NEW INTERNATIONAL LAW TO PROTECT UNDERWATER CULTURAL HERITAGE

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*The views expressed in this article are the personal opinions of the author and do not necessarily reflect the views of National Oceanic and Atmospheric Administration or the US Government.

Underwater Cultural Heritage at Risk

We are all connected by the sea. Our common maritime heritage plays a significant role in molding who we are, where we live, what we do and how we do it. It takes the form of millions of time-capsules, including historic shipwrecks and other submerged cultural resources. As advances in technology provide humans with greater access to the deepest parts of the ocean – with exciting discoveries such as the resting place of RMS Titanic – that same technology puts undiscovered heritage resources at ever greater risk from treasure hunting.

Treasure hunting is “looting” to some and “commercial salvage” to others. However, even when the “salvage” is done under oversight of an admiralty court, it is too often focused on commerce and private profit without due regard to the public interest in the scientific standards for research, conservation and curation of our common heritage resources. Since the advent of SCUBA in the 1940s, many divers have imagined getting rich by salvaging gold, silver and jewels from long lost shipwrecks. Both popular culture and commercial media promote this idea, as revealed in magazines such as National Geographic or on the Discovery Channel, which report fantastic finds by treasure hunters. Archaeologists, on the other hand, have long argued that these shipwrecks are time capsules that should be preserved in situ until there is a genuine need to bring them up in order to conserve and preserve them for the general public’s benefit.

A New Age of Treasure Hunting and Commercial Salvage

Access to deep-seabed sites has resulted in a new breed of commercial salvor, personified by firms such as Odyssey Marine Exploration, Inc. These firms want to avoid the image of the old smash-and-grab treasure hunter. They evoke the image of a professional enterprise that complies with environmental and archaeological standards in a bid to “rescue” (cont’d on page 25)
Welcome to our Fourth Issue!

On behalf of the Art & Cultural Heritage Law Committee, welcome to the fourth issue of our newsletter. Our aim is to inform art and cultural heritage enthusiasts about recent developments in the legal arena, to provide a forum for discussion of related issues, and to provide opportunities for interested persons to get involved.

In this issue, we are pleased to offer in-depth analysis of two major developments in the international law of cultural heritage, namely the US ratification of the Hague Convention on Cultural Property and the entry into force of the Underwater Cultural Heritage Convention. This Committee has long been active in the debate on the worldwide looting of antiquities and provided a lively catalyst for the discussion of these issues by world’s experts from the time of the looting of the Baghdad Museum during the Second Gulf War.

We are also pleased to provide a view into history with an in-depth review of the cultural property case most frequently asked about, the Elgin Marbles. Katherine Bagerman and Gregor Kleinknecht do an excellent job of bringing our readers up to speed on the historical, political, and legal differences surrounding this popular controversy.

This issue’s Q&A is with Corinne Hershkovitch, who provides readers valuable insight into the life of a lawyer practicing in art & cultural property matters. Ms. Hershkovitch is one of the top lawyers in the field, practicing in Paris.

Our Co-Chair, Jennifer Kreder, reports on progress being made on cutting edge issues in the development of guidelines for museum ethics.

Jessie Duco of Pennsylvania’s Volunteer Lawyers for the Arts provides an invaluable review of pro bono opportunities for legal work in the arts.

As always, we are indebted to Ricardo St. Hilaire for his News Notes to keep us all up on recent developments in the field.

I should note that we are interested in showcasing the work of budding artists in future newsletters. If you or anyone you know is interesting in sharing their work, please let me know! Enjoy!

Cristian DeFrancia, Editor-in-Chief
On September 25, 2008, the US Senate voted to give its advice and consent to ratification of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. The 1954 Hague Convention was based on several earlier codifications of the law of conflict, including the Lieber Code (drafted as a code of conduct for the US Army during the Civil War), the 1899 and 1907 Hague Conventions, and a convention drafted in the 1930s, all of which aimed to protect cultural property during warfare and military occupation. The 1954 Hague Convention was the first international convention to address exclusively cultural property and now has 121 States Parties.

The Convention requires States Parties to respect and safeguard cultural property. This includes requiring States Parties to make provisions to protect cultural property within their own territory during peacetime from adverse consequences during potential conflicts. The Convention protects cultural sites, monuments and repositories, including museums, libraries and archives, during armed conflict by prohibiting the targeting of cultural property unless justified by military necessity; prohibiting looting, vandalism and misappropriation of cultural property and prohibiting the requisition of cultural property. During military occupation the Convention requires States Parties to support the competent national authorities in protecting cultural property and prohibits interference with cultural property by the occupying power unless the national authorities are unable to provide the necessary measures of preservation. The First Protocol, which deals with movable cultural objects, was also written in 1954. The Second Protocol was promulgated in 1999 to respond to criticisms of the main Convention, particularly in light of the cultural destruction during the Balkan Wars.

Although the Convention was modeled on instructions issued by General Eisenhower during World War II and the United States was among the first nations to sign the Convention, the US military later objected to ratification. It is only with the collapse of the Soviet Union in the late 1980s that the Pentagon came to support ratification, although the United States already regarded the Convention’s main provisions as part of customary international law. In 1999, President Clinton transmitted the Convention and First Protocol to the Senate for consideration. The attention given to the looting of the Iraq Museum in Baghdad and the looting of archaeological sites in southern Iraq led to increased interest in the Convention. In early 2007, the State Department listed the Convention and First Protocol on its treaty priority list. In April 2008, the Senate Foreign Relations Committee held hearings on the Convention and unanimously recommended ratification to the full Senate. This led to the vote of advice and consent in late September. All that remains is for the United States to prepare and deposit its instrument of ratification with the UNESCO Director-General, and, after three months, the United States will be a party to the Convention. No further action is required on the part of the President. The Senate considered neither Protocol at this time.

United States ratification was subject to four understandings and one declaration. The First Understanding states that the level of protection accorded to property under special protection is one that is consistent with existing customary international law. The Second Understanding clarifies that the action of any military commander or other military personnel is to be judged based on the information that was reasonably available at the time an action was taken. The Third Understanding clarifies that the
rules of the Convention apply only to conventional weapons and do not affect other international law concerning other types of weapons, such as nuclear weapons. The Fourth Understanding states that the provisions of Article 4(1) requiring Parties “to respect cultural property situated within their own territory . . .” means that the “primary responsibility for the protection of cultural objects rests with the Party controlling that property, to ensure that it is properly identified and that it is not used for an unlawful purpose.” The Declaration states that the Convention is self-executing, meaning that it operates “of its own force as domestically enforceable federal law.” It does not require any implementing legislation, but the Declaration also notes that the Convention does not confer any private rights enforceable in U.S. courts.

While U.S. policy has been to follow the principles of the Convention, ratification will bring many advantages. It will raise the imperative of protecting cultural heritage during conflict, including the incorporation of heritage preservation into all phases of military planning, will clarify the United States’ obligations, and will encourage the training of military personnel in cultural heritage preservation and the recruitment of cultural heritage professionals into the military. Perhaps most importantly, ratification sends a clear signal to other nations that the United States respects their cultural heritage and will facilitate U.S. cooperation with its allies and coalition partners in achieving more effective preservation efforts in areas of armed conflict.

Many individuals and Members of this Committee contributed over a long period of time to the success of ratification. When she was chair of the ABA International Cultural Property Committee, Marilyn Phelan wrote a report on the Convention and succeeded in getting the ABA’s endorsement for ratification. This report played a role in persuading the State Department to put the Convention on its treaty priority list. Other members of the ABA and representatives of the Archaeological Institute of America (AIA), the Lawyers’ Committee for Cultural Heritage Preservation (LCCHP) and the U.S. Committee of the Blue Shield (USCBS) worked for ratification. Testimony drafted by the AIA, LCCHP and USCBS and joined by twelve other preservation organizations was submitted to the Senate Foreign Relations Committee at the time of the hearings and is available at: [http://www.culturalheritagelaw.org/advocacy](http://www.culturalheritagelaw.org/advocacy). The Society for American Archaeology and the Oriental Institute of the University of Chicago also assisted in the effort to achieve ratification of the Hague Convention.

