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# Beyond Wealth: Stories of Art, War, and Greed

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# BEYOND WEALTH: STORIES OF ART, WAR, AND GREED

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There is something about great art that can move otherwise law-abiding people to seek to acquire it even by taking advantage of the chaos and desperation of war. This Article concerns three stories of art acquisition in war. The first is the story of ancient mosaics taken from Cyprus after the 1974 Turkish invasion; the second is the story of five paintings by the great Viennese artist Gustav Klimt acquired around World War II; and the third is about a Sumerian statue that disappeared from an Iraqi museum sometime after the U.S.-led invasion of Iraq began in March 2003. The statue turned up in the summer of 2005 in a Brooklyn warehouse. All three stories provide glimpses of great artistic achievement as well as great desire and great greed. Each story also concerns international law and, in each, a failure of American decision-makers to look to the applicable international law. This failure is particularly curious with respect to these cases because in each the relevant international law supported outcomes various decision-makers were quite evidently seeking. The cases indicate unfamiliarity or discomfort with international law in the United States today, problems the legal academy might well address if the United States is to take greater advantage of the benefits international law has to offer.

## MOSAICS OF THE AUTOCEPHALOUS GREEK ORTHODOX CHURCH OF CYPRUS

The first of these revelatory stories is about a group of mosaics that were once a single work created to decorate a sixth century church on the island of Cyprus. The facts of this story are taken largely from *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, a 1989 decision of the U.S. District Court for the Southern District of Indiana[1] and the 1990 decision on the appeal to the Seventh Circuit.[2] The

* Robert and Marion Short Chair in Law, University of Notre Dame Law School. With thanks for research assistance to Lenore VanderZee, LL.M. This Article is based on a lecture given at the University of Alabama School of Law as part of the Meador Lecture Series on Wealth.

1. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).
2. 917 F.2d 278 (7th Cir. 1990).

District Court decision was affirmed by a three-judge panel,[3] but only one judge, Cudahy, in his concurring opinion discusses the relevant international law despite the fact that the case involved at least six countries, inter-governmental organizations, international non-governmental organizations, treaties, customary international law, war, and occupation.[4] Even he only raises international law as an additional point in support of the decision and not as the law of the case.[5] Rather, all four judges who heard the case held that Indiana law was the proper law.[6] As will be discussed below, the case for international law as the proper law seems far stronger.[7] International law has treaties and customary rules specifically devoted to the protection of cultural property in war and occupation, in particular, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[8] the United Nations Educational, Scientific and Cultural Organization's Convention on the Means of Prohibiting and Preventing the Illicit Transport, Export and Transfer of Ownership of Cultural Property,[9] and the Hague Convention (IV) of 1907.[10] Applying international law would have been the right choice of law for the case of these ancient mosaics.[11]

The four mosaics in the case were originally one mosaic created in 530 A.D. for a Greek Orthodox Church on Cyprus called the Church of the Panagia Kanakaria in the village of Lythrankomi.[12] It depicted Jesus as a young boy seated with his mother Mary on a throne.[13] The figures of Jesus and Mary were flanked by two archangels, and the central figures were bordered by a frieze consisting of busts of the twelve apostles.[14] The mosaic somehow survived both the period of "iconoclasm" and the ravages of time.[15] It should have been destroyed a thousand years ago when in the eighth century edicts mandated the destruction of religious images so they would not be the subject of veneration.[16] These iconoclast edicts were largely successful as the original Kanakaria mosaic is one of only six or seven Byzantine mosaics to have survived to this date.[17]

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3. *Id.* at 279.
4. *See id.* at 294–97 (Cudahy, J., concurring).
5. *See id.* at 295–97.
6. *Id.* at 286–87, 294 (majority opinion).
7. *See infra* notes 79–123 and accompanying text.
8. May 14, 1954, 249 U.N.T.S. 215 [hereinafter 1954 Hague Convention].
9. Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].
10. Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention (IV) of 1907].
11. See the discussion of art and antiquities being acquired in war-torn Iraq and the law that should protect them, *infra* notes 223–266 and accompanying text.
12. 717 F. Supp. at 1377.
13. *Id.*
14. *Id.* at 1377–78 (citing A.H.S. MEGAW AND E.J.W. HAWKINS, THE CHURCH OF THE PANAGIA KANAKARIA AT LYTHRANKOMI IN CYPRUS: ITS MOSAICS AND FRESCOES (1977)).
15. *Id.* at 1377.
16. *Id.*
17. *See id.*

Cyprus, the island where the Kanakaria Church is found, was a British colony from 1878 until it became independent in 1960.[18] In 1963, however, conflict broke out between Greek and Turkish Cypriots.[19] The United Nations intervened, establishing a peacekeeping force that has been in place ever since, but in 1974, Turkey invaded, taking control of more than a third of the island.[20] Turkey argued that it had the right to intervene under a treaty with Britain and Greece providing for the protection of the Turkish minority on Cyprus.[21] The use of force was generally condemned, however, and only Turkey had recognized the entity it established, the Turkish Republic of Northern Cyprus (TRNC), as of the time of the case.[22] In addition to using force in apparent violation of international law, Turkey also failed to follow the international law of occupation in taking control of northern Cyprus. A report by the European Commission of Human Rights found:

> a. During the military invasion and the first weeks after the cessation of the fighting, the Turkish troops committed looting and plundering on a large scale and an indiscriminate destruction of immovable, but mainly movable, property belonging to Greek Cypriots. . . .
>
> b. In the early stages of the occupation, the systematic usurpation and occupation of immovable property, mainly by the Turkish invading armed forces, was an everyday phenomenon.[23]

This failure to prevent looting extended even to churches: "Turkish Cypriot leaders evidently felt little obligation to preserve Orthodox churches, which many viewed as remnants of rulers who had oppressed them. Over the next 10 years [following the invasion], Greek Cypriot officials say, the churches were looted of more than 20,000 religious artifacts."[24] People living in the occupied zone reported to the Government of Cyprus and the Church about the looting and destruction of churches and

18. *Id.* at 1378.
19. *Id.*
20. *Id.*
21. For a discussion of the situation prior to the invasion and the treaty Turkey relied upon, see Thomas Ehrlich, *The Measuring Line of Occasion*, *in* 2 THE VIETNAM WAR AND INTERNATIONAL LAW 1050, 1052–54 (Richard A. Falk ed., 1969).
22. 717 F. Supp. at 1378.
23. KYPROS CHRYSOSTOMIDES, THE REPUBLIC OF CYPRUS 186–87 (2000) (quoting REPORT OF THE ECHR, Nos. 6780/74 & 6950/75, paras. 411–87, at 136–52).
24. Judith Miller & Stephen Kinzer, *Greek Orthodox Church Icons Ravaged in the Turkish Part of Cyprus*, N.Y. TIMES, Apr. 1, 1998, at A8.

other national monuments, including the theft of "mosaics, frescos, and icons."[25]

The Kanakaria Church is in the Turkish-held area of the island.[26] By 1976, all Greek Cypriots in the village had vacated, fleeing to the Greek-held south.[27] Sometime between August 1976 and October 1979, the interior of the Kanakaria Church was vandalized and the mosaics were forcibly removed from the apse of the church.[28] Judge Bauer in the appellate decision provided the following account:

> When the priests evacuated the Kanakaria Church in 1976, the mosaic was still intact. In the late 1970s, however, Church of Cyprus officials received increasing reports that Greek Cypriot churches and monuments in northern Cyprus were being attacked and vandalized, their contents stolen or destroyed. . . . In November, 1979, a resident of northern Cyprus brought word to the Republic's Department of Antiquities that this fate had also befallen the Kanakaria Church and its mosaic. Vandals had plundered the church, removing anything of value from its interior. The mosaic, or at least its most recognizable and valuable parts, had been forcibly ripped from the apse of the church. Once a place of worship, the Kanakaria Church had been reduced to a stable for farm animals.[29]

Turkish authorities in northern Cyprus purported to acquire all property of persons who left the north if they left, owing to the invasion or in the words of the decree: "'as a result of the situation after 20th July 1974.'"[30] Turkish authorities also sought to acquire all religious buildings and antiquities.[31] The same authorities sought to intervene in *Autocephalous* to assert title to the mosaics under these decrees.[32]

As soon as the Republic of Cyprus learned that the mosaics were no longer in the Kanakaria Church, it contacted UNESCO, informing officials of the theft.[33] UNESCO has special responsibility for protection of

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25. 717 F. Supp. at 1379.
26. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 280 (7th Cir. 1990).
27. *Id.*
28. *See id.* at 280–81.
29. *Id.*
30. *Id.* at 291.
31. *Id.* at 291–92.
32. *See id.*
33. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1380 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

world cultural heritage.[34] Cyprus also notified other people and organizations that might help in the recovery of the mosaics.[35]

In 1984, Peg Goldberg was the owner of an art gallery in Carmel, Indiana, an affluent Indianapolis suburb.[36] She went on a buying trip to the Netherlands in the hope of purchasing impressionist paintings and other more contemporary work.[37] After an attempt to purchase a Modigliani fell through, Robert Fitzgerald, another Indiana art dealer, introduced her to his friend, Michael van Rijn, who claimed to be a descendant of Rembrandt van Rijn *and* Peter Paul Reubens.[38] Van Rijn was also a known felon, convicted in France for forging the signature of Marc Chagall on prints of the artist's unsigned work.[39] Apparently, this was known to Goldberg, but she nevertheless entered into discussions with Fitzgerald and Van Rijn to purchase four ancient mosaics from an "extinct" church in northern Cyprus through a Turkish antiquities dealer, Aydin Dikman, based in Munich.[40]

