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## Museums in the Crosshairs: Unintended Consequences of the War on Terror

Jennifer Anglim Kreder  
*Northern Kentucky University*

Kimberly Degraaf  
*Northern Kentucky University*

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# MUSEUMS IN THE CROSSHAIRS: UNINTENDED CONSEQUENCES OF THE WAR ON TERROR

JENNIFER ANGLIM KREDER\*  
KIMBERLY DEGRAAF\*\*

## ABSTRACT

*Congress has passed ineffectual, “sound bite” anti-terrorism legislation that has foisted conflicting jurisdictional mandates upon the federal courts, sucked terrorist victims into a vacuous, exhausting drama with no chance for justice, and interfered with the President’s ability to conduct diplomatic relations in the Middle East. One group of victims is mired in multiple jurisdictions trying to enforce a default judgment, exorbitant by international standards, against the Islamic Republic of Iran by forcing auctions of antiquities collections housed at Harvard University, the Oriental Institute at the University of Chicago, the Field Museum of Natural History (Chicago), and the Museum of Fine Arts (Boston) among others. Congress in this political posturing has triggered the Department of Justice to participate in the litigation counter to the victims’ interests. The victims likely feel ignored and maligned by their own president, while Congress all along was the master puppeteer of their false hopes. This Article analyzes the legislation and litigation and concludes that Congress should leave the ever-changing war on terror to the executive branch and that the artifacts should not be auctioned—even to satisfy the plaintiffs, the most deserving of victims.*

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\* Associate Dean for Faculty Development and Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University; J.D. Georgetown University Law Center. The author was a litigation associate at Milbank, Tweed, Hadley & McCloy LLP, where she worked on art disputes and inter-governmental Holocaust negotiations and litigation before entering academia. She is Co-Chair of the American Society of International Law Interest Group on Cultural Heritage and the Arts and would like to thank Laina Lopez for her comments.

\*\* J.D. Salmon P. Chase College of Law, Northern Kentucky University.

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## I. INTRODUCTION

The origin of the phrase “Politics makes strange bedfellows” is attributed to Shakespeare,<sup>1</sup> and life is imitating art in a bizarre group of cases that has pitted innocent victims of a 1997 Hamas terrorist attack against some of the nation’s most respected institutions and people,<sup>2</sup> which some view as “Pillars of Society.”<sup>3</sup> Congress has foisted jurisdiction upon the federal courts via “terrorism amendments” to the Foreign Sovereign Immunities Act (“FSIA”),<sup>4</sup> which has sucked a large number of terrorist victims into a vacuous, exhausting drama with little to no chance for justice. These victims are mired in multiple jurisdictions trying to enforce a \$71 million default judgment against the Islamic Republic of Iran by forcing auctions of antiquities collections housed at Harvard University,

1. RALPH KEYES, THE QUOTE VERIFIER 171 (2006).

2. *Rubin v. Islamic Republic of Iran*, 541 F. Supp. 2d 416 (D. Mass. 2008) (Harvard University, Museum of Fine Arts–Boston); *Rubin v. Islamic Republic of Iran*, No. 03 C 9370, 2008 WL 192321 (N.D. Ill. Jan. 18, 2008) (Oriental Institute of University of Chicago, Field Museum of Natural History, Department of Justice). The prior and subsequent history in these cases is extensive and omitted from this footnote in the interest of clarity, but these two opinions are at the core of the disputes concerning ancient Persian artifacts in museums. *See also* Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT’L LAW. 613, 624–26 (2007) (generally discussing the claims and mentioning now dismissed cases against the University of Michigan Museum of Art and Kelsey Museum of Archaeology and Detroit Institute of Arts); Travis Sills, *Judicial Conversion of Culture: Attaching Embodiments of Ancient Culture to Judgments in Civil Proceedings*, in YEARBOOK OF CULTURAL PROPERTY LAW 237 (Sherry Hutt ed., 2007) (generally discussing the claims).

3. *The Pillars of Society* is a play written in 1877 by Norwegian playwright Henrik Ibsen; its premise is that the rich and powerful are often selfish and corrupt. 3 MCGRAW-HILL ENCYCLOPEDIA OF WORLD DRAMA 9 (Stanley Hochman ed., 1984).

4. *See infra* Part II.

the Oriental Institute at the University of Chicago, the Field Museum of Natural History (Chicago), and the Museum of Fine Arts (Boston) among others.<sup>5</sup> Moreover, Congress, in this political posturing, unwisely interfered with the President's ability to conduct diplomatic relations in the Middle East and triggered the Department of Justice to participate in the litigation counter to the victims' interests.<sup>6</sup> The victims likely feel ignored and maligned by their own president, while Congress all along was the master puppeteer of their false hopes.<sup>7</sup>

This Article posits that Congress should leave the ever-changing war on terror to the executive branch and that the artifacts should not be auctioned—even to satisfy the judgments obtained by the plaintiffs, the most deserving of victims. Part II provides context necessary to understand the litigation at issue and the consequences thereof. Part III delves into legal analysis of the applicable statutory provisions. Part IV examines British court decisions regarding other Iranian artifacts, which could potentially impact the U.S. litigation. Part V concludes that members of Congress acted in their own political self-interest in passing

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5. See *supra* note 2. The overarching judgment was \$300 million, see *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 274–79 (D.D.C. 2003), but only \$71.5 million is enforceable against the Islamic Republic of Iran. Gerstenblith & Roussin, *supra* note 2, at 624.

6. E.g., Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307 (2009) (discussing all “terrorism legislation” enacted since 1991). See also *Republic of Iraq v. Beatty*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2183 (2009) (discussing presidential waiver of Foreign Sovereign Immunities Act jurisdiction against Iraq); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1732 (2009) (demonstrating interaction between arbitral awards and default terrorism judgments); Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 VILL. L. REV. 479 (2008) (analyzing Foreign Sovereign Immunity Act commercial activity exception aspects of the earlier stages of the *Rubin* litigation).

7. S. Jason Baletsa, Note, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1293 (2000) (“The practical result of U.S. intervention, from the perspective of the victims’ families, is that the United States has sided with the terrorist nation against them.” (footnote omitted)); Brian Blomquist, *Grieving Dad: Prez Boosts Terror*, N.Y. POST, Sept. 27, 1999, at 15 (discussing regrets of one parent of a woman who perished in a terrorist attack of ever having initiated litigation against the Islamic Republic of Iran); see also Sean P. Vitrano, Note, *Hell Bent on Awarding Recovery to Terrorism Victims: The Evolution and Application of the Antiterrorism Amendments to the Foreign Sovereign Immunities Act*, 19 DICK. J. INT'L L. 213, 213–14 (2000) (“President Clinton publicly pledged his support for the families of the victims of terrorism, [but] his Administration subsequently worked to undermine the effectiveness of the new [legislation].”); Josh Gerstein, *Justice Dept. ‘Helps Iran’ in Court Case*, N.Y. SUN, Nov. 23, 2007, at National 1, available at <http://www.nysun.com/national/justice-dept-helps-iran-in-court-case/66872/> (quoting plaintiffs’ counsel: “Congress said, ‘Go do this.’ We do it and now the [executive] branch stands in the way”). See generally William P. Hoye, *Fighting Mire with . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105, 129 (2002) (discussing presidential national security waiver provision).

“sound bite” legislation<sup>8</sup> at the expense of terrorism victims, foisted conflicting jurisdictional mandates upon the federal courts and, in the future, should leave the fast-changing war on terror, at least in regard to the Islamic Republic of Iran, to the executive branch.

## II. BACKGROUND

As a result of the cases, known collectively as the “*Rubin*” cases, Harvard University, the University of Chicago, the University of Michigan, the Field Museum of Natural History in Chicago, the Detroit Institute of Arts, the Boston Museum of Fine Arts, and the U.S. Department of Justice *have aligned with the Republic of Iran* to prevent the victims from enforcing their \$251 million default judgment by forcing an auction of antiquities unearthed in the cradle of civilization.<sup>9</sup> President Barack Obama has been petitioned by Iranian-Americans, most of whom likely fled the post-Shah regime, to join the coalition supporting Iran,<sup>10</sup> one of the three rogue nations forming what President George W. Bush dubbed the “Axis of Evil.”<sup>11</sup> Standing against this alliance are a handful of U.S. citizens, including young study-abroad students horrifically injured by the attack<sup>12</sup> and an advisor to Israeli Prime Minister Netanyahu who testified as to the link between Hamas and Iran.<sup>13</sup> Moreover, a group of victims of a different attack, the 1983 Hezbollah marine barracks bombing in Beirut, Lebanon, hold a \$2.5 billion default judgment against Iran.<sup>14</sup> These victims have entered the legal fray in the *Rubin* cases, asserting a

8. Cf. Bobby Scott et al., *Juvenile Justice: Reform After One Hundred Years*, 37 AM. CRIM. L. REV. 1409, 1414 (2000) (stating that Congress is more interested in “tough-on-crime sound bites” than effectively tackling the difficult problems surrounding juvenile justice).

9. E.g., Courtney Campbell, Note, *Arts and Arms: An Examination of the Looting of the National Museum of Iraq*, 32 B.C. INT’L & COMP. L. REV. 423, 424 (2009) (using term “Cradle of Civilization” to refer to Iraq, Iran, and the surrounding region).

10. Goli Fassihian, *Appeal for Protection of Persian Artifacts Reaches New Heights*, NAT’L IRANIAN AM. COUNCIL (Mar. 12, 2009), <http://www.niacouncil.org/site/News2?page=NewsArticle&id=5502>.

11. In 2002, President Bush called Iran, Iraq, and North Korea the “Axis of Evil” in his State of the Union Address, “an obvious twist on the Axis Powers in World War II (i.e., Germany, Italy, and Japan) and the Evil Empire speech of Ronald Reagan against the Soviet Union.” NANCY S. LIND & BERNARD I. TAMAS, *CONTROVERSIES OF THE GEORGE W. BUSH PRESIDENCY* 131, 145–46 (2007).

12. *Rubin v. Hamas—Islamic Resistance Movement*, No. CIV. A. 02-0975(RMU), 2004 WL 2216489, at \*1 (D.D.C. Sept. 27, 2004) (first opinion in lengthy lawsuit discussed below).

13. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 261–62 (D.D.C. 2003). This case was later consolidated with one of the cases in the *Rubin* litigation discussed below. *Id.* at 261. Unless otherwise noted, both the *Campuzano* plaintiffs and the *Rubin* plaintiffs will be collectively referred to as “the plaintiffs” or “the *Rubin* plaintiffs” throughout this Article.

14. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007) (awarding damages); *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003) (default judgment).

competing claim to the proceeds of any future sale of the antiquities at issue.<sup>15</sup> The 1983 attack resulted in 241 American casualties, the largest number of American lives lost in a terrorist act until September 11, 2001.<sup>16</sup> “The resulting explosion was the largest non-nuclear explosion that had ever been detonated on the face of the Earth.”<sup>17</sup> The war on terror<sup>18</sup> has made strange bedfellows, indeed.

The attacks certainly terrorized innocents. In 1997, three Hamas terrorists detonated suicide bombs packed “with nails, screws, pieces of glass, and chemical poisons to cause maximum pain, suffering, and death” in a crowded Jerusalem marketplace.<sup>19</sup> The attack killed five people and injured more than two hundred.<sup>20</sup> Eight of the *Rubin* plaintiffs were among the severely wounded.<sup>21</sup> They experienced pain and suffering beyond adequate description and will probably never truly recover from the resulting post-traumatic stress while struggling tremendously simply to go through life each day.<sup>22</sup> Four of the plaintiffs are family members who care for injured victims.<sup>23</sup> All are U.S. citizens.<sup>24</sup>

Descriptions of terrorism victims’ horrible injuries are “stories that supply the necessary human dimension to the stark, horrifying skeleton of the bombing itself.”<sup>25</sup> All of the injured victims suffer from Post-

15. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007); *Peterson v. Islamic Republic of Iran*, No. C 08-80030-MISC JSW, 2008 WL 5046327 (N.D. Cal. Nov. 24, 2008). *See also* *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2008 WL 2531197, at \*1 (N.D. Ill. June 25, 2008) (granting a motion to strike the *Peterson* plaintiffs’ application to appear pro hac vice, appearance, and motion to dismiss); Order Granting Motion to Intervene, *Rubin*, 2008 WL 2531197 (No. 03 CV 9370) (granting *Peterson* plaintiffs’ subsequent motion to intervene) (on file with author).

16. Robert C. McFarlane, *From Beirut to 9/11*, N.Y. TIMES, Oct. 23, 2008, at A37, available at <http://www.nytimes.com/2008/10/23/opinion/23mcfarlane.html>; *The President’s News Conference, Transcript of Bush’s Remarks on Iraq: “We Will Finish the Work of the Fallen”*, N.Y. TIMES, Apr. 14, 2004, at A12, available at <http://www.nytimes.com/2004/04/14/politics/14BTEX.html>.

17. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 56 (D.D.C. 2003).

18. The phrase “war on terror” was a hallmark of President Bush’s administration, which “adopted the phrase soon after the Sept. 11, 2001, attacks to capture the scope of the threat it perceived and the military operations that would be required to confront it.” Scott Wilson & Al Kamen, *Global War on Terror’ Is Given New Name*, WASH. POST, Mar. 25, 2009, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>; *see also* OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COMBATING TERRORISM (2003), available at [http://www.upmc-biosecurity.org/website/resources/govt\\_docs/public\\_health\\_prep/whitehouse/whitehouse\\_national\\_strategy\\_for\\_combating\\_terrorism.html](http://www.upmc-biosecurity.org/website/resources/govt_docs/public_health_prep/whitehouse/whitehouse_national_strategy_for_combating_terrorism.html); JIM A. KUYPERS, BUSH’S WAR 4, 21–34 (2006).

19. *Campuzano*, 281 F. Supp. 2d at 261. The facts alleged here are from this opinion containing findings of fact supporting the entry of a default judgment against Iran.

20. *Id.*

21. *Id.*

22. *See id.* at 263–68.

23. *Id.* at 261.

24. *Campuzano*, 281 F. Supp. 2d at 263–68.

25. *Damarrell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 108 (D.D.C. 2003) (default

Traumatic Stress Disorder (PTSD), common symptoms of which include “paranoia, fear, emotional reactions to news of other terrorist attacks, and depression.”<sup>26</sup>

Their individual stories should be known.<sup>27</sup> Diana Campuzano’s skin burned while her “brain leaked cerebral spinal fluid from a massive skull fracture, and she was blind and hearing impaired.”<sup>28</sup> During her five-hour craniotomy, her anterior skull base fracture was repaired with “mini plates, bone cement, and her own harvested tissue.”<sup>29</sup> Her “recovery” was delayed as a life-threatening infection spread throughout her body.<sup>30</sup> “Photographs demonstrate the startling difference in her appearance before and after the explosion.”<sup>31</sup> Avi Elishis, who had just graduated from high school, “suffered from lacerations and multiple entry wounds from the bomb shrapnel, a ruptured eardrum, and first- and second-degree burns covering his body.”<sup>32</sup> He went into shock, had a two-inch screw removed from his spleen, and underwent surgeries to recover shrapnel that perforated his

judgment issued after six days of hearings concerning 1983 Beirut Hezbollah car bombing that killed sixty-three people, including seventeen U.S. citizens, and injured more than one hundred other people). The gruesome reality of a terrorist attack should be acknowledged here.

The [1997] explosion ripped the bodies of the bombers apart, leaving limbs and torsos lying on the street and spattering the walls of buildings with blood. The people they killed were identified as two young women and a 12-year-old girl, and a managed 48. Hospital officials said most of the injuries were either caused by shrapnel or flames.

Serge Schmemmann, *Bombing in Jerusalem: The Overview; 3 Bombers in Suicide Attack Kill 4 on Jerusalem Street in Another Blow to Peace*, N.Y. TIMES, Sept. 5, 1997, at A1, A14, available at <http://www.nytimes.com/1997/09/05/world/3-bombers-in-suicide-attack-kill-4-on-jerusalem-street-in-another-blow-to-peace.html> (“Officials said eight people were severely wounded, and about 180 others were also hurt.”); Charles M. Sennott, *Suicide Bombs Take Heavy Toll in Jerusalem 7 Die, Nearly 200 Hurt; Hopes for Peace Dim Again*, BOS. GLOBE, Sept. 5, 1997, at A1 (“Orthodox members of the Jewish burial society meticulously gathered blood and human fragments. They acted in accordance with Jewish tradition that the entire body is sacred and all remains must be buried within 24 hours.”). A local proprietor who was lucky enough to have just re-entered his store prior to the blast relayed: “I saw bodies and people hurt and screaming . . . It’s the worst thing I’ve ever seen. I am a very strong person but I couldn’t help much.” Storer H. Rowley, *Netanyahu Tells Arafat Bombings Are Last Straw*, CHI. TRIB., Sept. 5, 1997, at 1, available at [http://articles.chicagotribune.com/1997-09-05/news/9709050315\\_1\\_lebanon-raid-israeli-jet-fighters-united-nations-interim-force](http://articles.chicagotribune.com/1997-09-05/news/9709050315_1_lebanon-raid-israeli-jet-fighters-united-nations-interim-force).

26. *Campuzano*, 281 F. Supp. 2d at 265.

27. The *Campuzano* case filed by plaintiffs Diana Campuzano, Avi Elishis, and Gregg Salzman was consolidated with the *Rubin* case filed in the U.S. District Court for the District of Columbia by plaintiffs Jenny Rubin, Daniel Miller, Abraham Mendelson, Stuart Hesch, Noam Rozenman, Deborah Rubin, Renay Frym, Elena Rozenman, and Tzvi Rozenman on August 2, 2002. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 261 (D.D.C. 2003).