Bonnie Czegledi
Introduction

The Elgin Marbles are the subject of one of the most prominent source country claims for the return of important objects of cultural heritage and a frequently used example in legal and academic debate as to the role and place of cultural heritage in the international community.

In what may still be regarded as the leading legal discussion of the subject (83 Mich. L. Rev. 1881 (1984-1985)), Professor John Merryman rightly identified the Elgin Marbles as representative of the many works of art in the world’s museums and private collections that could be subject to a growing movement for the repatriation of cultural property. This is one of the reasons why the debate about the Elgin Marbles is of much wider than purely Anglo Hellenic significance. Many of the events which led to the removal of the Marbles from Greece are now disputed and can no longer clearly be ascertained. This article attempts to give an account of the status quo.

What are the Elgin Marbles?

The Elgin Marbles, or Parthenon Marbles (the use of either one or the other of these terms will already place its user in one or other of two camps), ("the Marbles") are marble sculptures researched and brought from Athens to Britain by Lord Elgin between approximately 1800 and 1810 and now housed in the British Museum in London.

The Parthenon was built on the Acropolis in Athens in 447-438 BC, and originally housed a grand statue of Athena, the patron goddess of the city. It may well be regarded as the most important remnant of classical Greek built heritage. The frieze, metopes, and pediment of the monument were originally decorated throughout with scenes from Athenian cult and mythology.

Early Christians later turned the building into a church. While under the rule of the Ottoman Empire from Constantinople, the Parthenon became a military citadel and was used inter alia as a store for gunpowder. In September 1687, the gunpowder store was hit by a cannon ball during the Venetian siege of Athens. The resulting explosion destroyed significant parts of the building, principally its interior, and many of the artworks which it housed, although the Marbles themselves remained relatively unscathed.

For the next 113 years, the Parthenon site lay unprotected and was not the subject of any attempts at preservation by the Ottoman authorities or local population, and the Ottoman occupiers as well as locals removed numerous fragments from the site for use as building materials elsewhere, or burning for lime, or, indeed, to fuel a growing international trade in antiquities. In 1800, Lord Elgin arrived to study and document the artworks of the Parthenon. His intentions are disputed, but whether he hoped to improve the arts in Great Britain, to establish the reputation of classical Greek heritage as superior to that of ancient Rome (then regarded as ideal), to rescue the sculptures for posterity to avoid their further destruction, or a combination of these, is a matter of some discussion.
destruction, or whether he calculated to take advantage of his position as ambassador to the Sublime Porte of the Ottoman Empire, and of the corrupt local authorities, to remove the Marbles from Greece, has not to date been established with any degree of certainty.

In order to access the Parthenon, Lord Elgin acquired two so-called ‘firmans’ (letters of instruction) from the Ottoman authorities, then the recognized as the Government of Greece. The documents have not survived the passage of time and it is now disputed what work they precisely authorized Lord Elgin to carry out. In the event, Elgin assembled a collection of sculptures, in part, apparently, by removing them from the Parthenon, and succeeded to ship them to Britain, much to the dismay of the French, who were at the same time aggressively acquiring artworks to fill the Musée Napoleon (now the Louvre).

A Special Committee of the House of Commons purchased the collection for £35,000 after considering and approving the method by which the collection was acquired and its value. The House of Commons then vested the collection in the Trustees of The British Museum in perpetuity under the Local and Personal Acts 56 George III c.99 of 1816. However, even at the time, the removal of the Marbles to Britain proved not uncontroversial: Lord Byron, for example, famously and emotionally described this as the “last plunder from a bleeding land.” Today, the collection continues to be held by the Trustees under The British Museum Act 1963.

It is estimated that Lord Elgin removed roughly half of the then surviving marble sculptures from the Parthenon site. The other half which remained on the Acropolis endured more destruction. A war of independence and a restoration attempt during the 19th century severely harmed both the structure of the Parthenon itself as well as the remaining marble sculptures. In the 20th century, the air-pollution of modern day Athens (the City was infamous for its smog) took its erosive toll until the remaining parts of the sculptures were finally removed from the Parthenon when a new restoration project began in 1975. They have now been moved into the Acropolis Museum and were replaced with replicas on the Parthenon itself.

**Why Does Greece Want the Marbles Back?**

In a sense it is easy to see why Greece wants to have the Marbles back and Britain wants to keep them. They are obviously an important part of classical Greek cultural heritage and extremely valuable in any sense of the word. Since international legal instruments, such as the 1970 UNESCO Convention, have no direct bearing on the issue because they post-date the removal of the Marbles from Greece by a considerable time, the claim for the return of the Marbles to their land of origin relies on both legal arguments about defects in their acquisition by Lord Elgin and moral arguments for their return.

First, Greece disputes the method by which Lord Elgin acquired the Marbles, in particular, whether Lord Elgin had proper authority to remove the Marbles from the Parthenon site. This question arises due to a conflict of interpretations as to the scope of the ‘firmans’ granted to Lord Elgin. The originals of these Sultan’s decrees no longer exist, but an Italian translation does subsist of the second ‘firman’. In a paper produced in 1998, Professor Vassilis Demetriades from the University of Crete asserted that he did not believe the documents issued to Lord Elgin to be ‘firmans’ at all since they lacked certain features common to ‘firmans’. Even assuming the documents were ‘firmans’, the scope of the authority granted by them is contested. The first ‘firman’ granted Lord Elgin access to the Acropolis to make drawings, erect scaffolding and make moulds, while the second ‘firman’ granted him...
permission to “dig, to take away any sculptures or inscriptions and figures.” This wording would seem to exclude the removal of sculptures from the Parthenon structure (and the considerable incidental damage which this caused to the building itself), although such removal was apparently witnessed and described by contemporaneous travelers. These arguments were intended to put Elgin’s legal acquisition to the Marbles into doubt but no legal claim for the return of the Marbles has in fact ever been brought by Greece.

Secondly, effectively acknowledging the fact that settling a dispute about events that occurred now over two centuries ago by legal means may be problematic, Greece progressively shifted the focus of the debate away from legal arguments towards political and moral arguments about the place of important objects of cultural heritage in the international community. This coincided with a growing trend towards cultural nationalism and the (voluntary) repatriation of cultural property. The basis for this line of argument is that, even if the Marbles had become British property, they are Greek and a key symbol of Greek cultural heritage and national identity, and there is no doubt as to their origin. They should therefore be returned to Greece to be preserved in their totality and in their historic context for the citizens of Greece, as well as for the benefit of the international community.

Furthermore, it is argued that their display in the British Museum is unsatisfactory in that it does not put the Marbles in the historical context of their original position, as the sculptures are not freestanding works of art, but rather part of a world-famous monument. Concerns have also been raised about the way in which the Marbles have been handled by the British Museum, in particular, by reference to a “cleaning” which the British Museum carried out in the 1930s and which many scholars now regard as somewhat over-zealous.

**What Steps Has Greece Taken to Assert its Position?**

Greece began to formulate its official claim for the return of the Marbles in the 1980s through its then celebrity Culture Minister Melina Mercouri, only to find it equally officially rejected by Britain. Nevertheless, the Greek efforts continued with the urging of quiet diplomacy to convince Britain to return the Marbles prior to the 2004 Athens Olympics. Greece sought to encourage their return by shifting the focus to reuniting all the Parthenon sculptures in one place, and with the promise of a new Acropolis Museum, purpose-built to accommodate the Marbles upon their return to Greece. The Acropolis Museum was indeed completed in 2008 and now principally contains finds from the slopes of the Acropolis, works from the archaic period, the classical Acropolis, the post-Parthenon and the Roman periods, bringing these works together close to their original location. It is due officially to open in the course of 2009.

