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Panel : Protecting the Cultural Heritage in War and Peace

*James A.R. Nafziger, Moderator**

Welcome to our session concerning the protection of cultural heritage in war and peace! The Committee on Cultural Heritage Law of the International Law Association (I.L.A.) was established in 1988. Its first project, which was completed in 1994, was to draft a Convention for the Protection of the Underwater Cultural Heritage. The Buenos Aires Draft Convention, as it was called, provided the foundation for the 2001 UNESCO convention of the same name.¹ It is expected to come into force quite soon. Although the United States is not rushing to become a party, the convention has substantial implications even for non-parties. The I.L.A. Committee on Cultural Heritage Law has undertaken several other projects as well, most recently drafting the Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, which the I.L.A. adopted at its 2006 biennial conference in Toronto.

Cultural heritage law is still a young regime.² Among the earliest specific multilateral agreements were the Roerich Pact³ in 1935 to protect monuments in the Western Hemisphere, and The Hague Convention⁴ in 1954 to protect cultural material in time of armed conflict. Of course, broader treaty law, including The Hague Conventions of 1899 and 1907, have provided a basic protective framework, but specific rules, institutions, and procedures of cultural heritage law

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1. Convention for the Protection of the Underwater Cultural Heritage, 11 I.L.M. 1358 (Nov. 3, 2001), available at http://www.unesco.org/culture/laws/underwater/html_eng/convention.shtml.
2. What follows draws briefly from the Moderator's report *Present State of Research Carried out by the English-Speaking Section of the Centre for Studies and Research*, in THE HAGUE ACADEMY OF INTERNATIONAL LAW, THE CULTURAL HERITAGE OF MANKIND 179 (2007).
3. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 167 L.N.T.S. 289.
4. The Hague Convention on Cultural Property, May 14, 1954, 249 U.N.T.S. 240.

are of recent derivation. The late 1960s and early 1970s, in particular, were definitive. First, concerned archaeologists began to blow the whistle on illegal excavations, trafficking, and acquisitions. Second, governments, particularly Mexico, began to bring pressure on import states, specifically the United States, to cooperate in barring the import of significant cultural material and returning it to countries of origin. Third, the Native American Movement in North America sparked efforts to regain possession of indigenous material. There is a close correlation that is often lost sight of between the Native American initiative and the movement towards an international regime to protect cultural heritage. And fourth, more sophisticated thefts of cultural material and their growing links with organized crime alerted law enforcement authorities to the need for better controls. Illegal trafficking in cultural material fast assumed third place behind drugs and weapons as international contraband.

In response to these developments, both intergovernmental organizations, particularly UNESCO, and nongovernmental organizations enlisted the cooperation of national governments and private institutions in fashioning rules and procedures that now form the framework of cultural heritage law. The emerging regime performs five interrelated functions: protection, cooperation, rectification, criminal justice, and dispute resolution. Accordingly, the law seeks to protect the physical integrity of cultural material; facilitate cooperation in the protection, transfer, and return of cultural material; rectify wrongful activity by means of civil remedies and otherwise; impose penal sanctions; and provide formal and informal mechanisms and rules for resolving disputes. As Anastasia Telesetsky will argue, an overarching purpose of these efforts is to promote cultural rights and encourage related human development as an essential ingredient of human dignity.

In particular, claims for the restitution or return of cultural heritage have been of central importance in shaping this still incomplete framework. On the domestic level, for example, the historical and cultural identity of tribal and other indigenous groups may be at stake in efforts to reclaim significant artifacts from museums, art galleries, and private collections. NAGPRA (The Native American Graves Protection and Repatriation Act)⁵ is a prime example. On the international level, the recovery of stolen cultural material, whose value is estimated to be as high as \$3 billion annually, requires substantial diligence by customs officials and cooperation among international organizations, governments, private institutions

5. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2007).

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and individuals.

Because the origins of international cultural heritage law lie in the battlegrounds of conflict and the underworld of crime, it should not be surprising that the normative framework to protect the cultural heritage has essentially been adversarial. Efforts to develop an effective body of cultural heritage laws emphasize formal remedies for past wrongs.

In procedural terms, litigation has been a preferred means of resolving pertinent disputes, despite the voices of experience urging greater recourse to mediation and other more informal means of dispute resolution when it is feasible. In substantive terms, considerable emphasis has been placed on exclusive rights of ownership and the elaboration of rules for the return or restitution of stolen or illegally exported property.

The availability of adjudication and the articulation of applicable rules are essential. Conversely, an absence of detailed rules may inhibit the resolution of cultural property disputes, as we have seen in this very difficult experience, particularly over the last fifteen years or so, in responding to the confiscation of material taken during the Holocaust and the transfer of cultural material during the Second World War. But a reliance on formal adjudication is problematic. It is essential to work out new methods of dispute resolution that can effectively offer an alternative to litigation, with all of its problems.

This really has been the crux of the project of the International Law Association, culminating in the Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material. This important new instrument begins with a preamble, which emphasizes the need for a guiding spirit of partnership among private and public actors through international cooperation, and is intended to be used by a broad range of interested parties, governments, museums, other institutions, individual persons and groups of persons. To facilitate the desired spirit of partnership among such a broad range of actors and potential issues, the principles are quite simple and specific. Each one is followed by a set of comments and notes. It is expected that their guidance in handling transfer requests will help define good stewardship of cultural heritage.