Goldberg was very keen about the possibility of the purchase and quickly contacted her bank in Indianapolis.[41] She apparently did not, however, attempt to contact the Republic of Cyprus, the Autocephalous Greek-Orthodox Church, UNESCO, or the International Foundation for Art Research (IFAR); nor did she take any steps to check the credentials of the Turkish antiquities dealer.[42] She did not seek to verify title.[43] Instead, she went to Geneva, where she met Mr. Dikman in the "free port" area of the Geneva airport.[44] She saw the mosaics and set about getting cash to pay for them.[45] She needed to wait a few days for the bank loan and says she used the time to contact both UNESCO and IFAR.[46] In her call to UNESCO, she "inquired as to whether any treaties prevented 'the removal of items from northern Cyprus in the mid- to late-1970s to Germany,' but did not mention the mosaics."[47] IFAR has no record of her call, nor of a search she claims she requested regarding the mosaics.[48]

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34. *See* United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Centre—World Heritage, http://whc.unesco.org/en/about/ (last visited Mar. 10, 2008).
35. 717 F. Supp. at 1380.
36. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 281 (7th Cir. 1990).
37. *Id.*
38. 717 F. Supp. at 1381 & n.4.
39. *Id.* at 1381.
40. 917 F.2d at 281–82.
41. *See id.* at 282.
42. *See id.* at 283.
43. *See id.*
44. *Id.* at 282.
45. *See id.*
46. *See id.* at 282–83.
47. *Id.* at 283.
48. *Id.*

Goldberg soon received the requested loan of $1.2 million dollars from her bank.[49] Dikman had requested cash, so she brought two satchels stuffed with $100 bills to the meeting.[50] She kept $120,000 and gave the remaining $1,080,000 to Fitzgerald in return for the mosaics and a "[g]eneral bill of sale."[51] Fitzgerald distributed the $1.08 million among himself, Dikman, Van Rijn, and others.[52] Goldberg returned to Indianapolis the next day with the mosaics and deposited the remainder of the $120,000 into several business and personal accounts in her name.[53] She then developed a brochure to re-sell the mosaics and began contacting possible purchasers.[54] It was her intention to sell them for a healthy profit.[55] Two of her contacts led her to Dr. Marion True of the Getty Museum in Los Angeles.[56] Upon hearing of the mosaics, True contacted the Republic of Cyprus, notifying officials of the offer she had received.[57] It was through True's information that the Republic of Cyprus and the Church of Cyprus (hereinafter "Cyprus") finally located the mosaics in a suburb of Indianapolis.[58]

Naturally, Cyprus asked Goldberg to return the mosaics and even offered to reimburse the purchase price[59] as provided for in the UNESCO Convention.[60] When she refused, Cyprus brought a replevin action in the Federal District Court for the Southern District of Indiana.[61] The TRNC moved to be joined in the action as the true owners of the mosaics under the confiscatory edicts described above.[62] The Court refused to allow the TRNC to join, owing mostly to the fact that at the time of the case only Turkey had recognized it as the lawful government of northern Cyprus.[63]

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49. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1383 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 283 (7th Cir. 1990).

55. *See id.*

56. *Id.* While Judge Noland was complimentary of True, pointing out her apt name in the circumstances, at time of writing she is defending herself in Rome against criminal charges for illicit acquisition of antiquities for the J. Paul Getty Museum. She also faces charges in Greece. Dalya Alberge, *Getty Museum Gives Treasures Back to Greece*, TIMES (London), Dec. 13, 2006, *available at* 2006 WLNR 21545571; Hugh Eakin & Anthee Carassava, *Getty Deal to Return Treasures to Greece*, INT'L HERALD TRIB., Dec. 12, 2006, *available at* 2006 WLNR 21418113.

57. 917 F.2d at 283.

58. *See id.*

59. Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT'L L. 1177, 1180 (2005).

60. UNESCO Convention, *supra* note 9, art. 7(b)(ii).

61. 917 F.2d at 283-84.

62. William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW & POL'Y INT'L BUS. 123, 138 (1996).

63. *Id.*

Then, after doing a thorough analysis of Indiana law, Judge Noland awarded possession of the Kanakaria mosaics to Cyprus.[64] Goldberg had argued Swiss law applied, in the evident hope that she could prove she was a good faith purchaser.[65] Such purchasers may obtain title even from a thief in Switzerland.[66] Indiana has the opposite rule.[67] The court found the contacts in the case more substantial with Indiana than Switzerland,[68] however, and held that Goldberg never acquired good title to the mosaics.[69] The court also considered in the alternative that, even under Swiss law, Goldberg did not have good title, as she was hardly a good faith purchaser.[70]

Goldberg appealed.[71] The Seventh Circuit considered a variety of issues related to the case, but again, on the basis of Indiana law, it affirmed.[72] The Supreme Court denied *certiorari* and Goldberg finally handed over the mosaics to the Church.[73] The appellate court remonstrated with Goldberg for failing to exercise due diligence in a transaction where "'[a]ll the red flags are up, all the red lights are on, all the sirens are blaring.'"[74] As the Court observed, if Goldberg had pursued a full search with the International Foundation for Art Research, a full background check of the seller, or a title search, she would have quickly discovered the Church had "a valid, superior, and enforceable claim."[75] The appellate court again weighed the contacts in the case, straining to find more contacts to Indiana and, thus, a basis for applying Indiana law rather than Swiss law.[76] The appellate court also took up the issue of whether to recognize the decrees through which the TRNC sought to claim title to the mosaics.[77] Instead of turning to the decisive rule of international law on this question, the court considered only U.S. cases on the right of de facto entities to appear in U.S. courts and post-Civil War cases dealing with Confederate property decrees.[78]

Judge Cudahy in his concurrence did consider the contemporary international legal framework that protects cultural property in time of war and

64. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1395–1400 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).
65. *See id.* at 1400.
66. *See id.*
67. *See id.* at 1399 n.22
68. *Id.* at 1393–95.
69. *Id.* at 1398–99.
70. *Id.* at 1400–04.
71. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 279 (7th Cir. 1990).
72. *See id.* at 293–94.
73. *See* 502 U.S. 941 (1991).
74. 917 F.2d at 294 (quoting the testimony of Dr. Vikan).
75. *Id.*
76. *See id.* at 286–87.
77. *Id.* at 291–93.
78. *See id.*

occupation, though he agreed Indiana law governed the case.[79] He thought the 1954 Hague Convention "may" apply.[80] Judge Cudahy noted that "the Cypriot mosaics would be considered cultural property [under the Convention] warranting international protection."[81] He pointed out that the 1954 Hague Convention was applicable in the cases of invasion and occupation such as Turkey's invasion and occupation of Cyprus in 1974 and the United State's ongoing refusal to recognize the government it established in northern Cyprus.[82] The Hague Convention "prohibits the destruction or seizure of cultural property during armed conflict, whether international or civil in nature, and during periods of belligerent occupation."[83] In addition, the Hague Convention prohibits international trafficking in cultural property illegally seized during armed conflict or occupation.[84] Judge Cudahy viewed the TRNC's attempt to divest the Greek Cypriot Church of ownership in the mosaics as "interference of the sort contemplated by the 1954 Hague Convention."[85] Thus, the acts and decrees of the northern Cyprus government in attempting to divest the Greek Cypriot Church of title were without legal effect.[86]

Judge Cudahy also discussed Article 7 of the UNESCO Convention, which requires states "to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party . . . ."[87] He did not believe the UNESCO Convention applied directly to the case because the U.S. implementing

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79. *See id.* at 294–97 (Cudahy, J., concurring). It appears that the relevant international law was briefed in the case given that Judge Cudahy was aware of it. It is not known, however, whether the lawyers for Cyprus actually argued it should be the law of decision as opposed to supplementary supporting authority.

80. *Id.* at 295–96.

81. *Id.* at 295. The 1954 Hague Convention defines cultural property in Article 1:

> For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:
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> *(a)* movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
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> *(b)* buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph *(a)* such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph *(a)*;
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> *(c)* centres containing a large amount of cultural property as defined in sub-paragraphs *(a)* and *(b)*, to be known as "centres containing monuments".

1954 Hague Convention, *supra* note 8, art. 1.

82. 917 F.2d at 295–96.

83. *Id.* at 296.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (quoting UNESCO Convention, *supra* note 9, art. 7) (alteration in original).

legislation, the Cultural Property Implementation Act of 1983 (CPIA), has an effective date after the mosaics were stolen.[88] He also noted that the CPIA focuses on customs laws and not the type of replevin action in tort law at issue.[89]

While Judge Cudahy was correct that the CPIA could not be applied directly in the case, other international law did apply. First, Turkey and Cyprus are parties to the 1954 Hague Convention and were parties at the time of the invasion.[90] As a party, Turkey is bound under Article 18(1) of the Convention to apply the Convention with respect to another high contracting party.[91] The Convention requires in Article 4(3) that parties "prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."[92] The right choice of law, therefore, was the Convention in order to determine whether the mosaics could be lawfully acquired by anyone without the Church's permission. Under the Convention, they could not. The fact that the United States has signed but not ratified the Convention is not relevant to a choice-of-law decision.[93] The right choice of law is the law most applicable to the case.[94] The court considered applying Swiss law,[95] which is not at all part of the law of the United States but might have been applicable on other facts. The court faced no legal impediment to applying the Hague Convention as the proper law of the case.