28. *Campuzano*, 281 F. Supp. 2d at 263.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 264.

lung and three screws lodged next to his heart.<sup>33</sup> Another screw was later removed from his foot, but one remains lodged under his rib.<sup>34</sup> Gregg Salzman was a chiropractor who now suffers debilitating headaches and is in constant pain as he struggles to work part-time after undergoing root canals, tooth extractions, and having a titanium implant inserted into his gums.<sup>35</sup> Nerve damage spread to his brain and is not treatable except via counseling to help him “live with [the] pain.”<sup>36</sup> Jenny Rubin was diagnosed with “elective mutism, a psychiatric pain condition,” and permanent tinnitus.<sup>37</sup> Daniel Miller was a recent high school graduate who was impaled by a spike in his left leg, nuts and bolts in both ankles, and a piece of glass in his eye; he now suffers from a permanent limp, numbing and tingling in his foot, a hematoma, nerve damage, and hypersensitivity to sunlight, and he can no longer walk more than twenty minutes at a time.<sup>38</sup> Abraham Mendelson, a study-abroad student who had to endure nine hours before being able to be treated, suffered “multiple shrapnel-caused entry wounds in his legs, burns that included a burned cornea, . . . a partially-severed ear,” and a punctured ear drum.<sup>39</sup> Stuart Hersh suffered multiple entry wounds and burns, and when his “nightmares and other problems arising from his PTSD had become overwhelming,” he attempted to commit suicide on the one-year anniversary of the attack.<sup>40</sup>

Noam Rozenman, a high school junior at the time, was perhaps the most seriously injured.<sup>41</sup> He suffered “burns covering forty percent of his body and over 100 shrapnel-caused entry wounds.”<sup>42</sup> “He spent six weeks in the hospital and underwent daily burn treatments.”<sup>43</sup> “His burn recovery period was twice the normal length, because the chemicals inside the bombs caused increased body damage.”<sup>44</sup> Noam learned to walk again with substantial therapy, and, a year later, he underwent additional surgery to “adjust a steel plate in his leg and to treat his perforated eardrums.”<sup>45</sup> He has significant permanent injuries and impaired motor skills; he will

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33. *Id.*

34. *Campuzano*, 281 F. Supp. 2d at 264.

35. *Id.* at 265.

36. *Id.*

37. *Id.*

38. *Id.* at 266.

39. *Id.*

40. *Campuzano*, 281 F. Supp. 2d at 266–67.

41. *Id.* at 267.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

always walk with a limp because one of his legs is now shorter than the other.<sup>46</sup> As previously mentioned, all of the victims who were present suffered PTSD, but Noam's emotional injuries were so debilitating that it was clinically inadvisable for him even to testify.<sup>47</sup>

The rest of the plaintiffs are family members of those who were physically hit by the bomb blasts, but they too suffered greatly from the reverberations. Renay Frym is Stuart Hersh's wife, but she "now acts as his nurse rather than his wife."<sup>48</sup> Deborah Rubin, Elena Rozenman, and Tzvi Rozenman are parents who have dedicated their time and effort to care for their injured children and suffer from grief, anguish, depression, chronic fatigue, headaches, agitation, rejection, hypersensitivity, anxiety, irritable bowel syndrome, and generalized joint pain and stiffness.<sup>49</sup>

According to the United States Court of Appeals for the D.C. Circuit and innumerable news reports, Iran has provided support to Hamas by means of money and terrorist training.<sup>50</sup> Iran failed to appear in the court proceedings, which resulted in a default judgment totaling in excess of \$410 million, including compensatory damages in the amount of \$71.5 million for the *Rubin* plaintiffs and \$39.5 million for the *Campuzano* plaintiffs.<sup>51</sup> However, as punitive damages were blocked by foreign sovereign immunity, only the compensatory portion of the roughly \$410 million judgment is enforceable against Iran.<sup>52</sup>

46. *Campuzano*, 281 F. Supp. 2d at 267.

47. *Id.*

48. *Id.* at 268.

49. *Id.* at 267–68.

50. *Id.* at 262. Dr. Bruce Tefft, a terrorism expert, testified that in 1995 Iran provided \$30 million in Hamas support. *Id.* Dr. Patrick Clawson, another expert, testified that over the past ten years, Iran annually has provided between \$20 million and \$50 million to Hamas. *Id.* See also Steven Erlanger, *Iran Pledges Financial Aid To Hamas-Led Palestinians*, N.Y. TIMES, Feb. 23, 2006, at A12, available at <http://www.nytimes.com/2006/02/23/international/middleeast/23mideast.html>; John Kifner, *Roots of Terror: A Special Report; Alms & Arms: Tactics in a Holy War*, N.Y. TIMES, Mar. 14, 1996, at 1, available at <http://www.nytimes.com/1996/03/15/world/roots-of-terror-a-special-report-alm-and-arms-tactics-in-a-holy-war.html> ("[Hamas] has strong support from Islamic movements in neighboring countries, including . . . financial backing from Iran."); Michael Slackman, *Iran Gives Hamas Enthusiastic Support, But Discreetly, Just in Case*, N.Y. TIMES, Jan. 13, 2009, at A10, available at <http://www.nytimes.com/2009/01/13/world/middleeast/13iran.html>.

51. *Campuzano*, 281 F. Supp. 2d at 274–79. The compensatory damages included "pain and suffering, loss of prospective income, medical expenses, and solatium." *Id.* at 272. With respect to punitive damages, the court applied a four-factor test, noting that courts in previous cases "used a multiple of three times Iran's annual expenditure on terrorism and . . . have generally awarded \$300 million in punitive damages per terrorist incident," and concluded that punitive damages were available "against all of the defendants except Iran. . . ." *Id.* at 278 (citations omitted).

52. *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1110 (N.D. Ill. 2004) (citing *Campuzano*, 281 F. Supp. 2d at 275–77).

The *Rubin* plaintiffs soon discovered that “[o]btaining the initial judgment against Iran was the easy part,” and that recovery would be far more difficult.<sup>53</sup> After unsuccessful attempts to execute against various bank accounts<sup>54</sup> and limited success executing against real estate,<sup>55</sup> the plaintiffs developed a revised strategy which involved executing upon Iranian artifacts in U.S. museums.<sup>56</sup> “Once attached, the invaluable collections would be sold to the highest bidder at auction to pay the plaintiffs’ judgment award.”<sup>57</sup>

Rather than sit by and watch while the artifacts potentially “end up on coffee tables around the country,”<sup>58</sup> Iran eventually appeared in the enforcement proceedings.<sup>59</sup> Perhaps spurred by new concern about its cultural property located in Western nations, Iran also has attempted to recover cultural property in the United Kingdom.<sup>60</sup> Iran’s efforts are supported by the coalition described above in addition to many Iranian-Americans, most of whom presumably fled the current regime, and are petitioning U.S. President Barack Obama to intervene.<sup>61</sup> National Iranian American Council (NIAC) Board of Directors member, Djamshid Foroughi, stated: “As Iranian Americans, we simply cannot allow our heritage to be auctioned off.”<sup>62</sup> Most archeologists would agree.<sup>63</sup>

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53. James Wawrzyniak, *Rubin v. The Islamic Republic of Iran: A Struggle for Control of Persian Antiquities in America*, in YEARBOOK OF CULTURAL PROPERTY LAW 223, 226 (Sherry Hutt ed., 2008).

54. *Rubin v. Islamic Republic of Iran*, 563 F. Supp. 2d 38, 40–41 (D.D.C. 2008) (rejecting attempt to attach bank accounts).

55. *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 489–90 (5th Cir. 2004).

56. *E.g.*, Wawrzyniak, *supra* note 53, at 227.

57. *Id.*

58. Sharon Cohen, *Whose Artifacts? Are They Iran’s? Or Terrorist Victims’?*, CHI. DAILY HERALD, Feb. 22, 2009, at 16 (quoting Thomas Fortune Fay, lawyer for families affected by the 1983 Beirut attack).

59. *E.g.*, *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2006 WL 2024247, at \*1 (N.D. Ill. July 14, 2006). Counsel for the *Rubin* plaintiffs, David Strachman, stated that “he has no intention of trying to sell them commercially—something he says would be ‘absolutely inappropriate.’” Cohen, *supra* note 58.

60. *See infra* Part III.

61. *See* Josh Gerstein, *Judge Gives Terror Victims a Victory over Iran*, N.Y. SUN, May 28, 2008, at 6, available at <http://www.nysun.com/foreign/judge-gives-terror-victims-a-victory-over-iran/78754/> (“An Iranian-American attorney who led a petition drive [to submit a statement to President Barack Obama] opposing the seizure of the artifacts by the terror victims and their heirs, Jamshid Irani of Manhattan” was quoted as stating: “These are belonging to the Iranian nation, not necessarily the Iranian government[.]”). A European association of scholars specializing in Iranian studies, Societas Iranologica Europea, also has collected hundreds of signatures worldwide on a petition submitted to President Obama. Cohen, *supra* note 58.

62. Shadee Malaklou, *NIAC Enlists Major Law Firm to Protect Persian Tablets*, NAT’L IRANIAN AM. COUNCIL (Mar. 12, 2008), <http://www.niacouncil.org/site/News2:page=NewsArticle&id=5640>. NIAC was quoted as stating: “Satisfying a court judgment out of assets that are part of a group of people’s cultural heritage will inflict unnecessary and irreparable damage on them[.]” *Id.*

Congress is to blame for this particular aftermath of the terrorist attacks. Congress has passed politically popular laws purporting to aid victims of terrorism, but all it handed them, at best, was a prospective Pyrrhic victory.<sup>64</sup> These laws effectively deputize plaintiffs' lawyers as "private secretar[ies] of state"<sup>65</sup> to file civil "terrorism cases."<sup>66</sup> Inexcusably, Congress has encouraged terrorism victims to undergo ineffective financially and emotionally draining trials at which Iran would never even show up, much less pay any resulting judgment.<sup>67</sup> And there are remarkably few assets in the United States or in other nations that potentially could be used to satisfy the judgment.<sup>68</sup>

For example, Congress passed legislation in 1996, discussed below, named for Alisa Flatow, a Brandeis student who was killed in a 1995 terrorist attack in Gaza.<sup>69</sup> Alisa's father, Stephen Flatow, became a plaintiff in litigation against Iran.<sup>70</sup> After the Flatow Amendment was passed in 1996, Mr. Flatow on national television stated:

63. *E.g.*, Gerstenblith & Roussin, *supra* note 2. Much has been written about the uniqueness of cultural property. See Janet Blake, *On Defining Cultural Heritage*, 49 INT'L & COMP. L.Q. 61, 61 (2000) ("Examples can be found from ancient times of concern for the protection of cultural artefacts and early legislation to protect monuments and works of art first appeared in Europe in the 15th century."); Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169 (2007) (analyzing scope of "public interest" in archeological knowledge); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 344 (1989) (discussing uniqueness of cultural property); Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbé Grégoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1142 (1990) ("Public responsibility for the conservation of artifacts of historic or aesthetic value is now acknowledged everywhere."); Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 N.Y.U. J. INT'L L. & POL. 95 (1998).

64. Judge Royce C. Lamberth, Chief Judge of the United States District Court for the District of Columbia, stated that "Flatow's original judgment against Iran has come to epitomize the phrase 'Pyrrhic victory.'" *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 27 (D.D.C. 1999). The term "Pyrrhic victory" means a victory achieved at far too great a cost to the purported victor. See, *e.g.*, The Phrase Finder, <http://www.phrases.org.uk/meanings/297150.html> (last visited Jan. 24, 2011). It alludes to the victory of King Pyrrhus of Epirus over the Romans in 279 B.C. at the battle of Asculum in Apulia, achieved with great losses to King Pyrrhus' elite forces. *Id.*

65. Roger Parloff, *Deep Freezing Terror's Assets*, 24 AM. LAW. 122, 122 (2002).

66. *E.g.*, Strauss, *supra* note 6, at 308 ("A new type of lawsuit has emerged in the United States, in which victims of terrorism, individually or in groups, have pursued the perpetrators of terrorist acts and the organizations of nations who have enabled and funded them."). See generally Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169 (1999) (discussing pre-amendment litigation).

67. Iran has made a point not to appear in "terrorism litigation" in the United States. *E.g.*, Hoye, *supra* note 7, at 129.

68. *E.g.*, *id.*

69. *E.g.*, Baletsa, *supra* note 7, at 1247.

70. *E.g.*, *id.* at 1248.

[The law g]ave me a weapon. In other words, a—a sovereign country has the right to launch Tomahawk missiles at another country to protect its rights . . . . I don't have that kind of power. I don't have \$60 million to launch those kinds of missiles. But now I have something that's purely American. I have—I have American jurisdiction over the people who sponsored the terrorist attack which killed Alisa.<sup>71</sup>

Three years later, Mr. Flatow was devastated yet again after he “won” the case but could not force Iran to pay even a dime.<sup>72</sup> He tried to convey his pain: “If I knew then what I know [now], after spending tens of thousands of dollars trying to get some measure of justice for Alisa, I don't think I would have ever started this lawsuit.”<sup>73</sup>

Although the plaintiffs' lawyers in terrorism cases certainly took their cases in good faith on contingency, Mr. Flatow (and presumably other victims) had to pay nonrefundable costs to launch his law suit and recovery efforts.<sup>74</sup> Moreover, despite literature about the cathartic benefits of litigation to terrorism victims<sup>75</sup> and positive international law development spurred by some types of human rights litigation,<sup>76</sup> it is more likely that the *Rubin* and *Peterson* plaintiffs experienced emotional turmoil

71. *Id.* at 1248 n.1 (citing *60 Minutes: In Memory of Alisa* (CBS television broadcast Oct. 4, 1998)).

72. Blomquist, *supra* note 7, at 15.

73. *Id.*

74. *Id.* See generally 20 AM. JUR. 2D *Costs* § 60 (2009) (describing basic litigation finance). Third-party litigation finance could dramatically change this calculation and perhaps even lead to better recoveries for plaintiffs via extra-legal settlements. See Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. \_ (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1586053](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586053) (last visited Feb. 23, 2011); John R. Crook, *United States and Libya Sign Agreement to Resolve Pan Am Flight 103 and Other Claims*, 102 AM. J. INT'L L. 892 (2008) (describing extra-legal \$1.2 billion settlement).

75. See, e.g., Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation As a Tool for Social Change*, 57 VAND. L. REV. 2305, 2324 (2004) (“A favorable judgment or verdict . . . offers a public and official acknowledgement of rights, the stigmatization of violations, a measure of accountability, and a symbolic break with the past.”).

76. In regard to Alien Tort Claims Act claims, Professor Van Schaack observed:

Although ostensibly tort disputes seeking retrospective relief, obtaining an executable judgment was often a secondary goal of this litigation. Indeed, most of the cases' damage awards were issued by default and/or are unenforceable—a “teasing illusion like a munificent bequest in a pauper's will.” Nonetheless, the cases exposed the presence of alleged abusers within the United States, created an opportunity for norm enunciation, and achieved, at a minimum, a symbolic denunciation of abuses. . . .

Human rights advocates have generally cheered these strategies and results, although a few detractors have denounced this endeavor as nothing more than ideological theatre.

*Id.* at 2313–14.

by pursuing a trial at which Iran was not even compelled to show up<sup>77</sup>—except for now to contest the still-uncertain auction of unrelated artifacts.<sup>78</sup> The victims are left with no closure,<sup>79</sup> likely feeling maligned by those trying to block the sale,<sup>80</sup> feeling like no one is hearing their call for “justice.”<sup>81</sup> As in other human rights litigation,

Plaintiffs may resent the “commodification” of their experience when forced to quantify in financial terms the harm caused by torture or the extrajudicial killing of loved ones. Similarly, the introduction of money damages may distort some of the symbolic value of these cases and splinter a sense of solidarity among plaintiffs by creating competition for awards among different victims and subclasses and by raising concerns about distributive justice. Finally, a money damage award without any prospect of enforcement or prospective change may ultimately not satisfy retributive impulses and may actually undermine victims’ faith in real justice or reform . . .<sup>82</sup>

What is true regarding Alien Tort Claims Act litigation seems to be true regarding anti-terrorism litigation against Iran: “[I]t may be a stretch to postulate that, at this point in time, the existence of the [legislation] or the potential to be sued in the United States exerts any sort of generalized deterrent function . . .”<sup>83</sup> Perhaps it is best to leave the war on terror and

77. E.g., *Jerseyan Seeks Top-Level Aid in Iran Suit*, STAR-LEDGER (Newark, N.J.), July 18, 1998, at 6 (quoting unnamed source from Tehran who stated that the Islamic Republic in Iran did not appear in the Flatow litigation and viewed the ultimate damage award as “politically motivated” and “totally lacking objectivity and credibility”).

78. See *infra* Part II.

79. E.g., Baletsa, *supra* note 7, at 1251. See generally Yael Danieli et al., *The Psychosocial Aftermath of Terrorism*, in UNDERSTANDING TERRORISM: PSYCHOSOCIAL ROOTS, CONSEQUENCES, AND INTERVENTIONS 223 (Fathali M. Moghaddam & Anthony J. Marsella eds., 2004); Enrico L. Quarantelli, *An Assessment of Conflicting Views of Mental Health: The Consequences of Traumatic Events*, in TRAUMA AND ITS WAKE: THE STUDY AND TREATMENT OF PTSD 191 (C.R. Figley ed., 1985); Ginny Sprang, *The Psychological Impact of Isolated Acts of Terrorism*, in TERRORISTS, VICTIMS AND SOCIETY: PSYCHOLOGICAL PERSPECTIVE ON TERRORISM AND ITS CONSEQUENCES 133 (Andrew Silke ed., 2003).

80. See *supra* note 7 and accompanying text.

81. E.g., Dave Newbart, *‘They Can Give Us Justice’: Families of Marines Killed in Lebanon Join Suit Seeking Iran Funds*, CHI. SUN-TIMES, May 30, 2008, at 10 (quoting Luddie Belmer, mother of Alvin Belmer, who died in the 1983 bombing: “‘They can give us justice by paying the money,’ she said. Asked about the other victims, she said: ‘Pay them, too. Everybody [should] get justice.’”).

