

EVENTS AND CONFERENCES

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In re Context: Understanding Our Past Is Its Own Reward Cultural Property: Current Problems Meet Established Law, Philadelphia, 26-27 March 2015

On 26-27 March 2015 the Penn Cultural Heritage Center (Penn CHC) at the University of Pennsylvania, Philadelphia, hosted the Sixth Annual Conference for the Lawyers' Committee for Cultural Heritage Preservation (LCCHP), a non-profit organization based in Washington, DC, uniting lawyers and members of the public in their efforts to preserve and protect cultural heritage through education and legal action. Entitled *Cultural Property: Current Problems Meet Established Law*, the conference featured the input of 19 speakers, 18 of whom came from the United States. Consequently, the program's key themes addressed US laws, policy and practice pertaining to issues such as: the protection of underwater cultural heritage (UCH), prevention of looting and international trade in looted cultural objects, the pillage of archaeological sites, museum collections and collecting ethics, due diligence in provenance research and emergency responses to cultural

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plunder in Syria and Iraq. Comprising attorneys, law scholars, archaeologists, scientists, museum professionals, and other individuals the conference hosted distinguished representatives of the public sector, *inter alia* Patty Gerstenblith, Chair of the President's Cultural Property Advisory Committee in the US Department of State and Ole Varmer from the National Oceanic and Atmospheric Administration as well as practitioners from the most prominent practices in art and cultural property law in the United States including Frank K. Lord IV, a partner at Herrick Feinstein LLP;¹ Jim Goold (Of Counsel, Covington & Burling LLP) and Leila Amineddoleh, a partner at Galuzzo & Amineddoleh LLP.

A substantial body of the conference was devoted to underwater cultural heritage (UCH). Both the opening lecture of Mariano Aznar-Gomez (Professor of International Law Universitat Jaume I) as well as a later presentation on archaeological site looting by Ole Varmer addressed the legal status of sunken historic shipwrecks. While Mr. Gomez demonstrated how recent results before US admiralty courts affect the interpretation of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (CPUH)² and should facilitate its ratification by the reluctant States, Mr. Varmer underlined that the US protects its UCH in a manner that does not interfere with the balance of coastal and flag State jurisdiction maintained under the United Nations Convention on the Law of the Sea.³ Invoking the 4th Circuit of Appeals decision in the case of two sunken Spanish frigates of war, *Juno* and *La Galga*,⁴ located in Virginia waters, where the Spanish title was upheld, Mr. Gomez noted how the case proved to be an opportunity for the US to state its position regarding the continued sovereign immunity of sunken warships and the rule of "express abandonment". Indeed, the case was a significant catalyst for formulating US policy on the protection of sunken military vessels, codified in the Sunken Military Craft Act (SMCA, 2004)⁵ which protects US sunken military vessels wherever located and foreign vessels located within the US

¹ Frank K. Lord IV is representing Marei von Saher, heiress of the Jewish art dealer Jacques Goudstikker, in her claim in the US Federal Court for the Central District of California for the recovery of Cranach the Elder's "Adam and Eve", held at the Norton Simon Museum of Art in Pasadena, California (see the most recent decision: *Von Saher v. Norton Simon Museum of Art at Pasadena*, Case No. CV 07-2866-JFW [CD Cal Apr 2 2015]). For the case's exceptional impact on California's statute of limitations for actions to recover stolen artwork see K. Ray, *Von Saher: Court Says Statute of Limitations for Recovery of Stolen Art Runs Anew against Subsequent Purchasers/Transferees*, "Cultural Assets. Legal Analysis and Commentary on Art and Cultural Property. A Greenberg Traurig Blog", <http://www.gtlaw-culturalassets.com/2015/05/von-saher-court-says-statute-of-limitations-for-recovery-of-stolen-art-runs-anew-against-subsequent-purchaserstranferees/> [accessed: 22.10.2015].

² 2 November 2001, 2562 UNTS 3.

³ 10 December 1982, 1833 UNTS 397.

⁴ See *Hunt Inc v. Unidentified Shipwrecked Vessel or Vessels* 221 F 3d 634 (4th Cir 2000).

⁵ 10 USC § 113 (2012).

contiguous zone.⁶ Similarly, the prevalence of Spanish sovereign rights over other interests with respect to the vessels which no longer exercise their public functions has been affirmed in the seminal 2009 judgment delivered by the US District Court, Middle District of Florida, Tampa Division, concerning *Nuestra Señora de las Mercedes*,⁷ a Spanish shipwreck located by the American maritime treasure-hunter company on the now-Portuguese continental shelf. Those cases and State practice reinforcing sovereign immunity of flag States and foreign title to UCH, in the view of Mr. Gomez, change the interpretation of Article 2(8) of the CPUH which implies that whenever the Convention's provisions pertaining to the status of sunken State vessels are at odds with the State practice and international law the latter prevail. This "saving clause" should be viewed as an exception to the "creeping jurisdiction" in Article 7(3) of the CPUH referred to by Mr. Varmer while explaining US concerns over the ratification of the CPUH. Article 7(3) has indeed been perceived by maritime powers as recognizing only a tenuous interest of a flag State in the territorial waters of a coastal State. This is due to the conditional tense employed in connection with the obligation to inform the flag State about the discovery of its sunken craft. Explaining that Article 7 and the provisions of the CPUH relating to exclusive economic zone and continental shelf actually do not create new rights for the coastal States, Mr. Gomez stressed they encourage balanced cooperation between the States. While Mr. Varmer confirmed this opinion, he warned that protective measures, including recovery, are permitted to proceed without the formal cooperation of the flag State in the event of immediate danger to UCH.

