

2017

International Hurdles in Nazi-Era and Russian Revolution Cultural Property Cases

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Recommended Citation

Jennifer Anglim Kreder, *International Hurdles in Nazi-Era and Russian Revolution Cultural Property Cases*, 49 Case W. Res. J. Int'l L. 227 (2017)

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INTERNATIONAL HURDLES IN NAZI- ERA AND RUSSIAN REVOLUTION CULTURAL PROPERTY CASES

*Jennifer Anglim Kreder**

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Theft victims filing lawsuits to recover cultural property taken during war and revolution face hurdles that most claimants of stolen property do not. This is particularly true if a governmental official, perhaps acting in the gray zone where authority, duress, corruption and persecution meet, took the property. Historically, individuals could not sue foreign sovereigns under international law.¹ Over time, exceptions were born. Nations differ in their interpretations of them, but this essay will focus on U.S. law.

Until 1952, when a plaintiff tried to sue a friendly foreign sovereign, the U.S. State Department would request the court dismiss the case; the court always did.² By 1952, in the wake of World War II, a more restrictive approach gained acceptance, whereby sovereign immunity was “confined to the sovereign or public acts of the foreign state and [would] not extend to its commercial or private acts.”³ The State Department does not always communicate its perspective to the courts, but even if it does, the court has a constitutional responsibility to decide on a case-by-case basis whether the foreign sovereign being sued is, as

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1. DAVID P. STEWART, *THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES* 5 (2013).

2. Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L 1141, 1142–43 (2011).

3. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1167 (D.C. Cir. 1994) (reiterating the progression of the foreign sovereign immunity doctrine in a case about a Holocaust slave laborer).

a matter of law, immune.⁴ The Foreign Sovereign Immunities Act (FSIA) codifies the restrictive approach to sovereign immunity.⁵ The U.S. was the first state to do so.⁶

The FSIA, however, did not do away with the common law act of state doctrine, which is another hurdle plaintiffs must overcome. Under the act of state doctrine, U.S. courts decline to hear suits challenging the acts of another sovereign in its own territory. This doctrine, too, is grounded in flexible principles of international comity. This essay discusses both the FSIA and the act of state doctrine in the context of cases seeking to recover art and cultural property taken during the Nazi-era and Russian Revolution after providing necessary historical background.

I. OF EMPIRES, CZARS, AND DICTATORS

World War I devastated the population, economy and stability of the entire European continent. The Habsburg Empire collapsed; Kaiser Wilhelm abdicated the German throne; and the Ottoman Empire disintegrated.⁷

By 1917, the Russian population and its parliament, the Duma, had lost faith in Czar Nicholas II's leadership.⁸ The Russian economy collapsed, and Nicholas dissolved the Duma yet again.⁹ The February Revolution of 1917 began when hungry demonstrators stormed the

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4. *See id.* (“[I]f in a particular case no advice was forthcoming, then the courts independently determined whether immunity was appropriate.”)
 5. *See* 28 U.S.C. § 1602 (2017) (codifying the restrictive approach to sovereign immunity).
 6. ROSANNE VAN ALEBEEK, *THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW* 17 (2008).
 7. Erich Zöllner et al., *End of the Habsburg Empire*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Austria/End-of-the-Habsburg-empire> [<https://perma.cc/6VXZ-QGF3>] (last visited Mar. 10, 2017); Michael Graham Balfour, *William II*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/William-II-emperor-of-Germany> [<https://perma.cc/EY68-GSE4>] (last visited Mar. 10, 2017); Malcolm Edward Yapp & Stanford Jay Shaw, *Ottoman Empire: The Empire 1807 to 1920*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Ottoman-Empire/The-empire-from-1807-to-1920> [<https://perma.cc/HL4T-6VQW>] (last visited Mar. 10, 2017).
 8. *Russian Revolution of 1917*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Russian-Revolution-of-1917> [<https://perma.cc/9UGW-JUUT>] (last visited Apr. 13, 2017).
 9. *Id.*