82. Van Schaack, *supra* note 75, at 2322–23.

83. See *id.* at 2332. See also, e.g., Jennifer Elise Plaster, Note, *Cold Comfort and a Paper Tiger: The (Un)Availability of Tort Compensation for Victims of International Terrorism*, 82 WASH. U. L.Q. 533, 550–51 (2004) (stating that Congress’ goals in passing the Antiterrorism and Effective Death Penalty Act of deterring funding of terrorism have not been met).

trying to influence Iran and other nations in the Middle East to the executive branch.<sup>84</sup> The attempts to force a sale of the artifacts are a distraction that gives further ammunition to the Iranian regime criticizing U.S. culture, values, and politics.<sup>85</sup>

### III. *RUBIN V. THE ISLAMIC REPUBLIC OF IRAN*—THE ENFORCEMENT STAGE

Currently, the crux of the collection efforts by the “victorious” *Rubin* plaintiffs involves ancient Iranian artifacts housed in some of the most esteemed museum collections in the country. The Oriental Institute’s descriptions of some of the artifacts at issue reveal their archaeological significance:

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84. Cf., e.g., Jeewon Kim, Note, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT’L L. 513 (2004) (discussing separation of powers problems posed by the Flatow amendment to the Foreign Sovereign Immunities Act). Analogous to criticism of civil anti-terrorism litigation generally, Andrew C. McCarthy, former lead prosecutor in the terrorism trials in the Southern District of New York has come to criticize the use of criminal trials in U.S. courts instead of military tribunals. Benjamin Weiser, *Top Terror Prosecutor Is a Critic of Civilian Trials*, N.Y. TIMES, Feb. 19, 2010, at A1, available at <http://www.nytimes.com/2010/02/20/nyregion/20prosecutor.html> (“A war is a war . . . . A war is not a crime, and you don’t bring your enemies to a courthouse.”). For recent discussion of diplomatic issues concerning Iran’s nuclear program and sanctions, see, for example, Alan Cowell & Thom Shanker, *Iran’s Enrichment Plans Start New Calls for Sanctions*, N.Y. TIMES, Feb. 9, 2010, at A6, available at <http://www.nytimes.com/2010/02/09/world/middleeast/09iran.html>. But see Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 474 (2008):

Civil litigation involving claims of international terrorism has the potential to play a part in a comprehensive anti-terrorism strategy, especially where military strikes or governmental sanctions may be considered too blunt a response, are politically unpalatable, or lack multilateral support. In particular, by harnessing the motivation, investigative capabilities, and resources of private attorneys general and the robust U.S. tort system on behalf of those victims who have access to the U.S. legal system, civil suits can enhance the government’s ability to bring targeted criminal suits, aid in the rehabilitation of victims, and promote the rule of law in the face of acts of terrorism.

See also Kellie McGowan, Note, *Following the Money Trail: Can American Lawyers Use American and International Discovery Procedures to Prove the Link between International Terrorist Acts and Financiers?*, 18 TEMP. INT’L & COMP. L.J. 175 (2004).

85. *Tell the Department of Justice to Prevent Ancient Persian Artifacts from Being Sold*, NAT’L IRANIAN AM. COUNCIL (Nov. 21, 2006), reprinted in *Tell the Department of Justice to Prevent Ancient Persian Artifacts from Being Sold!*, UNITED IRANIAN FRONT FOR DEMOCRACY IN IRAN (Nov. 21, 2006), <http://unitediranianfront.blogspot.com/2006/11/tell-department-of-justice-to-prevent.html>.

As political tensions have risen between the United States and Iran, the case has begun to receive international headlines. Manouchehr Mottaki, the Foreign Minister of Iran[,] has threatened to cancel proposed negotiations with the US while Hamid Reza Asefi, the Iranian Foreign Ministry Spokesman, has called on the US to show a quick and serious reaction to the case.

*Id.*

- (1) Seal impressions, generally made of stone, tracing the chronology of Persepolis, a magnificent palace complex built around 518–516 B.C.<sup>86</sup>
- (2) Artifacts evidencing cultures on the plain in southwestern Iran, pushing back the date of human occupation by at least one millennium . . .<sup>87</sup>
- (3) Hundreds of pieces of prehistoric pottery, metal objects, and seals and figurines along with photographs and related documentation . . .<sup>88</sup>
- (4) Carved chlorite jars, bowls and cups from the Jiroft region, the home of a sophisticated civilization dating back to the third millennium B.C.<sup>89</sup>

In addition to the University of Chicago's Oriental Institute, the other institutions housing artifacts sought by the *Rubin* plaintiffs include the Field Museum of Natural History ("Field Museum"), Harvard University, and the Museum of Fine Arts in Boston.<sup>90</sup> Accordingly, the litigation involves two lawsuits, one in each of the two jurisdictions in which these institutions are located: the Northern District of Illinois, Eastern Division, in Chicago, which is currently subject to an interlocutory appeal,<sup>91</sup> and the District of Massachusetts, in Boston, which was just remanded by the United States Court of Appeals for the First Circuit on the grounds that more fact-finding was necessary before an interlocutory appeal could be heard.<sup>92</sup> The plaintiffs also pursued objects at the University of Pennsylvania and the University of Michigan but later voluntarily

86. *Persepolis and Ancient Iran: Introduction*, ORIENTAL INST. OF THE UNIV. OF CHICAGO, <http://oi.uchicago.edu/museum/collections/pa/persepolis/introduction.html> (last updated Apr. 19, 2007) [hereinafter *Persepolis Introduction*]; *Oriental Institute Photographic Archives: Seals and Seal Impressions*, ORIENTAL INST. OF THE UNIV. OF CHICAGO, <http://oi.uchicago.edu/museum/collections/pa/persepolis/seals.html> (last updated Apr. 19, 2007).

87. Abbas Alizadeh, *Excavations at Chogha Bonut: The Earliest Village in Susiakh, Iran*, ORIENTAL INST. OF THE UNIV. OF CHICAGO, [http://oi.uchicago.edu/research/pubs/nn/spr97\\_alizadeh.html](http://oi.uchicago.edu/research/pubs/nn/spr97_alizadeh.html) (revised July 30, 2007).

88. Wawrzyniak, *supra* note 53, at 229.

89. *Gov't of the Islamic Republic of Iran v. Barakat Galleries Ltd.*, [2007] EWHC (QB) 705, [1] (Eng.) ("[Iran] seeks an order for the delivery up of a number of carved jars, bowls and cups made out of chlorite . . .") [hereinafter *Barakat I*]. See also Andrew Lawler, *Iranian Dig Opens Window on New Civilization*, 304 SCIENCE 1096 (2004).

90. Sills, *supra* note 2, at 238.

91. *Rubin v. Islamic Republic of Iran*, 251 F.R.D. 561 (N.D. Ill. 2008), *appeal docketed*, No. 08-2805 (7th Cir. July 21, 2008).

92. *Rubin v. Islamic Republic of Iran*, 541 F. Supp. 2d 416 (D. Mass. 2008), *appeal denied*, No. 08-8021 (1st Cir. Aug. 11, 2008).

dismissed enforcement actions regarding artifacts in the collections of these institutions.<sup>93</sup>

Because of the multiple lawsuits, parties, and collections involved as well as the complexity of the underlying legal issues, it can be difficult to follow the history of the enforcement litigation. In short, as it currently stands, the litigation turns primarily on two issues. The first issue is whether the museum's use of the artifacts constitutes "commercial activity" that renders Iran's sovereign immunity irrelevant under the FSIA. The second issue is whether the various artifacts are "blocked assets" within the meaning of the Terrorism Risk Insurance Act (TRIA). The arguments for and against "blocked asset" status vary by museum and collection. Underlying both issues is the threshold question of whether Iran even has an ownership interest in the artifacts. The details of the litigation will be discussed further throughout the remainder of this Section, but the following table provides a graphical overview:

TABLE 1: OVERVIEW OF THE EXECUTION LITIGATION

	N.D. Ill. ("Chicago") Litigation		D. Mass. ("Boston") Litigation	
	Oriental Institute	Field Museum	MFA Boston	Harvard
Collections Involved	Persepolis; Chogha Mish	Herzfeld	(various items)	(various items)
Court's Position on Sovereign Immunity	Only Iran Can Assert Sovereign Immunity (resulted in Iran's appearance)		The Court Has the Power to Determine Sovereign Immunity <i>Sua Sponte</i>	
Museum's Position as to Ownership	Iran	Not Iran	Not Iran	Not Iran
Argument	Different TRIA "Blocked Assets" Arguments for Each Collection; FSIA "Commercial Activity" Via Agency		FSIA "Commercial Activities" Exception; TRIA "Blocked Assets" Provision	
Status	On Interlocutory Appeal after Extensive Discovery Disputes		Remanded by 1st Circuit for Additional Discovery	

93. Wawrzyniak, *supra* note 53, at 227; *e.g.*, Plaintiffs-Judgment Creditor's Notice of Withdrawal of Trustee Process, *Rubin v. Islamic Republic of Iran*, No. 2:05-x-71387-VAR (E.D. Mich. Nov. 17, 2005). They had also pursued a residential property used by the former Iranian crown prince in Lubbock, Texas and two Iranian bank accounts, but they only had limited success, recovering approximately \$390,000 from the sale of the residence. Wawrzyniak, *supra* note 53, at 226.

### A. *The Collections Involved in the Enforcement Litigation*

In the Illinois case, the plaintiffs are seeking to attach two collections at the Oriental Institute, the Persepolis Fortification Texts (the “Persepolis Collection”) and the Chogha Mish Collection.<sup>94</sup> The Persepolis Collection contains tablets and tablet fragments dating back to the rule of Darius I around 500 B.C.<sup>95</sup> that were excavated approximately 400 miles south of the present city of Tehran.<sup>96</sup> Darius I envisioned Persepolis “as a show place and the seat of his vast Achaemenian Empire.”<sup>97</sup>

The Chogha Mish Collection includes a fairly small amount of clay seal impressions<sup>98</sup> that were excavated in Iran’s Khuzistan Province,<sup>99</sup> providing “vital new information on cultural developments” in the area and covering “the complete chronological span from the Neolithic up to the Proto-Literate period. . . .”<sup>100</sup> The Oriental Institute has consistently stated that Iran owns both the Persepolis and Chogha Mish Collections, in accordance with Iran’s claims of ownership.<sup>101</sup> The ownership issue is particularly relevant because, as discussed further below, if the plaintiffs can show that ownership of the collections is “contested,” then the collections would be subject to attachment under the “blocked assets” provision of the TRIA. If Iran has title to the objects, then they might be able to be attached under the “commercial activities” exception of the FSIA.<sup>102</sup>

The other artifacts at issue in the Illinois litigation include the Field Museum’s Herzfeld Collection.<sup>103</sup> This collection consists of

94. *Id.* at 227.

95. *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1110 (N.D. Ill. 2004).

96. *Persepolis Introduction*, *supra* note 86.

97. *Id.*

98. *Rubin*, 349 F. Supp. 2d at 1110.

99. *The Chogha Mish Project*, ORIENTAL INST. OF THE UNIV. OF CHICAGO, <http://oi.uchicago.edu/research/projects/cho/> (last updated June 17, 2010).

100. *Id.*

101. *Rubin v. Islamic Republic of Iran*, No. 03 C 9370, 2007 WL 1169701, at \*6 (N.D. Ill. Apr. 17, 2007).

102. *Id.* at \*8; *id.* at \*2 (“The dispute in this case centers around whether the Persian artifacts are immune or exempt from execution or attachment. Plaintiffs have presented two theories that Plaintiffs argue allow them to execute or attach against these artifacts. The first theory involves the Terrorism Risk Insurance Act (“TRIA”), which provides that properties belonging to Iran that are in the United States are subject to attachment in satisfaction of a judgment debt if those properties are ‘blocked’ within the meaning of the TRIA . . . . The second theory involves the FSIA, which provides that properties belonging to a foreign state are immune from attachment unless some exception applies.” (citations omitted)).

103. *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2007 WL 2219105, at \*2 (N.D. Ill. July 26, 2007). Of note, the plaintiffs allege that the Oriental Institute also has some items from the Herzfeld Collection. *Rubin*, 2007 WL 1169701, at \*2.

approximately one thousand pieces, including pieces of prehistoric pottery, metal objects (such as bronze weapons and implements), ornaments, seals, and figurines.<sup>104</sup> These items were collected by Professor Ernst Herzfeld in the early half of the twentieth century while on archaeological digs of Persian sites in and around Iran.<sup>105</sup> The Field Museum has stated that it purchased the Herzfeld Collection many years ago and that Iran does not claim ownership.<sup>106</sup>

In the Massachusetts case, the plaintiffs sought artifacts housed at the Museum of Fine Arts and Harvard. They asserted generally that Iranian law safeguarding ancient artifacts vested ownership in Iran, thus voiding any purported transfer to the museums.<sup>107</sup> These institutions claim that they do not hold any cultural materials that are the property of Iran.<sup>108</sup>

The following sections provide a more detailed overview of the plaintiffs' arguments for attachment under the FSIA and TRIA. While the overarching theories under each act are essentially the same for all of the artifacts at issue, the sub-arguments vary substantially depending on the facts pertinent to each collection and the differing positions of the two courts on key issues in the litigation.

### *B. The Foreign Sovereign Immunities Act Argument*

The doctrine of foreign sovereign immunity has a long and storied history beyond the scope of this Article, but its modern restrictive theory relevant to the *Rubin* litigation has been codified in the FSIA.<sup>109</sup> The FSIA sets forth the general proposition that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States. . . ."<sup>110</sup> However, it also provides a number of exceptions to foreign

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104. Hilton, *supra* note 6, at 495–96.

105. Ron Grossman, *Museums in Legal Bind as Terror Victims Sue*, CHI. TRIB., Mar. 13, 2006, at 1.

106. *Rubin*, 2007 WL 1169701, at \*7.

107. *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 230 (D. Mass. 2006).

108. *Id.* at 235–36 ("From the commencement of this action, the . . . defendants have repeatedly and emphatically argued that none of the antiquities in their possession belong to the Republic of Iran.").

109. See Lauren Felder Redman, *The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 FORD. INT'L L.J. 781 (2008) (questioning the appropriateness of using the FSIA in art and antiquities litigation); Kim, *supra* note 84 (providing general history of anti-terrorism amendments to the FSIA); Jennifer A. Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765 (1996) (making the case that the FSIA was not intended for human rights litigation).

110. 28 U.S.C. § 1604 (2006).

sovereign immunity.<sup>111</sup> The *Rubin* plaintiffs contend that one of these exceptions, the “commercial activity” exception, enables them to attach the museums’ artifacts.<sup>112</sup>

### 1. FSIA Standing

Initially, the litigation in both courts centered on a standing issue—whether sovereign immunity under the FSIA, and thereby its commercial activity exception, was an affirmative defense personal to Iran. The plaintiffs argued that it was an affirmative defense personal to Iran and, therefore, only Iran itself could assert that the property in question is immune from attachment.<sup>113</sup> The museums countered that “the Court’s subject matter jurisdiction over the property in issue require[d] the Court to apply [the commercial activity exception of the FSIA] regardless of who raise[d] the issue of foreign sovereign immunity.”<sup>114</sup>

Each of the two courts arrived at different conclusions regarding the standing issue. The Illinois court found that, “as a matter of law, no party other than Iran may assert Iran’s foreign sovereign immunity defenses under Sections 1609 and 1610 of the FSIA.”<sup>115</sup> This ruling forced Iran to appear in the litigation to try to protect the artifacts, which it later did.<sup>116</sup> The Illinois court continues to rule against Iran seemingly on all fronts—it even stayed Iran’s motion for summary judgment and entered an order compelling Iran to respond to plaintiffs’ discovery requests concerning *all* Iranian assets in the United States.<sup>117</sup> In contrast, the Massachusetts court concluded that “it is appropriate for the Court, of its own accord or at the behest of the [museums in possession of the alleged sovereign property], to determine whether the property in dispute is immune from execution . . . .”<sup>118</sup>

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111. 28 U.S.C. §§ 1609–1611 (2006); *see also* Dellapenna, *supra* note 66, at 242–70; U.S. Dept. of State, *Foreign Sovereign Immunities Act*, TRAVEL.STATE.GOV, [http://travel.state.gov/law/judicial/judicial\\_693.html](http://travel.state.gov/law/judicial/judicial_693.html) (last visited Jan. 24, 2011).

112. *Rubin*, 2007 WL 1169701, at \*8.

113. *Rubin v. Islamic Republic of Iran*, 408 F. Supp. 2d 549, 553 (N.D. Ill. 2005).

114. *Id.*; *see also* *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 230 (D. Mass. 2006) (noting that the “issue . . . could be raised properly by . . . [the museums] or even by the Court *sua sponte*”).

115. *Rubin*, 408 F. Supp. 2d at 563.

116. *Rubin*, 2006 WL 2024247, at \*1.

117. *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2008 WL 2502039 (N.D. Ill. June 23, 2008).

118. *Rubin*, 456 F. Supp. 2d at 233.

The approach of the Illinois court seems to run counter to the generally cautious approach federal courts take with foreign sovereigns,<sup>119</sup> but most of the potentially relevant published cases concern *Erie* federalism issues not present in this case.<sup>120</sup> Lately, despite the caution generally required by the foreign sovereign immunity doctrine,<sup>121</sup> U.S. courts have predominantly been broadening the reach of the FSIA.<sup>122</sup> The museums based their argument on<sup>123</sup> *Verlinden B.V. v. Central Bank of Nigeria*,<sup>124</sup> in which the Supreme Court concluded that though “sovereign immunity is an affirmative defense that must be specially pleaded,” a court must evaluate its jurisdiction under the FSIA “even if the foreign state does not enter an appearance to assert an immunity defense. . . .”<sup>125</sup> However, the Illinois court concluded that *Verlinden* did not apply:

[T]he district court’s responsibility to evaluate immunity *sua sponte* is rooted not in the FSIA, but rather in 28 U.S.C. § 1330(a). Under § 1330(a), federal courts have jurisdiction over actions against foreign states only if “the foreign state is not entitled to immunity either under sections 1605–07 of this title or under any applicable international agreement.” Thus, *Verlinden* is inapposite for two reasons. First, the obligation to evaluate immunity *sua sponte* is created by § 1330(a), not by the FSIA. Second, the immunity that must be evaluated under § 1330(a) is immunity afforded the foreign state itself under § 1604, not afforded its property under § 1609, the only immunity at issue in this case.<sup>126</sup>

This attempt by the Illinois court to distinguish *Verlinden* is, at best, flawed. As the Supreme Court recently stated in *Hertz Corp. v. Friend*, “We normally do not read statutory silence as implicitly modifying or

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119. See, e.g., *Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 593 (2004) (“[b]y whatever route a case arrives in federal court, it is the obligation of both district court and counsel to be alert to jurisdictional requirements.” (extensive citations omitted)).