Next, the speakers addressed the issue of salvage. They argued that by recognizing the sovereign immunity of foreign vessels, the US federal admiralty courts have, at the same time, denied any rights to commercial discoverers of cultural objects. The law of salvage is restricted and the law of finds is eliminated by the SMCA. This is notwithstanding the enormous amount of money the treasure-hunter companies invest. As treasure commercial salvors often destroy objects of lesser value, the preclusion of salvage reinforces *in situ* protection imposed by the CPUH which *inter alia* aims at preserving contextual integrity.

Preventing the destruction of stratified context as a means of preserving our understanding of the past in fact emerged to be the most underlined issue coming up in different panels. Dr. Lauren Ristvet (Associate Professor of Anthropology, University of Pennsylvania) juxtaposed the Penn Museum's cuneiform tablets collection deriving from the Museum's own excavations in Nippur to the one held by the Yale University Library. While the former collection consists of objects

⁶ It has to be observed that the Act does not openly claim sovereign immunity for sunken warships but only perpetual ownership, not extinguishable by the passage of time.

⁷ The US 11th Circuit Court of Appeals affirmed, holding that *Odyssey*, the salvage company, failed to invoke any of the exceptions to the immunity granted by §1609 of the Foreign Sovereign Immunities Act (28 USC § 1602-1611); *Odyssey Marine Exploration Inc v. Unidentified Shipwrecked Vessel*, 657 F 3d 1159 (11th Cir. 2011), *aff'g* 657 F Supp 2d 1126 (MD Fla 2009).

with untouched physical integrity and its context is intact, the Yale's derives from different, dispersed sources, thus giving much less insight into research on Sumerian culture. In the same vein, Patty Gerstenblith focused on how the legal structure developed in the US has not been utilized to its fullest potential to deter the market in illegally obtained archaeological objects and disincentivize looting on site. While the relatively easy route of restitution achieved through civil forfeiture under legislation enabling the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,⁸ i.e. the Convention on Cultural Property Implementation Act (CPIA)⁹ is certainly very efficient and wins acclaim of source countries, Ms. Gerstenblith noted it serves as a disincentive to conduct criminal prosecution. What she identified as 'first generation' cases of cultural property restitution involved primarily civil replevin actions brought by foreign countries or institutions bearing the burden of proving by preponderance of evidence that the property was stolen.¹⁰ Those claims are likely to be barred by procedural defences based on statutes of limitations or laches. At the same time criminal prosecutions under the National Stolen Property Act (NSPA)¹¹ founded on the principle that cultural objects removed in violation of source countries' patrimony laws are stolen property in the US,¹² face the challenge of establishing knowledge beyond reasonable doubt. Conversely, CPIA enacted as a Customs statute requires a low standard of proof of probable cause. The routine choice of this action to achieve restitution creates a bad policy of 'catch and release', as most civil forfeitures remain uncontested. The possessors and importers simply walk away. As many authors point out¹³ only incarceration would have a deterrent effect on potential perpetrators, who can easily afford the monetary fines imposed. As those perpetrators often appear to be museums Victoria Reed (Senior Curator of Provenance, Museum of Fine Arts, Boston) stressed the institution's efforts to apply even stricter standards of provenance research than those set up by the 2008 Association of Museum Directors (AAMD) guidelines dictating 1970 as a threshold.¹⁴ Beneficial

⁸ 14 November 1970, 823 UNTS 231.

⁹ 19 USC §§ 2601-2613 (2012).

¹⁰ Ms. Gerstenblith referred to *the Autocephalus Greek-Orthodox Church of Cyprus & the Republic of Cyprus v. Goldberg & Feldman Fine Arts Inc* 717 F Supp 1374 (SD Ind 1989), aff'd 917 F 2d 278 (7th Cir. 1990).

¹¹ 18 USC §§ 2314, 2315 (2012).

¹² See *United States v. McClain* 545 F 2d 988 (5th Cir. 1977); 593 F 2d 658 (5th Cir. 1979).

¹³ S.R.M. Mackenzie, *Going, Going, Gone: Regulating the Market in Illicit Antiquities*, Institute of Art and Law, Leicester 2005, pp. 149-156; L.A. Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, "Fordham Intellectual Property, Media and Entertainment Law Journal" 2015, Vol. 24, p. 755; eadem, *The Role of Museums in the Trade of Black Market Cultural Heritage Property*, "Art Antiquity and Law" 2013, Vol. 18, p. 241.

¹⁴ Guidelines on the Acquisition of Archaeological Material and Ancient Art (revised 2013), <https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf> [accessed: 30.11.2015].