Happily, there is now evidence of greater interest in collaboration as a technique of resolving cultural heritage disputes. This evidence may be found in bilateral agreements as well as in the articulation of formal claims such as the long-standing claim by Greece for return of the Parthenon (Elgin) Marbles from the British Museum. Along with an emerging blend of adversarial and collaborative processes to address cultural heritage issues has come a substantial broadening of

the normative framework, including protection of the underwater cultural heritage, the intangible heritage, cultural diversity, and traditional knowledge. All of these topics are controversial as are the legal instruments that incorporate them, but the issues they embrace are vital to us all, whether our viewpoint is the global arena or simply this conference room.

*Carla Shapreau, Panelist**

As you may have heard from the press, Nazi-era battles for title to stolen art and international art sales involving looted antiquities have resulted in increased litigation as well as a fast developing body of law relating to cultural heritage. Many of the threshold issues that arise in these kinds of matters include subject-matter jurisdiction, personal jurisdiction, choice of law, the statute of limitations, and immunity of foreign sovereigns, to name just a few.

In prosecuting or defending against a claim for title to cultural property, whether you are a theft victim, a *bone fide* purchaser, a museum, an auction house, a dealer, a foreign sovereign, or other entity or person, one of the first things that you need to analyze is provenance. This is the unbroken historical chain of possession and ownership of the object in question. Provenance can provide evidence of title, as well as authenticity. Depending on who has owned the object, provenance may also impact the value of the item, and it can be relevant to the statute of limitations.

When an object of cultural significance is stolen, it may go underground to evade public detection. It may pass from hand to hand and eventually end up in the possession of a *bone fide* purchaser who privately displays the work in his or her home for years and years. It may be innocently donated to a museum where it might not be displayed or included in exhibition catalogues for many years. It is often many decades before a theft victim has actual or constructive knowledge of the whereabouts of her missing property. A theft victim's failure to diligently investigate, coupled with the passage of time, may forever bar recovery of the missing object under a statute of limitations defense, once a battle for title percolates up to the litigation stage.

Historical research, increased awareness regarding issues of cultural heritage,⁶

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6. See, e.g., Jeremy Kahn, *Is the U.S. Protecting Foreign Artifacts?* *Don't Ask*, N.Y. Times,

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and high-profile litigation over objects of great historical, aesthetic, and pecuniary value have resulted in a shifting standard of care regarding post-theft and pre-purchase due diligence for all parties involved with respect to issues of provenance and title. In investigating the whereabouts of a missing artifact or researching its provenance, in addition to contacting governmental authorities,⁷ the resources have greatly increased over the last decade.⁸ The FBI has formed an art crime team specifically dedicated to the prosecution of such crimes.⁹ One of the most important resources is the Art Loss Register, which operates an international database of stolen art.¹⁰ If a theft victim fails to notify the public of her loss or the seller, buyer, auction house, or gallery fails to engage in reasonable efforts to investigate the provenance of valuable art or antiquities to be bought or sold, it most probably will be argued that the standard of care regarding due diligence has not been met.

The museum community, in response to a growing awareness regarding cultural property issues, has established guidelines and recommendations for provenance research.¹¹ Museums are also looking at their own holdings, investigating the history of the objects in their collections. Many museums now post information relating to their collections online to both educate and put the public on notice of the museum's inventory.

There are currently several international disputes regarding cultural heritage, many involving claims relating to American museums. One noteworthy example involves the Getty Museum and litigation by Italy and Greece against Marion True,

Apr. 8, 2007, at Section 2, p. 26.

7. See, e.g., Interpol.com, Work of Art – Recent Theft, <http://www.interpol.int/Public/WorkOfArt/Search/RecentThefts.asp>; FBI.com, Art Theft Program, <http://www.fbi.gov/hq/cid/arttheft/arttheft.htm> (last visited May 5, 2007).
8. See e.g., Holocaust-Era Assets, <http://www.archives.gov/research/holocaust/index.html> (last visited May 5, 2007); Nazi-Era Provenance Internet Portal, <http://www.nepip.org/> (last visited May 5, 2007); Holocaust Claims Processing Office, <http://www.claims.state.ny.us/link.htm#Searchable> (last visited May 5, 2007); Holocaust-Era Research Resources (Research at the Getty), http://www.getty.edu/research/conducting_research/provenance_index/holocaust.html (last visited May 5, 2007); and The Central Registry of Information on Looted Cultural Property, <http://www.lootedart.com> (last visited May 5, 2007).
9. FBI.com, Art Theft Program, <http://www.fbi.gov/hq/cid/arttheft/arttheft.htm> (last visited May 5, 2007).
10. The Artloss Register, <http://www.artloss.com> (last visited May 5, 2007).
11. Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, American Association of Museums, Apr. 2001, http://www.aam-us.org/museum_resources/ethics/nazi_guidelines.cfm (last visited May 5, 2007); Association of Art Museum Directors: Position Papers and Reports, <http://www.aamd.org/papers> (last visited May 5, 2007); International Council of Museums, <http://icom.museum> (last visited May 5, 2007).

a former Getty curator in the antiquities area.¹² Many museums are returning such objects when the evidence and the law warrant such a result.¹³

One important issue in international disputes over cultural property is sovereign immunity, as many of the objects at issue are in government-owned museums around the world. The Foreign Sovereign Immunity Act (FSIA)¹⁴ provides protection to foreign sovereigns from suit in U.S. courts. But there are exceptions. A foreign sovereign can be sued in the United States “in any case in which rights in property taken in violation of international law are in issue and that property is present in the U.S. in connection with a commercial activity carried on in the U.S. by the foreign state; or in any case in which that property is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in a commercial activity in the U.S.”¹⁵

In the *Altmann* case,¹⁶ which involved paintings by Gustav Klimt allegedly stolen during the Nazi-era, the U. S. Supreme Court in 2004 held that plaintiff’s claims against the Republic of Austria to recover the paintings were not barred by the FSIA and that the California district court had jurisdiction to proceed with the litigation. Even though the underlying acts predated enactment of the FSIA in 1976 as well as the “restrictive theory” of sovereign immunity adopted in 1952, the Court found that the conduct at issue fell within the FSIA’s exception. The *Altmann* decision has deeply resonated in subsequent cases.