120. See generally *id.*

121. See, e.g., Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT’L L. REV. 1, 1 (2008) (stating that “the standards for bringing suit under the FSIA are rigorous, and sovereign states retain much of their immunity.” (footnote omitted)).

122. Cf., e.g., *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (holding that the FSIA applies in disputes concerning activities that pre-dated its passage in 1976, which codified the restrictive theory of sovereign immunity adopted by the United States in 1952).

123. *Rubin v. Islamic Republic of Iran*, 436 F. Supp. 2d 938, 942 (N.D. Ill. 2006).

124. 461 U.S. 480, 493–94 n.20 (1983).

125. *Id.* (citation omitted).

126. *Rubin*, 436 F. Supp. 2d at 942 (citations omitted).

limiting . . . jurisdiction that another statute specifically grants.”<sup>127</sup> The Illinois court has done the converse—reading silence in one statute to *expand* jurisdiction that another statute denies. This seems to be even more serious than what the Supreme Court prohibited in *Hertz*. In *Rubin*, the U.S. Department of Justice attempted to sway the court but to no avail.<sup>128</sup> The Illinois court appears to be entrenched in its interpretation of its jurisdictional limitations, which, therefore, will likely stand at least until the matter reaches a higher court.

## 2. The FSIA “Commercial Activity” Exception

The second FSIA issue involves section 1610, referred to commonly as the “commercial activity exception,” which provides that “property in the United States of a foreign state . . . shall not be immune from attachment in aid of execution, or from execution, . . . if . . . the property is or was used for . . . commercial activity . . . .”<sup>129</sup> Despite the Illinois court’s rebuff as to the standing issue, the plaintiffs were able to keep their FSIA argument alive by asserting that the museums were acting as agents of Iran,<sup>130</sup> which, as discussed further below, remains an open question important in both cases. Thus, whether the museums’ use of the artifacts constituted commercial activity under the FSIA remained an issue in both cases despite the different conclusions reached by the courts on the standing issue.

In short, the plaintiffs argued that the museums’ study and publication of the various collections amounted to commercial activity, thereby triggering jurisdiction under the exception.<sup>131</sup> They further argued that the “commercial activity” exception includes activity by any party and not just the foreign state.<sup>132</sup> The museums countered that their efforts were of an academic quality and “could not be construed as a commercial endeavor.”<sup>133</sup>

127. *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010) (citing *Felker v. Turpin*, 518 U.S. 651, 660–61 (1996); *Ex parte Yerber*, 85 U.S. (8 Wall.) 85, 104–05 (1869)).

128. Statement of Interest of the United States of America, *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370 (N.D. Ill. Aug. 3, 2004); Second Statement of Interest of the United States, *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370 (N.D. Ill. Mar. 3, 2006); Third Statement of Interest of the United States, *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370 (N.D. Ill. Nov. 16, 2007).

129. 28 U.S.C. § 1610 (2006). For an analysis of the commercial activity exception in the context of the *Rubin* litigation, see Hilton, *supra* note 6.

130. *Rubin*, 2007 WL 1169701, at \*8.

131. *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108, 1112 (N.D. Ill. 2004).

132. *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 233 (D. Mass. 2006).

133. Sills, *supra* note 2, at 246.

In contrast to their disagreement on the standing issue, the two courts reached the same conclusion as to the commercial activity exception, finding that it only applies if the foreign sovereign itself engages in the commercial activity.<sup>134</sup> As the Fifth Circuit concluded “[w]hat matters . . . is how the *foreign state* uses the property, not how private parties may have used the property in the past.”<sup>135</sup> Thus, the plaintiffs have not yet overcome the FSIA’s presumption of immunity in either suit. However, the still open question of agency that kept the FSIA argument alive in the Illinois litigation has also kept the FSIA issue alive, this time in both cases. The heart of the issue is whether Iran has acted through the museums in regard to the care, study and conservation of the objects via an agency relationship.<sup>136</sup>

Despite the courts’ conclusions as to the commercial activity exception, recent congressional amendments to the FSIA may allow the plaintiffs to force a sale of the artifacts. On January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008.<sup>137</sup> The legislation creates a new “terrorism exception to immunity” in the FSIA, section 1605A, and amends section 1610, the “commercial activity” exception.<sup>138</sup> Of note, the new law is retroactive.<sup>139</sup> In other words, it allows a plaintiff who obtained a judgment under the old law to obtain a new enforceable judgment under the new version of the law.

First, section 1605A allows a terrorism victim to sue a foreign state for compensatory and punitive damages for materially supporting an act of terrorism. Specifically, it states the following:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support

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134. *Rubin*, 456 F. Supp. 2d at 234. *See also Rubin*, 349 F. Supp. 2d at 1112 (stating that the commercial activity exception “requires that the foreign sovereign’s property was used by the foreign sovereign in the United States for commercial purposes” (citations omitted)).

135. *Id.* at 1113 (citing *Conn. Bank of Commerce v. Congo*, 309 F.3d 240, 257 n.5 (5th Cir. 2002) (emphasis in original)).

136. *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2007 WL 2219105 (N.D. Ill. July 26, 2007) (discussing at length the potential for an agency relationship to affect the FSIA exception).

137. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008).

138. Ronald J. Bettauer, *Claims of Victims of Terrorism Against Foreign State in U.S. Courts*, 102 AM. SOC’Y INT’L L. PROC. 101, 104 (2008).

139. *Id.*

or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency.<sup>140</sup>

Second, once a party files under section 1605A, a lien of *lis pendens*<sup>141</sup> is automatically created for “any real property or tangible personal property that is . . . subject to attachment in aid of execution, or execution, under section 1610.”<sup>142</sup>

Finally, under amended section 1610, there is an express *lack* of limitation as to the type of property against which a judgment issued pursuant to section 1605A may be executed.<sup>143</sup> It provides:

Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state . . . is subject to attachment in aid of execution, and execution, . . . regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property . . . .<sup>144</sup>

Thus, as stated by Laina Lopez (formerly Wilk), one of the attorneys for Iran, in an article about the litigation that she wrote in her individual capacity, a foreign state’s property is subject to attachment regardless of whether the foreign sovereign is engaging in the “commercial activity.”<sup>145</sup> In response to amended section 1610 and the addition of section 1605A, the *Rubin* plaintiffs filed a motion on March 28, 2008, in Washington,

140. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a), 122 Stat. 338 (2008).

141. “Lis pendens” refers to “the jurisdiction, power, or control acquired by a court over property while a legal action is pending.” BLACK’S LAW DICTIONARY 950 (8th ed. 2004).

142. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a), 122 Stat. 3, 338–39 (2008).

143. *Id.* § 1083(b).

144. *Id.*

145. Laina Wilk, *Latest Developments in Rubin v. Iran and the New FSIA Exception to Immunity*, 28 *U.S.C. §1605A*, 1 A.B.A. SEC. INT’L LAW 9, 10 (2008). “This section thus seems aimed directly at eliminating Iran’s defense in the *Rubin* case that the Persepolis Collection has not been used for any commercial act in the United States.” *Id.*

D.C., to amend their initial judgment to expressly state that their judgments also issue pursuant to section 1605A, to allow them to make use of the amendments.<sup>146</sup>

According to Ms. Lopez, again in her individual capacity and not in the context of her role in the litigation, a core issue in the litigation going forward will be whether section 1605A, at least as applied in the *Rubin* litigation, violates the Algiers Accords.<sup>147</sup> The Statement of Interest of the United States of America filed by the Executive Branch<sup>148</sup> in the Illinois case does an excellent job of explaining the significance of the Algiers Accords to the dispute. As relayed by the U.S. Attorney General's Office:

On January 19, 1981, Iran and the United States resolved the hostage crisis with the signing of the Algiers Accords. Under the Algiers Accords, the United States agreed, *inter alia*, to “restore the financial position of Iran, insofar as possible, to that which existed prior to November 14, 1979,” and further agreed “to commit itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction.”

For the purposes of implementing the commitments made in this agreement, the President issued several Executive Orders directing the marshaling and transfer of the majority of once-blocked assets to Iran and to escrow accounts to facilitate the settlement of claims involving Iran under a claims settlement process provided for in the Algiers Accords. . . .

As a result of [these orders and an implementing regulation issued by the Office of Foreign Assets Control], nearly all previously-blocked properties, including those at issue here, namely, the artifacts held by the University of Chicago's Oriental Institute, were no longer subject to blocking under the Iranian

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146. Plaintiff's Motion Pursuant to § 1083(c)(2) of the National Defense Authorization Act—2008, *Rubin v. Islamic Republic of Iran*, 563 F. Supp. 2d 38 (D.D.C. Mar. 28, 2008) (No. 01-1655(RMU)).

147. Wilk, *supra* note 145, at 10 (“Such a lien, to the extent it covers Iranian assets pending before the [Iran-United States Claims] Tribunal, violates the Algiers Accords.”).

148. “28 U.S.C. § 517 authorizes the Attorney General to attend to the interests of the United States in any proceeding in which the United States is not a party. The submission of a Statement of Interest does not constitute an intervention in this action but is the equivalent of an *amicus curiae* brief.” Statement of Interest of the United States of America at 1 n.1, *Rubin v. Islamic Republic of Iran*, No. 03—CV-9370 (N.D. Ill. July 28, 2004) (citing *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249, 1252–53 & n.5 (D.C. Cir. 2002)).

Assets Control Regulations, but instead could be transferred at any time upon the request of the Government of Iran.<sup>149</sup>

### C. *The Terrorism Risk Insurance Act (National Defense Act) Argument*

The *Rubin* plaintiffs also are attempting to attach the artifacts via section 201 of the TRIA,<sup>150</sup> which is one of the misguided terrorism amendments to the FSIA that Congress passed in 2002 and which might very well violate the Algiers Accords.<sup>151</sup> Like the Algiers Accords, the TRIA addresses the mechanics surrounding “blocked assets,” providing as follows:

[I]n every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.<sup>152</sup>

The TRIA defines “blocked assets” as “any asset seized or frozen by the United States under . . . sections 202 and 203 of the International Emergency Economic Powers Act . . .”<sup>153</sup> In response to the hostage emergency at the U.S. embassy in Iran,<sup>154</sup> President Carter issued Executive Order 12,170 on November 14, 1979, blocking all Iranian assets in the United States.<sup>155</sup> After the release of the hostages and per the Algiers Accords,<sup>156</sup> President Reagan issued Executive Order No. 12,281

149. Statement of Interest of the United States of America at 9, *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370 (N.D. Ill. Aug. 3, 2004) (“United States persons who engage in certain transactions related to Iranian properties located in the United States, however, remain subject to the Iranian Transactions Regulations, which implement a number of Executive Orders which were promulgated years after the signing of the Algiers Accords and the lifting of most of the blocking prohibitions.” (internal citations omitted)). In other words, trade restrictions, which are instituted by the President pursuant to the International Emergency Economic Powers Act, are not synonymous with blocking of assets. *Id.* at 9–10.

150. *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 234 (D. Mass. 2006).

151. Terrorism Risk Insurance Act, Pub. L. No. 107-297, § 201(a), 116 Stat. 2322 (2002).

152. *Id.* at 2337.

153. *Id.* § 201(d)(2), 116 Stat. at 2338.

154. *E.g.*, Sills, *supra* note 2, at 248.

155. *Id.* (citing Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979)).

156. U.S. Department of State, Iran-U.S. Claims Tribunal, <http://www.state.gov/s/1/3199.htm> (last

on January 19, 1981, effectively unblocking the assets.<sup>157</sup> Related Treasury Department regulations defined the unblocked assets as “all uncontested and non-contingent liabilities and property interests of the Government of Iran.”<sup>158</sup> A property is “contested” and remains “blocked” if the property holder “believes, based on the bona fide written opinion of an attorney, that Iran ‘does not have title or has only partial title to the asset.’”<sup>159</sup>

The *Rubin* plaintiffs argue that ownership of the Chogha Mish and Herzfeld Collections is “contested,” signifying that they were not unblocked by Executive Order No. 12,281 (and thus still are blocked), and “that all are subject to execution to satisfy [p]laintiffs’ judgment debt.”<sup>160</sup> The museums counter that the Herzfeld Collection never was “blocked” because it was not owned by Iran as of November 14, 1979, and, thus, that it was either not covered by President Carter’s Executive Order 12,170<sup>161</sup> or was effectively “unblocked” by the subsequent Executive Order.<sup>162</sup>

The courts have not reached decisions as to ownership of the artifacts, which will determine their eligibility to satisfy the judgment. The Illinois court has ruled that plaintiffs are entitled to further discovery regarding the Chogha Mish and Herzfeld Collections in order to advance their argument that they are “blocked” assets.<sup>163</sup> The Massachusetts court has found that property ownership is “contested,” and, as such, the property remains “blocked.”<sup>164</sup> “Thus, if the plaintiffs are able to establish that the antiquities are indeed the property of Iran, those assets will be subject to attachment and execution pursuant to § 201 of TRIA.”<sup>165</sup>

The irony is that Iran—and, for that matter, the museums—is in a better legal position if it is found not to own the artifacts because then the artifacts would not be subject to execution, and the museums would be

visited Jan. 24, 2011); U.S. Department of State, Background Note: Iran (July 23, 2010), <http://www.state.gov/r/pa/ei/bgn/5314.htm> (last visited Jan. 24, 2011).

157. Gerstenblith & Roussin, *supra* note 2, at 626 (citing Exec. Order No. 12,281, 46 Fed. Reg. 7923 (Jan. 19, 1981)).

158. *Rubin v. Islamic Republic of Iran*, No. 03 C 9370, 2008 WL 192321, at \*6 (N.D. Ill. Jan. 18, 2008) (citing 31 C.F.R. § 535.333(a)).

159. *Id.* (citing 31 C.F.R. § 535.333(c)).

160. *Rubin v. Islamic Republic of Iran*, No. 03 C 9370, 2007 WL 1169701, at \*5 (N.D. Ill. Apr. 17, 2007). The plaintiffs argued that the Persian materials meet the definition of blocked assets because they are contested as Iran owns the collections, yet the museums say they do. *Id.*

161. *Id.* However, the Oriental Institute has maintained that Iran owns both the Persepolis and Chogha Mish Collections; therefore, title is not contested. *Id.* at \*4–6.

162. Wawrzyniak, *supra* note 53, at 235.

163. *Rubin*, 2007 WL 1169701, at \*5–7.

164. *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 235–36 (D. Mass. 2006) (“From the commencement of this action, the trustee process defendants have repeatedly and emphatically argued that none of the antiquities in their possession belong to the Republic of Iran.”).

165. *Id.* at 236.

free to make a gift of them back to Iran after their studies are completed. The courts have not undertaken yet the factual determination as to who owns the various antiquities in question. Ownership of the antiquities depends to a large degree on Iranian law and how it will be regarded by the U.S. courts.

There are many national and international legal frameworks aimed at restricting trade in ancient artifacts; some are broad in their stated goals, whereas others are quite specific and narrowly tailored to apply only to certain categories of artifacts from particular locations.<sup>166</sup> These schemes include “vesting statutes” and import and export controls among others.<sup>167</sup> Such statutes vest ownership in the state of all materials found after the effective date of the legislation.<sup>168</sup> The *Rubin* plaintiffs have argued that ownership rests in Iran because of a vesting statute giving the state ownership of “artifacts excavated in Iran by operation of Iranian law.”<sup>169</sup>

Two additional means for protecting cultural property are export controls and import controls. Export controls take “the form of prohibition or licensing requirements.”<sup>170</sup> “Some countries simply prohibit the export of all or some categories of art treasures . . . [while others] require that a

166. See generally Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 388 (1995) (providing overview of cultural property customs restrictions). The following articles are useful to understanding the basic arguments concerning the best way to regulate the antiquities trade, with some in the field calling for the outright elimination of the market: Paul M. Bator, *The International Trade in Art*, 34 STAN. L. REV. 275, 306 (1982) (landmark work providing that “Art is a good ambassador.”); Gerstenblith, *supra* note 63 (analyzing scope of “public interest” in archeological knowledge); Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and “Property” Aspects of Cultural Property under International Law*, 16 FORDHAM INT’L L.J. 1033 (1992) (promoting a “best interest of the object” standard); John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831 (1986) (seminal work dichotomizing cultural nationalism/internationalism). See also Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L. 197 (2001); John H. Merryman, *Cultural Property Internationalism*, 12 INT’L J. CULT. PROP. 11, 18–19 (2005); John H. Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT’L L. & POL. 1 (1998); John H. Merryman, *The Nation and the Object*, 3 INT’L J. CULT. PROP. 61, 70 (1994). For a general history about the problem of plundered antiquities and the international trade in them, see, KARL E. MEYER, *THE PLUNDERED PAST* (1973).

167. See generally, *e.g.*, Borodkin, *supra* note 166, at 388.

168. *Id.* at 392 (“As of 1984, state claims to undiscovered archaeological artifacts could be found in countries of every region and economic and political stratum.”).

169. *Rubin v. Islamic Republic of Iran*, No. 03-CV-9370, 2007 WL 2219105, at \*4 (N.D. Ill. July 26, 2007).

170. Borodkin, *supra* note 166, at 391 (“As of 1989, at least 141 countries had some form of legislation regulating the export of antiquities.”). The licensing requirement is found in countries such as Great Britain, France, Austria, Canada, and Australia. For example, Great Britain’s Board of Trade reviews export applications. If the property meets the “criteria of cultural significance,” the object must remain in Great Britain for six months so that a “domestic purchaser may make a reasonable offer to the buyer the object.” *Id.* at 392.

license be obtained before some or all works of art are exported.”<sup>171</sup> Import restrictions may prohibit a cultural object’s entry “if it is stolen from another country,” if its export has not been properly licensed by the other country, or if the import nation’s import regulations specifically prohibit importation of the object in question.<sup>172</sup> Generally, however, nations do not recognize other nations’ ownership of an artifact merely because it was exported from the source nation in violation of an export restriction or criminal law.<sup>173</sup> Title in the object must have resided in the source nation.<sup>174</sup>

In addition, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”) is an important international effort to “restrict the antiquities trade.”<sup>175</sup> The UNESCO Convention allows nations to enter into agreements in order to prevent the “illicit import, export and transfer of ownership of cultural property,” recognizing that “international co-operation constitutes one of the most efficient means of protecting each country’s cultural property . . .”<sup>176</sup> It calls for state parties to prohibit the import of stolen property and, in certain situations, to participate in a “concerted international effort . . . including the control of exports and imports and international commerce in the specific materials concerned.”<sup>177</sup>

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171. Bator, *supra* note 166, at 286.

