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Upcoming YLD-ILC Programming

- At the ABA Midyear Meeting in Miami, Florida (February 2-5, 2017), the YLD-ILC is co-sponsoring two programs on February 3:
  - Cuba Libre: The Potential Legal Costs and Benefits of Doing Business in Cuba
  - The Zika Virus: The Legal Implications of a Public Health Emergency (in collaboration with the Litigation Committee)

- The YLD-ILC is currently considering live CLE program proposals for the upcoming YLD 2017 Spring Conference (May 4-6, 2017). We welcome any suggestions for program proposals at aba.yldilc@gmail.com.

Other YLD Upcoming Programming


- March 16, 2017, ABA Webinar: Making a Superstar: An Associate’s Path to Success and Partnership
United States Responses to Looting of Syrian Artifacts

By Anna Annino

Whether by destroying ancient Syrian cultural sites through explosives\(^1\) or attacking artifacts in the Mosul Museum with sledgehammers,\(^2\) the Islamic State of Iraq and Syria (known also as ISIS, ISIL, and Daesh) has garnered publicity and international outrage through its acts of destruction. France Desmarais, director of programs and partnerships at the International Council of Museums, described ISIS’s actions in Syria as “the largest-scale mass destruction of cultural heritage since the Second World War.”\(^3\) However, these violent acts are only one form of cultural heritage destruction. Looting, which illegally removes objects from their archeological context and usually results in irreparable damage to the object and the surrounding area, is another way of destroying cultural patrimony. In his address to the United Nations Security Council, Vitaly Churkin, Representative of the Russian Federation, stated that over 100,000 artifacts and nine archeological sites included in the UNESCO World Heritage List are controlled by ISIS.\(^4\) In these areas under ISIS control, Churkin describes an organized system of looting where looters are issued excavation permits from the “ministry for control of natural resources” and the stolen objects are collected and sold by a “division of antiquities.”\(^5\) In their regime, ISIS considers everything coming from the Syrian soil, including artifacts, as a natural resource to be used for profit.

Churkin estimates that looting by ISIS accounts for $150-200 million annually,\(^6\) although the amount of income from looting is contested by some in the antiquities trade, who believe that the true value is far less and that unverified estimates of millions of dollars of value in Syrian artifacts could actually encourage looters.\(^7\) Satellite images of fields covered in pockmarks, with

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5 Id.
6 Id.
each dark spot indicating an illegal excavation; have allowed us to see the massive scale of looting operations. However, the satellite images also reveal that looting is not unique to ISIS-controlled areas and was prolific before the Syrian conflict as well.\(^8\) The 2015 report \textit{Satellite Imagery-Based Analysis of Archaeological Looting in Syria} indicates that “it does not appear that looting is more widespread in ISIS held areas.”\(^9\) The report states that 21% of looted sites are in ISIS areas, 16.5% are in Syrian regime areas, 28% are in Kurdish-held areas, and 27% are in opposition-held areas.\(^10\) However, the disproportionately amount of “heavy looting” (42.7%), signified by high numbers of objects being removed from a single site, took place in ISIS-controlled areas, indicating that the looting is thorough, organized, and repetitive.\(^11\)

In 2016, President Obama signed into law the Protect and Preserve International Cultural Property Act in order to stop the import of Syrian artifacts into the United States, whether they originate from areas controlled by ISIS or other factions. This act serves to “protect and preserve international cultural property at risk due to political instability, armed conflict, or natural or other disasters,” but despite this broad statement it focuses explicitly on Syrian cultural property.\(^12\) The act has two main objectives: to create an interagency committee to coordinate the protection of cultural heritage and to explicitly ban the import of “any archaeological or ethnological material of Syria,” with exceptions for objects “temporarily located in the United States for protection purpose.”\(^13\) Another measure meant to curb looting is a $5 million award offered by the U.S. Department of State for “information leading to the significant disruption of the sale and/or trade of oil and antiquities” by ISIS.\(^14\) In addition to offering an award for information, the State Department worked with the International Council of Museums to jointly release an illustrated “red list” of cultural objects that are deemed to be at a high risk of smuggling, with the hopes that museums, auction houses, and collectors will report any objects found on the list.\(^15\)

These changes were implemented in part due to the work of the #CultureUnderThreat Task Force, formed by the Antiquities Coalition, Asia Society, and the Middle East Institute. The task force drafted a report, \textit{#CultureUnderThreat: Recommendations for the U.S. Government}, which addresses the federal government, the international community, and the art markets.\(^16\) Their recommendations target diverse areas of government, including the Justice Department, the Defense Department, and Congress. If implemented, many of these recommendations would impact the legal community, such as calling for dedicated federal prosecutors focused on cultural heritage crimes, similar to the current wildlife trafficking unit, requiring ownership history to be submitted to the Internal Revenue Service in order to receive tax deductions for art and

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\(^9\) Id. at 150.

