [See also *Jeanneret v. Vichey*, 693 F.2d 259 (2nd Cir. 1982.)]

The general rule that export restrictions do not prevent a possessor in another country from acquiring good title to such artifacts can be qualified by statutes or treaties. For example, in the United States, the Pre-Columbian Art Act, 19 U.S.C. 2091-2095, provides that any pre-Columbian monumental or architectural sculpture or mural imported into the United States in violation of the Act is to be seized and is subject to forfeiture under the U.S. customs laws. The Convention on Cultural Implementation Act, 19 U.S. C. 2601 et. seq., provides that import restrictions will be placed on designated archaeological or ethnological material exported from a nation which requests such restrictions. If such objects are imported into the United States, they are subject to seizure and forfeiture.

48. For example, the trade in antiquities became illegal in Italy in 1939 with the enactment of the Law for the Protection of Works of Artistic and Historic Interests (law n.1089/39). Under this law, all archaeological objects belong to the state unless they were in private ownership prior to 1902. Further, only the state (or a private citizen by special permit) can conduct excavations.

As noted in *United States v. Antique Platter of Gold*, cited in note 5, the Egyptian government has declared ownership of all its archaeological artifacts pursuant to its Antiquities' Protection Law 117, which was adopted in 1983.

The 1932 Act with Respect to Antiquities in Greece provides that all antiquities belong to the State. Individuals cannot acquire ownership of antiquities.

In 1926 the Republic of Turkey declared in force and effect a 1906 Decree that all antiquities found in or on lands in Turkey are owned by the Republic. Also, in 1926, the Republic adopted a Turkish Civil Code which remains in effect today. Article 697 of the Turkish Civil Code declares that antiquities found on Turkish land are the property of the Republic.

49. 18 U.S.C. §§ 2314-15. The NSPA provides that it is a felony knowingly to sell or receive stolen goods in interstate or foreign commerce.

50. Cited in note 17.