172. *Id.* at 327.

173. *See, e.g.*, United States v. McClain, 545 F.2d 988, 996 (5th Cir. 1977) (“The general rule today in the United States, and I think in almost all other art-importing countries, is that it is not a violation of law to import simply because an item has been illegally exported from another country.”).

174. *E.g., id.*

175. Borodkin, *supra* note 166, at 388.

176. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 2, Nov. 14, 1970, 96 Stat. 2354, 823 U.N.T.S. 231, available at <http://www.un-documents.net/cppiiecp.htm> [hereinafter UNESCO].

177. *Id.* art. 9. “The States Parties to this Convention undertake . . . [t]o take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported . . . [and] at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property . . .” *Id.* art. 7.

Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

The United States signed the UNESCO Convention in 1970, but Congress did not enact its implementing legislation, the Convention on Cultural Property Implementation Act (CPIA), until 1983, and even then, the CPIA implemented only two provisions of the UNESCO treaty.<sup>178</sup> The CPIA creates presidential authority to “impose import restrictions[,] but only in certain circumstances and only after considering the views of concerned interest groups.”<sup>179</sup> Furthermore, import restrictions are imposed only for certain “archaeological and ethnological material on a country-by-country basis.”<sup>180</sup> In conclusion, the United States is able to establish import restrictions after determining the requesting country’s cultural patrimony is in jeopardy from pillage and after determining that the country has taken measures to protect its own cultural heritage, among other things.<sup>181</sup>

No U.S. import restriction applies to Iranian artifacts. Thus, whether the artifacts will be returned turns, in part, on whether Iranian law vests ownership of the Persian antiquities in Iran as the plaintiffs have suggested. This will be explored in Part III below. A preliminary matter, however, is laying out the types of foreign patrimony laws the United States recognizes. If a source nation’s patrimony law is such that would be recognized in the United States, then property taken in violation of that law is considered converted property subject to civil or criminal restitution.<sup>182</sup>

The leading U.S. case, *United States v. McClain*, which involved Mexican artifacts, held that “declaration of national ownership is necessary before illegal exportation of an article can be considered theft,

*Id.* art. 9. See generally Ann Guthrie Hingston, *U.S. Implementation of the UNESCO Cultural Property Convention*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY* 129, 130 (Phyllis Mauch Messenger ed., 1989) (“Article 7(b) calls for each state party to take measures to prohibit the import of inventoried cultural property that has been stolen from a museum or a religious or secular public monument or similar institution located in a state party to the Convention. Article 9 provides that a state party whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other state parties that are affected.”).

178. See, e.g., Hingston, *supra* note 177, at 131. The United States has implemented only articles 7 and 9. S. REP. NO. 97-564, at 2 (1982), available at <http://exchanges.state.gov/heritage/culprop/index/pdfs/97-564.pdf>.

179. Hingston, *supra* note 177, at 131–32.

180. *Id.* at 132.

181. *Id.* (citing Section 303 of the CPIA). For example, in 1987 the United States implemented import restrictions in response to the Republic of El Salvador’s request under UNESCO’s article 9. *Id.* at 143. The request focused on “Pre-hispanic archaeological material” from the Cara Sucia region and reported that the “intensive looting [is] destroying its archaeological heritage in this region . . .” *Id.* at 135. The report also cited the efforts the country had taken to protect its cultural heritage and to prevent looting in this region. *Id.* at 137.

182. E.g., *id.*

and the exported article considered ‘stolen’ . . .”<sup>183</sup> The Fifth Circuit closely examined pertinent Mexican law and concluded that it vested ownership in Mexico as to all antiquities found within its soil as of 1972.<sup>184</sup> The *McClain* case established that a nation seeking to establish title recognizable in U.S. courts by means of the nation’s own laws must show by a preponderance of the evidence that (1) the object was taken out of the ground within the nation’s borders (2) after the nation had enacted effective vesting law and (3) that title of all objects taken out of the ground clearly vests in that nation.<sup>185</sup> If the U.S. government also brings criminal charges, the government must prove beyond a reasonable doubt that the possessors knew that what it was taking did not belong to them (known as the scienter requirement).<sup>186</sup> Mere violation of foreign export restrictions is not enough to void title, but if it appears egregious it will help the government establish the scienter requirement.<sup>187</sup> All of these requirements, in both the civil and criminal context, are referred to collectively as the *McClain* doctrine.<sup>188</sup>

The Second Circuit adopted the *McClain* doctrine in *United States v. Schultz*, another criminal prosecution under the NSPA.<sup>189</sup> Schultz asserted that the Egyptian antiquities in question could not have been “stolen” because they were not owned by anyone.<sup>190</sup> However, the government argued that the “antiquities were owned by the Egyptian government pursuant to a patrimony law known as ‘Law 117’ which declared all antiquities found in Egypt after 1983 to be the property of the Egyptian government.”<sup>191</sup>

After reviewing *McClain* and other case law, the Second Circuit concluded that the “NSPA applies to property that is stolen from a foreign government, where that government asserts actual ownership of the property pursuant to a valid patrimony law.”<sup>192</sup> It found that Law 117 was not just an export restriction on antiquities,<sup>193</sup> but that its provisions made “it clear that the Egyptian government claims ownership of all antiquities

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183. *United States v. McClain*, 545 F.2d 988, 1000 (5th Cir. 1977).

184. *Id.* at 1000–01.

185. *See generally id.*

186. *E.g., id.* at 1001 n.30.

187. *E.g., id.*

188. *E.g., Jennifer Anglim Kreder, The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT’L L. 1199, 1246 n.335 (2005).

189. *See United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

190. *Id.* at 396.

191. *Id.*

192. *Id.* at 416.

193. *Id.* at 401.

found in Egypt after 1983, and the government's active enforcement of its ownership rights confirms the intent of the Law."<sup>194</sup> Finally, in dicta, the court stated it believed that, "when necessary, our courts are capable of evaluating foreign patrimony laws to determine whether their language and enforcement indicate that they are intended to assert true ownership of certain property, or merely to restrict the export of that property."<sup>195</sup>

The U.S. government has shown some willingness to assist foreign countries by seizing objects, which puts the burden of showing title onto the one from whom they are seized.<sup>196</sup> This offers a significant advantage to source countries, as they have had significant difficulty satisfying the *McClain* doctrine standards in civil litigation filed against owners, in part because ancient cultures crossed many modern-day boundaries.<sup>197</sup>

The *McClain* case also indicates that the source country must enforce its law with regularity for it to be enforced in the United States, but that point is not certain.<sup>198</sup> Few countries consistently enforce their export restrictions and ownership laws in regard to antiquities.<sup>199</sup> Those particularly known for doing so include Mexico,<sup>200</sup> Egypt,<sup>201</sup> Cyprus,<sup>202</sup> and Turkey.<sup>203</sup> Iran can now be added to this list. Over time, additional source nations have firmed up vesting laws, or "in-the-ground laws," in the hopes that clearly vesting title in the source nation of all antiquities still located within the earth would lead to recognition of the source nation's ownership of the object, and eventual return of the object from the United States—the largest antiquities market in the world.<sup>204</sup>

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194. *Id.* at 402.

195. *Schultz*, 333 F.3d at 410.

196. *E.g.*, Kreder, *supra* note 188, at 1232.

197. *E.g.*, Kreder, *supra* note 188, at 1233–34.

198. Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123 (2010).

199. *E.g.*, *id.*

200. For example, *McClain* was initiated by a request from the Republic of Mexico. *McClain*, 545 F.2d 988.

201. *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003), was an action to recover Egyptian antiquities. Egypt's Secretary General of the Supreme Council of Antiquities, Zahi Hawass, is notoriously aggressive in seeking the return of Egyptian antiquities. *E.g.*, Phil Bolton, *Egypt Archaeologist Has a Vigilant Eye for Stolen Antiquities*, GLOBALATLANTA.COM (Mar. 28, 2009), <http://www.globalatlanta.com/article/17239>.

202. *E.g.*, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F.2d 278 (7th Cir. 1990).

203. *E.g.*, *Republic of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990).

204. The development of law in the Republic of Colombia provides a clear example. After signing its first bilateral agreement with the United States in 2006, Colombia amended its cultural property laws in such a manner to comply with the *McClain* doctrine in 2008. See Country Summary for Colombia, INT'L FOUND. FOR ART RESEARCH, [http://ifar.org/country\\_title.php?docid=1180064085](http://ifar.org/country_title.php?docid=1180064085) (last visited Jan. 24, 2011).

At this point, the *McClain* doctrine has been followed (with some inconsistencies) in the Second,<sup>205</sup> Fifth,<sup>206</sup> Ninth,<sup>207</sup> and Eleventh Circuits.<sup>208</sup> Petitions for certiorari to the Supreme Court were filed in both *McClain* and *Schultz*, but the Court did not grant the petitions and thus has not taken up the issue.<sup>209</sup> Nonetheless, the norm remains that simply violating a source nation's export laws warrants neither criminal prosecution nor civil liability including seizure of an object of antiquity in the United States.<sup>210</sup>

Although the Supreme Court has not yet addressed the matter directly, it appears that the United States will continue to recognize foreign patrimony statutes.<sup>211</sup> In *Rubin*, the plaintiffs allege that all artifacts in the Herzfeld Collection belong to Iran by virtue of Iranian law. The positions of the defendants with respect to ownership of the various artifacts in question can be summarized as follows:

1. The Museum of Fine Arts and Harvard University have stated the Persian materials in their collections are not the property of Iran, which Iran has not attempted to refute.<sup>212</sup>
2. The Oriental Institute maintains that Iran owns the Chogha Mish and Persepolis Collections.<sup>213</sup>
3. The Field Museum has stated that Iran makes no claim of ownership as to the Herzfeld Collection.<sup>214</sup> However, Iran's counsel, while cautious in noting that Iran has never claimed ownership of the Herzfeld Collection, would not "affirmatively state that Iran did

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205. *Schultz*, 333 F.3d 393.

206. *McClain*, 545 F.2d at 1000-01.

207. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974) (pre-dating *McClain* but nevertheless largely consistent and involving the same smuggling ring).

208. *McClain* was decided before the Eleventh Circuit was split off from the Fifth Circuit on October 1, 1981. *History of the Court of Appeals*, U.S. COURT OF APPEALS, ELEVENTH CIRCUIT, <http://www.ca11.uscourts.gov/about/appealshistory.php> (last visited Jan. 24, 2011).

209. *Schultz v. United States*, 540 U.S. 1106 (2004); *McClain v. United States*, 444 U.S. 918 (1979).

210. Bator, *supra* note 166, at 287.

211. *E.g.*, Kreder, *supra* note 188, at 1232.

212. *Id.* at 1230.

213. *Rubin v. Islamic Republic of Iran*, No. 03 C 9370, 2007 WL 1169701, at \*5-6 (N.D. Ill. Apr. 17, 2007). However, the plaintiffs have argued that the Oriental Institute may believe that Iran has partial title; their discovery request for related information was granted. *Id.* at \*10. They further argued that the Chogha Mish Collection might be "contested" because it is before the Iran-United States Claims Tribunal. *Id.* at \*6.

214. *Id.* at \*7.

not own the Collection.”<sup>215</sup> Nonetheless, Iran’s counsel has represented that Iran never will claim the Herzfeld Collection.<sup>216</sup>

The next question is whether Iran’s laws validly vest such ownership in cultural properties in the state. The issue has recently been litigated in British courts, where Iran has attempted to retrieve other cultural artifacts.

### III. ENGLISH CASES EVALUATING IRANIAN LAW

Iran filed suit in London, a large art market, against a premiere antiquities gallery,<sup>217</sup> in an attempt to stop the potential sale of historically significant antiquities from an archeological site within Iran.<sup>218</sup> This litigation, *Government of the Islamic Republic of Iran v. Barakat Galleries Ltd.*, could impact the *Rubin* litigation. In fact, the Illinois court allowed plaintiffs’ discovery requests for the *Barakat* pleadings from Iran.<sup>219</sup> This litigation deals with the interpretation of Iran’s national ownership laws and whether they confer property rights that England recognizes.<sup>220</sup> It was heard first by England’s High Court of Justice Queen’s Bench Division and then was appealed to the Court of Appeal (Civil Division).

In this litigation, Iran sought the return of a “number of carved jars, bowls and cups made out of chlorite . . . from the Jiroft region of Iran.”<sup>221</sup> The Jiroft region is thought to have been the origin of “one of the earliest literate societies in the world,”<sup>222</sup> and the Jiroft objects are considered a major find.<sup>223</sup> Iran contends that, under certain provisions of Iranian law

215. *Id.*

216. *Id.*

217. THE BARAKAT GALLERY, <http://www.barakatgallery.com/store/Index.cfm?FuseAction=AboutUs&UserID=0> (last visited Jan. 25, 2011) (“The Gallery is a purveyor of museum quality ancient art specializing in Classical antiquities, Near Eastern, Biblical, Chinese, Pre-Columbian, Byzantine, Asian, African and Primitive arts.”).

218. *Gov’t of the Islamic Republic of Iran v. Barakat Galleries Ltd.*, [2007] EWCA (Civ) 1374, [2009] Q.B. 22 (Eng.) [hereinafter *Barakat II*]; *see also* *Islamic Republic of Iran v. Berend*, [2007] EWHC (QB) 132 (declining to award antiquities to Iran under interpretation of French law).

219. *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2007 WL 2219105, at \*4 (N.D. Ill. July 26, 2007) (observing that the magistrate judge granted discovery because of the ownership issue of whether “Iran owns artifacts excavated in Iran by operation of Iranian law . . .”).

220. *Barakat II*, [2007] EWCA 1374, [6].

221. *Barakat I*, [2007] EWHC (QB) 705, [1]. Archaeologists, who had thought that a Bronze Age civilization “flourished” in the region, are excited about the “prospect of revealing Jiroft’s secrets.” Andrew Lawler, *Jiroft Discovery Stuns Archaeologists*, 302 SCIENCE 973, 973–74 (2003).

222. *Barakat I*, [2007] EWHC (QB) 705, [1].

223. Lawler, *supra* note 221 (quoting Holly Pittman, art historian at the University of Pennsylvania, as saying: “This is another Bronze Age civilization comparable to the Indus and Mesopotamia, but smaller in scale and less complex. It will be extremely important”). The finds include a “massive stepped structure” that researchers believe may be a ziggurat (temple). If it is a

discussed below, it is the lawful owner of the objects in question.<sup>224</sup> In the alternative, Iran claims conversion by the Barakat Gallery because, even if it is not the owner of the Jiroft objects per Iranian law, it had an “immediate right to possession of the antiquities” under such law.<sup>225</sup>

The Barakat Gallery, with showrooms in London and Beverly Hills, is a “purveyor of museum quality ancient art.”<sup>226</sup> Barakat admits that it possesses the cultural material in question, “but disputes the entitlement of Iran to [its] return.”<sup>227</sup> It purports to have obtained good title to the objects through legitimate purchases in countries such as France, Germany, and Switzerland.<sup>228</sup> “In the alternative Barakat maintains that, even if . . . Iran has title to the antiquities by virtue of the laws of Iran, the present claim cannot succeed because Iran is seeking . . . to enforce . . . Iranian penal or public laws.”<sup>229</sup> As mentioned in Part II above, generally, a nation’s penal or public laws, including export regulations, are not enforceable in other nations.<sup>230</sup>

Both parties accepted that Iran did not give consent to the removal of the cultural materials.<sup>231</sup> Furthermore, it was assumed that the objects came from the Jiroft region and that the excavation was “unlicensed and therefore unlawful.”<sup>232</sup> Finally, for the purposes of trial, the court assumed that “Iranian law is the applicable law for the acquisition/transfer of title to the antiquities.”<sup>233</sup>

#### A. *Queen’s Bench Division—Iranian Laws Did Not Vest Ownership*

The lower English court addressed two issues. First, whether Iran can show it has obtained title to the Jiroft objects “as a matter of Iranian law

ziggurat, some believe it could be one of the largest and earliest known with an estimated date of 2300 B.C.E. Lawler, *supra* note 89.

224. *Barakat I*, [2007] EWHC (QB) 705, [6].

225. *Id.* [9]. Iran relies mainly on the Legal Bill of 1979, which requires an individual who discovers antiquities to deliver them “as soon as possible” to the closest office of Culture and Higher Education. *Id.* [61]. Therefore, Iran argues, it is entitled to immediate right of possession. *Id.* Barakat counters that in order for such a claim to succeed, the claimant must have a proprietary right. *Id.* [62]. The court concluded that a proprietary right is required in order to establish conversion or wrongful interference, which, as discussed herein in Section a., Iran was unable to accomplish. *Id.* [71].

226. THE BARAKAT GALLERY, *supra* note 217.

227. *Barakat I*, [2007] EWHC (QB) 705, [2].

228. *Id.*

229. *Id.*

230. See generally William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161 (2002).

231. *Barakat I*, [2007] EWHC (QB) 705, [1].

232. *Id.* [1], [5].

233. *Id.* [5].

and, if so, by what means.”<sup>234</sup> Second was, if Iran can show that it obtained title via Iranian law, “whether this court should recognise and/or enforce that title.”<sup>235</sup>

Iran conceded that there is no one specific provision of Iranian law that vests ownership of antiquities in the state.<sup>236</sup> Iran maintained that “it is apparent from a consideration of a series of statutory provisions . . . that Iranian law has treated the state as the owner of articles, such as the antiquities, which form part of Iran’s national heritage.”<sup>237</sup> In particular, Iran relied on the Civil Code, the National Heritage Protection Act of 1930, 1930 Executive Regulations, the Legal Bill of 1979, the Constitution of 1979, and the Punishments Act of 1996.<sup>238</sup> Each will be addressed in turn.