For example, in *Malewicz v. City of Amsterdam*,¹⁷ one of the issues before the court was whether works of art on loan to U.S. museums for the purpose of temporary exhibition and display and subject to immunity from seizure under the Federal Immunity From Seizure Act,¹⁸ may fall within the exception to the FSIA and be subject to a grant of U.S. jurisdiction in connection with a claim related to the art work. The City of Amsterdam sent fourteen paintings to the U.S. for exhibition in New York and Houston and received immunity from prosecution relating to these paintings, under the Federal Immunity from Seizure Act. But two days before the exhibit closed, the heirs of the alleged owner of the paintings filed suit to recover the artwork. The district court found that there was no

12. Anthee Carassava, *Bail Set in Greece for Ex-Curator of Getty*, N.Y. Times, Jan.11, 2007, at B3.

13. See, e.g., Elisabetta Povoledo, *Umbrian Umbrage: Send Back That Etruscan Chariot*, N.Y. Times, Apr. 5, 2007, at Section E, page 1.

14. Foreign Sovereign Immunity Act, 28 U.S.C. § 1602 *et seq.* (1976).

15. *Id.* at 28 U.S.C. § 1603(d).

16. Republic of Austria v. Altmann, 541 U.S. 677 (2004).

17. Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005).

18. 22 U.S.C. 2459 (2005).

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inconsistency between both providing immunity from seizure during the exhibition and finding a basis for U.S. jurisdiction under the exception to the FSIA. As long as plaintiff's rights in the paintings were allegedly taken in violation of international law, the artwork was present in the U.S. when the complaint was filed, and the foreign sovereign conducted commercial activity in the U.S., there was a basis for jurisdiction. This was so even though when the defendant was served, the paintings had already been returned to Amsterdam. When determining whether, or not, the commercial activity element was present, the court looked to the nature, not the purpose of the activity, finding that "[t]here is nothing 'sovereign' about the act of lending art pieces. . . ."¹⁹

In August 2006, a San Diego resident, Claude Cassirer, filed suit against the Kingdom of Spain in a Los Angeles federal district court in connection with alleged Nazi-era extortion of a painting by Camille Pissaro, on exhibit in Spain when the lawsuit was filed.²⁰ The court found that Spain's commercial activity in the U.S. was sufficient to invoke the expropriation exception under the FSIA and U.S. jurisdiction. The court rejected defendant's argument that a minimum contacts analysis was required because the FSIA contains venue and removal provisions and prescribes procedures for obtaining personal jurisdiction over a foreign state. It further noted that the FSIA provides that subject matter over a case confers personal jurisdiction over the sovereign, as long as the defendant is properly served. There was no requirement that the commercial activity relate to the alleged expropriated property, or that the property be present in the U.S.

The statute of limitations is very significant in this area because often there can be decades before stolen items resurface. In a case I handled involving a stolen Stradivarius,²¹ the violin was missing for twenty-seven years before it surfaced.²² This passage of time is not an uncommon factual scenario in cases involving stolen art and antiquities. In the few U.S. jurisdictions that have ruled on what triggers accrual of a claim to recover stolen art, three approaches have emerged. In jurisdictions other than New York and California that have ruled on this issue, the constructive discovery rule has generally been applied. Thus, a claim accrues in these jurisdictions when the true owner actually discovers, or through the use of

19. *Id.* at 314.

20. *Cassirer v. Kingdom of Spain*, 461 F.Supp.2d 1157 (C.D. Cal. 2006).

21. *The Regents of the University of California v. Salvato et al.*, Los Angeles Sup. Ct., Civil Action No. 114151 (1995).

22. Daniel Pearl, *Stradivarius Violin, Lost Years Ago, Resurfaces but New Owner Plays Coy*, Wall St. J. Online, Oct. 17, 1994, at <http://online.wsj.com/public/resources/documents/pearl101794.htm>.

reasonable diligence should have discovered, the whereabouts of her property or its possessor.²³

New York employs a demand and refusal rule. A theft victim must first make a demand upon the possessor for return of the allegedly stolen property. When the demand is refused, accrual of the claim to recover the object commences to run. Issues of post-theft and pre-purchase due diligence also come into play.²⁴

California law arguably has three different standards. The statute of limitations for claims that arose before the 1983 amendment to Code of Civil Procedure section 338(3), set forth a three year statute of limitations for actions for the recovery of personal property, but did not specify when such a claim accrued. Was it three years from the date of theft? Three years from the date the theft victim located the property, the thief, or an innocent possessor? Could the statute be tolled if the theft victim could not find the missing property, or its possessor? It was not until 1996 that the California Court of Appeal interpreted this statute in *Naftzger v. the American Numismatic Society*.²⁵ The court implied a discovery accrual rule to section 338(3) and held that until the theft victim actually discovered the identity of the person in possession of the stolen property, the claim would not accrue. In *dicta*, this ruling was criticized in *The Society of California Pioneers v. Baker*.²⁶

Before the ruling in *Naftzger* at least two California trial courts had barred claims to recover stolen cultural property not filed within three years from the date of theft, regardless of the fact that the theft victims had no idea who to sue until much later. In the stolen Stradivarius case I mentioned, the University of California had no idea who to sue until nearly three decades after the violin disappeared. Therefore, *Naftzger*, provided much needed clarification regarding claims arising under California's pre-1983 statute of limitations.