streets of the Russian capital, Petrograd.¹⁰ Police who were loyal to the czar tried to suppress them but could not.¹¹ The demonstrations grew, and mobs destroyed police stations.¹² Troops from the Petrograd army intervened and killed protestors, pushing the populace to all-out revolt and forcing the imperial government to resign.¹³ The Duma reconvened but true power belonged to the Petrograd Soviet Workers' and Soldiers' Deputies.¹⁴ Czar Nicholas II instructed Russian soldiers and sailors to obey only those orders that did not conflict with the intentions of the Soviets, as he relinquished the throne to his brother Michael.¹⁵ The Soviets organized in cities and called for Russian withdrawal from World War I.¹⁶ Russia lost more people in the war than any nation in history had lost during warfare.¹⁷

The second Bolshevik Revolution overthrew the Soviet regime in the October Revolution of 1917.¹⁸ Vladimir Lenin was the Bolshevik party leader and organized a nearly bloodless *coup d'état*.¹⁹ The radical Bolsheviks gained control of government buildings and other strategic locations in Petrograd, then formed a new government.²⁰ With Lenin in charge of the first Marxist state in the world, his government made peace with Germany but fought new, internal enemies.²¹ Lenin and the Marxists nationalized property by seizing all land from landowners and refused to compensate them, then divided the land among the peasants.²²

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Dr. Jonathan Smele, War and Revolution in Russia 1914–1921, BBC HISTORY, http://www.bbc.co.uk/history/worldwars/wwone/eastern_front_01.shtml [<https://perma.cc/A3EP-KJVQ>] (last updated Mar. 10, 2011).

15. *Russian Revolution of 1917*, *supra* note 8.

16. *Russian Revolution of 1917*, *supra* note 8.

17. John Graham Royde-Smith, *World War I (1914–1918): Killed, Wounded, and Missing*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/World-War-I/Killed-wounded-and-missing> [<https://perma.cc/HA34-E9RE>] (last visited Apr. 1, 2017) (reporting 9,150,000 Russian casualties from World War I).

18. Smele, *supra* note 14.

19. Smele, *supra* note 14.

20. Smele, *supra* note 14.

21. Smele, *supra* note 14.

22. Albert Resis, *Vladimir Lenin*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Vladimir-Lenin> (last visited Mar. 10, 2017).

The Russian Soviet Federative Socialist Republic (RSFSR) was established as a sovereign state in 1917 following the October Revolution.²³ In 1918, the RSFSR fought a civil war against the anti-Bolshevik White Army forces, defeating them in 1920.²⁴ Two years later, the Union of Soviet Socialist Republics (USSR) was born, as the successor state to the RSFSR.²⁵

Hitler, the failed artist turned soldier, wounded in World War I, emerged from prison in 1925 for leading the failed Munich beer-hall putsch.²⁶ Open, violent anti-Semitism escalated in Germany.²⁷ After global markets began crashing in late 1929, Nazi Party membership grew,²⁸ reaching 400,000 by 1932, making the Nazis the most popular party in Germany with over 30% of the popular vote in the national election.²⁹ To form a workable parliamentary government, on January 30, 1933, Independent President Paul von Hindenburg appointed Hitler Chancellor.³⁰ Hitler quickly usurped all real power.³¹