The main civil laws of Iran were codified in 1928 in the Civil Code.<sup>239</sup> There are many provisions which are noted in the court’s summary of Iranian law. This article addresses the most relevant.<sup>240</sup> First is Article 26 of Section 3 On Properties which have No Private Owner:

Government properties which are capable of public service or utilisation, such as fortifications, fortresses, moats, military earthworks, arsenals, weapons stored, warships and also government furniture, mansions and buildings, government telegraphs, public museums and libraries, historical monuments and similar properties, and in brief, any movable or immovable properties which may be *in the possession* of the government of public expediency and national interest, may not privately be

234. *Id.* [4].

235. *Id.*

236. *Id.* [15].

237. *Id.*

238. *Id.* [20]–[58]. The court noted that, although Iran made no reliance on it, the “appropriate starting point” is the Constitutional Movement when the “king’s domain became the Crown’s, or government property. When the Iranian main laws were codified in the Civil Code of Iran . . . the internal ‘government properties’ legally replaced the king’s domain.” *Id.* [17]. However, this information was not part of Iran’s case and as such, the court did not consider it. *Id.* [19].

239. *Barakat I*, [2007] EWHC (QB) 705, [20].

240. The court also summarized articles 30, 31, 32, 35, 36 in chapter 2 On Various Rights that People May Have in Properties; article 165 in chapter 4 On Found Articles and Lost Animals; articles 173, 174, 175, 176 in chapter 5 On Treasure Trove; articles 308, 309, 317 in subsection 1 On Usurpation. *Id.* [20]. The court determined that chapter 2 demonstrates that “Iranian law both recognises and respects private ownership which, unless the law otherwise provides, carries with it a right to absolute control on the part of the owner over his property.” *Id.* [41]. The court also stated that articles in chapters 4 and 5 “lend some support to Barakat’s assertion that the Civil Code provides for the finder of an article to become the owner;” however, it was not possible for the court “to be categorical on this point. . . .” *Id.* [42].

owned. The same applies to properties that have, in the public interest, been allocated to a province, county, region or town.<sup>241</sup>

The court rejected the argument proffered by Iran's expert that the Jiroft material "fall[s] within the category of 'historical monuments and similar properties' which, according to Article 26, may not be privately owned."<sup>242</sup> The court declined to extend the words "and similar properties" to include "movable antiquities," but it did accept the evidence of Barakat's expert that "movable antiquities are not 'in use by the Government for the service of the public' within the meaning of Article 26."<sup>243</sup> The court further noted that article 26 refers to the properties therein as being in the "possession" of the government rather than using words of "ownership."<sup>244</sup>

The National Heritage Protection Act of 1930 was passed in order to provide for an inventory of Iranian national heritage, including items "which possess historical, scientific or artistic respect and prestige."<sup>245</sup> The Act provides for the registration of both immovable and movable properties.<sup>246</sup> There are several relevant provisions that the court examined:<sup>247</sup>

- Article 1—*All works of art and movable and immovable creations* which have been produced in Iran, as well as all historical sites, dating from before the end of the Zend dynasty, are, by virtue of Article 2 of the present law, *considered as*

241. *Barakat I*, [2007] EWHC (QB) 705, [20] (emphasis added).

242. *Id.* [40].

243. *Id.*

244. *Id.*

245. *Id.* [21].

246. *Id.* Articles 4 to 6 deal with immovable property. Article 7 and those following deal with movable property. Article 9 requires the owner of movable property registered on the List for National Heritage to notify the relevant governmental entity prior to selling it. *Id.*

247. *Barakat I*, [2007] EWHC (QB) 705, [43]–[44]. Iran also relied on articles 13, 16 and 17. *Id.* [46]. Article 17 requires individuals wanting to trade/export antiquities to obtain a license; items on the Inventory will be "confiscated by the State if any attempt is made to export it without State authorization." U.N. EDUC., SCIENTIFIC, & CULTURAL ORG., THE PROTECTION OF MOVABLE CULTURAL PROPERTY, COLLECTION OF LEGISLATIVE TEXTS: IRAN (1988), at 3, available at <http://unesdoc.unesco.org/images/0007/000785/078538eo.pdf> [hereinafter UNESCO LEGISLATIVE TEXTS: IRAN]. Article 16 states that an individual violating article 10 or conducting excavations without State authorization shall be fined and the items confiscated. *Id.* Article 13 states that excavations, even on private land, may only be undertaken with State authorization. *Id.* The court commented that articles 13, 16, and 17 are "inconsistent with a pre-existing state ownership of antiquities." *Barakat I*, [2007] EWHC (QB) 705, [46]. By these provisions, ownership vests in the State, but only in concert with a conviction in criminal court. *Id.*

*national antiquities and are placed under the protection and control of the State.*

- Article 5—*Private individuals who are owners . . . of property listed in the Inventory . . . retain their right of ownership . . . but may not oppose measures which the State considers that it has to take for the preservation of those antiquities. If work undertaken by the State entails expenditure, no reimbursement of that expenditure may be claimed from the owner nor shall the work in question . . . affect his right of ownership.*
- Article 10—*Any person happening to discover any movable property which . . . could be considered as a national antiquity, even if that property is on his own land, must notify the Ministry of Education . . . as soon as possible. Should the relevant public authorities decide that the movable property in question ought to be listed in the Inventory . . . half of the property discovered, or of its value as determined by appraisal, shall be due to the finder.* The State may, at its own discretion, decide whether to retain the other half or donate it to the finder.
- Article 14—*Items discovered during scientific or commercial excavations . . . belong exclusively to the State if the State has itself undertaken the excavations. If the excavations have been undertaken by a third party, the State may select and appropriate up to ten items of historical or artistic value and donate half of the remainder to the finder, keeping the other half itself.* If there are not more than ten items in all and if the State keeps them all, the expenses incurred by the excavations are reimbursed to the person who provided the funds. Buildings and parts of buildings are not covered by the above provision regarding sharing and the State is entitled to appropriate them in toto.<sup>248</sup>

The court emphasized that article 1 “makes clear that the aim of the Act is to protect under State control . . . artefacts which may be considered to be part of the national heritage of Iran,” distinguishing “state control” from “state ownership.”<sup>249</sup> Article 5 permits individuals to retain ownership, and article 9 requires an owner to notify the government before

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248. UNESCO LEGISLATIVE TEXTS: IRAN, *supra* note 247, at 1–3 (underlining in original; italics added).

249. *Barakat I*, [2007] EWHC (QB) 705, [43].

he sells the artifact.<sup>250</sup> Although article 9 references a state right to preemption, and article 10 requires state payment to the finder, article 14 notes that the “State may choose and take ownership.”<sup>251</sup>

The court accepted the testimony of Barakat’s expert “that the 1930 Act primarily regulates the listing of the national heritage and makes provision for measures to be taken to protect and preserve items of the National Heritage, for example by restricting excavations and export.”<sup>252</sup> It concluded that the 1930 Act regulates, protects and preserves, and is not “concerned with property rights.”<sup>253</sup>

In 1932, the Executive Regulations of the National Heritage Protection Act of 1930 were approved by Iran’s Council of Ministers.<sup>254</sup> These regulations were designed to implement the 1930 Act.<sup>255</sup> The court referred to various provisions, but found that just as the 1930 Act did not confer ownership, neither did the regulations.<sup>256</sup>

Central to the decision was the Legal Bill of 1979 (“Legal Bill”), entitled “Legal Bill Regarding Prevention of Unauthorised Excavations and Diggings intended to obtain antiquities and historical relics which according to international criteria, have been made or have come into being one hundred or more years ago.”<sup>257</sup> It consists of one article:

1. Considering the necessity of protection of relics belonging to Islamic and cultural heritage, and the need for protection and guarding these heritages from the point of view of sociology and scientific, cultural and historical research and considering the need for prevention of plundering these relics and their export abroad, which are prohibited by national and international rules, the following Single Article is approved:

- 1. Undertaking any excavation and digging intended to obtain antiquities and historical relics is absolutely forbidden and the offender shall be sentenced to six months to three years correctional imprisonment and seizure . . . of the discovered items and excavation equipment in favour of the public treasury. If the*

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250. *Id.* [44].

251. *Id.*

252. *Id.* [47].

253. *Id.*

254. *Id.* [23].

255. *Id.*

256. *Barakat I*, [2007] EWHC (QB) 705, [48]. The court briefly discussed Articles 17, 18, 31, 36. *Id.* [48]–[50].

257. *Id.* [26], [51].

excavation takes place in historical places that have been registered in the National Heritage List, the offender shall be sentenced to the maximum punishment provided.

2. Where the objects named in this [Act have been] discovered accidentally, the discoverer is duty bound to submit them to the nearest office of Culture and Higher Education as soon as possible. In this case, a committee consisting of the Religious Judge, local Public-Prosecutor and the director of the office of Culture and Higher Education, or their representatives, will be formed with a specialised expert attending and who will examine the case and decide as follows:

A. Where the items are discovered in a private property, in the case of precious metals and jewels, they will be weighed and a sum equal to twice the market value of the raw material thereof will be paid to the discoverer. In the case of other objects, half of the estimated price will be paid to him.

B. Where the items are discovered in non-private property, a sum equal to half of the discovery reward, provided for in Section A, will be paid to the discoverer[.]

3. Antiquities means articles that according to international criteria have been made or produced 100, or more, years ago. In the case of objects whose antiquity is less than a hundred years, the discovered objects will belong to the discoverer after he has paid a fifth of their evaluated price to the public treasury.

4. Persons who offer the discovered objects for sale or purchase in violation of the provisions of this Act will be sentenced [as] provided for in Section 1.<sup>258</sup>

Iran's expert contended that the Legal Bill's purpose is "to render unauthorised digging and excavating of antiquities 'absolutely prohibited' and to penalise those who offer antiquities for sale or purchase," reflecting "the fact that such antiquities belong to the state."<sup>259</sup> However, Barakat's expert argued that the bill has the "limited objective of preventing the plundering of relics" and is only a "criminal statute."<sup>260</sup> The view of Barakat's expert prevailed, and the Legal Bill was not construed to be a

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258. *Id.* (emphasis added).

259. *Id.* [53].

260. *Id.*

vesting statute.<sup>261</sup> “[T]he draftsman could so easily have provided for state ownership of all antiquities if such had been his intention.”<sup>262</sup>

Also in 1979, Iran adopted a new Constitution.<sup>263</sup> The key provisions follow:

- Article 45 [Public Wealth]—*Public wealth and property*, such as uncultivated or abandoned land, mineral deposits, seas, lakes, rivers and other public waterways, mountains, valleys, forests, marshlands, natural forests, unenclosed pastures, legacies without heirs, property of undetermined ownership, and public property recovered from usurpers, *shall be at the disposal of the Islamic government for it to utilize in accordance with the public interest . . .*
- Article 83 [Property of National Heritage]—Government buildings and properties forming part of the national heritage cannot be transferred except with the approval of the Islamic Consultative Assembly; that too, is not applicable in the case of irreplaceable treasures.<sup>264</sup>

The court concluded that these constitutional provisions did not provide for any state ownership.<sup>265</sup> It stated that even if “antiquities” fell within the category of “public wealth” in Article 45, designation that would not help Iran’s argument because Article 45 “refers only to possession by the Government.”<sup>266</sup> Furthermore, the court maintained that Article 83 does not indicate state ownership, but only requires Islamic Consultative Assembly approval prior to transfer of specified property.<sup>267</sup>

The final pieces of the Iranian law puzzle were provisions of the Fifth Book of Islamic Punishment Law ratified in 1996.<sup>268</sup> Iran relied upon the following three provisions:

261. *Id.*

262. *Id.* The court noted that ownership is only affected after seizure upon criminal court conviction. *Id.* [54].

263. *Id.* [27].

264. QUANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980], arts. 45, 83. The *Barakat I* court also referenced Article 47, [2007] EWHC (QB) 705, [27], which states that validly acquired private ownership is to be respected. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN art. 47.

265. *Barakat I*, [2007] EWHC (QB) 705, [56].

266. *Id.*

267. *Id.*

268. *Id.* [29]. See also *Islamic Penal Code of Iran*, MISSION FOR ESTABLISHMENT OF HUMAN RIGHTS IN IRAN (“MEHRIRAN”), [http://mehr.org/Islamic\\_Penal\\_Code\\_of\\_Iran.pdf](http://mehr.org/Islamic_Penal_Code_of_Iran.pdf) (last visited Jan. 26, 2011), which states that Ta’azirat, Book Five of the Penal Code, was ratified on May 22, 1996.

Article 559—*any person found guilty* of stealing equipments and objects, as well as the materials and pieces of cultural-historical monuments from museums, exhibits, historical and religious places or any other places which are under the protection and control of the state; or trades in such objects or conceals them—knowing that they are stolen—*shall be obliged to return them* and condemned to confinement of one to five years if not subject to punishment for theft (as ordained by Islamic religion) . . . .

Article 561—any attempt to take historical-cultural items out of the country, even if it would not be actually exported, shall be considered as illegal export. The *violation shall be condemned to retribute the items*, imprisoned from one to three years, and fined as (sic) twice as the value of the items exported . . . .

Article 562—any digging or excavation intended to obtain historical-cultural properties is forbidden. The violator shall be condemned to undergo a confinement of six months to three years; the *discovered objects shall be confiscated* in the interests of the Iranian Cultural Heritage Organisation and the equipments of the excavation shall be confiscated by the state.

Note 1. Whoever obtains the historical/cultural properties, that are the subject of this Article, by chance and does not take (the necessary) steps to deliver the same, according to the regulations of the State Cultural Heritage Organisation, will be sentenced to the seizure of the discovered (found) properties . . . .<sup>269</sup>

The court rejected the idea that these criminal provisions vested ownership of antiquities in the State: articles 561 and 562 provide for *confiscation* as a consequence of criminal prosecution, but neither addresses the *ownership* issue.<sup>270</sup>

In summary, after considering the provisions outlined in this section, the court concluded “with some regret” that Iran had not met its burden in establishing its ownership of the Jiroft objects under Iranian laws.<sup>271</sup> Although Iran has “gone to some lengths” to protect its natural heritage and prevent illegal looting and removal, “the enactments relied on by Iran fall short . . . of establishing its legal ownership of the antiquities.”<sup>272</sup> Furthermore, even consideration of the various legal schemes together is

269. *Barakat I*, [2007] EWHC (QB) 705, [29] (emphasis added).

270. *Id.* [58] (“These Articles say nothing of the position in regard to ownership prior to the seizure or confiscation.”).

271. *Id.* [59].

272. *Id.*

not enough to affect the “vesting [of] ownership in the State . . . by default or as a matter of inference.”<sup>273</sup>

Because the court found that Iran did not meet the first issue by establishing ownership in the Jiroft objects under Iranian law, it was not required to address the second issue regarding justiciability—whether the court “should recognise and/or enforce Iran’s title to the antiquities.”<sup>274</sup> However, it did briefly express its conclusions on this issue.

As mentioned above, courts globally will generally refuse to enforce a foreign public law.<sup>275</sup> English courts are no different, and they do not have the jurisdiction, directly or indirectly, to enforce a “penal, revenue, or other public law of a foreign state.”<sup>276</sup> Barakat contended that Iran was seeking to enforce the penal or other public law of Iran.<sup>277</sup> The court cited *Dicey, Morris and Collins on the Conflict of Laws* in defining a penal law:

A penal law is a law which punishes or prevents an offence. To come within this principle the law does not have to be part of the criminal code of the foreign country. Thus a law intended to protect the historic heritage of New Zealand by forfeiting historic articles illegally exported was held to be penal.<sup>278</sup>

This definition references a prior Court of Appeal case, *Attorney General of New Zealand v. Ortiz*,<sup>279</sup> that the *Barakat I* court relied upon.<sup>280</sup> The *Ortiz* court found that a New Zealand statute was penal because “[i]t concerns a public right—the preservation of historic articles within New Zealand—which right the state seeks to vindicate. The vindication is not

273. *Id.*

274. *Id.* [77].

275. See *supra* notes 173–74 and 211 and accompanying text; Dodge, *supra* note 230, at 161 (“However, when the foreign law at issue is public—criminal, tax, antitrust, or securities law, for example—courts will neither apply that law to decide a case nor enforce the decision of a foreign court applying that law.”). See also, e.g., Felix D. Strebler, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 LOY. L.A. INT’L & COMP. L. REV. 55, 55 (1999) (“This general refusal to recognize foreign public law in enforcement proceedings has been described as the ‘public law taboo.’”).

276. *Barakat I*, [2007] EWHC (QB) 705, [11] (citing DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS art. 3(1) (14th ed. 2006)).

277. *Id.* [79]. Iran counters that the relevant law is “patrimonial” and not penal and therefore enforceable in England. *Id.* [84]. The court described “patrimonial” claims by the following: “Thus there would be no infringement of the principle governing justiciability if the English Courts were to enforce a proprietary claim by a foreign sovereign state in relation to movables acquired by that State (whether by purchase, bequest, gift . . .) at a time when the movables were within the territory of that state.” *Id.* [85]. However, Iran does not claim to have acquired the Jiroft objects in this way; it contends that “it assumed” ownership of the articles. *Id.* [86].

278. *Id.* [83] (citing DICEY, MORRIS AND COLLINS, *supra* note 276, para. 5-027).

279. [1984] A.C. 1 (Eng.).

280. *Barakat I*, [2007] EWHC (QB) 705, [83].

sought by the acquisition of the article in exchange for proper compensation. The vindication is sought through confiscation.”<sup>281</sup>

The *Barakat I* Court, after comparing Iran’s Legal Bill of 1979 with the New Zealand statute, found that they have the same purpose — protection of antiquities.<sup>282</sup> Furthermore, the court found that the Legal Bill “imposes penal sanctions for invasion of the public right,” just as the New Zealand statute vindicated the public right through “confiscation.”<sup>283</sup> Therefore, because this is an action to “enforce a public right of state ownership,” and because the obligatory penalties “for the vindication of that public right include imprisonment and seizure[,] . . . the Iranian legislation is properly characterised as ‘penal.’”<sup>284</sup>

#### *B. Court of Appeal—Iranian Laws Did Vest Ownership*

On appeal, the higher English court addressed the same two issues as did the Queen’s Bench: whether Iran obtained ownership of the Jiroft material under Iranian law and, if so, whether an English court should recognize and enforce that title.<sup>285</sup> The appellate court approached these issues in the following manner: “i) [w]hat is the interest in moveable property that a claimant must show in order to found a claim in conversion in this jurisdiction? ii) What, if any, interest in the antiquities does Iran enjoy? iii) Does that right found a cause of action in conversion under English law?”<sup>286</sup> Each of these issues will be addressed in turn.