\(^10\) Id. at 151.

\(^11\) Id.


\(^13\) Id.


antiquities, and mandating that museums which receive federal funding follow the Freedom of Information Act in order to disclose the provenance of objects in their collection.\textsuperscript{17} Outside of governmental areas of reform, it seems unlikely that the task force's recommendations for art dealers and auction houses to "commit to greater transparency" will result in any concrete action without legal backing.\textsuperscript{18}

While these measures may curb the import of looted Syrian artifacts, it is important to recognize that looting is not an issue specific to Syria. Dr. Sarah Parcak, an archeologist who pioneered the use of satellite imagery to combat looting and the founding director of the University of Alabama at Birmingham's Laboratory for Global Observation, expressed her view that the problem was far more expansive. During an interview in 2015 after her research received a TED prize, Dr. Parcak said, "...look at Peru, India, China. I've been told in China there are over a quarter-million archaeological sites, and most have been looted. This is a global problem of massive proportions and we don't know the scale."\textsuperscript{19} While the current focus on the crimes of ISIS has sparked a public awareness of looting and incited the interest of the U.S. legal community in protecting cultural heritage, the smuggling of antiquities from Syria is only one facet of a global problem.

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\textsuperscript{17} \textit{Id.} at 2-4.
\textsuperscript{18} \textit{Id.} at 4.
The Torrens System: Caveat Emptor!

By Diriki T. Geuka

Purchasing residential property in the Caribbean presents perils not commonly associated with residential real estate transactions in the United States. The availability of title insurance to indemnify buyers from encumbrances, adverse title claims, and other title defects has become commonplace in contemporary American real estate transactions. Title insurance, however, is frequently unavailable to real estate investors in Caribbean countries because they often use the Torrens title registration system.

Title insurance is advantageous to buyers seeking to lower the risk associated with residential purchases because “title insurers attempt to eliminate or reduce risks prior to the issuance of a title insurance policy.” When insurers examine titles for defects prior to issuing a policy, buyers, sellers, and third-party mortgagees benefit from high assurances that the title for a given plot of real property is, in fact, clear. Indeed, “[c]laim payoff rates [for title insurance] are lower than for many other types of insurance. The industry argues that most of the effort goes into fixing title problems before the loan closes, rather than dealing with future claims.”

Grantor-grantee indexes and tract indexes are common in the United States; the less popular Torrens system is permitted in only 11 states, and enjoys frequent use in even fewer states. The difference between these registration systems is that grantor-grantee and tract indexes record the relative title interest of interest holders, while the Torrens system “is one of title by registration, not of registered title.” In other words, at the conclusion of a favorable adjudication of land ownership, a party under the Torrens system gains an indefeasible certificate of title to real property.

Theoretically, Caribbean real property registered in Torrens should be eligible for title insurance coverage just like real property in the United States. In actuality, a low percentage of residential property is registered in Caribbean nations. As late as 2011, no proper registration system existed in Haiti and only 5% of land was registered, only 15% and 35% of residential properties on each island of Trinidad and Tobago respectively were registered, and only 8% of land was

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1 See generally Quintin Johnstone, Title Insurance, 66 YALE L.J. 492 (1957).
2 Torrens registration is the predominant system in international real estate transactions.
5 Johnstone, supra note 1, at 493.
7 E.g., In re Collier, 726 N.W.2d 799 (Minn. 2007).
registered in Belize. Though title insurance for many property owners has streamlined residential real estate transaction and reduced the risk associated with ensuring good title, title insurance is difficult to procure outside of the United States.