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23. Leonid Praisman, *Russia: Russian Soviet Federated Socialist Republic*, YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE (2010), http://www.yivoencyclopedia.org/article.aspx/Russia/Russian_Soviet_Federated_Socialist_Republic [https://perma.cc/5R8W-BULU].
 24. KRISTEN BLAKE, *THE U.S.-SOVIET CONFRONTATION IN IRAN, 1945-1962* 11 (2009).
 25. *From Soviet federalism to the creation of the Commonwealth of Independent States* (CIS), CVCE, available at http://www.cvce.eu/obj/from_soviet_federalism_to_the_creation_of_the_commonwealth_of_independent_states_cis-en-caa796f9-24f0-4e25-98da-4e98b20f18c8.html (last updated Aug. 7, 2016).
 26. John Lukacs, *Adolf Hitler: Rise To Power*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Adolf-Hitler/Rise-to-power> [https://perma.cc/FWP7-3N48] (last visited Oct. 12, 2016).
 27. See Oded Heilbrunner, *German or Nazi Antisemitism*, in *THE HISTORIOGRAPHY OF THE HOLOCAUST* 9, 12 (Dan Stone ed., 2004) (describing the escalation of anti-Semitism in Germany after 1923).
 28. Lukacs, *supra* note 26.
 29. *Nazi Party*, ENCYCLOPEDIA BRITANNICA (last visited Oct. 12, 2016), <https://www.britannica.com/topic/Nazi-Party> [https://perma.cc/3N7G-3E2N]; *A Teacher's Guide to the Holocaust*, UNIVERSITY OF SOUTH FLORIDA (last visited Oct. 12, 2016), <https://fcit.usf.edu/holocaust/timeline/nazirise.htm> [https://perma.cc/K5J3-25TA].
 30. Lukacs, *supra* note 26.
 31. See Wilfred F. Knapp, *Adolf Hitler: Dictator 1933-39*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Adolf-Hitler/Dictator-1933-39> [https://perma.cc/XUY2-CR6Y] (last visited Oct. 12, 2016) (stating that Hitler quickly became a dictator once in power).

With the Hitler-Stalin nonaggression pact in place on August 23, 1939,³² Germany annexed Austria and invaded Poland, Denmark, and Norway, and the Low Countries.³³ By the end of June 1940, Germany had annexed France.³⁴ The Nazis implemented Aryanization procedures to steal absolutely everything from Jews.³⁵

This essay will focus on the art, which the Nazis sought to control in every way. The Nazis plundered Europe's finest, traditional art.³⁶ They also appropriated art they did not like, which they called "degenerate" and banned from Germany.³⁷ As much as Hitler sought to exterminate a race, he also wanted to wipe out all support for Bolshevism.³⁸ Modern art movements at the time were strongly intertwined with leftist political beliefs, including communism.³⁹

The Nazis purged modern artworks from German museums and opened the traveling Exhibition of Degenerate Art, *die Ausstellung "Entartete Kunst,"* during the latter part of 1937.⁴⁰ They launched a concurrent exhibit of Nazi-favored art to display what art they would

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32. *German-Soviet Pact*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005156> [<https://perma.cc/R7AC-W7R2>] (last visited Apr. 1, 2017).
 33. *Invasion of Poland, Fall 1939*, U.S. HOLOCAUST MEMORIAL MUSEUM (Jul. 2, 2016), <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005070> [<https://perma.cc/6CK6-2MV4>].
 34. *See World War II: In Depth*, U.S. HOLOCAUST MEMORIAL MUSEUM (Jul. 2, 2016), <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007314> [<https://perma.cc/Y84J-PUZK>].
 35. CHRISTOPHER R. BROWNING, *THE ORIGINS OF THE FINAL SOLUTION* 173 (Alan E. Steinweis ed., 2004).
 36. Donald S. Burris, *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, Von Saher And Their Progeny*, 15 J. MARSHALL REV. INTELL. PROP. L. 394, 401 (2016).
 37. *Id.* at 399.
 38. *Nazi Propaganda*, U.S. HOLOCAUST MEMORIAL MUSEUM (Jul. 2, 2016), <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005202> [<https://perma.cc/74FT-66XL>].
 39. *See* Jason Farago, *Degenerate Art: The Attack on Modern Art in Nazi Germany, 1937 Review—What Hitler Dismissed as 'Filth'*, GUARDIAN (Mar. 13, 2014), <https://www.theguardian.com/artanddesign/2014/mar/13/degenerate-art-attack-modern-art-nazi-germany-review-neue-galerie> [<https://perma.cc/6TGW-YE5K>].
 40. LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 16–21 (1995).