Even if the court decided it was United States law that should apply in the case and not the 1954 Hague Convention per se, international law is part of U.S. law. The primary forms of international law are treaties, customary international law, and general principles of law.[96] Customary international law, which is proven through evidence of a general practice followed out of a sense of legal obligation, includes rules for the protection of cultural property in time of armed conflict and occupation.[97] In-

88. *Id.* at 296–97.

89. *Id.* at 297.

90. Turkey became a party in 1965 and Cyprus in 1964. *See* UNESCO, List of Signatories to the 1954 Hague Convention, http://erc.unesco.org/cp/convention.asp?KO=13637&language=E (last visited Mar. 10, 2008).

91. 1954 Hague Convention, *supra* note 8, art. 18(1).

92. *Id.* art. 4(3).

93. *See* 1954 Hague Convention, *supra* note 8, art. 18(3).

94. *See* Annette Kur, *Applicable Law: An Alternative Proposal for International Regulation*, 30 BROOK. J. INT'L L. 951, 952 (2005).

95. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1394–95 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

96. *See* Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055 [hereinafter Statute of the International Court of Justice].

97. In 2005, the International Committee of the Red Cross (ICRC) restated the relevant customary law principles as:

Rule 40. Each party to the conflict must protect cultural property:

deed, it is generally acknowledged that the 1954 Hague Convention is largely customary international law; certainly Article 4 is. This conclusion is based not only on the widespread support for the Convention but other evidence of state practice in support of similar rules in the 1970 UNESCO Convention[98] and the 1907 Hague Regulations.[99] Both treaties, like the 1954 Hague Convention, restrict acquiring and trafficking in cultural property in armed conflict and occupation. These three treaties, together with other state practice, form a clear rule of customary international law that should have been applied to protect transfer of title in the mosaics to any party other than the Church.

The United States helped move the 1954 Hague Convention to customary law status. First, it has signed the Convention and stated it plans to join.[100] Second, it has stated officially that it is generally bound by the customary international law obligation to protect cultural property.[101]

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A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory.

1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 132, 135 (2005); *see also* Jan Hladik, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the Notion of Military Necessity*, 835 INT'L REV. RED CROSS 621 (1999), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ39; John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190/191 MIL. L. REV. 111, 125, 129 (2006/2007); David A. Meyer, Note, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 387–89 (1993). For an article-by-article assessment of the 1954 Convention and its two Protocols, see KEVIN CHAMBERLAIN, WAR AND CULTURAL HERITAGE (2004).

98. UNESCO Convention, *supra* note 9, art. 7.

99. Hague Convention (IV) of 1907, *supra* note 10.

100. James A. R. Nafziger, *Protection of Cultural Heritage in Time of War and its Aftermath*, IFAR J., http://www.ifar.org/heritage.htm (last visited Mar. 10, 2008).

101. "The United States considers the obligations to protect natural, civilian, and cultural property to be customary international law." OFFICE OF GEN. COUNSEL, DEP'T OF DEF., JANUARY 1993 REPORT OF DEPARTMENT OF DEFENSE, UNITED STATES OF AMERICA, TO CONGRESS ON INTERNATIONAL POLICIES AND PROCEDURES REGARDING THE PROTECTION OF NATURAL AND CULTURAL RESOURCES DURING TIMES OF WAR, *reprinted in* PATRICK J. BOYLAN, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (THE HAGUE CONVENTION OF 1954) app. VIII, at 201, 202 (1993), *available at* http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf. Apparently, in 1994, U.S. State and Defense Department lawyers reviewed the Convention and supported its submission to the Senate for advice and consent. *See id.* According to Parks, however, it was not submitted at that time owing to a shortage of experts to prepare the submission. *See* Hays Parks, *Protection of Cultural Property From the Effects of War*, *in* THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE: PROTECTION, TRANSFER AND ACCESS 3-1, 3-24 (Marilyn Phelan ed., 1998).

In addition to this recognition that provisions of the treaty are part of customary international law, the United States has duties as a signatory to the Convention. Treaty signers have duties not to defeat the object and purpose of a treaty, pending its coming into force. Vienna Convention on the

The UNESCO Convention provides additional evidence that the rule against trafficking in cultural property illegally seized in a zone of occupation is customary international law. Judge Cudahy cited Article 7 of the Convention that requires states to take appropriate steps to recover and return protected property when requested to do so by states party such as Cyprus.[102] In addition, the UNESCO Convention requires in Article 11: "The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit."[103] As Judge Cudahy noted, the United States has ratified the UNESCO Convention and implemented it in the Cultural Property Implementation Act.[104] The Convention's Articles 7 and 9 require concerted action among nations to prevent trade in specific items of cultural property in emergency situations, such as situations of occupation.[105] The UNESCO Convention complements the 1954 Hague Convention by focusing on trafficking in cultural property during peacetime, imposing a "moral imperative to protect" humanity's treasures.[106]

The U.S. implementing legislation, the CPIA, provides further support for the conclusion here that a firm rule of customary international law was in place. As Judge Cudahy pointed out, the policy embodied in the CPIA is clear:

> at the very least, we should not sanction illegal traffic in stolen cultural property [such as the mosaics] that [are] clearly documented as belonging to a public or religious institution. This is particularly true where this sort of property is "important to the cultural heritage of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people."[107]

The Judge could also have looked to another important source of law on occupation: The Hague Convention (IV) of 1907 to which the United

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Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

102. *See supra* notes 87–88 and accompanying text; *see also* UNESCO Convention, *supra* note 9, art. 7, at 240. Cyprus became a party in 1979, Turkey in 1981, and the United States in 1983. *See* UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: List of State Parties, http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml (last visited Mar. 10, 2008).

103. UNESCO Convention, *supra* note 9, art. 11; *see also* Johnson, *supra* note 97, at 136.

104. *See supra* note 88 and accompanying text; *see also* 19 U.S.C. §§ 2601–13 (2000).

105. UNESCO Convention, *supra* note 9, arts. 7, 9.

106. Michele Kunitz, Comment, *Switzerland & the International Trade in Art & Antiquities*, 21 NW. J. INT'L L. & BUS. 519, 528 (2001).

107. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 297 (7th Cir. 1990) (Cudahy, J., concurring) (quoting 19 U.S.C. § 2601(2)(C)(ii)(II) (2000)).

States is also a party.[108] It includes an annex of regulations on land warfare. Article 56 of the Hague Regulations requires:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[109]

"Should be made the subject of legal proceedings" refers to all parties to the Hague Regulations, which includes the United States. In this obligation, and more generally, Article 56 provides support for the rule against acquiring and trafficking in a zone of occupation. Other examples of state practice provide additional evidence of a rule of customary law: Iraq was forced to return Kuwaiti cultural property in the wake of its illegal invasion in 1990-1991.[110] The International Criminal Tribunal for the Former Yugoslavia has also stressed the importance of cultural property protection in the event of armed conflict.[111]

Given the existence of a firm rule of customary international law against trafficking, the judges in this case should have applied it. In the words of the Supreme Court in the famous *Paquete Habana* case: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[112] In that case, property was acquired by the United States Navy at the time of the war with Spain in 1898.[113] The property at issue there was fishing boats.[114] Fishing boats, like cultural property today, were exempt from seizure in wartime.[115] The Navy had to return the proceeds of the sale of the boats to the private owners.[116]

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108. *See* Hague Convention (IV) of 1907, *supra* note 10.
109. *See id.* art. 56.
110. *See* Victoria A. Birov, Note, *Prize or Plunder?: The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT'L L. & POL. 201, 226 (1997-98).
111. *See id.* at 226-27.
112. The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004). For an excellent analysis of the *Paquete Habana* decision that responds to some recent misreadings of the case, see William S. Dodge, The Paquete Habana*: Customary International Law as Part of Our Law*, *in* INTERNATIONAL LAW STORIES 175 (John E. Noyes et al eds., 2007).
113. *Paquete Habana*, 175 U.S. at 678-79.
114. *Id.* at 678.
115. *Id.* at 707.
116. *Id.* at 714.