In November 2006, the United Nations Assembly adopted a resolution reaffirming its commitment to the protection of cultural heritage. Following this, in March 2008, Greece hosted the Athens International Conference on the **Return of Cultural Objects to their Countries of Origin** within the framework of the activities of the Inter-governmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, formed by UNESCO in 1978. During this conference, the concept and importance of cultural context was frequently emphasized, and a recent trend towards the return of items of cultural heritage to their country of origin identified, which was attributed to legal, social and ethical grounds for the preservation of
cultural identity and of world heritage. Recent examples of this trend include the University of Heidelberg in Germany and a Swedish teacher in 2006, the J. Paul Getty Museum in California in 2007, and US collector Shelby White in September 2008, all voluntarily returning fragments of ancient Athenian artworks to Greece.

Are There Any Reasons Why the Marbles Should Remain in England?

The opposing perspective calls for the Marbles to remain in the British Museum due to their importance and prominence, despite recent examples of artworks generously (and voluntarily) being returned to Greece. This opinion must be seen in the light of British responses to the arguments for the return of the Marbles to Greece.

As to the question of the legal rights or wrongs of the historical acquisition, a number of responses are put forward. The first gives a different interpretation to the ‘firmans’, taking the meaning of the authorization granted to Lord Elgin to include permission to remove the Marbles from the Parthenon and from Greece. However, it is argued that, even if the authorization granted originally was not actually that wide, various contemporaneous acts of ratification by the Ottoman authorities have removed any doubts as to the legality of the acquisition.

In particular, Lord Elgin was issued with a second ‘firman’ by the Sultan, which would presumably not have been granted if the authorities considered that he had exceeded the authority granted to him by the first ‘firman’ or otherwise abused his position. Furthermore, when a shipment of the Marbles was held up in the port of Piraeus (at the behest of the French), the Ottoman government gave written orders to the Athenian authorities to permit the shipment to proceed. If the removal of the Marbles can be regarded as ratified by these events, Lord Elgin acquired valid title to the Marbles which he in turn was able to transfer to the British government.

A second line of argument points to the fact that the Greek authorities never pursued their claim for the return of the Marbles against the British Museum or the British government in the courts, and that even diplomatic requests for their return did not begin until the 1980s. Greece must therefore be taken to have accepted the legality of the position and any claim for the return of the Marbles should now be barred through lapse of time.

Leaving aside purely legal considerations, many regard Lord Elgin in fact as the rescuer of the Marbles, which may well have suffered destruction or at least significant deterioration, had they not been removed from the Parthenon and from Greece, and also point to the British Museum’s track record in preserving the Marbles and making them accessible to the public for some 200 years. They may in fact now even be regarded as having become part of British cultural heritage. Any moral argument about preservation of cultural heritage used to demand the return of the Marbles to Greece must also take into consideration the principle of cultural internationalism. The Preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict states that “cultural property belonging to any people whatsoever ... is the cultural heritage of all mankind.” On this basis, the principle of repose has been invoked to argue that the Marbles should remain in the British Museum unless compelling reasons demand otherwise. An appreciation of their cultural value as part of classical Greek heritage (as opposed to their economic or political value) does not require actual possession of the Marbles by Greece. The question as to whether Greece or Britain can
provide better access to, and take better care of, the Marbles in the long term may support a somewhat moot debate for some time to come but even their exhibition in the Acropolis Museum would not restore the integrity of the Parthenon itself since the remaining sculptures were also removed from the building. It is the varying interpretation and arguments in response to these questions that have prolonged the debate as to where the Marbles should be displayed.

**What Are Possible Solutions?**

The first, and simplest, solution would be for the Marbles to remain in Britain on the basis of the access and care which the British Museum provides. This solution does not however resolve the challenge of contextualizing cultural heritage.

The second possibility would be to return the Marbles to Greece, to be housed in the Acropolis Museum. This would contextualize the objects, and arguably make Greek cultural heritage more complete. Apart from Britain’s refusal to return the Marbles, the cost and danger of moving the sculptures to Athens may be additional obstacles to this solution. The display of copies, rather than the original sculptures, is comparatively unsatisfactory from Greece’s point of view.

Another proposal, made by Greece in 1994, asked the British Museum for the return of the pediment sculptures, in return for which Greece would drop its claim to the rest of the collection. In 2000, Greece suggested that, in exchange for the collection of Parthenon works, the Greek Government would provide Greek antiquities on loan for exhibition in the British Museum, including rare and newly discovered antiquities that have not been seen outside Greece. This offer attempted to resolve some of the practical issues which the British Museum would face as a result of relocating the Marbles to Greece. However, none of Greece’s suggestions have so far found sufficient resonance in Britain to tip the balance in favor of return of the Marbles.

**Conclusion**

Although the debate about the return of the Marbles and, indeed, the wider debate about the merits of repatriation of cultural property, has been ongoing now for over twenty years, it remains to be seen whether the international attitude towards the protection of cultural heritage will support a national or international perspective, and what effect this will have not only on the Elgin Marbles, but on collections of foreign cultural heritage objects in the world’s great museums in general.

In the meantime the old adage that “possession is nine tenths of the law” will continue to rule and the world at large can rest assured by the knowledge that the Marbles are safely kept in one of the world’s leading museums and continue to inspire public and scholarly interest and an appreciation of classical Hellenic art at its best.

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“Cowboy Buddha,” by Millar Kelley
Q&A with Corinne Hershkovitch

How did your interest in art & cultural heritage law arise? How did you become involved in Holocaust restitution claims?

I started out work as an intellectual property lawyer at two large French firms before I set up my own practice in 1996. Shortly afterwards, I started to work on my first art matter when a client came to see me about the restitution of pictures belonging to his grandfather’s estate from the Louvre, including works by Tiepolo, Strozzi, and other Italian Masters dating from the 17th and 18th century.

One of our first tasks was to investigate the historic circumstances. The client’s grandfather was a very wealthy Italian Jewish businessman who settled in Paris at the beginning of the 20th century. His apartment housed an important private collection comprising some 5,000 books, French 18th century furniture, and some 250 (mostly Italian) old master paintings. He died of natural causes in Paris in 1940 but his children, including the client’s mother, had fled Paris due to the occupation of Paris and the persecution of the Jewish population and were therefore unable to deal with the inheritance. The French courts appointed an administrator who consigned the entire collection for auction at the French auctioneers Hotel Drouot. The collection was sold but five of the pictures from the collection where later identified as part of some 100,000 pictures returned by the US “collecting point” from Germany to France at the end of the war. They were amongst a group of some 2,000 works qualified and marked as “MNR” (Musées Nationaux Recuperation”), i.e., because of their quality and importance, they were to be held by a national museum pending any restitution claim. The pictures in issue were allocated to the Louvre. In the 1950s, the client’s mother unsuccessfully claimed for the return of the pictures. The claim was rejected on the grounds that the heirs had shown no interest in the inheritance and the sale had apparently been ordered “legally”.

The issue of the “MNR” pictures became a subject of public debate in France in the 1990s and the Government organized an exhibition of the remaining works held by state institutions in that category. It was at that exhibition, that the client identified his grandfather’s pictures. We went to see the exhibition again together and identified them against the original auction catalogue. I then submitted a claim for their restitution to the French Ministry of Culture. The claim was refused, again on the grounds that the sale had appeared “legitimate.” However, we
were able to rely on a law enacted by General de Gaulle in 1945, which was intended to reverse the effect of French “Vichy” legislation, legitimizing the wrongful appropriation of Jewish property during the war. It was quite clear why the heirs were unable in the circumstances to deal with their father’s estate. The claim succeeded on appeal and we managed to achieve the return of all five pictures. They were later sold at Christie’s in New York and the Tiepolo now hangs in the Getty Museum in Los Angeles.

To what extent is this experience typical for the French Government’s approach to Holocaust restitution claim?

The problem is really one of collective historic responsibility. After the war, the French state regarded the measures adopted by the Vichy government during the war as effectively not being the responsibility of post-war France. Outside of the strict restitution of property to Jewish owners, no claims could ever be brought for compensation or damages for loss or hardship suffered at the hands of the Vichy regime. This has for more than 50 years now influenced French attitudes towards the Holocaust and fostered an attitude holding France blameless in what happened during the collaboration.