allow within the Third Reich.⁴¹ The Nazis burned approximately 5,000 low-value, modern artworks, but sold and traded far more on the international market to acquire works they wanted and to raise foreign currency.⁴² They utilized auctions in Berlin and Switzerland to raise that currency. Through auctions, the art filtered out into the world's private collections and museums.⁴³

In addition to other agencies with the mission to extort all Jewish-owned property, Hitler established agencies with the specific mission to steal art.⁴⁴ In 1940, for example, he charged the *Einsatzstab Reichsleiter Rosenberg* (ERR) with the specific task of confiscating and destroying artwork in the occupied territories, with a focus on theft in the West and destruction in the East.⁴⁵ The *Sonderauftrag Linz* took orders straight from Hitler for his planned *Führermuseum* in Linz, Austria, his childhood home.⁴⁶

Hitler obsessed over what he viewed as a moral failure in art's departure from symmetry, order, natural color tones, and reinforcing German superiority.⁴⁷ Nazi elites shared his views.⁴⁸ Stealing art, creating propaganda, and eliminating art of which they disapproved

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41. *Degenerate Art*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/art/degenerate-art> [<https://perma.cc/9ALJ-DAF2>] (last visited Oct. 12, 2016) (explaining that works of both degenerate and Nazi-approved art were exhibited side by side).
 42. NICHOLAS, *supra* note 40, at 25; See Marc Balcells, *Plunder as an Art Crime, and Its Context in History*, in CULTURAL HERITAGE IN THE CROSSHAIRS: PROTECTING CULTURAL PROPERTY DURING CONFLICT 332, 337 (Joris Kila & James Zeidler ed. 2013) (explaining how the Nazis profited by selling artwork).
 43. *See id.* (describing the auction houses).
 44. Martin Dean, *Cultural Looting: the seizure of archives and libraries by Einsatzstab Reichsleiter Rosenberg, 1940–1945*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/offenbach-archival-depot/einsatzstab-reichsleiter-rosenberg-a-policy-of-plunder> [<https://perma.cc/C355-E955>] (last visited Oct. 12, 2016).
 45. *Id.*
 46. WAYNE SANDHOLTZ, PROHIBITING PLUNDER: HOW NORMS CHANGE 130–40 (2007).
 47. See Lucy Burns, *Degenerate art: Why Hitler hated modernism*, BBC (Nov. 6, 2013), <http://www.bbc.com/news/magazine-24819441> [<https://perma.cc/HH9V-EXCC>].
 48. See JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH 11 (1996).

was an important part of their mission.⁴⁹ It was not a mere sideshow to the Final Solution; it was part and parcel of it.

In 1990, just before the Soviet Union collapsed, Russia admitted for the first time that its military had taken “Trophy Art” at the end of World War II.⁵⁰ The Russians view the art as cultural reparations for the massive human, monetary, and cultural losses they suffered.⁵¹ They view the Nazis’ war as a fight against Bolshevism—not primarily against Jewish people.⁵² The Russian admission about “Trophy Art,” forty-five years after the war’s end, coincided with the de-classification of archives in the West as well as loosened travel restrictions.⁵³ This set the stage for a wave of research and lawsuits no one could imagine.

II. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (FSIA) generally provides that a “foreign state shall be immune from the jurisdiction of the courts of the United States and of the States”⁵⁴ While that seems straightforward in its application, the FSIA also provides significant exceptions to foreign sovereign immunity. The exceptions most often at stake in cultural-property cases have been the following under FSIA § 1605(a):

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; [or]

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of

49. *Id.* at 7.

50. PATRICIA K. GRIMSTED, *RUSSIA’S “TROPHY” ARCHIVES: STILL PRISONERS OF WORLD WAR II?* 2 (2002).

51. *Id.*

52. *Id.* at 49.

53. Elizabeth Shogren, *U.S. and Russia Lift Travel Restrictions*, L.A. TIMES (Sept. 26, 1992), http://articles.latimes.com/1992-09-26/news/mn-877_1_travel-restrictions [<https://perma.cc/EY2F-LPYG>].