In another relevant Supreme Court case, *Banco Nacional de Cuba v. Sabbatino*,[117] a U.S. national tried to prove that international law prevented an American buyer from taking title to a shipment of sugar from Cuba.[118] The Court's majority could not find a clear rule of customary international law superior to the otherwise applicable Cuban nationalization decree that purported to transfer ownership of the sugar.[119] The Court feared that ascertaining the law in a case such as *Sabbatino* could interfere with executive branch participation in international law-making.[120] Justice White, in dissent, had no doubt that the Court could and should determine what the international law on the subject of expropriation required. He wrote:

> This Court has time and again effectuated the clear understanding of the Framers, as embodied in the Constitution, by applying the law of nations to resolve cases and controversies. As stated in *The Paquete Habana* "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." Principles of international law have been applied in our courts to resolve controversies not merely because they provide a convenient rule for decision but because they represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof. Fundamental fairness to litigants as well as the interest in stability of relationships and preservation of reasonable expectations call for their application whenever international law is controlling in a case or controversy.[121]

Congress subsequently gave express jurisdiction to the federal courts and a cause of action to plaintiffs in cases where a foreign sovereign state allegedly takes property in violation of international law.[122] This is exactly the cause of action in the next case to be discussed, *Republic of Austria v. Altmann*.[123]

In the case of the mosaics, where a clear rule of international law prevented transfer of title in a case, the rule should have been applied. The lingering question from the *Autocephalous* case is why only Judge Cudahy

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117. 376 U.S. 398 (1964).
118. *Id.* at 416–39.
119. *See id.*
120. *See id.* at 428–33.
121. *Id.* at 451–53 (White, J. dissenting) (alteration in original) (citations omitted) (footnotes omitted).
122. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11 (2000).
123. 541 U.S. 677 (2004).

looked at the relevant international law. The other three judges had to stretch the facts in order to apply Indiana law. The facts naturally fit within the international law governing occupation. As international law and Indiana law had the same result in this case, some may believe it unimportant to raise the issue of failing to apply international law, but it is always important for judges to apply the proper law of a case. Moreover, applying international law would have provided a helpful precedent for the many future cases likely to present themselves to U.S. courts from the war in Iraq and other wars and occupations where looting of precious art and antiquities, sadly, continues.[124]

## FIVE KLIMTS FROM THE AUSTRIAN NATIONAL GALLERY

The next story concerns five paintings by the great Viennese artist Gustav Klimt. The paintings hung on public display for fifty-five years in the Austrian National Gallery (the Belvedere) in Vienna.[125] Today, one of the paintings hangs in a small private museum on Manhattan's Upper East Side; the other four were sold at auction in November 2006, for record sums and are in private hands.[126] This outcome is due in part to a 2004 United States Supreme Court decision on a major doctrine of international law, the immunity of sovereign states from national court process.[127] The Court reached its decision by interpreting a U.S. statute without assessing the relevant international law the statute was intended to implement.[128]

The paintings at the center of this story were all made between 1903 and 1915.[129] Two are portraits of Adele Bloch-Bauer, including *Adele Bloch-Bauer I* (1907), which is considered one of Klimt's finest works, perhaps second only to *The Kiss*.[130] Like *The Kiss*, *Adele Bloch-Bauer I* features glittering gold and other rich hues inspired by Klimt's visit made in 1903 to Ravenna, Italy, to see the extraordinary Byzantine mosaics there.[131] The visit is described in a brochure prepared for a special exhibit

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124. *See infra* notes 220–261 and accompanying text.

125. The five paintings are *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Apfelbaum*, *Buchenwald/Birkenwald*, *Häuser in Unterach am Attersee*. This and other factual information is found in the Austrian arbitral award. Altmann v. Austria (U.S. v. Austria) 1 (2006) (on file with the Alabama Law Review) [hereinafter Arbitral Award]; *see also* Brief for Petitioners at 5, *Altmann*, 541 U.S. 677 (No. 03-13), 2003 WL 22766740.

126. *See Klimt Crowns Record Art Auction*, BBC NEWS, Nov. 9, 2006, http://news.bbc.co.uk/2/hi/entertainment/6131520.stm; Souren Melikian, *Auction Sets $491 Million Record*, INT'L HERALD TRIB., Nov. 10, 2006, *available at* 2006 WLNR 19551085; Souren Melikian, *How Christie's Kept Top Spot Over Sotheby's in 2006 Sales*, INT'L HERALD TRIB., Jan. 13, 2007, *available at* 2007 WLNR 763090.

127. *Altmann*, 541 U.S. at 677.

128. *Id.* at 688–702.

129. *See* Neue Galerie: Museum for German and Austrian Art, Brochure for "Gustav Klimt: Five Paintings from the Collection of Ferdinand and Adele Bloch-Bauer," July 13–Sept. 18, 2006.

130. *See id.*

131. *See id.*

to show the five paintings together[132] for possibly the last time before being sold at auction. The brochure says that Klimt was impressed at Ravenna especially by the figure of the Empress Theodora, whose portrait features jewels and inlaid gold.[133] When he "return[ed] to Vienna, he began to work [on] what became known as his 'Golden Style,' incorporating gold elements in both his allegorical and portrait paintings."[134] In *Adele Bloch-Bauer I*,

> gold is used in a variety of contexts, from the lustrous background to the shining fabric of Adele's gown. The subject seems to become one with her glowing surroundings, yet a distinctive and tenderly drawn figure emerges from the profusion of decorative motifs. Adele appears as a modern, complex woman, her intelligence as evident as her sensuality.[135]

The description seems consistent with the rumor that Adele Bloch-Bauer had had an affair with Gustav Klimt.[136] She met him before she married and may have posed secretly for him in his famous Judith series of a beautiful, semi-clad woman.[137] At any rate, Adele's family arranged a marriage for her to Ferdinand Bloch-Bauer, a wealthy Jewish industrialist in Vienna at the turn of the last century.[138] She became part of Viennese society, renowned for its focus on art, literature, philosophy, and the sciences.[139] Her husband was a patron of the arts and apparently commissioned, among other paintings, the two portraits of his wife.[140]

In 1925, Adele died of meningitis at age 43.[141] She and Ferdinand had no children.[142] Her will, written in 1923, designated her husband as her principal heir and requested that he donate six Klimt paintings, including the two portraits and four landscapes, to the Austrian National Gallery upon his death.[143] A translation of the exact request reads, "'I ask my husband after his death to leave my two portraits and the four landscapes by Gustav Klimt to the Austrian State Gallery in Vienna . . . .'"[144] Ferdi-

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132. *See id.*
133. *See id.*
134. *Id.*
135. *Id.*
136. *See* FRANK WHITFORD, KLIMT 12 (1990).
137. *Id.*
138. *Id.*
139. *See id.* at 12, 16.
140. *See id.* at 9; *see also* Republic of Austria v. Altmann, 541 U.S. 677, 681 (2004).
141. Michael Kimmelman, *Klimt Sale: The Road Not Taken by Heirs*, INT'L HERALD TRIB., Sept. 20, 2006, *available at* 2006 WLNR 16317171.
142. WHITFORD, *supra* note 136, at 12.
143. Arbitral Award, *supra* note 125, at 3.
144. *Id.*

nand's brother Gustav settled the estate.[145] He made a statement to the probate court that the paintings were not Adele's property, but his brother's.[146] Nevertheless, he added that his brother would carry out his wife's wishes.[147] Notice to this effect was sent to the Austrian Gallery.[148] In 1936, Ferdinand did transfer one of the Klimt paintings designated in Adele's will to the Austrian Gallery.[149]

In 1938, "Germany invaded, occupied and claimed to annex Austria, in what became known as the *Anschluss*."[150] As a Jew and someone who had opposed the *Anschluss*, Ferdinand Bloch-Bauer decided to leave Austria the same year in 1938, first for Prague, then Zurich.[151] Soon after his departure, tax authorities began proceedings against him under laws commonly used by the Nazis against Jews to acquire their property.[152] The remaining Klimt paintings mentioned in Adele's will and other art works were seized to pay the tax penalty.[153] A Dr. Führer was assigned to liquidate the Bloch-Bauer estate in order to pay the tax penalty.[154] With respect to the five Klimts,

> Dr. Führer gave the paintings *Adele Bloch-Bauer I* and *Apfelbaum I* to the gallery, which in turn gave him *Schloss Kammer am Attersee III*, which Ferdinand Bloch-Bauer had given to the gallery in 1936 in fulfillment of his promise made as part of the probate proceedings. Dr. Führer subsequently sold the latter painting for 6,000 Reichsmark to Gustav Ucicky, a son of Gustav Klimt. In 1942 Dr. Führer sold and surrendered *Buchenwald (Birkenwald)* for 5,000 Reichsmark to the City of Vienna Collection. In 1943, Dr. Führer sold *Adele Bloch-Bauer II* to the Austrian Gallery (known as the Modern Gallery at that time), and kept *Häuser in Unterach am Attersee* for himself.[155]

Ferdinand Bloch-Bauer changed his will shortly before his death in 1945 in Zurich, leaving all his property in unequal shares to three of his brother's five children.[156] The largest share went to the oldest daughter with smaller amounts to a son, Robert, who changed his last name to

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145. *Id.* at 4.
146. *Id.*
147. *Id.* It is not clear who paid for the paintings. Austria has argued that Adele did. *See id.* at 6–7.
148. Brief for Petitioners, *supra* note 125, at 6.
149. *Id.*
150. *Id.*
151. Arbitral Award, *supra* note 125, at 4.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 4–6.