In 1983, the California legislature carved out a unique three year discovery accrual rule only applicable to the theft of "any art or artifact"; it later expanded this to include items of "historical, interpretive, scientific or artistic significance."²⁷

23. See, e.g., *O'Keefe v. Snyder*, 416 A.2d 862, 872-73 (N.J. Sup. Ct. 1980); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg, Feldman Fine Arts, Inc.*, 717 F.Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278, 289 (7th Cir. 1990) ("a plaintiff cannot be said to have 'discovered' his cause of action until he learns enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that 'other' is").

24. *Guggenheim v. Lubell*, 77 N.Y.2d 311, 317 (1991).

25. *Naftzger v. The American Numismatic Society*, 42 Cal. App. 4th 421, 49 Cal. Rptr. 2d 784 (Ct. App. 1996).

26. 43 Cal.App.4th 774 (1996).

27. 1988 Cal. Stat. Ch. 1186 § 1; 1989 Cal. Stat. Ch. 467 § 1.

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In addition, in 2002, the California legislature enacted a Holocaust-era statute of limitations,²⁸ which only pertains to property in the possession of a museum or a gallery. The 2002 law extends the statute of limitations until December 31, 2010, for claims to recover Holocaust-era artwork.

In *Adler v. Taylor*, Elizabeth Taylor was sued in federal district court in 2005 in connection with a Van Gogh she had purchased at Sotheby's in 1963.²⁹ The painting had been taken by the Nazis before plaintiff's heirs fled from Germany in 1939. According to plaintiff, Taylor ignored warning signs regarding provenance and bought the painting without investigating its ownership history. The district court, applying the pre-1983 statute of limitations, barred plaintiff's claims. In so doing, the court rejected the California Court of Appeal's interpretation of the pre-1983 statute of limitations in *Naftzger*, concluding that there was no implied discovery accrual rule in the pre-1983 statute. It reasoned that precedent established that the statute of limitations begins to run against the subsequent purchaser of stolen property at the time the subsequent purchaser obtains the property. An odd result, if the theft victim has no possible means of identifying the whereabouts of her property, or the identity of its possessor. Relying on plaintiff's complaint, the *Taylor* court ruled that Taylor's purchase and ownership of the Van Gogh were common knowledge and easily discoverable. It also bolstered its questionable interpretation of the statute by stating that even if there was a discovery rule of accrual under the pre-1983 statute, the claim was still barred by the statute of limitations.

When antiquities are exported from a foreign country and imported into the U.S. in violation of foreign patrimony laws, a violation of the National Stolen Property Act (NSPA)³⁰ may occur. This is what occurred in the recent case of *United States v. Schultz*,³¹ in which the defendant was prosecuted under both the NSPA and the Cultural Property Implementation Act,³² for illegally importing Egyptian artifacts.

I want to finish by talking briefly about underwater cultural property. Battle for title to sunken shipwrecks is a fascinating subject and may involve the law of salvage, the law of finds, or the 1987 Abandoned Shipwreck Act (ASA),³³ under which title to qualified shipwrecks located in or on a state's submerged lands

28. CAL. CIV. PROC. §354.3 (Deering 2007).

29. *Adler v. Taylor*, 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. 2005).

30. National Stolen Property Act, 18 U.S.C. §2314, 2315 (1994).

31. *U.S. v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *cert denied*, 530 U.S. 1106 (2004).

32. Convention on Cultural Property Implementation Act, 19 U.S.C.S. § 2601 *et seq.* (1983).

33. Abandoned Shipwreck Act, 43 U.S.C.S. § 2101-2106 (1987).

become the property of the federal government who, under this statute, transfers title in those wrecks to the state. The idea behind this statute was to protect these cultural resources, because of concerns that treasure salvors were not taking adequate measures to preserve and conserve these artifacts and the context from which they were removed.

Since enactment of the ASA, an interesting case in California was litigated regarding a ship called the *Brother Jonathan*,³⁴ which went all the way to the U.S. Supreme Court. The Court ruled that a treasure salvor who is the first to “possess” a historical shipwreck on state submerged lands can proceed with her title claim in federal court without fear of being ousted from federal court by an Eleventh Amendment immunity argument from the state. Whether, or not, the shipwreck was “abandoned” was at the heart of the dispute since a finding of abandonment would arguably have vested title in the shipwreck to the state under the ASA. The ASA does not contain a definition for the term “abandonment.” Different circuits have different opinions about what abandonment means. In the Ninth Circuit, abandonment may be found if title is affirmatively renounced or it can be inferred from the lapse of time or failure by the owner to pursue salvage efforts,³⁵ although an owner’s failure to attempt salvage operations because of a lack of technology does not give rise to such an inference.³⁶ The nuances of the definition have yet to be refined by the Supreme Court.

But the Fourth Circuit, in *Sea Hunt v. the Kingdom of Spain*,³⁷ used a far more restrictive definition of abandonment. The case involved two 18th century Spanish vessels discovered and salvaged by a treasure salvor operating under a state permit. The court held that where an owner appears in court, makes an assertion of ownership or possession to a shipwreck, abandonment will not be inferred from circumstantial evidence, remarking that sovereign warships can never be abandoned except by explicit renunciation. It is a very interesting ruling. Were the shipwrecks really military vessels? There was evidence that silver coins on one of the vessels had been mined and minted in South America at the hands of African and Indian slaves. Some of the coins were stamped with a “P”, which indicated their origin was the Potosi mine, once located in Peru, now Bolivia. Maybe one could argue that this is not so different from art looted during the Nazi-era. Will

34. *California v. Deep Sea Research*, 524 U.S. 925 (1998).