54. 28 U.S.C.A. § 1604 (1976).

the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States⁵⁵

Republic of Austria v. Altmann is the leading cultural-property case illustrating the difficulty of overcoming the FSIA in claims seeking art stolen long ago.⁵⁶ Ms. Altmann's case used the second exception, the commercial-activity exception, as the basis of jurisdiction to sue the Republic of Austria for artworks by Gustav Klimt, including *Portrait of Adele Bloch-Bauer I* (1907) and *Portrait of Adele-Bauer II* (1912).⁵⁷ Ms. Altmann was the heir of the last rightful owner of the paintings, Ferdinand Bloch-Bauer.⁵⁸ Nazis seized the paintings from his residence in Vienna after he fled in the wake of Germany's 1938 annexation of Austria, the *Anschluss*.⁵⁹ After a hard-fought battle in the lower courts, the U.S. Supreme Court ruled in 2004 that the commercial-activity exception provided for jurisdiction based on Austria's use of the painting in tourism advertisements, even though the taking occurred before the FSIA's enactment in 1976.⁶⁰ This ruling allowed Ms. Altmann to force Austria to have to at least defend itself on American soil. That was enough to bring Austria to the negotiating table. Both sides then agreed to go to arbitration in Vienna, where Ms. Altmann recovered her artwork worth approximately \$400 million.⁶¹

Though Ms. Altmann was successful, most plaintiffs are not. In *Westfield v. Federal Republic of Germany*, for example, the heirs of a prominent German art dealer sought to recover the value of his art collection from the Federal Republic of Germany.⁶² As the art dealer fled to Tennessee, he attempted to ship his art collection.⁶³ But the Nazis seized and sold it.⁶⁴ In this case, the district court granted Germany's motion to dismiss, holding that the heirs' claims were barred because none of the exceptions to the FSIA applied to the case.⁶⁵ On appeal, the heirs argued that their claim fell within a literal reading of

55. 28 U.S.C.A. § 1605 (1976).

56. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

57. *Id.* at 685–86.

58. *Id.* at 681.

59. *Id.* at 682.

60. *Id.* at 696.

61. Nikhil Khanade, *The Restitution of Nazi Looted Art: Altmann v. Austria*, CLAREMONT J. OF L. AND PUB. POL'Y (Feb. 23, 2014).

62. *Westfield v. Federal Republic of Germany*, 633 F.3d 409, 411–412 (6th Cir. 2011).

63. *Id.* at 412.

64. *Id.*

65. *Id.*

the text of the commercial-activity exception and that the Nazis' seizure had the effect of preventing the assets from reaching Mr. Westfield in the U.S.⁶⁶ The court ruled that Germany could not be sued under the FSIA because even assuming the taking was commercial activity, it had no "direct effect" in the U.S. in the sense required by the third FSIA exception.⁶⁷ The court noted, "[w]hen considering whether an action caused a direct effect in the United States, we are cognizant of the Act's presumption that foreign sovereigns are immune, and wary of applying this requirement too loosely such that our courts become a haven for airing the world's disputes."⁶⁸

There is still one pending case against Germany.⁶⁹ The plaintiff seeks an important medieval art collection called the Guelph Treasures, or *Welfenschatz*, and \$250,000,000 in damages.⁷⁰ The plaintiff filed the complaint in February 2015.⁷¹ The complaint alleged that the plaintiffs were heirs of the Jewish owners, three art dealers, who sold the artifacts under duress from Hermann Göring for a price far below market value to the Prussian government.⁷² The treasures now are in a Prussian museum.⁷³ A motion to dismiss, based on the FSIA, statute of limitations, and other defenses, is pending.⁷⁴ It is shameful that the government-run Prussian museum would assert the statute of limitations defense in a Nazi-era case.⁷⁵ No case against the German