You have since dealt with many more restitution claims, do any of these stand out for you for legal or other reasons?

I also have some experience acting for the museum’s side in relation to a restitution claim. This concerned a Canaletto painting which was and still now remains in the Musée des Beaux Arts, Hotel de Rohan in Strasbourg in eastern France, a local municipal museum which acquired it from a French private collection. However, the picture had originally belonged to a wealthy Viennese Jewish family and had been sold at a forced auction at the Dorotheum during the 1940s. When it became apparent that the picture had a looted art background, the museum approached me to seek to help secure it for the collection against payment of compensation to the rightful heirs. However, the French museums directorate wanted to return the picture so the museum’s director and I first had to persuade the French state to allow me to negotiate a compensation amount with the heirs, who now lived in the United States. Once we succeeded in this, we had long and intense negotiations with the heir’s US attorneys but eventually a compensation figure was agreed and the picture saved for the museum.

Where do you see the current trends in French art law?

First, in that art law is now recognized as an increasingly important field of practice. Due to the internationalization of the art market, a growing network of international conventions, the problem of illicit exports, et cetera, we are seeing an increasing amount of regulation in what was not so long ago a more or less entirely unregulated market.

Second, there is a big current debate here about whether France should ratify the UNIDROIT Convention On Stolen Or Illegally Exported Cultural Objects. This has a lot to do with the art market resisting the due diligence obligations which this would impose.

Third, the French state has traditionally played a large role in the art world and was the principal source of funds for the acquisition of new works. This is now beginning to change as public funds are becoming more scarce and institutions have to start looking for alternative sources of funds, as has been the case in the UK and the United States for a long time. To help with this process, the French government
recently enacted a very good new statute but the difficulty in France is to bring about the sea-change in attitude which this requires and many institutions find difficult to adapt.

Rather curiously, Christie’s and Sotheby’s did not have a presence in France until a few years ago. Can you explain the reasons to us?

This was an example of the French state carving out state monopolies: the appointment of an auctioneer was a government prerogative and not open to foreigners. This was clearly contrary to EU law but it was only in the year 2000 that France was finally forced to change its law and admit outsiders into the market place. Since then, Paris has if anything probably grown in importance as an international sales location and both houses have taken a significant share of the fine arts and antiques auction market.

Do you see any signs of the credit crunch starting to affect the art market in your day-to-day work?

Yes, certainly. Art dealers and auctioneers increasingly have difficulty getting paid following a sale, in particular, for contemporary art. By contrast, old masters appear once again to be becoming something of a safe haven.

What tips do you have for young lawyers who are interested in art & cultural heritage law?

Art & cultural heritage law is a relatively new practice area in France but becoming very fashionable. At the moment, only the University of Lyon offers art law courses in France. A solid grounding in general law is probably just as useful because art law covers such a wide range of legal topics, ranging from private to administrative and public law. The Association Art et Droit is the leading professional organization for art lawyers and worth getting in touch with for anybody with an interest in the field. There are only a handful of firms in Paris with a serious art law practice and therefore only a limited number of private practice positions. French museums do not tend to have any legal staff but rely on the Ministry of Culture for advice. However, I can see opportunities increasing for young lawyers as the art market becomes both more commercial and more regulated and there will be an increasing demand for art lawyers.
August

The American Association of Museums issued a statement announcing new ethical guidelines regarding the acquisition of antiquities. The new Standards Regarding Archaeological Material and Ancient Art are meant to discourage illicit excavation of archaeological sites and monuments. The Standards require public access to a museum’s acquisition and provenance policies and recommend that museums not obtain ancient art or archaeological material that has no ownership history prior to November 17, 1970, the date on which the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was signed.

A federal jury in Boston found former attorney Robert M. Mardirosian guilty under the National Stolen Property Act of receiving seven paintings stolen by one of his clients from a house in Massachusetts in 1978. Mardirosian kept the paintings in Europe. The artworks included one by Cezanne, *Pitcher and Fruits*. The original thief passed on the paintings to Mardirosian. Then some were transferred from Massachusetts to Geneva, and then to Sotheby’s in London in preparation for a sale, reported the *Boston Globe*.

New York antiquities collector Shelby White delivered a bronze krater and the upper portion of a funerary stela to Greece pursuant to an agreement with Greek authorities who agreed not to pursue legal action in connection with the objects’ illegal removal from that nation. *Agence France-Presse* stated that the krater was “likely looted from a royal tomb in the northern region of Pieria” and the upper funerary stela was “found in the early 1960s in Porto Rafti, a coastal resort east of Athens. Three decades later, a Greek archaeologist identified its missing upper fragment in the White-Levy collection from a New York Metropolitan Museum exhibit catalogue.”

The *Guardian* reported on the controversy that has erupted over the British Ministry of Defense’s deal with Tampa based Odyssey Marine Exploration to salvage what is believed to be the warship Sussex, which sank in 1694 with a treasure of gold. The government maintains that the archaeological value of the wreckage site will be respected, while archaeologists remain unconvinced. The agreement calls for Britain and Odyssey to split the treasure from the find on a percentage scale and authorizes National Geographic television to document the recovery.

Royal Canadian Mounted Police found the last of the gold pieces by artist Bill Reid stolen in
ART & ANTIQUITIES TRAFFICKING NEWS NOTES

August (cont’d)

May 2008 from the Museum of Anthropology at the University of British Columbia. The Globe and Mail uncovered that that money was paid by the RCMP to retrieve the items. According to CBC News, items including bracelets, brooches and cufflinks by Reid were originally stolen from the museum in addition to three Mexican art objects. In June 2008, police recovered ten of Reid’s stolen pieces and the Mexican objects, arresting three people.

The FBI’s web site prominently featured an announcement titled “Stolen Art Uncovered: Is It Yours?” It was part of the federal law enforcement agency’s attempt to identify a trove of stolen art found in 2006 in the Manhattan apartment of the deceased William Milliken Vanderbilt Kingsland (born Melvyn Kohn). More than 300 items found included artworks by Picasso, Copley, Fairfield Porter, and Odilon Redon, reported the New York Times.

The Netherlands returned a statue to Egypt that was unearthed by British and Dutch archaeologists in 1985, and then later stolen from a warehouse. The Associated Press said that a businessman took the Ushebti statue to a museum in Leiden when the 3000+ year old statue was discovered.

China’s State Administration of Cultural Heritage announced its intent to enter into an agreement that would curb antiquities trafficking, according to China View. Similar agreements between China and other nations provide for the free exchange of information about smuggled antiquities.

Artdaily.org reported that Tiffany glass dealers Paula and Howard Ellman ended up purchasing their own items in a Philadelphia auction that had been stolen in 1971 from their New York gallery. The four art glass objects had the label of their Antique Center of America gallery still on them.

Brazilian police recovered Pablo Picasso’s Minotaur, Drinker and Women, which was stolen at gunpoint along with three other works from Sao Paulo’s Pinacoteca Museum in June 2008. Reuters reported that authorities have already arrested two persons associated with the crime.

Press TV reported that Iranian authorities recovered over 1100 looted antiquities as part of a police operation that caught seven smuggler rings and closed four illegal excavations.

Matthew Boire, age 26, was charged with another count of stealing from the Clinton County Historical Association in Plattsburg, New York where he was a member of the board of directors. The Press Republican said that Boire was already serving a sentence of probation and community service for stealing several objects from the museum when police discovered that he still had a stolen civil war uniform in his possession. Boire pled guilty to the charge, and prosecutors announced that they would be seeking prison time for the thief.

VCM/The Roman Forum announced that the Italian Carabinieri uncovered approximately 30 looted archaeological objects in the hands of a tailor, including an ancient Roman sarcophagus. The objects originated from illegal excavations located in Campania and Apulia.