Bentley, and a younger daughter, Maria Altmann. (Apparently two other sons, Karl and Leopold, were not included.)[157] Altmann had left Austria with her husband in 1938, shortly after his release from detention in the Dachau concentration camp in Germany.[158] The Altmanns settled in California, where Maria became a citizen in 1945.[159] In that same year, Ferdinand hired a lawyer, Dr. Rinesch, to represent him in seeking restitution of his property.[160] After Ferdinand died, Rinesch continued to represent the family.[161] He succeeded in re-acquiring a great many assets, but reached an agreement with officials to forego any claim to the five Klimts in exchange for permission to export other property.[162]

The paintings hung in the Austrian National Gallery from 1948 until 1999.[163] Then, in 1999, an Austrian journalist wrote an article in which he raised doubts about whether the Austrian Gallery had good title to the paintings.[164] He argued that the deal made with Rinesch had been fraudulent[165] and brought the matter to the attention of Maria Altmann, who wrote to the Gallery claiming title to the paintings.[166] The case first went to a commission in Austria.[167] Altmann was joined at the commission hearings by two other Bloch-Bauer heirs.[168] The commission decided that as a result of Adele's will, Ferdinand's promise, and/or Rinesch's agreement, the Austrian Gallery had title to the five Klimts.[169] At this point the other heirs dropped out of the case, but Altmann sought to bring suit on the matter in Austrian courts.[170] Under Austrian procedural rules, she was required to post a bond for a percentage of the value of the paintings.[171] In 1999, the five paintings were together estimated to be worth $150 million dollars.[172] An Austrian court, however, lowered the amount of the bond to $350,000, but Austria appealed the decision.[173] At that point, Altmann decided to sue in the United States.[174]

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157. *Id.*
158. *See* Josh Kun, *The Art of Memory: How an Obsessed Brentwood Lawyer Reunited the Most Expensive Painting in the World with its Nonagenarian Los Angeles Heir*, L.A. MAG., Oct. 1, 2006, *available at* 2006 WLNR 21455895.
159. Republic of Austria v. Altmann, 541 U.S. 677, 681 (2004).
160. *See* Arbitral Award, *supra* note 125, at 5.
161. *Id.*
162. *See id.*
163. Brief for Petitioners, *supra* note 125, at 5–9.
164. *Altmann*, 541 U.S. at 684.
165. *See id.*
166. *See id.*
167. Brief for Petitioners, *supra* note 125, at 5–9.
168. *Id.*
169. *Id.*
170. *See Altmann*, 541 U.S. at 684.
171. Altmann v. Republic of Austria, 317 F.3d 954, 961 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004).
172. *See* Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1192 n.2 (C.D. Cal. 2001).
173. *Altmann*, 541 U.S. at 685.
174. *Id.*

In the United States, however, Mrs. Altmann was immediately confronted with the problem of foreign sovereign immunity as her suit was against the Republic of Austria and the Austrian National Gallery, a state institution. Under the 1976 Foreign Sovereign Immunities Act, she might have had an exception for immunity under the same provisions of the Act already discussed above with respect to the *Sabbatino* case, property expropriation by the state in violation of international law.[175] Altmann argued that Austria had acquired the paintings in violation of the 1907 Hague Regulations, in particular, Article 56's protection of cultural property during occupation, [176] the same provision discussed above in the mosaics case.[177] But this exception for expropriation of property and cause of action were created in 1976.[178] Her claim concerned actions of a foreign sovereign between 1938 and 1948, when states enjoyed absolute immunity from process in national courts.[179] In other words, there were no exceptions for private suits. Disputes of this kind had to be adopted by an individual's state of nationality and settled through negotiation or brought in an international court or tribunal.[180] In a surprising decision, however, the Federal District Court in Los Angeles lifted the immunity of Austria retroactive to 1948.[181] Austria appealed to the Ninth Circuit, but the appeals court affirmed the lower court decision, though on slightly different grounds.[182] Austria then appealed to the United States Supreme Court, which granted certiorari, and, in a 6-3 decision, affirmed the District Court decision to make the exception to immunity for expropriation of property in violation of international law in the 1976 Foreign Sovereign Immunities Act retroactive to 1948.[183]

The case raises interesting domestic law questions, such as why the court felt it merited overriding the presumption against retroactive application of statutes,[184] but of interest here is the fact that six U.S. Supreme Court Justices did not consider what international law says about the retroactive application of an exception to sovereign immunity, a doctrine of

175. *See supra* note 122 and accompanying text.

176. Brief for Respondent at 4, *Altmann*, 541 U.S. 677 (No. 03-13), 2003 WL 23002713.

177. *See supra* notes 108–111 and accompanying text.

178. *Altmann*, 541 U.S. at 691.

179. *See id.* at 688.

180. This is what the United States did for example with respect to American claims of expropriation of property by the Soviets. In 1937, the United States agreed in the Litvinov Assignment to offset American claims against the Soviet government with those of Soviet nationals. *See, e.g.*, United States v. Belmont, 301 U.S. 324, 332 (1937). Justice Breyer in his concurring opinion doubts that the United States could have represented Altmann against Austria because she failed to exhaust remedies in Austria. *Altmann*, 541 U.S. at 714.

181. Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1197–1201 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004).

182. *Altmann*, 541 U.S. at 687–88.

183. *Id.* at 679, 688.

184. There may be an indication from Justice Stevens's re-telling of the facts, which suggests great sympathy for the respondent. *See id.* at 680–85.

international law.[185] Even the dissenters, who objected to the retroactive application of the law, Justices Kennedy, Rehnquist, and Thomas, failed to look to international law despite the fact it supported their position.[186] In a strongly-worded dissent, they spoke against undermining the rule on retroactivity, restated that statutes are not to be applied retroactively unless it is clear that is what Congress intended, and invoked the policy implications of disturbing international relations through altering a settled doctrine.[187] They failed to look, however, to the applicable international law, which included a rule of absolute immunity until the 1950s and embraces today a general principle against the retroactive application of law.[188]

Justice Stevens, writing for the majority, begins by considering whether sovereign immunity is a matter of procedural or substantive law.[189] As substantive law, the provisions of the FSIA should not be applied retroactively absent clear Congressional intent.[190] Justice Stevens finds no clear intent, but concludes that the FSIA defies categorization as either substantive or procedural.[191] He decides, therefore, to create a new test for retroactive application of the law for the case, on the basis that the presumption against retroactive application of law can be relaxed where private rights are not involved.[192] Then, implying from a few aspects of the FSIA and Congressional purposes for adopting the Act, he decides the FSIA can be made applicable to 1948.[193]

Vázquez is critical of Stevens's approach.[194] First, he explains that the FSIA is both procedural and substantive.[195] As a jurisdiction-conferring statute that increases the burden on a party, it falls under the rule of *Hughes Aircraft*[196] and should not be applied retroactively.[197] Vázquez points out that Stevens is in error when he de-emphasizes the burden on states created by lifting immunity:

> While recognizing that *Hughes Aircraft* supported characterization of the immunity as substantive, the majority attempted in a foot-

185. *See id.* at 688–702.
186. *See id.* at 715–38 (Kennedy, J., dissenting).
187. *See id.* at 715.
188. Again, as in the mosaics case, the lawyers may not have briefed the court on what international law required. *See, e.g.*, Brief for Petitioners, *supra* note 125; *see also supra* note 79 and accompanying text.
189. *Altmann*, 541 U.S. at 692–700.
190. *See id.* at 692–94.
191. *Id.* at 694.
192. *Id.* at 694–97.
193. *Id.* at 697–700.
194. *See* Carlos M. Vázquez, Altmann v. Austria *and the Retroactivity of the Foreign Sovereign Immunities Act*, 3 J. INT'L CRIM. JUST. 207 (2005).
195. *See id.* at 211–19.
196. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 950–51 (1997).
197. Vázquez, *supra note* 194, at 213.

> note to distinguish the statute in *Hughes Aircraft* on the ground that it prescribed a jurisdictional limitation that any court entertaining the cause of action was bound to apply. Suits against foreign states barred from the state and federal courts by the FSIA, on the other hand, could still be entertained in foreign courts. The availability of foreign courts, in the majority's view, made the FSIA more like the jurisdictional rules characterized in *Landgraf* as procedural because they determine *which* court may entertain an action, rather than *whether* the action may be maintained at all.
>
> The Majority overlooked the fact that the FSIA purported to be largely a codification of international law principles of immunity, applicable equally in all nations. To the extent that the FSIA did codify existing international law, the conclusion that a suit was barred by the FSIA would mean that the suit would be likewise barred in the courts of other states (if those states complied with their obligations under international law).[198]

Stevens gives no reason why sovereign immunity should not be treated as substantive per *Hughes*.[199] Vázquez also points out that the congressional purpose in adopting the FSIA would be better met if courts applied the international law on sovereign immunity at the time of the state's conduct.[200] The majority should have read the FSIA as requiring courts to decide sovereign immunity claims "by applying the general principles of sovereign immunity recognized by the United States at the time at which the cause of action arose."[201]

Part of Stevens' apparent reason for relaxing the anti-retroactivity presumption in the case of sovereign immunity appears to be his view that sovereign immunity is only part of international comity and not a rule of international law.[202] He looks back to the venerable *Schooner Exchange* case of 1812 for the proposition that "sovereign immunity is a matter of grace and comity," not law.[203] He fails to note that under international law absolute sovereign immunity had ripened into a rule of "customary international law by the late 19th century, and clearly had that status by the early 20th century."[204] It only began to evolve toward restricted immunity in the 1950s, and the exception for expropriation came later still. [205] Aus-

198. *Id.* at 214 (footnotes omitted).
199. *See id.*
200. *Id.* at 221.
201. *Id.*
202. *See* Republic of Austria v. Altmann, 541 U.S. 677, 688-89 (2004).
203. *Id.*
204. Vázquez, *supra note* 194, at 212.
205. *See id.* at 212-13.

tria, therefore, would have had absolute immunity from U.S. courts under international law for acts performed in 1938-1948.[206] Moreover, international law today includes a general principle against the retroactive application of law.[207] That principle was the critical one to apply in a case on the international law doctrine of sovereign immunity.