Iran’s action claimed conversion.<sup>287</sup> The court referenced the Torts (Interference with Goods) Act 1977, which defines “wrongful interference with goods” to mean “conversion of goods” as well as other things.<sup>288</sup> The Act acknowledges that “it is possible to enjoy different interests in goods,”<sup>289</sup> but it does not define “possessory” or “proprietary” title.<sup>290</sup> This court undertook a review of the authorities and case law which provided

281. [1984] A.C. 1, 34 (Eng.).

282. See *Barakat I*, [2007] EWHC (QB) 705, [87].

283. *Id.* [88].

284. *Id.* 91. The court also undertook a discussion of whether the relevant Iranian laws were “public” laws. It found that because the Legal Bill is “seeking to protect the interests of the State of Iran in recovering items of that country’s natural heritage and seeking further to enforce the right to delivery up which has under Iranian law . . . become vested in the State,” it is a “paradigm example of a public law.” *Id.* [99].

285. *Barakat II*, [2007] EWCA (CIV) 1374, [6] (Eng.).

286. *Id.* [11].

287. *Id.* [12].

288. *Id.*

289. *Id.* [14].

290. *Id.* [15].

contrasting views as to whether “possessory” or “proprietary” title was needed to bring an action in conversion.<sup>291</sup>

The lower court relied on *Jarvis v. Williams*,<sup>292</sup> which held that a “claimant in conversion had to show not merely an immediate right to possession but a proprietary interest in the subject matter of the claim.”<sup>293</sup> The Court of Appeal cited a conflicting opinion found in *International Factors Ltd. v. Rodriguez*, which held that an individual with a right to immediate possession may sue “even the owner of the chattel for wrongfully interfering with this right.”<sup>294</sup> Ultimately, the court “reconciled” the two cases<sup>295</sup> and did not overturn the conclusion that “a claimant in conversion must demonstrate some proprietary right in the goods . . . .”<sup>296</sup>

In deciding what type of ownership interest Iran has under Iranian law, the appellate court initially noted that the lower, Queen’s Bench court cited “no judicial or academic authority on the central question”—mainly whether the 1979 Legal Bill vested ownership of the Jiroft materials in the state.<sup>297</sup> The lower court had been satisfied with the assistance the experts for Iran and Barakat provided, but “preferred” the conclusions of Barakat’s expert without making a judgment on “credibility, or expertise.”<sup>298</sup>

Furthermore, the Court of Appeal stated that “it is important to bear in mind that it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant.”<sup>299</sup> Thus, the issue the court was concerned with here was whether the ownership rights enjoyed by Iran “equate to those that give standing to sue in conversion under English law.”<sup>300</sup> In undertaking this analysis, the court looked to the Civil Code, the National Heritage Protection Act of 1930, and the Legal Bill of 1979. These will be considered in turn.

First, the appellate court agreed with the general findings of the Queen’s Bench court with regard to the Civil Code, which it found did not

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291. *Id.* [19]–[30].

292. *Id.* [31] (citing *Jarris v. Williams*, [1955] 1 WLR 71 (Eng.)).

293. *Id.* [28] (citing *Int’l Factors Ltd. v. Rodriguez*, [1979] 1 Q.B. 351 (Eng.)).

294. *Id.* [29] (citing *MCC Proceeds Inc. v. Lehman Bros. Int’l (Eur.)*, [1998] 4 All E.R. 675 (discussing *Rodriguez*, [1979] 1 W.B. 352)).

295. *Barakat II*, [2007] EWCA 1374, [30].

296. *Id.* [31].

297. *Id.* [48].

298. *Id.*

299. *Id.* [49].

300. *Id.*

to vest ownership of the Jiroft materials in Iran.<sup>301</sup> Second, although the appellate court partially questioned the Queen’s Bench court’s analysis of the National Heritage Protection Act of 1930,<sup>302</sup> it ultimately agreed with the Queen’s Bench court’s conclusion that the Act’s articles did not lend support to Iran’s broad contention that “all antiquities were owned by the state.”<sup>303</sup> The “lack of clarity” in the relevant articles as to *when* the State becomes an owner is more in line with Barakat’s evidence “that the finder is the owner unless and until antiquities are transferred to the State.”<sup>304</sup>

Finally, the appellate court turned to the Legal Bill of 1979 and noted that it is the “clinching statutory provision” of Iran’s action.<sup>305</sup> Iran again conceded that there is no specific language “vesting” ownership in the state.<sup>306</sup> However, it argued that ownership is determined by rights, such as “the right of exclusive enjoyment, the right of alienation, [and] the right of recovering possession,” and, based on the rights that it had, it was effectively the owner, notwithstanding the lack of specific statutory language of vesting.<sup>307</sup>

The appellate court undertook its analysis of the Legal Bill of 1979 by trying to identify *someone*, other than Iran, who could be the owner of any cultural objects discovered.<sup>308</sup> The court first noted that the third provision of the Legal Bill<sup>309</sup> provides that the finder of items less than 100 years old becomes the owner upon paying one-fifth their value to the state, but that the provision does not indicate who the owner is prior to making such a payment.<sup>310</sup> Next, the court noted that the second provision of the Legal Bill does not let the accidental discoverer benefit from his find “other than by obtaining the statutory reward.”<sup>311</sup> In relation, the court noted that because the first provision deals with an “illegal” finder, such a person can

301. *Id.* [55]–[57].

302. *Id.* [60] (noting that article 10 “gives the state the option of becoming (or remaining) the owner of the other half. The words . . . placed in brackets reflect the fact that it is perhaps arguable that the language is sufficiently imprecise so as to accommodate the possibility that antiquities vest in the state when they are found . . .”). In addition, this court found that Article 14, as described by Article 31 of the Regulations, appears to “vest the state’s share in the state as owner, rather than mere possessor.” *Id.* [61].

303. *Id.* [58].

304. *Id.* [62].

305. *Id.* [63].

306. *Id.*

307. *Id.*

308. *Id.* [66] (noting that “[t]his is a question that the judge [below] did not expressly address . . .”).

309. *See infra* Part III for the Legal Bill of 1979.

310. *Barakat II*, [2007] EWCA 1374, [68].

311. *Id.* [69].

be in no better position than the “accidental” finder who could not benefit from his discovery.<sup>312</sup>

Next, the court referenced the meaning of ownership, defined in *Halsbury’s Laws of England*: “Ownership consists of innumerable rights over property, for example the rights of exclusive enjoyment, of destruction, alteration and alienation, and of maintaining and recovering possession of the property from all other persons. Those rights are conceived not as separately existing, but as merged in one general right of ownership.”<sup>313</sup> The court concluded that “[u]nder the Legal Bill of 1979 the finder of antiquities enjoys none of these attributes of ownership.”<sup>314</sup>

After analyzing the rights of the finder under the Legal Bill, the court turned to those of Iran. “Iran is entitled to immediate possession of any antiquities found,” because the second provision provides that the finder must “submit them” to the authorities “as soon as possible.”<sup>315</sup> Furthermore, “[t]here has been no dispute that once the antiquities are handed over, they become the property of Iran.”<sup>316</sup> Additionally, in the case of the “illegal” finder, they are “subject to ‘seizure’ by Iran” as stated in the first provision.<sup>317</sup> Therefore, except for the accidental finder’s reward payment, “no one enjoys any rights in relation to antiquities found accidentally or as a result of illegal excavation except Iran. . . . [T]he rights that Iran enjoys are essentially the rights of ownership.”<sup>318</sup>

In summary, because the accidental discoverer and the illegal finder of antiquities do not enjoy general rights of ownership under the Legal Bill of

312. *Id.* [70].

313. *Id.* [73] (citing 35 Halsbury’s *Laws of England* para. 1227 (reprt., 4th ed. 1994)).

314. *Id.*

315. *Id.* [74]–[75] (noting that “[i]f they are not handed over, but are transferred by the finder to a third party, the third party will get no title and the antiquities will be subject to ‘seizure’”).

316. *Id.* [74].

317. *Id.* [75].

318. *Id.* The court then rejected the various arguments proffered by Barakat as to why the Legal Bill did not grant Iran ownership. First, the Farsi word “zabt” “can mean both ‘seizure’ and ‘confiscation.’” *Id.* [77]. The court stated that the word could be used to describe both “confiscation of equipment owned by the excavator and taking possession of antiquities in respect of which Iran had the rights of the owner.” *Id.* [78]. Second, Barakat argued that the Legal Bill acts “in personam.” *Id.* [76]. The court found this to be an “arid” issue, stating that although the obligations imposed by the bill are “personal obligations” and the right to seizure is a “personal right,” “these rights none the less [sic] inferentially affect title.” *Id.* [79]–[80]. Third, Barakat contended that a clear and express vesting statute could have been included in the bill. *Id.* [76]. The court noted that this bill “was enacted as an urgent response to the pillaging of antiquities which took place immediately after the revolution.” *Id.* [82]. Furthermore, “it is possible that the draftsman started from the premise that antiquities were owned by Iran.” *Id.* However, the court reiterated that it does not matter because the “clear effect of the Legal Bill was to vest title to antiquities in Iran . . . .” *Id.* Finally, the court did not attach any significance to the fact that there is no record of previous litigation where Iran is seeking the return of antiquities in a civil proceeding. *Id.* [83].

1979, because Iran is entitled to immediate possession of found antiquities, and because once handed over they become the property of Iran under the bill, the court concluded that Iran had demonstrated that it was the owner of the Jiroft objects.<sup>319</sup>

The appellate court divided the conversion issue into two sub-issues: (1) whether Iran's interest could be the basis of a conversion action, and (2) whether the claim is non-justiciable in England because its relevant law is either penal or public.<sup>320</sup> Each will be considered in turn.

First, regarding whether Iran's interest could sustain a conversion claim, the court noted that "[u]nder English law the owner of a chattel who has an immediate right to possession of it has a right to sue in conversion."<sup>321</sup> Under England's conflict of laws principles, the court determined that the immediate right to possession should be considered by the law of Iran as the *lex situs*.<sup>322</sup> As stated previously, the court found that Iran "enjoys both title and an immediate right to possession of the antiquities under the law of Iran."<sup>323</sup> Therefore, Iran's interest can give rise to a conversion action.<sup>324</sup>

The second issue is whether Iran is seeking to enforce a foreign penal or public law, or whether the claim is patrimonial, as Iran maintains.<sup>325</sup> Penal laws are unenforceable because crimes "are only cognisable and punishable in the country where they were committed . . ."<sup>326</sup> Public laws refer to the "exercise or assertion of a sovereign right,"<sup>327</sup> and, as such, are also unenforceable. Patrimonial claims involve a country asserting its "rights of ownership."<sup>328</sup> The court stated that whether a foreign law is to be considered "penal" depends on English law and not on the label given

319. *Id.* [84] (Furthermore, the court stated that had it not reached this conclusion it would have determined that "under Iranian law, Iran had an immediate right to possession of the antiquities that would vest ownership on taking possession." *Id.*

320. *Id.* [85].

321. *Id.* [86].

322. *Id.* "Lex situs" means the "law of the place where property is located." BLACK'S LAW DICTIONARY 932 (8th ed. 1999) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 222 et. seq. (1971)). See Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 240 (2004) (providing discussion of lex situs doctrine in civil and common law nations).

323. *Barakat II*, [2007] EWCA 1374, [86].

324. *Id.* Furthermore, the court stated that "[h]ad we not formed this view, we would have concluded that Iran enjoyed an immediate right to their possession under the law of Iran which of itself would suffice to found a claim in conversion in this jurisdiction." *Id.*

325. *Id.* [87].

326. *Id.* [105].

327. *Id.* [125].

328. *Id.* [131]. See *supra* note 168.

to it by the foreign state.<sup>329</sup> “The English court has to determine the substance of the right sought to be enforced, and whether its enforcement would, directly or indirectly, involve the execution of the penal law of another state.”<sup>330</sup> Furthermore, “[i]t follows that a law may be characterised as penal even if it does not form part of the criminal code of a foreign country.”<sup>331</sup> Finally, just because a provision can be found within a law containing criminal penalties does not mean “that the provision itself is penal in nature.”<sup>332</sup>

Applying this reasoning to the case at hand, the court concluded that the Queen’s Bench was in error in holding the 1979 Legal Bill to be a penal law.<sup>333</sup> It acknowledged that a large part of the bill was penal, but stated that although some provisions “impose penalties,” this does not make all other provisions of the Legal Bill penal in nature.<sup>334</sup> The modifications that the bill made with regard “to ownership of antiquities were not penal or confiscatory . . . . They altered the law as to the ownership of antiquities that had not yet been found, with the effect that these would all be owned by the state . . . .”<sup>335</sup> These provisions, the court reasoned, were not penal provisions.<sup>336</sup>

Next, the court turned to whether the 1979 Legal Bill is enforceable as a public law. As stated in Rule 3(1) of *Dicey, Morris and Collins on the Conflict of Laws*, “English courts have no jurisdiction to entertain an action for the enforcement . . . of a penal, revenue or other public law of a foreign state . . . .”<sup>337</sup> After a review of the authorities and case law, the court found that “the only category outside penal and revenue laws which is the subject of an actual decision, as opposed to dicta, is a claim which involves the exercise or assertion of a sovereign right.”<sup>338</sup> It stated that a “helpful and practical test”<sup>339</sup> in deciding whether a law will be enforced is

329. *Barakat II*, [2007] EWCA 1374, [106].

330. *Id.* (citing *Huntington v. Attrill* [1893] A.C. 150, 156 (Eng.); *Att’y-Gen. of N.Z. v. Ortiz*, [1984] A.C. 1, 32 (Eng.)).

331. *Id.* [108] (citing *Ortiz*, [1984] A.C. 1, at 33 (Eng.)).

332. *Id.* [109].

333. *Id.* [111].

334. *Id.* (“The 1979 Legal Bill was in large part penal in that it created criminal offences with criminal penalties for unlawfully excavating or dealing with antiquities.”).

335. *Id.*

336. *Id.*

337. *Barakat I*, [2007] EWHC (QB) 705, [11]. The part of Rule 3(1) referring to “other public law” originally appeared as “political law.” *Barakat II*, [2007] EWCA 1374, [112].

“Political law” was replaced by “other public law” in the seventh edition of *Dicey, Morris and Collins on the Conflict of Laws*, and was meant to be the “equivalent to ‘prerogative right.’” *Id.* [113].

338. *Id.* [125].

339. *Id.*

“whether ‘the central interest’ of the state in bringing the action is governmental in nature.”<sup>340</sup> Finally, the court determined that there is no binding decision preventing the “enforcement of *all* foreign public laws;”<sup>341</sup> laws that will not be enforced are ones that “involve[] the exercise or assertion of a sovereign right . . . .”<sup>342</sup>

Third, Barakat conceded that if Iran had obtained “actual possession” of the Jiroft antiquities, it could have acquired the title necessary to enforce a “patrimonial claim,”<sup>343</sup> where a country asserts its “rights of ownership.”<sup>344</sup> However, Barakat argued that Iran cannot claim conversion because it never “perfected its title” by acquiring “possession of the antiquities,”<sup>345</sup> and, as such, Iran was seeking to enforce Iranian sovereignty in England.<sup>346</sup>

The court concluded that Iran was seeking to enforce a patrimonial claim, asserting title to cultural material, a part of its “national heritage,” via legislation implemented in 1979.<sup>347</sup> Because of this, the court held that Iran’s action could be maintained even though it had not taken “actual possession” of the Jiroft objects; it is not “a claim based on its compulsory acquisition from private owners,” but a patrimonial one.<sup>348</sup>

Finally, the court assumed, *arguendo*, that if this was a claim to enforce a foreign public law, “it should [not] be precluded by any general principle that this country will not entertain an action whose object is to enforce the public law of another state.”<sup>349</sup> Furthermore, the court reasoned there are “positive reasons of policy” why Iran’s claim to recover part of its “national heritage . . . should not be shut out.”<sup>350</sup> The court acknowledged

340. *Id.* [118] (citing *Att’y-Gen. (U.K.) v. Heinemann Publ’rs Austl. Pty. Ltd.*, (1988) 165 C.L.R. 30).

341. *Id.* [125] (emphasis added).

342. *Id.*

343. *Id.* [87]

344. *Id.* [131].

345. *Id.* [87].

346. *Id.* [93].

347. *Id.* [93], [149].

348. *Id.* [149]. The court noted earlier that the “universal rule” is that “title to movables depends on the *lex situs* . . . [and therefore a] transfer of a tangible movable which is valid and effective by the law of the country where the movable is at the time of the transfer is valid and effective in England . . . .” *Id.* [132] (citing 2 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS rule 124, para. 24R-0001 (14th ed. 2006)). The court further stated that “[w]here the foreign state has acquired title under its law to property within its jurisdiction in cases not involving compulsory acquisition of title from private parties, there is no reason in principle why the English court should not recognise its title in accordance with the general principle.” *Id.* [133]. The court also noted that in *United States v. Schultz*, the United States recognised the patrimonial rights of a foreign state “even where the State never had possession.” *Id.* [150] (citing *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003)).

349. *Id.* [151].

350. *Id.* [154].

a global recognition of the importance for international cooperation in order “to prevent the unlawful removal of cultural objects including antiquities,”<sup>351</sup> citing the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and certain provisions therein.<sup>352</sup> The court recognized that even though these international efforts do not directly affect this case, “they do illustrate the international acceptance of the desirability of protection of the national heritage.”<sup>353</sup>

In summary, because Iran demonstrated that it was the owner of the Jiroft objects it can maintain a conversion action.<sup>354</sup> Furthermore, because the 1979 Legal Bill is not a penal law and because Iran was seeking to enforce a patrimonial claim, the claim is justiciable in England.<sup>355</sup>

### C. Which *Barakat* Court was Correct?

Although some antiquities collectors may have been alarmed by a cursory reading of the court of appeal’s opinion, fearing it unjustly enforced a source nation’s law that fell short of full vesting, the court of appeal, which found that Iranian law did vest ownership and that it was justiciable in England, was correct for the following reasons.