A news release from the New York Attorney General announced that a former New York State Department of Education employee pleaded guilty to stealing more than $50,000 worth of historic documents and artifacts from the New York State Library and Archives.
The United States extended import restrictions on archaeological material from Cambodia under the terms of the Cultural Property Implementation Act. The restrictions last for five years.

The United States Senate voted to give its advice and consent to ratification of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The Peruvian Times reported that police recovered 740 stolen pre-Columbian artifacts sold in a souvenir shop across the street from the Incan Museum in Cuzco’s main plaza. Two people were arrested.

Greek police arrested four people for antiquity smuggling after they tried to sell religious antiquities to undercover officers for $7.7 million, according to EU Business.

Radio Netherlands aired a story detailing how Dutch police raided a house in Den Bosch and arrested three people, solving the six year old robbery of the Frans Hals Museum that netted the theft of five masterpieces paintings.

US Immigration and Customs Enforcement transferred more than 1,000 seized antiquities to Iraqi Ambassador Samir Sumaida’ie during a ceremony in Washington, DC, according to the Voice of America. The items were seized by US customs officials from smugglers and included ceramic pieces, figurines, tablets, and ancient coins. No prosecutions resulted from the seizures.

Dinosaur bones and fossils from 145 million years ago were discovered at an archaeological site in Utah this past summer. Vandals wrecked the site and stole two bones, according to Deseret News. Scott Foss, the Bureau of Land Management’s regional paleontologist was reported to say that “It’s a large scientific loss.”

The United States returned two archaeological pieces to the Mexican government at a ceremony held in California. One piece was a stone Teotihuacan mask of a face and the other was a ceramic statuette of a man, reported the San Bernadino County Sun. In 2004, an unnamed Denver art dealer tried to import the pieces from a Paris dealer, but a customs agent suspected that they were pre-Columbian. Since the importer could not show that the items were legally taken from Mexico, the objects were forfeited to the US government where they were kept in a warehouse in Riverside before being returned. No arrests were made.

Longtime art and antiquities theft investigator Robert Wittman retired after twenty years with the FBI.

The Associated Press reported that 168 pre-Columbian antiquities were returned by the United States to Ecuador. The objects hailed from such cultures as the Jama Coaque and the Mantera and were seized two years ago by the FBI after a Miami-based broker offered these and other artifacts for sale for $5 million through the International Council of Museums. The broker and others involved in the case were not charged. However, Cecilia Marillo-Aviles from Ecuador pleaded guilty to a smuggling charge but was only sentenced to one day in jail.

A US federal district court in Florida sentenced Bernard Jean Ternus, a French national, to 62 months incarceration for his role in an August 2007 armed robbery of the Musée des Beaux-Arts in Nice, France, according to a release issued by the US Justice Department. The museum heist netted the “Cliffs Near Dieppe” by Claude Monet, “The Lane of Poplars at Moret” by Alfred Sisley, and “Allegory of Water” and “Allegory of Earth” by Jan Breughel the Elder. Ternus pled guilty to conspiring to transport the four stolen paintings. The Justice Department state: “Ternus previously admitted in open
court during a plea hearing that, from August 2007 through June 2008, he and his co-conspirators worked to sell the stolen paintings to undercover agents of the Federal Bureau of Investigation and an undercover officer of the French National Police.”

The Associated Press reported that Macedonian authorities seized 70 looted artifacts, including coins, figurines, jewelry and amphora from the Hellenistic and Roman periods. The antiquities were suspected to have been pillaged from Isar, one of the largest archaeological sites in the country. Police made the discovery after raiding the home of two brothers with prior convictions for antiquities smuggling.

Switzerland agreed to give back to Egypt an eye stolen in 1972 from a statue of Amenhotep III at Luxor Temple. Agence France-Presse explained that the eye was taken after a fire broke out. “The thieves sold it to an American antiquities dealer who then auctioned it at Sotheby’s,” stated Egypt cultural minister Faruk Hosni. A German antiquities dealer then bought it before it wound up in a Basel museum.

The Telegraph of Calcutta, India described how plainclothes police discovered 53 rare ivory artifacts in a bag after taking two suspicious men into custody. The objects have designs similar to those found in Konark temple. The paper went on to say: “The police suspect an underground network involved in illegal trade in ivory artefacts with its hub in south India was behind the attempt to smuggle out the priceless antiques with the help of local conduits.”

The Museum of Fine Arts in Budapest announced that it is ready to repatriate some of its antiquities to Greece. The Associated Press described how the 22 pieces were purchased by the museum several years ago from a private owner. Hungarian foreign minister Kinga Goncz stated: “It turned out in the last few months that some of them are for sure from excavations, from Greece, and ... were illegally brought to Hungary.”

A federal district court judge in New York sentenced historian Edward Renihan, Jr. to 18 months of incarceration for his taking and selling letters written by George Washington and Abraham Lincoln. US Attorney for the Southern District of New York Michael Garcia described the facts as follows: “Between March 2005 and May 2006, Renehan served as Interim Executive Director of the Theodore Roosevelt Association. Beginning in early February 2006, Renehan stole from the Theodore Roosevelt Association, among other things: a letter written on March 1, 1840 by Abraham Lincoln, and two letters written by George Washington on August 9, 1791 and December 29, 1778, respectively. Renehan then resold the letters through a Manhattan gallery for a total of approximately $97,000, of which he received $86,700.”

The Yemeni news agency Saba reported that authorities confiscated 30 antiquities that three individuals were attempting to smuggle out of the country.

Zachary Scranton, 21, was charged in federal district court in Columbus, Ohio with stealing “Laws of the Territory of the United States North West of the Ohio,” also known as the Maxwell Code. The 1796 publication was reported stolen from the Rutherford B. Hayes Presidential Center Library in August 2008, according to the News-Messenger.

The Portland Art Museum acquired a stone sculpture of a Ganesha that was purchased from Christie’s for $50,000 to $100,000. Because the museum is uncertain of its provenance, it is the first museum to place an antiquity on the web site of the Association of Art Museum Directors to uncover its
ownership history. The item can be seen at the AAMD object registry at aamdobjectregistry.org.

*Indian Country Today* reported that an amendment to the Indian Arts and Crafts Act of 1990 was passed by the Senate and sent to the House for consideration. The legislation would allow any federal law authority to investigate the sale of arts and crafts that are misrepresented to have been made by American Indians.

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Afghan officials held a press conference to announce that the national museum at Herat was hit by a gang of thieves, resulting in the loss of 22 artifacts. One of the two suspects taken into custody was later found dead, reported *Agence France-Presse*. “We’re investigating whether he was killed. If we find out that he was murdered in prison this will confirm our suspicions that we are dealing with a very dangerous gang,” Najibullah Manali, a cultural ministry official said.

*Myanmar Times & Business* reported that the Myanmar (formerly known as Burma) government was asking member nations of the Association of Southeast Asian Nations (ASEAN) to join together to curb antiquities trafficking. U San Win, the director general of the Department of Archaeology at the National Museum and Library, said that “[w]e will collaborate with ASEAN countries to ban illegal trading. If our antiques make their way to their countries through illegal channels they will return them to us, and when we find their antiques we will give them back.”

*Timesonline* reported that Francesco Rutelli, the former Italian Deputy Prime Minister and Minister for Culture responsible for trying to recover many illegally looted and exported antiquities over the last several years, was pressuring Bonhams in London to stop an impending sale of artifacts previously in the hands of dealer Robin Symes and believed to be illicit. In statements made to the press, the Italian Parliament, and to the Culture Minister, Rutelli demanded that the sale of unprovenanced Italian antiquities be halted by the auction house. Bonhams initially responded that it had not received any legal request to stop the sale. However, Bonhams made an eleventh hour withdrawal of the lots after the Italian Embassy intervened, according to *ANSA*.

The White House announced in a press statement that the President intended to appoint Brent Benjamin to be a member of the Cultural Property Advisory Committee to fulfill the remainder of a three-year term that expires in 2011. Benjamin, the director of the St. Louis Art Museum (SLAM), has been the source of controversy over a mummy mask that the Egyptian government says was illegally excavated on its soil and later accessioned by the SLAM. Benjamin has refused to return the mask.