The dissenters argue against lifting Austria's immunity but only on the basis of U.S. rules and policies against non-retroactivity and not on the basis of what international law requires.[208] This failure to look to international law is difficult to understand in the sovereign immunity area. In one of the first decisions following the adoption of the FSIA, the *Texas Trading* case, Judge Kaufman explained that Congress intended the courts to fill in the rather simple text of the FSIA by looking to the legislative history of the Act and international law:

> The legislative history states that the Act "incorporates standards recognized under international law," House Report at 6613, and the drafters seem to have intended rather generally to bring Amer-

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206. The appellate court concluded that the State Department would not have indicated to the courts in 1948 that Austria *should* enjoy this immunity. Altmann v. Republic of Austria, 317 F.3d 954, 965 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004). But as the Supreme Court says, this conclusion is highly speculative and does not change the evidence as to what immunity Austria could claim under international law. *Altmann*, 541 U.S. at 700–02; *see also id.* at 716–17 (Kennedy, J., dissenting) (discussing the State Department's view that the expropriation was new at the time the FSIA was adopted).

207. General principles of law are the third primary source of international law. *See* Statute of the International Court of Justice, *supra* note 96, art. 38(1). International law includes a general principle of law against the retroactive application of new law to past acts. Giving retroactive effect to law is "contrary to general principles of international law." Multiplex v. Croatia, App. No. 58112/00, Eur. Ct. H.R. (2002) (unpublished decision), *available at* http://www.echr.coe.int/echr (follow "case-law" hyperlink to "HUDOC" database; search "Decisions" and "Judgments" for "Application Number 58112/00"; then follow link #3). There is a "general principle of international law found in the *Vienna Convention*, which establishes a presumption against the retroactive effect of treaties." Canada—Term of Patent Protection, WT/DS170/AB/R (2000), 71. The Vienna Convention restates this general principle with respect to treaties in Article 28:

> *Non-retroactivity of treaties* Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any *situation which ceased to exist* before the date of the entry into force of the treaty with respect to that party.

Vienna Convention on the Law of Treaties, art. 28, May 23, 1969, 1155 U.N.T.S. 331. In two recent national court decisions Italian and Greek courts ruled that an exception to sovereign immunity could be applied retroactively in the case of a violation of a *jus cogens* norm. *See* Lorna McGregor, *State Immunity and* Jus Cogens, 55 INT'L & COMP. L.Q. 437, 439–40 (2006) (discussing Ferrini v Federal Republic of Germany (Cass Sez UN 5044/04); Prefecture of Voiotia v FRG, Case No. 11/2000, Areios Pagos). These decisions underscore that in cases not involving *jus cogens* violations the principle against retroactivity applies. The expropriation of property in violation of international law is not considered a *jus cogens* violation. Further, Justice Breyer cites four jurisdictions that expressly mention that restrictive sovereign immunity legislation does not apply retroactively. *Altmann*, 541 U.S. at 708 (Breyer, J., concurring). Justice Breyer does not, however, point to these laws as indicating what international law requires, but only to suggest the United States should also have added such an express statement to the FSIA. *See id.* Such a statement was not necessary given that the FSIA codified the international law on the subject, which incorporates the non-retroactivity principle.

208. *See supra* note 186 and accompanying text.

> ican sovereign immunity practice into line with that of other nations. See 1976 Hearings at 25 (testimony of Monroe Leigh), 32 (testimony of Bruno A. Ristau); 1973 hearings at 18 (testimony of Charles N. Brower). At this point, there can be little doubt that international law follows the restrictive theory of sovereign immunity. House Report at 6613. See, e.g, State Immunity Act, 1978, s. 3 (United Kingdom); council of Europe, European Convention on State Immunity, art. 4 (1972), reprinted in 1976 Hearings at 37, 38; Empire of Iran, 45 I.L.R. 57 (1963) (West Germany).[209]

In addition to this specific directive by the Congress to look to international law, *Altmann* has multiple other references to international law, including the very exception to sovereign immunity that Altmann claimed under the FSIA, § 1605(a)(3): expropriation "in violation of *international law*."[210] Altmann knew she had to find international law against the taking of the paintings that was in existence during the Second World War. She relied on the Hague Regulations of 1907, discussed above in the mosaics case, in particular, Article 56, "'*All seizure of . . . works of art . . . is forbidden, and should be made the subject of legal proceedings.*'"[211] In other words, she looked back to the relevant international law on acquiring art in wartime as of the time of the events. The dissent does look to U.S. cases indicating that the international law at the time of the events would have afforded Austria immunity for alleged expropriation.[212] What the dissent does not do, however, is look to what international law in 2004 required respecting retroactive application of the restrictive immunity rule. No international law authorities are cited.

Upon losing the case and facing litigation on the merits of the claim in U.S. courts, Austria offered final, binding arbitration in Austria.[213] Altmann and other heirs of Ferdinand Bloch-Bauer agreed.[214] Austria lost the arbitration owing essentially to the weight the three (male) arbitrators put on the statement by Gustav Bloch-Bauer that Ferdinand, not Adele, owned the paintings.[215] They agreed that in cases where there is doubt as to whether a married woman owns property, the law of the 1920s required erring on the side of the husband's ownership.[216] Upon receiving the

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209. Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 310 (2d Cir. 1981) (citations omitted).

210. Brief for Respondent, *supra* note 176, at 17.

211. *Id.* at 4 (citing Hague Convention (IV) of 1907, *supra* note 10, art. 56). See also *supra* notes 108–111 and accompanying text for citations to Article 56 and discussion of the use of the Article in the mosaics case.

212. Republic of Austria v. Altmann, 541 U.S. 677, 726–27 (2004) (Kennedy, J., dissenting).

213. *See* Felicia R. Lee, *Arbitration Set for Case of Looted Art*, N.Y. TIMES, May 19, 2005, at E3.

214. *See id.*

215. *See* Arbitral Award, *supra* note 125, at 20–21.

216. *See id.* The arbitrators did not consider at any length Austria's arguments that Adele owned

award, the heirs offered to sell the paintings back to Austria, but the Austrian culture minister said the price was four times the annual budget of all Austrian national museums.[217] Altmann and the other heirs then sold *Adele Bloch-Bauer I* to the cosmetics heir, Ronald Lauder, for the largest sum ever paid for a painting at that time, $135 million.[218] Lauder hung the painting in his private gallery in New York City.[219] He staged a special exhibition with the other four paintings before they were auctioned at Christies in November, 2006 also for record sums to anonymous buyers.[220]

Given the outcome of the arbitration, it might not seem important that the United States Supreme Court lifted the immunity of Austria retroactively in the case without consulting current international law on the subject. Again, however, as in the case of the mosaics, courts should always apply the proper law. The Foreign Sovereign Immunities Act seeks to implement the customary international law of sovereign immunity.[221] Failing to consult that law was a failure to properly apply the statute as Congress intended. Moreover, as explained by Justice White in his dissent in *Sabbatino*, "[p]rinciples of international law have been applied in our courts to resolve controversies not merely because they embody a convenient rule for decision but because they represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof."[222] Not to apply these principles puts the United States out of step with the consensus of nations and may well put the United States in violation of its international law obligations.

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the paintings, including that she might have paid for them or that Ferdinand's gift in 1936 to the Austrian Gallery indicated he considered himself bound. They did not consider Gustav's self-interest in stating the paintings were his brother's property or any other reasons for the statement, such as a wish to suppress the rumors of Adele's affair with Klimt, rumors that might have been fueled had she owned six of his paintings at her death. Nor did they consider the principle of the relevant Austrian property law that personal items, such as clothes and jewelry, were presumed to belong to even a married woman.

217. *See* Emily Sharpe & Jason Edward Kaufman, *Lauder Raises $190m Cash as Bloch-Bauer Klimts Come Up for Sale*, ART NEWSPAPER, *available at* http://theartnewspaper.com/article.asp?id=460 (last visited Mar. 17, 2008).

218. Carol Vogel, *Lauder Pays $135 Million, a Record, for a Klimt Portrait*, N.Y.TIMES, June 19, 2006, at B1, *available at* http://www.nytimes.com/2006/06/19/arts/design/19klim.html?scp=1&sq=Lauder+pays+%24135+million&st=nyt.

219. *See id.*

220. *See id.* Altmann and other heirs also successfully sued a Swiss bank in 2005 for other assets of Ferdinand Bloch-Bauer. *See* William Glaberson, *For Betrayal by Swiss Bank and Nazis, $21 Million*, N.Y. TIMES, Apr. 14, 2005, at A1. They won $21 million, a record in World War II-era claims against Swiss Banks. *Id.*

221. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (2000).

222. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 453 (1964) (White, J., dissenting).

### A SUMERIAN KING FROM IRAQ[223]

The third story concerns the Entemena of Lagash, a statue created in ancient Sumeria and estimated to be 4,400 years old.[224] It was among thousands of cultural objects looted in the aftermath of the U.S.-led invasion of Iraq that began March 19, 2003.[225] The statue was one of the most significant pieces to be taken from the Iraqi National Museum in Baghdad.[226] According to a 2006 *New York Times* article, the headless, Sumerian "king is dressed in a skirt of tasseled sheepskin and his arms are crossed in prayer. Detailed inscriptions run along the figure's shoulder and back."[227] It "is among the most important artifacts unearthed in excavations of Ur, an ancient southern city . . . . [I]t [is] not only archeologically significant but also striking because the king's muscular arms were sculptured in a lively, naturalistic style. Earlier sculptural styles were cruder . . . ."[228]

The diorite statue was recovered in the summer of 2006 in a clandestine operation that the United States has declined to discuss in detail.[229] It is known that the statue was first taken out of the Baghdad Museum and brought to Syria where it was put on sale in the international art market.[230] It was apparently recovered through the combined efforts of international smugglers, an antiquities dealer named Hicham Aboutaam, and an "Iraqi expatriate businessman" who brokered the deal.[231] Those privy to the details of this particular theft say that "[e]fforts to sell the statue began not long after it was stolen."[232] Aboutaam was approached while visiting Lebanon and shown a picture of the Entemena statue.[233] Those holding the statue were seeking millions for it but when Aboutaam discovered "it had been stolen[, he] did not pursue the deal."[234] He did, apparently, inform

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223. This story draws on Mary Ellen O'Connell with Maria Alveras-Chen, *Rethinking the Remedy of Return in International Art Law*, *in* THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES 95 (Robin F. Rhodes ed., 2007).

224. Barry Meier & James Glanz, *U.S. Helps Recover Statue and Gives It Back to Iraqis*, N.Y.TIMES, July 26, 2006, at A12.

225. *Id.*

226. *Id.*

227. *Id.*; *see also* Press Release, U.S. Dep't of State, U.S. Repatriates Historical Artifact to the Iraqi People (July 25, 2006), *available at* http://www.state.gov/r/pa/prs/ps/2006/69504.htm.

228. Meier & Glanz, *supra* note 224.

229. *See id.*

230. *See id.*

231. *See id.*

232. *Id.*; *see also* Mike Boehm, *Baghdad Museum's Sad Fate 'Bleeds My Heart,'* L.A. TIMES, Oct. 2, 2007, *available at* 2007 WLNR 19247877; Barry Meier & James Glanz, *Piece from Looted Museum Returned—Headless Statue Had Been Taken to Syria, Put on Sale on International Antiquities Market*, HOUSTON CHRON., July 30, 2006, at A25, *available at* 2006 WLNR 13164178.

233. Meier & Glanz, *supra* note 224.

234. *See id.*

U.S. authorities about the offer, however.[235] At some later point, the FBI asked him for his assistance in recovering the statue, and he, in turn, was able to obtain the assistance of a mysterious businessman, who "began to shuttle among Iraq, Syria and other countries to make contact with those holding the statue and to negotiate its turnover."[236] It is unknown whether money was paid to those holding the statue or simply promises of payment.[237]

When the statue was found, it was covered in dirt, indicating that it may have been concealed in transport, and there were fresh chips along its stone surface, suggesting recent damage.[238] It was returned to Iraqi officials in a ceremony in Washington, D.C.[239] Nevertheless, the statue is not in Iraq today but rather in the Iraqi Embassy in Washington, D.C., because, at time of writing, it is still far too dangerous to try to return it to Baghdad.[240] The theft of the statue has not, to date, been the subject of judicial proceedings. Parties may one day seek to keep it in the United States for its protection. It is more likely that U.S. courts will see other cases involving Iraqi treasures where money has changed hands, not unlike the mosaics case.[241]

Despite the successful efforts of the FBI to return the statue, this is another story of failure to recognize and apply the international law on protection of art in war and occupation. A great deal has been said since March 2003 about failures to properly plan for the occupation of Iraq.[242] Little has been said, in comparison, about the body of international law that applies to occupation and that includes clear rules on protecting cultural property. As already discussed in the case of the mosaics, these rules obligate the occupying power to prevent looting of cultural sites and trafficking in cultural objects.[243] Yet, according to the *San Diego Union Tribune*, no orders were given to U.S. forces to protect sensitive sites in Iraq despite the fact archeologists had warned the Pentagon about the importance of doing so: "[t]hough Pentagon officials were warned as early as January [2003], and repeatedly since, that a U.S. invasion would place cultural treasures in grave danger, and though international law mandates the protection of artistic treasures in times of war, Defense Secretary Do-

235. *See id.*
236. *See id.*
237. *See id.*
238. *See id.*
239. *See id.*
240. *See* Boehm, *supra* note 232.
241. *See id.* The statue might one day be the subject of a suit with respect to its return to Iraq as parties interested in its protection might well seek to prevent its return. *See* O'Connell, *supra* note 223, at 103–08.
242. *See, e.g.*, Jennifer De Poyen, *Looting of Iraqi Museum Was a Blow to All Peoples*, SAN DIEGO UNION-TRIB., Apr. 20, 2003, at F8, *available at* 2003 WLNR 16791678.
243. *See supra* notes 79–111 and accompanying text.

nald Rumsfeld made the point again and again that soldiers were not there to stop the plunder."[244]

Soon sensitive archeological sites throughout the country were being looted.[245] Some were turned into moonscapes.[246] Secretary of Defense Rumsfeld's attitude was summed up in his now infamous comment: "'Freedom's untidy . . . . And free people are free to make mistakes and commit crimes and do bad things.'"[247] In April 2003, when asked about the looting in Iraq, especially in the Iraqi National Museum, he said, "it's the same picture of some person walking out of some building with a vase, and you see it 20 times and you think 'My goodness, were there that many vases? Is it possible that there were that many vases in the whole country?'"[248] The Entemena statue was ironically recovered through the efforts of the antiquities dealer, Aboutaam, who was himself previously charged with felonies including forgery of customs documents related to various artifacts.[249]

The Entemena and thousands of other invaluable objects might never have gone missing in the first place if the United States had not invaded in violation of international law,[250] but having done so, the United States. needed to take its obligations to protect cultural property seriously. Many agree that the invasion force was too small, but perhaps far more significant was the fact troops did not have the right orders, especially with respect to looting and cultural property protection. [251] As already discussed with respect to the mosaics case and the case of the Klimts, the Hague Convention (IV) of 1907, to which the United States is a party, includes an annex of regulations on land warfare.[252] Again, Article 56 of the Hague Regulations requires that "[a]ll seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."[253] And the 1954 Convention applies as customary international law binding on the United States to "prohibit, prevent and, if necessary, put a

244. De Poyen, *supra* note 242.

245. *See id.*

246. Alexandra Zavis, *Iraq's Heritage is Under Assault by Looters*, L.A. TIMES, Jan. 23, 2008, *available at* 2008 WLNR 1291911.

247. De Poyen, *supra* note 242.

248. *Id.*; *see also* Linda Diebel, *Rumsfeld on Chaos in Iraq: 'Stuff Happens,'* TORONTO STAR, Apr. 12, 2003.

249. Meier & Glanz, *supra* note 224, at A12; *see also* Ron Stodghill, *Do You Know Where That Art Has Been?*, N.Y.TIMES, Mar. 18, 2007, at B3.

250. Regarding the illegality of resort to war in Iraq, see Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 592-93 (2003); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004); Mary Ellen O'Connell, *Addendum to Armed Force in Iraq: Issues of Legality*, AM. SOC'Y INT'L L. INSIGHTS, Apr. 2003, http://www.asil.org/insights/insigh99a1.htm.

251. *See* De Poyen, *supra* note 242.

252. *See supra* notes 96-99, 109-110 and accompanying text.

253. 1907 Hague Convention (IV) of 1907, *supra* note 10, art. 56.

stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."[254] U.S. negligence in Iraq has truly resulted in a crisis surrounding Iraqi cultural property.[255] Only a few of the high-value, high-quality pieces looted from Iraq had been recovered five years after the invasion; the Statue of Entemena is one of the few.[256] At time of writing, looting continues throughout Iraq, and much of Iraq's infrastructure to protect cultural property is in decline.[257]

With respect to cultural property, the United States had plenty of notice regarding what would be required.[258] Months before the invasion, the Bush Administration had been warned by a number of organizations and experts that cultural sites would need protection from bombing and looting.[259] Considerable looting had occurred after the 1991 Gulf War, so the likelihood of it occurring again was known:

> In January [2003], the Archaeological Institute of America issued a statement calling on "all governments" to protect cultural sites both during and after a war. A mix of scholars, museum representatives, collectors and dealers made the same case during a briefing at the Department of Defense. "I did a lot of the talking," said McGuire Gibson, an Iraq specialist at the University of Chicago's Oriental Institute. "They had a list of 150 sites, and I said there were many more than that, and that the biggest problem was the aftermath."[260]

The United States Army War College issued a study, dated February 2003, describing post-conflict requirements in Iraq, including legal requirements.[261] The authors state:

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254. *See* 1954 Hague Convention, *supra* note 8, art. 4(3).