35. *Deep Sea Research, Inc. v. The Brother Jonathan et al*, 102 F.3d 379,388 (9th Cir. 1996).

36. *Id.*

37. *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000), *cert denied*, 121 S.Ct. 1079 (2001).

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this ruling protect cultural resources or encourage clandestine treasure salvaging?

Finally, a new statute was enacted in 2005 called the Sunken Military Craft Act (SMCA).³⁸ Under the SMCA, a finding of abandonment will require explicit renunciation of title to sunken military vessels located in U.S. waters. This arguably may nullify application of the ASA with respect to military shipwrecks, which prior to enactment of the SMCA were generally subject to an implied finding of abandonment, inferred from the circumstances. There is a shipwreck called the *San Augustin* thought to be in Drake's Bay, in Marin County, based on reports and artifacts from the vessel found in the area.³⁹ The National Parks Service conducted an underwater remote sensing survey in Drakes Bay in an effort to locate this Manila galleon, lost in 1595. Under the SMCA, the Kingdom of Spain might have a basis to claim title in the shipwreck by arguing that it never abandoned its long lost vessel. There might be some interesting action on that.

*Jiri Toman, Panelist**

I'm very sorry to interrupt such an interesting presentation of cases. As Jim mentioned, I was involved with UNESCO where these issues were and still are discussed with the aim to adopt the principles of the restitution of cultural property from the Second World War. One will be surprised that these things were not settled already or a long time ago, but are still on the table and there is still opposition of some countries to have these principles adopted.⁴⁰

But that's not the subject of my presentation today. My subject is large and I am wondering how to present it. And in 15 minutes I think I just have to mention a few stories.

38. Sunken Military Craft Act, 108 P.L. 375, Title XIV, 118 Stat. 2094 (2005).

39. *Human Uses and the Sea* NOAA Ocean Explorer: Sanctuary Quest, <http://www.oceanexplorer.noaa.gov/explorations/02quest/background/uses/uses.html> (last visited May 5, 2007).

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40. Cultural Objects displaced in connection with the Second World War. The main purpose of the meeting of the Committee is, in pursuance of 33 C/Resolution 45, to elaborate the draft of the Declaration of Principles relating to cultural objects displaced in connection with the Second World War with a view to its submission to the 34th Session of the General Conference. UNESCO, *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*, http://portal.unesco.org/culture/en/ev.php-URL_ID=2634&URLDO=DOTOPIC&URLSECTION=201.html (last visited May 5, 2007).

My intention was mostly to speak about enforcement and implementation of rules of protection of cultural property which were elaborated already at the Hague Conferences in 1899 and 1907. And it is quite interesting that after the adoption of the Hague conventions, and after the First World War, there was also an effort by the new international organization, the League of Nations, to do something about the protection of cultural property. The conclusion of the League of Nations Committee dealing with cultural property was that in fact it is not necessary to protect cultural property. It was considered too complicated and there were other, more important, things to take care of. The Directors' Committee of the International Museum Office, meeting on 6 and 7 December 1933, and basing itself on the opinion expressed by the League of Nations, asserted that "it could in no circumstances give its support to an action of this kind, which it deems both impossible to apply and undesirable in principle".

The attitude changed during the Spanish Civil War. The massive destruction and burning of churches suddenly awakened the international community, and unfortunately the international community needs to be awakened by the massive catastrophic events. We see it in the very concrete cases today. The League of Nations finally decided to create a committee, which was presided over by one of the most famous international lawyers in that time, Charles de Visscher, a professor of international law in Belgium.⁴¹ He elaborated a draft of the international convention for the protection of cultural property, which was adopted by the committee. Well, you know that lawyers are slow. The preparation of the draft was taking a long time, and it was only in 1938 that the draft was submitted for the consideration of government. It is quite interesting that the draft included several issues which were later used for the preparation of the 1954 Convention.

The Dutch government offered to organize the Conference in 1939. As the Second World War started on 1 September 1939, it was too late. Instead, the war demonstrated again the destruction of cultural property on the largest possible scale.

So it was necessary to wait and it was only after the end of the war that the protection of cultural property became part of the effort to "change the world". The Charter of the United Nations outlawed the war, several human rights instruments were adopted (Universal Declaration of Human Rights,⁴² 1948 Genocide

41. Other members of the Committee were not less prestigious: M. Gouffre de Lapradelle, Nicolas Politis, F. Moineville and G.J. Sas.

42. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

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Convention⁴³), and the 1949 Geneva Conference adopted the new conventions for the protection of the victims of war⁴⁴. The new international organization dealing with culture and education, UNESCO⁴⁵, started immediately to work on the legal instrument for the protection of cultural property. This new organization already included in its constitution a provision that protection of cultural property was its aim⁴⁶. The new post-War atmosphere created a favorable terrain for the adoption of the legal instrument based mostly on the 1938 draft.

And so, in 1954, The Hague Convention for the Protection of Cultural Property was adopted⁴⁷. The most restrictive attitude at the 1954 Conference was that of the government of the United Kingdom. It is amazing to go through the acts of this Hague Conference and see that states paid attention to the requirements of the United Kingdom government and reduced the different provisions. They wanted to satisfy the UK government to have them on board to adopt the Convention. The US very much followed the UK government at that time. But all these efforts were in vain. Until now, neither the United Kingdom, nor the United States became party to this important legal instrument.

The Convention was adopted in 1954, and came to force very quickly in 1956. It includes an interesting provision about the general protection of cultural property, about special protection of cultural property. But there are very few provisions concerning implementation and enforcement.