351. *Id.* [155].

352. *Id.* [156], [161] (noting that the United Kingdom has ratified UNESCO, but not UNIDROIT). Iran has ratified UNIDROIT. *See* UNESCO, *supra* note 176, at section (C)(2). UNESCO article 2(2) states that “States Parties undertake to oppose such practices [e.g., the illicit import, export and transfer of cultural property ownership] with the means at their disposal and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.” *Id.* art. 2(2). Article 13 states that members undertake, consistent with the laws of each State:

(a) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property; (b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner; (c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners; (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

*Id.* art. 13. UNIDROIT article 3(2) states that “a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen.” UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330, available at <http://unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf>. Article 5(1) states that “[a] Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.” *Id.* art. 5(1).

353. *Barakat II*, [2007] EWCA (CIV) 1374, [163].

354. *See supra* notes 320–25.

355. *See supra* notes 326–34.

The first reason is that the lower court opinion was inadequate as a matter of process. As the court of appeal acknowledged, the Queen's Bench did not undertake any review of the authorities as to whether Iranian law vested ownership of the cultural objects in the state.<sup>356</sup> The judge indicated only a *preference* for the conclusions of Barakat's expert after indicating his satisfaction with both experts and without considering their respective credibility and expertise.<sup>357</sup> On the other hand, the appellate court undertook an in-depth analysis as to ownership of discovered antiquities under the Legal Bill of 1979.

The second reason is a matter of logical reading of the Iranian law. The court of appeal's analysis of the Legal Bill of 1979 is very persuasive. It looked at the "substance" of the legislation and past the fact that the bill contained no express vesting statute language. Specifically, the court was unable to identify anyone, other than Iran, that could be the owner of found antiquities, either accidentally or illegally discovered. As stated, the purpose of the bill is to prevent the plundering of antiquities and their subsequent exportation in order to protect Iran's heritage. Excavation of antiquities is "absolutely forbidden," resulting in the State's seizure of any found items.<sup>358</sup> Accidentally found antiquities must be turned in to the nearest authorities "as soon as possible," with an award payment made to the finder.<sup>359</sup> Logically, the finder is not the owner, and Iran enjoys the rights of ownership.

Third, a comparison of other vesting or nationalization statutes yields the conclusion that the Legal Bill of 1979 conclusively places ownership of found antiquities with the State. For example, Polish legislation states that "[a]rchaeological excavations and findings are the property of the State,"<sup>360</sup> and Peru's law provides that all "archaeological sites belong to the state."<sup>361</sup> In addition, Egypt's Law 117, which was at issue in *Schultz*, "prescribes the procedure to be followed by persons in possession of antiquities at the time the Law takes effect, and by persons who discover antiquities thereafter."<sup>362</sup> "It [also] sets forth serious criminal penalties for the violation of its provisions," among other requirements.<sup>363</sup>

356. *See supra* note 299.

357. *See supra* note 299.

358. *See supra* note 257 and accompanying text.

359. *See supra* notes 247 and 257 and accompanying text.

360. Borodkin, *supra* note 166, at 392 n.103 (citing Law on the Protection of Cultural Property and on Museums art. 24 (1962) (Pol.) (cited in LYNDEL V. PROT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE (1984))).

361. Borodkin, *supra* note 166, at 395 n.124.

362. *United States v. Schultz*, 333 F.3d 393, 402 (2d Cir. 2003).

363. *Id.*

Even though the language of the Legal Bill does not contain specific phrases such as “property of the state” or “belong to the state,” as discussed earlier, the Legal Bill as a whole vests ownership with Iran. Iran’s bill provides that excavations are illegal, and illegal and accidental discoveries ultimately become property of the state,<sup>364</sup> yielding the same result as Poland’s and Peru’s laws. Furthermore, the Legal Bill compares with Egypt’s Law 117, providing a process to be followed upon excavation and accidental discovery of cultural objects and providing criminal penalties for violations.<sup>365</sup> Therefore, even though the language is different, the resulting effect and meaning of Iran’s legislation compares strongly with that of Poland, Peru and Egypt.

Finally, the court’s reasoning in its discussion regarding whether the claim is justiciable is sound. As the court stated, the Legal Bill has criminal penalties.<sup>366</sup> However, the overall scheme is not one of punishment, but one regarding the ownership of cultural material not yet discovered, ultimately resulting in state ownership.<sup>367</sup> As concluded by the court of appeal, Iran is seeking to enforce a “patrimonial claim” in England—not its sovereignty.<sup>368</sup>

In summary, because Iran’s enjoyment of rights of ownership under the 1979 Legal Bill was clear, because a comparison of other foreign patrimony laws further indicates Iran’s right to ownership, because the bill was found to be justiciable in England, and because such foreign patrimony laws are recognizable across borders and under English law, the Court of Appeal (Civil Division) was correct in its findings.

#### *D. What is Barakat’s Potential Impact on Rubin?*

Turning to the potential impact on the *Rubin* litigation, the plaintiffs and museums involved are very interested in the *Barakat* reasoning and outcome.<sup>369</sup> However, the impact should be minimal for a number of reasons. First, the objects at issue in *Barakat* were assumed to be from “recent excavations in the Jiroft region,” as alleged by Iran, for the purposes of trial.<sup>370</sup> As such, Iran’s Legal Bill of 1979—the clinching legislation in Iran’s case and the law relied upon by the Court of Appeal

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364. *See supra* note 148.

365. *See supra* note 148.

366. *See supra* note 224.

367. *See supra* note 225.

368. *See supra* note 238.

369. *See supra* note 107.

370. *Barakat II*, [2007] EWCA (CIV) 1374, [4] (emphasis added).

(Civil Division) to find state ownership—was in place prior to the illegal excavation of the Jiroft objects, vesting ownership of the antiquities in the Iranian State. That may not be the case for the objects at issue in the *Rubin* litigation.

As stated previously, in the Massachusetts litigation, the court determined that the property in question remains “blocked” according to the TRIA such that if the plaintiffs can demonstrate Iranian ownership of the cultural objects, those assets “will be subject to attachment and execution.”<sup>371</sup> The *Rubin* plaintiffs have stated in general that “upon information and belief” Harvard and the Boston Museum of Fine Arts possess property belonging to Iran.<sup>372</sup> The only specific claim relates to objects that Harvard contends were donated by Grenville L. Winthrop in 1937 at the time of his death.<sup>373</sup> As discussed in Part III above, the United States will recognize foreign patrimony laws. However, as clearly stated in *McClain*, the “declaration of national ownership is necessary before illegal exportation of an article can be considered theft.”<sup>374</sup> Therefore, the *Rubin* plaintiffs will need to prove that the objects they allege are available for judgment satisfaction were discovered after the enactment of the Legal Bill of 1979.

Furthermore, the impact on the Illinois litigation involving the Field Museum’s Herzfeld Collection also is questionable. The Illinois court has not determined yet whether any of the collections at issue are “blocked” assets under the TRIA. As noted before, Iran would not “affirmatively state” that it did not own the museum’s antiquities, only that Iran has never claimed ownership.<sup>375</sup> The plaintiffs have argued that Iran does own the artifacts, alleging that they became the property of Iran by “operation of . . . law” when the items were excavated.<sup>376</sup> However, the Herzfeld Collection was excavated by Professor Herzfeld in the early part of the twentieth century prior to the enactment of the Legal Bill of 1979 which would vest ownership in Iran.<sup>377</sup> Again, the *Rubin* plaintiffs will need to prove that the Herzfeld Collection was discovered after the enactment of the Legal Bill, an unlikely outcome.

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371. *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 236 (D. Mass. 2006).

372. *Id.* at 230.

373. Wawrzyniak, *supra* note 53, at 12.

374. *United States v. McClain*, 545 F.2d 988, 1000 (5th Cir. 1977).

375. *See supra* Part II.

376. *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2007 WL 2219105, at \*4 (N.D. Ill. July 26, 2007).

377. *See supra* note 30.

For the Oriental Institute, which has maintained that Iran owns the Chogha Mish Collection, the *Barakat* decision should not have an impact at all. The plaintiffs are seeking to demonstrate that the Chogha Mish Collection is “blocked” for other reasons, including presence before the Iran-United States Claims Tribunal and the possibility that the Institute, at some point, did not recognize Iran’s title.<sup>378</sup>

Another issue to be considered is whether U.S. courts would give res judicata effect to the English court’s finding of Iranian ownership of discovered antiquities per the Legal Bill of 1979. A “final judgment of a court of a foreign state . . . determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.”<sup>379</sup> Because Iran is a party to the English litigation as well as the U.S. litigation, the issue of whether Iranian law vests ownership of antiquities could be precluded may be argued, but it should not succeed.<sup>380</sup>

The core requirements for an issue decided in another case against a party to preclude re-litigation of the same issue in a second case could be stated as: (1) the same issue was decided under roughly similar procedural conditions; (2) the issue was actually litigated and decided; (3) the litigation ended with a valid and final judgment; and (4) the issue determined was essential to the judgment.<sup>381</sup>

Central is the fact that two different laws are at issue: in *Barakat* it was the Legal Bill of 1979, whereas in *Rubin* it is the National Heritage Protection Act of 1930. Moreover, the Restatement indicates that issue preclusion underlies “confidence that the result reached is substantially correct. [However, w]here a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted.”<sup>382</sup> Therefore, because two different English courts reached different conclusions, perhaps U.S. courts would not preclude the issue and would allow it to be re-litigated. This could be key to the *Rubin* plaintiffs’ ultimate victory because, as mentioned above, it is incredibly unlikely that they could establish that any parts of the

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378. See *supra* note 75. The United States and U.S. citizens are still pursuing claims before the Iran-United States Claims Tribunal which was established pursuant to the Algiers Accords. See, e.g., PRESIDENT’S PERIODIC REPORT ON NATIONAL EMERGENCY WITH RESPECT TO THE 1979 IRANIAN EMERGENCY AND ASSETS BLOCKING, H.R. DOC. NO. 106-312 (2000).

379. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1986).

380. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1980).

381. See, e.g., *id.* § 27. *Accord*, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

382. RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. f (1980).

various collections were discovered *after* the enactment of the Legal Bill of 1979.

Furthermore, foreign judgments generally are enforceable from one country to another under the intricate doctrine of comity.<sup>383</sup> Additionally, Illinois, like all U.S. states, has a statute allowing the recognition and enforcement of foreign judgments.<sup>384</sup> The United States is not required to accept and acknowledge foreign judgments and awards.<sup>385</sup> However, courts in the United States have “considerable discretion in deciding whether a foreign judgment or award is to be recognized or enforced.”<sup>386</sup> As such, the Illinois and Massachusetts courts could utilize the doctrine of comity in order to give effect to the English court’s judgment establishing Iranian ownership per the Legal Bill of 1979, but they should not.

In summary, a factual determination of Iranian ownership has not been made in the *Rubin* litigation. However, because the FSIA’s presumption of immunity was not overcome by the commercial activity exception,<sup>387</sup> and because the TRIA will likely figure as the key statute for judgment recovery, a factual determination is likely forthcoming. Determination of ownership is necessary for the courts to identify what assets are “contested” and thus still “blocked” and subject to execution under the TRIA. In the litigation against Harvard University, the Boston Museum of Fine Arts and the Field Museum, the *Barakat* decision likely will not control the outcome.

383. See generally, e.g., Roger P. Alford, *Federal Courts, International Treaties and the Continuum of Deference*, 43 VA. J. INT’L L. 675 (2003) (providing analysis of the intricacies of the doctrine). The classic definition of comity can be found in *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895):

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

384. 735 ILL. COMP. STAT. 5/12-620 (2009).

385. *Id.* at 344.

386. *Id.*

387. However, given the recent changes in the FSIA—specifically those dealing with the “commercial activity” exception—and the subsequent filing of a new lawsuit by the *Rubin* plaintiffs, the FSIA likely will continue as a key statute for judgment recovery, in addition to the TRIA. See *supra* notes 59–60.

## IV. CONCLUSION

The *Rubin* litigation is tragic, and both the *Rubin* and *Peterson* plaintiffs deserve compensation they likely never will receive. As discussed above, because U.S. law should not permit execution against the artifacts subject to the enforcement proceedings, the final judgments held by both sets of plaintiffs will probably not be enforced in the currently pending proceedings. Further, given that both cases resulted in default judgments with incredibly high damage awards at levels that would not have been awarded by the courts in any other nation, it is doubtful that the judgments would be enforceable in any other country, much less Iran.<sup>388</sup> Some literature looking at the cases has called for the creation of a new fund to compensate the victims<sup>389</sup>—although doing so is counter to the purely theoretical deterrence and punishment goals of the vacuous anti-terrorism legislation that duped the plaintiffs into suing Iran in the first place.<sup>390</sup> Given the current state of the economy, a new fund is an unlikely prospect.

Even more tragic is the fact that the legislative scheme has pitted terrorism victims against each other. Terrorism victims to date have received very little compensation.<sup>391</sup> The *Rubin* plaintiffs now also are fighting off the victims of the 1983 Hezbollah Beirut bombing, the *Peterson* plaintiffs, who want their share of the artifact sale proceeds.<sup>392</sup> David Strachman, attorney for the *Rubin* plaintiffs, was quoted in regard to this development: “[i]t’s unseemly for lawyers for one group of victims to

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388. See Strauss, *supra* note 6, at 319; Hoye, *supra* note 7, at 137 (noting that anti-terrorism cases “are made by the courts of the United States, solely to protect its own citizens against actions by other states” and raise issues of “fairness, objectivity, and credibility of the decisional law that has developed or will develop in this context”).

389. See Plaster, *supra* note 83, at 553–54; Hoye, *supra* note 7, at 149; Kelly A. Atherton, *Compensating Victims under the “Terrorism-Exception” of the Foreign Sovereign Immunities Act: A State-Sponsored Victim’s Compensation Fund*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 158, 173–74 (2004); Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT’L L.J. 1, 47–48 (2002) (discussing 2001 legislation requiring the President to establish a “comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism . . .” and Victims of Trafficking and Violence Protection Act of 2000); Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83 (2001) (calling for unification of laws providing relief to victims of terrorism). *But see* Donna M. Balducci, Note, *American Taxpayers Bear the Burden of Beating Iraq in the Courtroom*, 31 HOFSTRA L. REV. 819 (2003) (criticizing likely passage of legislation to pay victims of Iraq-sponsored terrorism after enforcement of exorbitant judgments proves impossible).

390. *E.g.*, Strauss, *supra* note 6, at 310.

391. *Hegna*, 376 F.3d at 489 n.14.

392. See *supra* note 15.

undermine collection actions of other victims.”<sup>393</sup> Perhaps it is, but would it not be malpractice for counsel for the *Peterson* plaintiffs to sit back and watch while the last available Iranian assets in the United States are auctioned to pay a later-obtained judgment? The cases are not just about abstractions of justice; they involve severely injured people and those who care for them who need money. A potential sale certainly would not bring in enough to satisfy one judgment—let alone two.<sup>394</sup>

Finally, despite Judge Lamberth’s hopes that an “extremely sizeable judgment will serve to aid in the healing process for these plaintiffs, and simultaneously sound an alarm to the defendants that their unlawful attacks on our citizens will not be tolerated,”<sup>395</sup> and despite testimony in the *Peterson* litigation by Dr. Patrick Clawson, deputy director of the Washington Institute for Near East Policy, “that civil judgments for acts of state-sponsored terrorism have had a noticeable impact upon the present regime in Iran,”<sup>396</sup> it is completely naïve to believe that civil anti-terrorism trials against Iran—or enforcement against the few Iranian artifacts in the country—are having any deterrent effect whatsoever.<sup>397</sup> In fact, the litigation may be affirmatively interfering with the executive branch’s foreign policy in the Middle East.<sup>398</sup> That is the entire point of the Department of Justice Statement of Interest filings.

393. *E.g.*, Newbart, *supra* note 81.

394. *Cf.* Shirley J. Foster, *An American Inquiry into Contemporary Terrorist Accountability*, 6 TEX. REV. L. & POL. 513, 528 (2002) (discussing limited funds problem in the context of satisfying multiple staggering default judgments against nations on State Department list of nations sponsoring terrorism).

395. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 60 (D.D.C. 2007).

396. Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing with Civil Litigation*, 41 CASE W. RES. J. INT’L L. 65, 79 (2009).

397. *E.g.*, Plaster, *supra* note 83, at 553. Indeed, it may be worse yet: “Since there are many states that would consider the United States a state sponsor of terrorism, the United States should expect to be haled into diverse foreign domestic courts by victims of ‘terrorists’ funded and supplied by the United States, and should, collaterally, expect to see its foreign assets attached to satisfy judgments.” Keith Sealing, “*State Sponsors of Terrorism*” Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Make Less Sense Now Than It Did Before 9/11, 38 TEX. INT’L L.J. 119, 121 (2003). Iran and Cuba each have passed legislation encouraging retaliatory suits in their courts. Atherton, *supra* note 389, at 173–74.

398. *See, e.g.*, Press Release, National Iranian American Council, Tell the Department of Justice to Prevent Ancient Persian Artifacts from Being Sold (Dec. 26, 2006) (on file with author) (“Manouchehr Mottaki, the Foreign Minister of Iran [sic] has threatened to cancel proposed negotiations with the US while Hamid Reza Asefi, the Iranian Foreign Spokesman, has called on the US to show a quick and serious reaction to the case.”). President Obama was recently quoted: “The American people have great respect for the people of Iran and their rich history.” Press Release, The White House, Office of the Press Secretary, Statement By President Barack Obama on Iran (Nov. 3, 2009), available at <http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-iran>.

In conclusion, Congress should stop usurping foreign policy decisions to indulge in political posturing that inflicts further pain on terrorism victims, stop trying to foist nonsensical amendments to the FSIA on the judicial branch, and leave the rapidly changing war on terror, at least insofar as Middle East regimes are concerned, to the executive branch.