Police at Sana’a International Airport stopped a Yemeni woman from smuggling 38 ancient manuscripts and other antiquities onto a Qatar bound flight, reported the *Yemen Observer*.

The *UN News Centre* announced this month that UNESCO’s Convention on the Protection of Underwater Cultural Heritage will into force in January 2009. The treaty’s intent is to prevent looting and treasure hunting of sunken vessels and to curb trafficking of salvaged objects across international borders. The UN states that “[t]he convention is based on four main principles – the obligations to preserve underwater cultural heritage, to ensure no commercial exploitation of this heritage, to promote training in underwater archaeology and to raise public awareness of the importance of sunken cultural property.” Only 20 nations are signatories to the Convention. They include: Barbados, Bulgaria,
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Cambodia, Croatia, Cuba, Ecuador, Lebanon, Libya, Lithuania, Mexico, Montenegro, Nigeria, Panama, Paraguay, Portugal, Romania, Saint Lucia, Slovenia, Spain, and Ukraine.

One of Shakespeare’s books was returned by United States authorities to an undisclosed location in England. Ten years earlier the first folio had been stolen from Durham University Library. This past June a man approached the Folger Shakespeare Library in Washington DC, saying he found the book in Cuba. The Independent explained: “The authorities set about tracing the man who took the folio to the library, and who told staff he was an “international businessman.” It led to the arrest of eccentric playboy Raymond Scott, 51, who lived with his 80-year-old mother in a quiet cul-de-sac in Washington, Tyne and Wear.”

The Associated Press reported that Spain returned 45 illicit pre-Columbian objects to Peru during a visit by King Juan Carlos and Queen Sofia. Twelve of the artifacts were looted from the site of the Lords of Sipan tomb.

Lebanese customs officials confiscated 57 ancient Iraqi antiquities consisting of statues, pottery and stone carvings from the automobile of a Syrian and an Iraqi smuggler near the Syrian-Lebanese border. Following their arrest, authorities found more illegal artifacts during a house raid, according to Agence France-Presse.

The Art Newspaper reported that Scotland Yard’s Art and Antiques Unit has recruited volunteers with expertise in cultural objects under its ArtBeat program to supplement its investigative resources.

-Ricardo St. Hilaire

Natasa Kokic
On June 4, 2008, the Association of Art Museum Directors (AAMD) issued its New Report on Acquisition of Archaeological Materials and Ancient Art, which amended its June 4, 2004 Task Force Report. The Report represents a shift in focus from the AAMD’s prior approaches while allowing flexible, case-by-case assessment. Instead of the approach adopted in 2004, which left individual museums on a fully case-by-case basis to assess (1) the potential legal risk; and (2) the object’s possible link to clandestine excavation within the last ten years, the new Report, in part, adopts the “blank check” approach previously rejected in relation to UNESCO. The “blank check” approach would have required the United States to try to block importation of any object exported in violation of any source nation’s export regulations. The new AAMD Report in Principle I(E) “recognizes the date of the [UNESCO] Convention, November 17, 1970 (‘1970’), as providing the most pertinent threshold for the application of more rigorous standards to the acquisition of archeological materials and ancient art as well as for the development of a unified set of expectations for museums, sellers and donors.” It also provides that AAMD member museums should not acquire a work unless its provenance research: (1) “substantiates that the work was outside its country of probable modern discovery before 1970”; or (2) “was legally exported from its probable country of modern discovery after 1970.”

Principle I(F) retains flexibility to exercise judgment when complete ownership history is unavailable. It states:

Recognizing that a complete recent ownership history may not be obtainable for all archeological material and every work of ancient art, the AAMD believes that its member museums should have the right to exercise their institutional responsibility to make informed and defensible judgments about the appropriateness of acquiring such an object if, in their opinion, doing so would satisfy the requirements set forth in the Guidelines below and meet the highest standards of due diligence and transparency as articulated in this Statement of Principles.

Guideline II(F) expands upon this flexibility, which fairly can be described as an intentional loophole:

The AAMD recognizes that even after the most extensive research, many works will lack a complete documented ownership history. In some instances, an informed judgment can indicate that the work was outside its probable country of modern discovery before 1970 or legally exported from its probable country of modern discovery after 1970, and therefore can be acquired. In other instances, the cumulative facts and circumstances resulting from provenance research, including, but not limited to, the independent exhibition and publication of the work, the length of time it has been on public display and its recent ownership history, allow a museum to make an informed judgment to acquire the work, consistent with the Statement of Principles above.
The overarching guiding light to operating within the loophole and deciding whether to acquire an object with incomplete ownership history back to 1970 is stated in Guideline F (second paragraph): “In both instances, the museum must carefully balance the possible financial and reputational harm of taking such a step against the benefit of collecting, presenting, and preserving the work in trust for the educational benefit of present and future generations.” (emphasis added). This emphasis is less legalistic than that of the 2004 Report. And, the guiding light is not that of preserving archeological context, but that of the bottom line of the museum. This approach also underscores the importance of museum leaders’ fiduciary obligations to manage museums and the objects within them for the public.

The 2008 Report largely repeats the remaining due diligence standards of the 2004 Report, but a few differences should be highlighted. Guideline II(A) seems to strengthen the due diligence standard: “Member museums should thoroughly research the ownership history of archeological materials or works of ancient art . . . prior to their acquisition, including making a rigorous effort to obtain accurate written documentation with respect to their history, including import and export documents.” (emphasis added). Moreover, Guideline II(C) states that member museums “should require sellers, donors, and their representatives to provide all information of which they have knowledge, and documentation that they possess, related to the work being offered. . .” Additionally, the Report announced the creation of a new AAMD web site where museums will publish images and information about new acquisitions. Thus, the AAMD is recognizing that the old days – of almost unquestioned faith in representations by esteemed donors about an object’s ownership history – are over. The market’s previous standard of full anonymity and secrecy is changing.

The American Association of Museums (AAM) also weighed in on the debate in its new Standards Regarding Archaeological Material and Ancient Art approved by its Board of Directors on July 2008. The new AAM standards largely mirror the AAMD approach, but arguably put even more of an emphasis on the date UNESCO was opened for signature, November 17, 1970 (1970). It states in Section 2, ¶ 3, that even if an acquisition would be legal, museums “should not acquire any object that, to the knowledge of the museum, has been illegally exported from its country of modern discovery or the country where it was last legally owned.”

The standards “recommend” that “museums require documentation that the object was” (1) “out of its probable country of modern discovery” by 1970; or (2) legally exported out of its country of modern discovery. The AAM policy also contains a loophole “when there is substantial but not full documentation” of provenance, and states that if a museum utilizes the loophole, “it should be transparent about why this is an appropriate decision in alignment with the institution’s collections policy and applicable ethics codes.”

Dr. Kwame Opoku, a frequent contributor to the debate concerning repatriation of African objects from Western museums who wrote an essay in 2008 that attracted a rejoinder on Afrikanet.info from Philip de Montebello, critiqued the AAM loophole:

The solution of the AAM is what one often finds where there is division of opinion and both sides are almost equally strong: a bold general principle with an exception which almost negates totally the general principle. Both sides win. One step forward and one back.
(Kwame Opoku, New AAM Standards for the Acquisition of Archaeological Material and Ancient Art: A Minor “American Revolution”? , Museum Security Network Email, Sept. 7, 2008.)

But surely the expression of the U.S. museum community’s new attitude toward the “blank check” approach represents a significant development. Also significant is the fact that the Getty and the Indianapolis Museum of Art had already adopted the 1970 “blank check” approach for new acquisitions – without a loophole – in 2006 and 2007, respectively. The Getty’s adoption was a permanent change whereas the Indianapolis Museum of Art policy was a stop-gap pending the adoption of new standards by the AAMD. The British Museum also acknowledged 1970 as a bright line in March 2004 and is one of the signatories of the 2002 Declaration on the Importance and Value of Universal Museums.