As a result, the Convention was not very efficient in practice. UNESCO did its best during the years to achieve practical results. In 1983 it organized in Vienna an expert meeting which adopted many new ideas regarding how to improve the practical impact of the Convention. Nothing was happening until 1990, when again the Dutch government, strongly supported by Italy, wanted to improve the situation. All these efforts led finally to the adoption of the 1999 Second Protocol.⁴⁸

43. Convention on the Prevention and Punishment of the Crime Genocide Convention of 1948, Jan. 12, 1951, 78 U.N.T.S. 277.

44. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

45. United Nations Educational, Scientific and Cultural Organization [hereinafter UNESCO].

46. The Constitution of the UNESCO signed in London on 16 November 1945, defined one of its purposes as "assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions."

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

48. Second Protocol to the Hague Convention of 1954, Mar. 26, 1999, 38 ILM 769. The First Protocol adopted in 1954, in the same time as the Convention, was dealing with the

And here I am coming back to the subject which I wanted to discuss: how effective this Second Protocol could prove to be. As we have limited time I will probably just take two issues which seem to me quite interesting and quite original as far as concerns the new methods of the enforcement of this protection.

One of them was invented previously by Charles de Visscher before the Second World War and was instituted by a Commissioner General for the protection of cultural property. It means that immediately after a conflict starts, the power which is involved in the conflict, together with the protecting power or substitutes of the protecting power, should appoint a person who will ensure the protection of cultural property and will take requisite measures to do so. That's something absolutely unique which we don't have in any other convention, and it was working, curiously enough. It worked in the 1967 war between Israel and the Arab states of Egypt, Jordan and Syria. Two Commissioners General were appointed and did the work. In future conflicts this was not case anymore. The main problem is the procedure for appointment of the Commissioner General. If the protecting powers are not there, somebody should replace them. During the discussions at the 1954 Conference, several proposals were made: ask the Secretary General of the United Nations, ICRC or a neutral state.

But one of the proposals was included in the text of the Convention: ask the cooperation of the president of the International Court of Justice. Some time ago I discussed this issue with Jose Maria Ruda when he was president of the International Court of Justice. There was not follow up on the proposal. It is perhaps an issue that should be discussed again.

Then came the brilliant idea of the Italians who proposed during the discussion of the 1999 Second Protocol the creation of a committee. You know, when something is not working, we create a committee and it is not always the best solution. The Committee was elected and is composed of 12 representatives of the States parties. They met for one morning last October, where they disagreed with the draft documents – guidelines were submitted to them and they will meet again before the end of June of this year.

The problem is that the committees and namely the committees composed of governmental representatives become very formalistic and very slow. There is one way that a committee can work, and this proposal was also submitted to the conference. It is a committee composed of individual members acting in their personal capacity. We have such committees in the field of human rights: the

prevention of the exportation of the cultural property from a territory occupied during an armed conflict and return of the property.

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Human Rights Committee created by the International Covenant on Civil and Political Rights for example. That's the committee which is really working and accomplishes a lot in the promotion of the civil and political rights. Because you have individuals who are appointed there, they are more independent and also more courageous to act without waiting for instructions. Of course nobody is really independent, but those coming from democratic countries have a certain freedom of action. And they can do some positive work in this area.

But that's not the committee we have now and I am afraid that the Second Protocol will not be able to substantially change the present situation. There is also question of the ratifications. I mentioned that the 1954 Convention was ratified very quickly and entered into force already in 1956. As far as the Second Protocol, it is in force, but now, in 2007, eight years after the adoption of the 1999 Protocol, we have only 44 States Parties. The 1954 Hague Convention now has 116 States Parties. It will therefore take quite a long time before all these other States become party to the Second Protocol.

*Anastasia Telesetsky, Panelist**

We have heard a little bit about domestic litigation, and a little bit about international treaties and protocols. Now I am going to talk about an area where the law is completely unclear and the law has yet to be formed, it is the area of traditional knowledge. My goal today is to focus on traditional knowledge. What is traditional knowledge? Why does it matter? Why does it need to be protected? What is being done to protect it? And is what is being done to protect it effectively?

Traditional knowledge is the longstanding traditions and practices of regional indigenous and local communities that have been passed down generation to generation. This is one definition. There are different definitions, but this is the definition I am going to be using in this discussion with you today.

I would like to start with some case studies involving traditional knowledge that inform us why traditional knowledge needs to be protected today. This is a carpet with an aboriginal design, and in Australia, the aboriginal designs are known as

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dreamings. This is a representation of a dreaming, and they are owned communally by clans. They started to appear in 1980 on doormats that were produced in Vietnam without the permission of the artists or their communities.

A similar design to this carpet was part of an aboriginal carpet copyright case in April 1993.⁴⁹ Three aboriginal artists and the public trustee of the Northern Territory, as the representative of the estates of five deceased aboriginal artists, commenced an action in the federal court of Australia against a Vietnamese company. The aboriginal artists, on behalf of their clan, won damages. However, in spite of their win, a company (with the very same business principals as the original Vietnamese defendant) produced another carpet which is a derivative of the original carpet. The only difference is the hatching. This issue is now currently being litigated in Australia.

Why does traditional property matter? Why does traditional knowledge matter? Because German techno dance bands like Enigma are ripping off traditional Taiwanese rhythms and producing them as dance riffs in their own popular songs. So a little history here: A group of Taiwanese aboriginal artists from a group called the Ami were brought to France where they performed their work, and it was recorded by a group called the Institute for World Cultures. Their work was given a limited release on CD and was purchased by some of the performers in Enigma, who remixed their performance and used their work for an Olympic Games promotional song.⁵⁰ The Ami ultimately sought legal recourse and eventually received a settlement from Enigma's record producer. This was actually done by a San Jose firm here, Oppenheimer, Wolf and Donnelly. The Ami artists then donated some of their settlement to a foundation to protect aboriginal music. Ironically, the Enigma song was called "Return to Innocence."