For example, “[a] number of U.S. citizens who have purchased or sold real estate in The Bahamas have reported tremendous difficulties in the process, some even losing their entire life savings.” Other buyers report that after the home purchase, adverse claims were made under deeds of trust that spark extensive legal disputes that often are resolved against the purchaser. Similarly, while Jamaica “guarantees” property rights through its constitution, only 55% of the land in Jamaica is properly registered in Torrens, and nearly 20% of the population occupies residences as squatters. Despite constitutional guarantees, squatters in Jamaica can challenge a property interest by alleging adverse possession under Jamaica’s Registration of Titles Act. One can only hope that “[a]s international markets become more ‘Americanized’... an increasingly greater use of title insurance to enhance the credit of transactions going to market” will evolve.

The relative unavailability of title insurance in international transactions, especially for those properties registered in Torrens as opposed to in tract or grantor-grantee indexes, makes investing abroad precarious. Investors should be well advised to seek legal counsel in the country where the purchase is being made and seek title insurance coverage, though it is likely to be unavailable for properties registered in Torrens. Aside from title issues, buyers should be aware of a host of environmental and geographical problems plaguing beachfront Caribbean residences. When shopping abroad for real property, the old Latin maxim of caveat emptor is sage advice.

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10 Id.
12 Id.
13 J. Carmichael Calder, S.H. Spencer Compton, What You Need to Know About Title Insurance in International Real Estate Transactions Title Insurance Has at Last Gone Global., 21 PRAC. REAL EST. LAW. 5 (March 2005).
By Loren Voss

In attempting to understand the U.S. Government's (USG’s) interpretations of the legal regimes that apply to use of military force abroad, one previously had to conduct a scavenger hunt across a range of documents and speeches. On December 5, 2016, the White House released a Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (the “Report”), which provides a gold mine of specific USG legal interpretations and policy restrictions.¹

Former President Obama wrote in the Foreword that, “the United States complies with all applicable domestic and international law in conducting operations” against enemies, including those that are non-State actors.² The real question, however, is not whether the U.S. complies with applicable law but rather what law the U.S. believes applies and how it applies. Former President Obama also wrote that the “United States has applied rules, practices, and policies long used in traditional warfare to this new type of conflict,”³ but how the rules of international humanitarian law (IHL), and especially customary IHL, apply to this “new type of conflict” is contentious.

The USG provides interpretations of the laws of war that are not publicly shared by any of its allies. This may be in part because the USG provides more transparency on its interpretation of these issues than many other States, but it is also because the USG has views that deviate from many of its allies.⁴ This difference in views does not in itself make one question the legitimacy of such views but it does encourage further examination, specifically in regards to IHL in non-international armed conflicts (NIACs).

One area that has previously been theorized on⁵ is specifically addressed in the Report — when does a NIAC with a global terrorist organization like al-Qa’ida end? According to the Report, a

² Report at i.
³ Id.
⁵ See, e.g., Gobor Rona, “The Start, End, and Territorial Scope of Armed Conflict,” Nov. 11, 2015, Just Security, https://www.justsecurity.org/27543/start-end-territorial-scope-armed-conflict/ (explaining that when an armed conflict can be declared over is also unsettled because there is confusion over whether the same standards should be used to mark both the start and finish of hostilities); Rogier Bartels, “Ceasefires and the end of the application of IHL in non-international armed conflicts,” Nov. 1, 2012, Armed Groups and International Law, https://armedgroups-internationallaw.org/2012/11/01/ceasefires-and-the-end-of-the-application-of-ihl-in-non-international-armed-conflicts/ (citing to The International Criminal Tribunal for the Former Yugoslavia
NIAC will end when the terrorist organization’s capacity is effectively destroyed and it can no longer even attempt a strategic attack against the United States. Presumably the “United States” is referring not only to its domestic territory but also its military bases, embassies, and people abroad. This standard essentially assumes that no “peace” can be made and would ensure the continuation of a NIAC until the non-state party is completely defeated.

The Department of Defense previously put forth the interpretation that objects that provide war-sustaining capabilities may be legally targeted under IHL as military objects. This is a minority view, and many believe military objects should be limited to those that provide war-fighting capabilities. This expansive interpretation of military objects to include war-sustaining objects, and not just war-making objects, has the potential to allow a State to claim almost every civilian activity as indirectly sustaining the war effort. Some go on to argue that such a broad interpretation risks undermining the entire differentiation between military objects and civilian objects.