These AAM standards apply to new acquisitions, but the standards take a revolutionary position in regard to existing collections. They state in relevant part:

In order to advance further research, public trust, and accountability museums should make available the known ownership history of archeological materials and ancient art in their collections, and make serious efforts to allocate time and funding to conduct research on objects when provenance is incomplete or uncertain. Museums may continue to respect requests for anonymity by donors.

This standard is revolutionary because there is no limit to the number of objects within a museum’s collection to which the standard applies, and some of the most prestigious institutions’ collections’ contain hundreds of thousands of objects. The task of full provenance research as to all archaeological and ancient art objects obtained after 1970 would be enormous. As stated by Lee Rosenbaum who pens the influential CultureGrrl blog: “Did they realize what they were saying?” It should be noted, however, that the new standards are aspirational in nature, not requirements.

Finally, the new AAM Standard 4 seems to be a more reconciliatory approach toward handling claims to objects as well. It states:

Museums should respectfully and diligently address ownership claims to antiques and archaeological material. Each claim, whether based on ethical or legal considerations, should be considered on its own merits. When appropriate and reasonably practical, museums should seek to resolve claims through voluntary discussions directly with a claimant or facilitated by a third party.

This new standard heavily reflects the cooperative approach to claims to Nazi-looted art previously advanced by the AAMD and the AAM, as well as the “Washington Principles,” eleven principles acceded to by 44 governments at a conference held in Washington, D.C. on December 3, 1998, which were reinforced in 2000 in Vilnius. The AAMD on June 4, 1998, issued guidelines that called on member museums to resolve legitimate claims to art in their collections “in an equitable, appropriate, and mutually agreeable manner.” The Washington Principles drew heavily from the AAMD guidelines and call for nations to reach “just and fair” solutions to Nazi-looted art claims. The AAM November 1999 Guidelines, amended April 2001, echo the AAMD standard. Similarly, the museum standards recommend the
use of mediation over litigation while Washington Principle 11 encourages nations “to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.” AAM Guideline 5 highlights that museums must review such claims while minding their fiduciary obligations to hold collections in the public trust. All of these standards and guidelines recognize that there is a tremendous variety in individual cases, and thus call for case-by-case evaluation. Although conciliatory in nature, it cannot be denied that the guidelines and principles are vague and lack instruction as to what is “equitable,” “appropriate,” or “just and fair” in difficult cases. And things have changed since this conciliatory tone was struck in 1998.

Ten years after the pivotal AAMD Report and Washington Principles in 1998, we are in an era where museums have begun to file declaratory judgment actions against claimants. They are throwing down the litigation gauntlet against fragile, perhaps weak, claims. It is telling that in May 2007, the AAMD issued a Position Paper stating that despite the large amount of Nazi-era provenance research that had been conducted in museums between 1998 and July 2006 (which one should note had not been uniformly progressive in all institutions), only “twenty-two works in American museum collections have been identified as having been stolen by the Nazis and not properly restituted after the war.” Although those who orchestrated the filing of declaratory judgment actions certainly felt such action was necessary to fulfill their fiduciary obligations to preserve museum collections for the public, it certainly seems a dramatic turn away from the spirit of 1998 and 1999. Is the same in store for antiquities? Will we transition out of this new phase of openness to a period of preemptive litigation strikes to defeat claims?
The Philadelphia Volunteer Lawyers for the Arts (PVLA) program of the Arts & Business Council of Greater Philadelphia is one of more than thirty Volunteer Lawyers for the Arts (VLA) organizations throughout the United States and Canada, offering attorneys the opportunity to represent artists and arts and cultural organizations pro bono, in addition to providing educational services to artists, cultural leaders and attorneys. PVLA's educational programs include continuing legal education (CLE) programs such as a periodic CLE in partnership with Penn Cultural Heritage Center of Penn Museum highlighting important issues related to cultural heritage and museums. Topics addressed include cultural heritage, cultural identity, museum ethics, international treaties and local Philadelphia case studies. Other subjects addressed by PVLA educational programs include the legal aspects of filmmaking, tax issues for visual artists and legal and contracting issues in the commissioning, fabrication and installation of public art.

**PVLA Pro Bono Opportunities**

In addition to providing CLE programming, the PVLA program, similar to many of its sister VLAs, provides attorneys with the opportunity to provide individual artists and arts and cultural organizations in the Greater Philadelphia Region with pro bono assistance on arts-related legal issues. In PVLA's experience, artists seek legal assistance for needs ranging from negotiating short and long-term contracts; employee/independent contractor matters; intellectual property challenges such as securing trademarks or copyrighting protection of artwork; tax concerns; establishing a nonprofit or for-profit entity; and small claims or other litigation. The impact of digital media on artists’ work from almost every artistic discipline has significantly escalated the need for time sensitive legal assistance.

The leadership of arts and cultural organizations also seek pro bono representation to remain current and compliant with an increasingly intricate set of legal requirements such as managing facilities and programs that must be accessible to disabled audiences; engaging creative individuals who work alternately as contractors and employees; producing work that is either “for hire” or, depending on circumstances, copyright protected; and developing programs to attract international artists to the region whose contracts are complicated by visas that are increasingly difficult to negotiate.

PVLA provides attorneys with three pro bono opportunities: Legal Line, Art Fax and Full Service Representation.

- **Legal Lines:** A Legal-Line is a no cost, one-time-only telephone consultation between an artist or representative of an arts or cultural organization and an attorney to discuss an arts-related legal matter. In a Legal-Line consultation the attorney provides legal advice – the attorney is not obligated to take any action on behalf of the client such as making telephone calls or drafting documents. Legal Line consultations are available to any artist or arts or cultural organization and the average Legal-Line consultation typically takes between 30 and 60 minutes.
- **Art Fax:** Like a Legal Line consultation, an Art Fax is a no cost, one-time-only telephone consultation on an arts-related
matter between an arts client and attorney. In an Arts Fax consultation a PVLA volunteer attorney provides a review of a one- to three-page legal document, such as a draft agreement. The attorney gives legal advice regarding the content of the document in question, such as suggesting additional provisions that would further protect the parties to the agreement and modifications to existing language.

• **Full Service Representation:** For matters that cannot be resolved with a single telephone call between a client and a PVLA volunteer attorney, the PVLA program provides Full Service Representation. In a Full Service Representation, the client becomes a full-fledged *pro bono* client of the attorney, and the relationship is subject to all of the ethical and other requirements of every attorney-client relationship.

PVLA’s volunteer attorneys include attorneys early in their careers, experienced partners, solo practitioners and in-house counsel. Attorneys volunteering with PVLA experience the ability to utilize their legal knowledge and expertise to help artists and arts and cultural organizations, and the opportunity to work on arts-related legal issues and cultural heritage law matters. In Philadelphia, for example, there has been a recurring need for *pro bono* assistance to local organizations seeking to protect local treasures, such as *The Dream Garden*, the Maxwell Parrish/Louis Comfort Tiffany mosaic masterpiece. Installed in 1916 in the headquarters of the Curtis Publishing Company, the massive mural was threatened with sale by its owner and removal in 1998. PVLA volunteer attorneys represented the Fairmount Park Art Association, the nation’s first and oldest public arts organization, in its role as an *amicus curiae* in the litigation brought by the City of Philadelphia to preserve *The Dream Garden* in the site for which it had been commissioned. Following more than three years of litigation, designation as an historic object under Philadelphia’s Preservation Ordinance and the emergence of a philanthropic solution, *The Dream Garden* is now owned by the Pennsylvania Academy of Fine Arts, on display in the site for which it was created.

PVLA was founded in 1978 as a nonprofit legal services organization. To broaden the legal assistance available to the cultural community, in March 2008 the PVLA program was integrated into the Arts & Business Council of Greater Philadelphia, ([Link to www.artsandbusinessphila.org](http://www.artsandbusinessphila.org)) a nonprofit organization dedicated to created mutually beneficial relationships between the business community and the arts and cultural sector across the Greater Philadelphia Region.