Why does traditional knowledge matter and need to be protected? Because in Trinidad and Tobago the steel pan was developed in the 1930s and 1950s as an instrument belonging to the community and to be shared by the community. Now other countries are appropriating the steel pan without any recognition of the contribution of folks from Trinidad and Tobago as the originators of this wonderful instrument. And even worse than other countries using the steel pan are the commercial entrepreneurs who are applying for patents under the techno-babble name. I pulled a process for the formation of a Caribbean steel pan using a

49. *Milpurruru and others v. Indofurn Pty Ltd. and others* (1994) 30 I.P.R. 209.

50. ENIGMA, *A Return to Innocence*, on THE CROSS OF CHANGES (Virgin/EMI Records 1994). See also Deborah Kuo, Taiwan Aborigines Sue Enigma, Music Companies, available at <http://www12.asphost4free.com/feienkde/ELawsuit.pdf>.

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hydroforming press in the resulting pan off a patent website.

My final sort of case study here is why does traditional knowledge need to be protected? Because here in the United States it is legal to sell imitation Native American products, such as a Kachina, if the retailer does not make the claim that the Kachina is authentic even where the works are obvious imitations of existing Native American products.

There are numerous other examples. Two others, just for your interest, are the Igloodik case and the Aveda case. The first example is the Igloodik case. The Inuit people had formed a business association to attempt to bring one of their kayak designs to the market. In attempting to bring their design to the market, they found out, by chance, that their design had already been patented with absolutely no credit to the Inuit people.

The second (that I found somewhat surprising) is the Aveda case. This is in some ways perhaps the most outrageous case. In 2000, the Aveda Company applied to trademark the word "indigenous" for a line of their yuppie cosmetic products. And they wanted to use the Sioux medicine wheel as their logo for this product line. But in the United States, Australia, and New Zealand, a number of activists protested and approached the Aveda president who ultimately agreed to change the branding on the product line. But if the word "indigenous" can be trademarked, where are we heading?

In many ways I find these cases more interesting than the law, because the law is an area that is completely in flux. All of these examples are examples of misappropriation and expropriation. Group cultural expressions have been regularly appropriated for individual commercial gain, in particular for the individual commercial gain of people who are not part of the community.

Communities are now seeking protection against this. This is sort of a laundry list that has been presented by indigenous groups at various meetings detailing unauthorized reproduction, adaptation, and the subsequent commercialization of their traditional knowledge. They have been seeking protection against appropriation of their languages and symbols. For example, the Maori are very concerned with the use of their traditional designs in tattoo parlors here in the U.S., and they are discussing what options they have.

Third, groups are also concerned with the use of traditional knowledge in insulting, degrading, and culturally offensive and spiritually offensive manners. For example, the Kachina are spiritual creatures for the Hopi people, and the fact that they are being used as major collector items is problematic to some Hopi elders. Fourth, traditional knowledge; there must be protection in order to prevent

people from failing to acknowledge traditional sources of creative work. This is the Enigma case of the Ami people. Fifth, the appropriation of a reputation; a number of native groups get very upset when they see cheap goods being released copied from actual works that are part of their cultural heritage and cultural tradition. They do not want their heritage to be cheapened. This is a problem with a lot of goods coming out of China that are being sent to Native American stores and not sold as Native American but they clearly have Native American characteristics.

There are a number of other things that the cultural groups would like to protect, including access to sacred materials and unauthorized fixation of live performances. Some groups are becoming quite upset when tourists come to their villages or communities and do not receive any permission to reproduce a picture of a ceremony or a live performance of the ceremony. Then these communities find out that their ceremony is online, without any recognition.

And then finally there is the exportation of derivative rights. This is the carpet case again. A derivative right is where a community permits an individual to use a technique, perhaps a particular sculpture technique or a painting technique, but then they do not ultimately approve of how it was used (perhaps because it was used in an offensive manner). So even though it is creative and the individual who is using it is using it in a creative manner, it is using it in an offensive manner to the community, and in a way that the community would not have approved. These are derivative rights.

Traditional intellectual property tools have been used by a number of these communities to protect their interests. In the case of the carpet case, there was \$188,000 payout from the Vietnamese company to the aboriginal artists. Or at least, these were the damages entered for the judgment; I am not sure if it was actually paid. Of this amount, \$70,000 was awarded to the living artists for the cultural harm that was suffered within their communities because, and, this is very interesting, they were involuntarily implicated in an offense against customary law. So that is what the \$70,000 was for, restitution, to make them whole.

Intellectual property rights such as these are not working, many of the communities say, because they are Eurocentric laws and do not recognize the community, and because a lot of traditional knowledge does not qualify for protection. It is too old and it is in the public domain. This is the example of yoga. I do not know if anyone has heard of the controversy here with some practitioners in India who would like to receive some royalties on the basis of various poses and

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practices.⁵¹ The yoga community here in the U.S. is saying this is ridiculous, this is in the public domain. So this is an area of controversy.

Another reason why intellectual property is not working is that authors of the traditional knowledge materials are not easily identifiable. An additional problem is that traditional knowledge is not held by an individual, and it does not have an expiration date. Unlike a patent that expires in twenty years, the holders of traditional knowledge do not want to say in twenty years it is in the public domain. That is not acceptable to them.