The Report reiterates that money and certain revenue-generating objects can, in certain circumstances, be targeted. It explains that destroying such objects may offer a definite military advantage if it denies revenue to a non-State armed group. It is unclear where exactly the USG would draw the line on revenue-generating objects. In cases like al-Qa’ida, all of the revenue-generating objects go to funding war capabilities and therefore are materially different from revenue-generating objects of a State in which much of the funding goes to civilian governance functions. However, the Report uses ISIL as an example, which now conducts

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*Tadic* decision for the premise that non-international armed conflicts continue until a peaceful settlement is achieved); John Fabien Witt, Op-ed, *The Legal Fog Between War and Peace*, N.Y. TIMES, Jun. 10, 2012, available at http://www.nytimes.com/2012/06/11/opinion/the-legal-fog-between-war-and-peace.html (describing the legal fog between war and peace caused by war and law enforcement merging); Rosa Brooks, *There’s No Such Thing as Peacetime*, FOREIGN POLICY, Mar. 13, 2015, http://foreignpolicy.com/2015/03/13/theres-no-such-thing-as-peacetime-forever-war-terror-civil-liberties/ (arguing that the perpetual war will not end in our lifetimes); *Al Razak v. Obama*, No. 1:05-cv-1601 (GK), at *13-16 (D.D.C. Mar. 29, 2016) (D.C. Court Filing System) 13-16, (holding the end of hostilities is a factual decision and the appropriate standard is cessation of active hostilities, which can continue even after combat operations have ceased but does not provide a specific test or criteria to apply).

6 Report at 11-12.

7 If it was limited solely to domestic territory, it is unclear how the U.S. could be at war with other terrorist organizations that do not currently, and in many cases, never, had the ability to launch a strategic attack against U.S. domestic soil. The phrase “United States” may include the U.S. interests abroad, although this is unclear and would imply an almost total destruction of the terrorist organization.


11 Id. at 175.


13 Id.


some functions that are traditionally thought of as civilian State functions, and therefore not all of its revenue goes to the war effort.\textsuperscript{16}

Therefore, this analysis is not limited solely to terrorist organizations that exclusively fund war. Additionally, the text of the Report discusses this interpretation of military objects to include war-sustaining objects in regards to non-state armed groups, but does not provide a reason why this interpretation would not apply to State objects in an international armed conflict. Following the same logic, targeting the central government bank or oil refineries of an enemy State, which contributes to an economy based on the single resource, could be allowed in the right circumstances.\textsuperscript{17} Ryan Goodman, although a Special Counsel to the General Counsel of the Department of Defense at the time, wrote in his personal capacity to provide some potential limiting rules, albeit his suggestions were limited to NIACs only.\textsuperscript{18} The USG has yet to definitively provide the bounds of targetable war-sustaining objects.

Another missed opportunity exists within the Report’s discussion of applicable IHL to NIACs. The Report urges the Senate to consent to ratification of Additional Protocol II to the Geneva Conventions (“AP II”), but adds that current U.S. military operations are already consistent with AP II provisions.\textsuperscript{19} However, it is unclear which provisions in AP II the USG considers legal requirements under customary international law besides general principles like proportionality, distinction, and necessity, and which elements are followed simply as a matter of policy. Brian Egan, the State Department Legal Advisor, previously highlighted some of the principles that “the United States regards as customary international law,” but only in the area of targeting.\textsuperscript{20} It appears this uncertainty will continue to persist, although arguably because many of the current military operations are coalitions with States that have ratified AP II, the USG is effectively compelled to meet AP II principles for practical purposes. However, restricting USG action for practical purposes simply does not have the same safeguards as if the law required it.

On the day the Report was released, former President Obama released a Memorandum for the Heads of Executive Departments and Agencies requiring that at least on an annual basis, the National Security Council shall coordinate and release to the public a report like the current Report that describes key legal and policy frameworks that currently guide the United States’ use of military force and related national security operations.\textsuperscript{21} It is possible that President Trump will dismantle this concept, but if he does not, perhaps more questions regarding the USG’s legal interpretations on international humanitarian law in non-international armed conflicts will be addressed at the end of this year.

\begin{footnotesize}
\begin{enumerate}
  \item See U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 5.7.8.5 (2015) (revised May 2016) (explaining that oil refining and distribution facilities may be targeting and providing Kosovo/Operation Allied Force as an example).
  \item Report at 32.
\end{enumerate}
\end{footnotesize}
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