EVENTS AND CONFERENCES

Jan Stoniewski

as they are, industry guidelines are not incorporated in federal or State laws that would include sanctions or penalties for perpetrators, which makes them practically unenforceable.¹⁵

In the face of a lack of witness testimony and no access to sites, evidencing intentional damage and destruction to cultural heritage in Syria appears to be crucial, especially in the light of trial of the member of Ansar Dine who allegedly directed the ransacking of Timbuktu, initiated before the International Criminal Court in September. Susan Wolfenbarger (Project Director, Geospatial Technologies and Human Rights Project, American Association for the Advancement of Science, AAAS) referred to the project AAAS has launched with the Penn Museum's CHC, the Smithsonian and the Syrian Interim Government's Heritage Force, which documents current conditions in this area through remote sensing. Submitting such data before regional and international tribunals might face legal challenges in future. She referred to the standard formulated in *Daubert v. Merrell Dow Pharmaceuticals*¹⁶ and *European Commission v. United Kingdom*,¹⁷ where the Court of Justice of the European Union clearly admitted and considered satellite imagery data information as evidence. Moreover, ethical challenges have to be carefully considered, and the impact of disclosing research findings has to be balanced against the gains of the local population, its security, possible negative consequences, and undermining people's own efforts to protect themselves. Additionally, Kathryn Hanson (Postdoctoral Fellow, Penn CHC, University of Pennsylvania), presenting satellite evidence of looting from *inter alia* Umma, Umm al-Aqarib, Zabalam in Iraq and Apamea in Syria stressed different types of looting existed, and satellite imagery did not reflect the full scale of plunder. Here, drone- and helicopter-level evidence would prove invaluable. Meanwhile, training seminars organized for the West African Museum Professionals by the Smithsonian Institution and ICOM in response to the damage to the Timbuktu cultural heritage site have to serve as a guidepost for SHOSHI (Safeguarding the Heritage of Syria Initiative) founded by Penn CHC. As noted by Cori Wegener (Cultural Heritage Preservation Officer, Smithsonian Institution) its 2014 summer workshops conducted in cooperation with the Smithsonian as well as the Syrian Interim Government's Heritage Task Force focused on informing cultural heritage professionals and activists on the ground on how to secure museum collections in the case of emergency, and the providing of supplies and equipment (special concern was given to the Ma'arra Museum in Idlib, where 90% of the mosaics that came under ISIS attack were covered with sandbags). Training sessions have so far taken place in Beirut and Southern Turkey.

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¹⁵ L.A. Amineddoleh, *Protecting Cultural Heritage...*, p. 734.

¹⁶ *Daubert v. Merrell Dow Pharmaceuticals* 509 US 579 (1993).

¹⁷ Case C-390/07 *European Commission v. UK* [2009] ECR I-214.

The conclusions of the conference may be summarized as follows.

While the US is reluctant to ratify CPUH, due to the alleged preference it gives to the coastal States, recent US case law and State practice seem to be in conformity with the Convention's provisions severely curtailing salvage and find. It can be even said that SMCA, though pertaining to only a certain type of UCH (State owned craft), can be viewed as an authority to cite while implementing CPUH in future.¹⁸ If seen as preserving the sovereign immunity of warships and State vessels due to the presence of the saving clause, i.e. Art. 2(8), the Convention guarantees balance between the coastal and flag State rights. Notwithstanding the benefits of the approach denying the right to a reward for discoverers aimed at acting as a deterrent to commercial exploitation of UCH it has been raised that such a solution might be paving the way for the cost-free excavation for the States of origin.¹⁹

Stressing the great scholarly, and thus universal value of the cultural material excavated in adherence with archaeological process the conference addressed the gravity of the elimination of demand for the pillaged cultural objects from the conflicted areas in the end-market countries. As the US remains one of the most important entrepot markets for art trade in the world²⁰ it is very important for this country to step up in its actions. While stricter and extensive museum acquisition policy as well as due diligence in provenance research is one way of dealing with the problem, taking advantage of available legal tools to criminally prosecute purchasers of looted antiquities might prove the only effective deterrent. It has to be observed that the conference did not address the Protect and Preserve International Cultural Property Act (at the time in the House of Representatives)²¹ tracking UN Security Council Resolution No. 2199²² which had been adopted in February 2015.

¹⁸ This argument has been raised by Ole Varmer; see O. Varmer, *United States: Responses to the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, "Journal of Maritime Archaeology" 2010, Vol. 5, p. 135.

¹⁹ P. Vigni, *The Enforcement of Underwater Cultural Heritage by Courts*, in: F. Francioni, J. Gordley (eds.), *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford 2013, p. 147.

²⁰ In 2012 the United States, next to the UK was the second largest importer and exporter of art and net importer of art, with imports of €6.1 billion, exceeding exports of €5.8 billion; see C. McAndrew, *TEFAF Art Market Report 2014 - The Global Art Market with a focus on the US and China*, The European Fine Art Foundation (TEFAF), Maastricht 2014, pp. 61-73.

²¹ HR 1493 114th Cong (2015-2016).

²² 12 February 2015, UN Doc. S/RES/2199 (2015).