The World Intellectual Property Organization (WIPO)⁵² is focusing on this issue. There is some discussion in the halls of WIPO for a traditional knowledge protection treaty, and nobody really knows what this is going to look like. There are a number of issues here, but I just want to mention two issues. First, how do you design a system to protect traditional knowledge? It is a little unclear what the parameters are. And here is an example of why it is complicated, how do you have an international body dealing with not just civil and common law, which international bodies are used to dealing with, but also customary law? Especially because of situations where customary law is not so much evolving but it belongs to certain members of a community. There is also conflict within customary laws, for example, the aboriginal communities of Australia. So how do you work with this? Also, how do you work where you have an unauthorized cultural imitation that is a violation of the civil law in one community but it is also a violation of criminal law for another community? How do you harmonize the standards?

What is being done, and this is sort of cutting edge, is that in the Pacific Islands in 2002, a document was produced called the Pacific Regional Model Framework on Protection of Traditional Knowledge and Expression of Culture.⁵³ This system was structured to try to protect, through exclusive property rights for the communities, a moral rights approach where they would protect the rights of the community to publish or disclose its materials, and a penal approach where individuals who violated what is in this framework would be held accountable through criminal and civil procedures.

It is unclear where this system is going because the Pacific nations who signed on in 2002 are now beginning to formulate their national laws, and it is unclear

51. See, e.g., Liz Mathew, *Yoga, Ayurveda Being Documented to Stop Patent Misuse*, <http://www.hvk.org/articles/1005/44.htm> (last visited Apr. 5, 2007).

52. *Convention Establishing the World Intellectual Property Organization*, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 (as amended on Sept. 28, 1979).

53. *Pacific Regional Model Framework on Protection of Traditional Knowledge and Expression of Culture*, available at http://www.wipo.int/tk/en/laws/pdf/spc_framework.pdf.

how these laws will read even though there are some guidelines.

The purpose of doing this was to protect the rights of the owners of traditional knowledge, permit tradition to be based on creativity and innovation, ensure prior informed consent, and ensure shared benefits. The most interesting bit there, at least from a practitioner or practical standpoint, is what is prior informed consent? What constitutes such consent? Who gets to give the prior informed consent? Does the chief speak for his people or is it something different? How do you share benefits? I mean this is incredibly complicated and the Convention for Biological Diversity⁵⁴ is right now discussing this. In 2010, I believe, they are supposed to have a document on the streets. So watch for that document on the web.

James Nafziger: I think you can see how diverse the emerging field, or framework as I somewhat hesitatingly put it, of cultural heritage law is. The purpose of this panel is really to open up some new ideas and to stimulate a discussion. There are several publications I would recommend to any of you who want to keep track of developments in this field. You can do really all of it or most of it online, but if you're looking for hard copy, I would recommend three publications. The first is the *International Journal of Cultural Property*, which I think has an article on this yoga controversy in its most recent issue. And then it regularly has articles pertaining to the issues of return and restitution of property of cultural heritage in times of armed conflict. In any event, it is quite an innovative publication of Cambridge University Press, and I recommend the *International Journal of Cultural Property* to you.

Another indispensable source, at least for me, is the *Art Newspaper*, which is published in London. It is a monthly publication. It is not limited to legal issues, but it has extremely good coverage of all kinds of legal issues, related specifically to the art market, and more generally to the field of cultural heritage law.

The third publication is the *International Foundation for Art Research Journal*, otherwise known as *IFAR Journal*, its acronym. It does not have the extensive scholarly material of the *International Journal of Cultural Property* on the one hand, nor does it have nearly as many specific items as *Art Newspaper*. It fits in between those first two publications.

Question from Audience: Courts always seem to be the traditional dumping place for these kinds of issues. What do you see as the role for an alternate dispute resolution, such as arbitration or binding arbitration, as opposed to taking everything to these courts and appealing everything.

54. United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

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James Nafziger: There have been some arbitrations. I spoke earlier to the I.L.A.'s project to develop principles which address the need, we think, to provide in fairly concrete terms for alternative processes of resolving disputes, but not necessarily arbitration. Those principles, I think, are particularly useful because they are intended to be used by such a diverse group of institutions, individuals, governments and so on. There is no division between private and public.

However, there certainly remains a need for litigation. The stakes are often so high, and the investment of states and cultures in these issues is so high that it is sometimes impossible to avoid litigation of these issues. On the other hand, there are plenty of opportunities to work out arrangements for sharing of property, for transfer of ownership but retention of possession, and so on. These arrangements, I think, are a coming thing. I think they have been evidenced in provisions of bilateral agreements and I think they are very much a part of the agenda of the International Law Association developing principles.

Anastasia Telesetsky: The Permanent Court of Arbitration in The Hague is currently pursuing this as a strategy. The question is how to get the parties in, because there is not any treaty language that requires them to arbitrate, and so often you have one firmly entrenched party who has no interest in going into arbitration as long as they cannot be brought in via litigation for whatever reason, such as the statute of limitations. There is just no motivation.

Carla Shapreau: I just think that, as Professor Nafziger was saying, the stakes are so high that you have a right to a jury trial. Are you going to give it up if you have got millions of dollars and you do not know what is going to happen? But you know the case involving those Gustav Klimt paintings went all the way to the Supreme Court, and that was a great victory in regards to the issue of being able to sue in the United States. But because the actual litigant was 89 years old, they agreed to arbitrate in Austria over these paintings and she won in Austria. Then they sold everything at an auction and made an absolute fortune. So, you know, they arbitrated because of the situation, but certainly not until they went to a lot of time and trouble to go through the courts.

I do not think there is a good answer, but it certainly is a great way to resolve issues and to save money; it is certainly an excellent idea. I do not know how you get people to do it. I know in federal court they require that you go through a process at state court where you have to give arbitration a try, but it is generally not binding because of Constitutional issues.