255. *See* Boehm, *supra* note 232; Zavis, *supra* note 246.

256. Boehm, *supra* note 232; Meier & Glanz, *supra* note 224.

257. *See* Boehm, *supra* note 232; Zavis, *supra* note 246.

258. Though, again, as in the previous two cases, we do not know what lawyers closest to Secretary Rumsfeld advised.

259. The following organizations contacted the Administration: "The Archaeological Institute of America, the American Association of Museum Art Directors, the American Schools of Oriental Research, and the American Association for Research in Baghdad," among others. Almira Poudrier, *Alas, Babylon! How the Bush Administration Allowed the Sack of Iraq's Antiquities*, HUMANIST, July 1, 2003, at 4, *available at* 2003 WLNR 6780082.

260. Guy Gugliotta, *Scholars Fret About Fate of Antiquities After War*, MILWAUKEE J. SENTINEL, Mar. 17, 2003, *available at* 2003 WLNR 4740598; *see also* Michael D. Lemonick, *Lost to the Ages: Could the U.S. Have Stopped the Looting of Iraq's Priceless Antiques? The Answer is Not That Simple*, TIME, Apr. 28, 2003, at 46, *available at* 2003 WLNR 13889309.

261. CONRAD C. CRANE & W. ANDREW TERRILL, RECONSTRUCTING IRAQ: INSIGHTS, CHALLENGES, AND MISSIONS FOR MILITARY FORCES IN A POST-CONFLICT SCENARIO 49–50 (2003), *available at* http://www.carlisle.army.mil/ssi/pubs/pubResult.cfm/hurl/PubID=182/.

> While it would be best to let the Iraqis control access to historic and cultural sites, an occupying power assumes responsibility for security of such places. Particular attention must be paid to religious and historic sites that have great importance; their damage or disruption could fan discontent or inspire violence, not just within Iraq but around the region.[262]

As in the previous cases, decision-makers had information as to the relevant applicable law in the situation, and they had data from past conflicts that following the law would support the outcome the United States evidently sought in Iraq. Nevertheless, the law was not applied; the orders to stop the looting were not given.

Rather than follow the applicable international law, Secretary Rumsfeld and other executive branch members developed their own ad hoc regulations. Finding the Geneva Conventions "quaint" and "obsolete," White House Counsel Alberto Gonzales, along with lawyers in the Justice and Defense Departments, drafted new memos and regulations for detention, interrogation, and trial of persons after 9/11.[263] Similarly finding the law of occupation obsolete, the State Department created its own rules for Iraq.[264] At the same time, thousands of cultural objects began to be smuggled out of Iraq and placed on the international black market in art and antiquities.[265] We can expect cases involving purchases to surface in the United States when Iraqi authorities attempt to get objects back for which Americans have paid considerable sums. At that point, one hopes the courts will apply international law as the applicable law governing situations of war and occupation.

International law exists for these purposes. It has developed through agreed methods and the participation of the international community. It is recognized as legitimate. All of these factors indicate the advantages of following international law that ad hoc solutions simply do not have. Looking to the international law governing invasion and occupation, in particular, the law governing protection of cultural property would have supported the outcomes U.S. decision-makers evidently sought with re-

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262. *Id.*

263. *See, e.g.*, Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush, regarding Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHARIB 118 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (outlining the ramifications of the decision by the President to consider al Qaeda and Taliban detainees as prisoners of war on a case-by-case basis).

264. For the State Department's occupation rules and justification for not applying the Hague Convention rules, see Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 202–25, 240–46 (2005).

265. *See supra* notes 245–246 and accompanying text.

spect to Iraq. Mark Danner wrote of the consequences of failing to stop the looting in Iraq:

> The weeks of looting and disorder that followed not only continued the destruction of Iraq's infrastructure, preventing the Americans from supplying the country with electricity and other basic services. More important, the looting and mayhem destroyed American political authority even before it could be established; such political authority is rooted in the monopoly of legitimate violence, which the Americans, after standing by during weeks of chaos and insecurity, were never able to attain.[266]

## CONCLUSIONS

What can we conclude from these three stories of art, law, and war? We have in the world today extraordinarily wealthy individuals willing to take advantage of the chaos and desperation created by war to acquire great art and antiquities.[267] Supplying the demand is doing untold damage to ancient objects and cultural sites. Great cultural treasures are also disappearing from public view and into private collections or hiding places awaiting sale. International law aims to protect cultural property in time of war—it seeks to protect it from damage and to control acquisition. The three stories here give insights into how international law seeks to do this and how it may be done better if courts, lawyers, and executive branch officials look to international law to guide their decision-making and advice.

Turning to international law requires knowledge of the law and recognition of its applicability. Both qualities seem to have declined in the United States in recent decades. It is not entirely clear why this is so. It is also beyond the scope of this Article to delve too deeply into possible explanations. Briefly, it appears to be that certain developments in the United States in the 1960s offer some explanation. By that time, international law began to decline as a subject of prominence in American law schools. Such highly-ranked law schools as Stanford, Pennsylvania, Chicago, and Texas had no regular members of faculty teaching and publishing in the area of public international law in the 1990s. Constitutional law, especially

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266. Mark Danner, *Iraq: The New War*, N.Y. REV. BOOKS, Sept. 25, 2003, at 88.

267. For accounts of the super-heated market in art and antiquities, see Calvin Tomkins, *A Fool for Art*, NEW YORKER, Nov. 12, 2007, at 35, and Steven M. L. Aronson, *Out of Sight, Eugene V. Thaw Reflects on the Skyrocketing Prices for Art*, ARCHITECTURAL DIG., June 2007, *available at* http://www.architecturaldigest.com/resources/notebook/2007/06/thaw_article. *See also* Melikian, *supra* note 126.

civil rights law, emerged as the leading topic taught in law schools.[268] International law was also under attack from international relations theorists, scholars such as Hans Morgenthau and his students, who advocated the pursuit of military power by the United States regardless of international law. Additionally, Wythe Holt has suggested that American officials became uncomfortable with international law as U.S. law was increasingly understood solely through positive law theory, to the exclusion of natural law.[269] International law could never be entirely explained by positive law theory as it is a legal system without a regular parliament and other typical institutions for producing positive law. All of these developments together likely helped produce the view held by some American legal scholars and judges that applying international law is somehow illegitimate as it does not emanate from U.S. law sources.[270]

As Justice White explained in *Sabbatino*, however, the Founders quite definitely looked to international law, the law created through the consensus of nations.[271] International law has always been part of United States law. To the extent the hesitation respecting international law is related to natural law, theorists are demonstrating that natural law explanations are needed for domestic law, too.[272] Law, any law, is more than the positive acts of legislators and executive officers. It incorporates belief, reason, and higher norms—all aspects of the law better explained in natural law theory than positivism.[273]

To the extent the hesitation regarding international law is related to international relations theory, in a world increasingly characterized by globalization and the rise of states like China, the pursuit of cooperation appears to many international relations scholars as more rational than the pursuit of military power. Finally, with respect to civil rights, it is also becoming increasingly clear that the rights of people and duties of governments toward them cannot be artificially limited by a state boundary.

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268. This can be confirmed to some extent through publication trends in student-run law journals, in addition to the number of faculty and course offerings in these different subjects.

269. Remarks to the author at the ALABAMA LAW REVIEW Meador Lecture, April 2007.

270. Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 EUR. J. INT'L L. 751 (2004) ("The different nature of international law and its potentially pervasive effects on domestic law are frequently a cause for US courts to reject its proper implementation. At the base of this attitude, which seems to be the prevailing one at the moment, lies the perception that the fundamental postulates of the domestic legal order, as enshrined in the Constitution, cannot be altered by a body of law which does not exclusively emanate from the national societal body."). *See also* Paul Kahn, *American Hegemony and International Law, Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1 (2000).

271. *See supra* text accompanying note 121.

272. This message can be found in STEVEN D. SMITH, LAW'S QUANDARY (2004), for example.

273. For more on the theory of international law, see MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT (2008); THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); LOUIS HENKIN, HOW NATIONS BEHAVE 329-32 (2d ed. 1979); and OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 135-86 (1995).

Two years after *Republic of Austria v. Altmann*[274] was decided, Justice Stevens wrote another opinion for the majority in *Hamdan v. Rumsfeld*.[275] There, the court held that non-Americans being detained by the United States at Guantánamo Bay, Cuba, are protected, at a minimum, by common Article 3 of the four 1949 Geneva Conventions.[276]

These and other developments are influencing law school curricula. International law is increasingly a required course in the United States The American Society of International Law has developed a program of outreach for judges.[277] American leadership is changing, and it may only be a matter of time until most judges and other decision-makers understand international law and the appropriateness as well as advantages of complying with it. The advantages include the prospect of better protecting invaluable cultural property from those who would exploit the tragedy of war to acquire it.

274. 541 U.S. 677 (2004).
275. 126 S. Ct. 2749 (2006).
276. *Id.* at 2796–97.
277. *See e.g.*, DAVID J. BEDERMAN, INTERNATIONAL LAW: A HANDBOOK FOR JUDGES (2001).