If interested in volunteering please go to: [http://www.artsandbusinessphila.org/pvla/lawyers.asp](http://www.artsandbusinessphila.org/pvla/lawyers.asp)
artifacts found in deep waters. It is not clear whether Odyssey Marine has fully succeeded in this regard: Odyssey Marine’s activities have generated controversy in Spain, the United Kingdom and the United States. This has rekindled discussion of the need for control over the looting and unwanted salvage activities here and abroad in a manner that is consistent with international law.

**Legal Framework: Law of the Sea Distinctions in Jurisdiction and Control for Natural and Cultural Heritage**

The Law of the Sea Convention provides the basic legal framework for activities related to underwater cultural heritage. Under the Law of the Sea Convention, the territorial waters of a country extend 12 nautical miles into the waters adjoining its land, with more limited control extending in a “contiguous zone,” which extends 24 nautical miles from the coast. A State may exercise control over economic resources extending 200 nautical miles from that shore in its “Exclusive Economic Zone” (EEZ). Under the Law of the Sea Convention, all nations share a general “duty to protect objects of an archaeological and historical nature found at sea” and are required to “co-operate for this purpose.” Article 303(1). This duty includes sites located within a State’s territorial waters.

The Law of the Sea framework is less clear with respect to the protection of underwater cultural heritage on the continental shelf seaward of the 24 nautical mile contiguous zone. Coastal nations do not have the same unilateral or exclusive authority to protect cultural heritage on their continental shelf and in their EEZ as they do to protect their natural heritage such as fish, oil, coral and coastal waters. Under Article 303(2) of the Law of the Sea Convention, a coastal nation’s authority to prevent looting and unwanted salvage does not extend out to the 200 nautical mile EEZ but is limited to the 24 nautical mile contiguous zone. The concept of control over economic resources in the EEZ is of limited use in the treatment of underwater cultural heritage.

For underwater cultural heritage found beyond a State’s EEZ in international waters, there is a requirement that “[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”

The Law of the Sea Convention reflects the careful balancing of coastal State jurisdiction and the rights of navigation that are so important to maritime nations. However, it is just a framework Convention which expressly states that this article is without prejudice to other “international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.” Article 303 (4). Some experts view this as an acknowledgement that new international law was contemplated.

**New International Law Protecting Underwater Cultural Heritage (UCH)**

The Convention on the Protection of Underwater Cultural Heritage will enter into force in January 2, 2009, three months after the twentieth instrument of acceptance. Adopted in 2001 by the UN Educational, Scientific and Cultural Organization’s (UNESCO) General Conference, the Convention represents an international response to the increased looting and destruction of underwater cultural heritage by treasure hunters.

The Convention is based on four main principles:

- the obligation to preserve underwater cultural heritage;
- in situ preservation policy and scientific rules for research & recovery;
• no commercial exploitation of this heritage; and
• cooperation among States to protect this heritage, particularly training, education and outreach.

The Convention does not arbitrate ownership claims nor prejudice the jurisdiction or sovereignty of States. The Convention’s Annex establishes rules for activities directed at underwater sites; these rules are widely recognized by archeologists.

The twenty (20) States Parties include: Barbados, Bulgaria, Cambodia, Croatia, Cuba, Ecuador, Lebanon, Libya, Lithuania, Mexico, Montenegro, Nigeria, Panama, Paraguay, Portugal, Romania, Saint Lucia, Slovenia, Spain and Ukraine.

The US and a number of other maritime nations have not yet signed the Convention due to reservations on: 1) treatment of sunken warships in the territorial waters, and 2) what is referred to as “creeping coastal State jurisdiction” over underwater cultural heritage on the continental shelf and EEZ.

Actions of the United States since 2001
Since the conclusion of negotiations at UNESCO in 2001, the US exhibited some leadership in regard to its concerns on: 1) the treatment of sunken warships, and 2) control of salvage seaward of 24 nautical mile contiguous zone.

Treatment of Sunken Warships
In 2001, President Clinton issued a Statement on the United States Policy for the Protection of Sunken Warships. In sum, it provides notice that the US maintains ownership of its sunken State craft wherever located unless expressly abandoned. The law of finds doesn’t apply and no salvage is authorized without the government’s consent. In 2004, the US Congress enacted the Sunken Military Craft Act (SMCA) which codified this policy, including the ban on the “law of finds” and requiring the consent of the appropriate government prior to any salvage. It protects US sunken military craft wherever located and foreign craft within the 24 nautical mile contiguous zone.

Protection of the Titanic: Underwater Cultural Heritage Beyond National Jurisdiction
In regard to underwater cultural heritage on the continental shelf and in the EEZ, the US (through the Department of State) in 2004 joined the UK in signing an International Agreement for the Protection of the Titanic. It provides a potential model for other agreements that fully addresses the US concerns about “creeping coastal State jurisdiction” consistent with the Law of the Sea Convention. The Annex to the Titanic Agreement is nearly identical to the Annex of the UNESCO Underwater Cultural Heritage Convention. The Department of State forwarded the proposed legislation necessary to implement this Titanic Agreement to the 109th and 110th Congress. To date, however, the proposed legislation has not been introduced by a member of Congress. There are likely a number of reasons for the inaction, including a lack of relative priority in the Congress and the Administration, and the perception that the concerns are being addressed in the US Federal Court’s (Eastern District of Virginia) oversight of the salvage of Titanic. The Court periodically requests reports on the status of the Agreement and legislation and has cited those materials as reflecting a public interest in the Titanic.

Other Recent Salvage Actions
There are several recent salvage actions by US salvors that are drawing international attention, including Odyssey Marine’s Black Swan salvage project that has resulted in reports in Spanish media accusing the US salvors of looting Spanish heritage. In order to preserve its interest in what it believes is the Spanish wreck Mercedes off the coast of Portugal near Spain, the Spanish government intervened before a US Court in Florida. The salvage of underwater
cultural heritage off the coast of the UK (believed to be the *Merchant Royal*) has similarly highlighted the need for law to protect underwater cultural heritage, wherever located, from US salvors.

**Suggested Next Steps**

The US remains interested in revisiting the Underwater Cultural Heritage Convention to address its concerns and entering into regional agreements to protect underwater cultural heritage. Regardless of those international efforts, there should be more US domestic control over US citizens and vessels conducting looting and unwanted salvage in US and abroad. While new legislation may be the best approach, improvements may be accomplished with new regulations and enforcement of existing laws.

**Conclusion**

The protection of underwater cultural heritage involves an interesting interplay of international law involving heritage law, and salvage law, plus other diverse and competing interests. If the past is indeed prologue, new laws will be necessary to control the new activities particularly in areas beyond the exclusive jurisdiction of the seaward limit of a nation’s 24 nautical mile contiguous zone.

**Workshop at AIA Meeting**

These and other issues will be discussed at the Annual Meeting of the Archaeological Institute of America (AIA) in Philadelphia on January 10, 2009 at a Workshop entitled “Legal Protection of Underwater Cultural Heritage: National and International Perspectives in Light of the ‘Black Swan’ Case.” Scheduled participants include: James Goold, David Bederman, Michele Aubry, Caroline Blanco, Jerome Hall and the author.
Tenure Track Position at Drexel University

The Department of Performing Arts at Drexel University’s Westphal College of Media Arts and Design seeks candidates for a tenure-track position for its Master of Science in Arts Administration starting Fall of 2009. The appointment is expected to be an Assistant Professor level, but a more senior appointment is possible for an exceptionally qualified candidate.

The college is seeking an individual for this position who can offer a combination of working experience in the field, a broad understanding of cultural policy (including knowledge of trends within the cultural and nonprofit sectors), and an ability to thrive in a dynamic and energetic academic environment.

One of the oldest programs in the nation, Drexel’s Arts Administration graduate program strives to provide the highest quality education for our students by integrating management practice, theory, and practicum into the curriculum.

Please consult the following announcement for the position description and visit the school website www.drexel.edu/westphal for an overview of Drexel University and our program.

Please contact cdefrancia@mac.com to make announcements in this Newsletter.