66. *Id.*

67. *Id.*

68. *Id.*

69. *Phillipp v. Fed. Republic of Ger.*, 1:15-cv-00266 (D.D.C. 2015).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See generally* Jennifer A. Kreder, *The New Battleground of Museum Ethics and Holocaust Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37 (2009) (discussing Washington Principles, Vilnius Declaration, and museums asserting technical defenses); *see also* Stewart Ain, *Germany's Dating of Start of Holocaust Questioned*, JEWISH WEEK (Nov. 3, 2015), <http://www.thejewishweek.com/news/national/germanys-dating-start-holocaust-questioned> [<https://perma.cc/DF8F-7VF5>] (quoting Rabbi Abraham Cooper: "I understand the tactic of what they are trying to do—saying that the sale was normal . . . But for a Jew in Germany in 1935 life was anything but normal . . . It is beyond the pale that such an argument would actually be put down on paper in the name of Germany . . . It should be stricken from the record.").

nation itself has survived a FSIA challenge.⁷⁶ It is doubtful this one will either, but there is a similarity to *Altmann* in that the German filing fee, a percentage of the value of the claim, would prohibit any plaintiff from seeking redress for the Guelph Treasure there.⁷⁷

III. ACT OF STATE DOCTRINE

Since 1954, cases have established that the act of state doctrine does not bar claims to property stolen by the Nazi regime, because of its status as a criminal organization.⁷⁸ But the doctrine potentially applies to other governments' actions during World War II.

The doctrine generally precludes the court of one country from inquiring into the validity of the acts of another sovereign that were committed within its own territory.⁷⁹ Additionally, the doctrine applies even if the sovereign took property without compensation from one of its own nationals.⁸⁰

The *Chabad* case highlights the foreign interests at stake under the act of state doctrine.⁸¹ The Jewish educational institution, *Agudas Chasidei Chabad*, brought the action in 2004 seeking the return of an archive of religious and educational books and artifacts.⁸² A Russian "Trophy Brigade" took the archive at the end of World War II.⁸³ After losing on jurisdictional arguments, the Russian Federation informed the court that it would no longer participate because it believed the court lacked the "authority to adjudicate rights in property that in most cases always has been located in the Russian Federation . . ."⁸⁴ One year later, the court entered a default judgment in favor of *Chabad* and ordered that the Russian Federation surrender the archive to the U.S. embassy in Moscow or to *Chabad*.⁸⁵ The Russian Federation did not

76. *See, e.g.*, *Sampson v. Fed. Republic of Ger.*, 250 F.3d 1145 (7th Cir. 2001).

77. *Altmann*, 541 U.S. at 2258 (stating that the Austrian filing fee was \$135,000).

78. *See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

79. *Konowaloff v. Metropolitan Museum of Art*, 702 F.3d 140, 143 (2d Cir. 2012).

80. *Id.*

81. *Chabad v. Russian Fed.*, 128 F.Supp.3d 242, 244 (D.D.C. 2015).

82. *Id.*

83. *Chabad v. Russian Fed.*, 466 F.Supp.2d 6, 13 (D.D.C. 2006).

84. *Chabad*, 128 F.Supp.3d at 244.

85. *Chabad*, 128 F.Supp.3d at 244.

comply with the order.⁸⁶ In January 2013, the court granted *Chabad's* motion for civil-contempt sanctions of \$50,000 per day.⁸⁷ By August 2015, *Chabad* held an American judgment in its favor for ownership of the archive and \$43,700,000.⁸⁸ The case remains pending.⁸⁹ Maybe someday *Chabad* can find assets against which it may collect the monetary judgment, but without governmental cooperation, the archive will remain in the Russian Federation.⁹⁰

Judicial concern about diplomacy shut down the Konowaloff litigation.⁹¹ Pierre Konowaloff is the sole heir of the estate of his great-grandfather, Ivan Morozov.⁹² Morozov was a Russian national living in pre-Bolshevik Moscow and owned a modern art collection that was ranked "among the finest in Europe."⁹³ After gaining power in 1917, the Bolsheviks issued decrees to nationalize property.⁹⁴ They issued specific decrees to confiscate artworks only from the Morozovs and one other family.⁹⁵ In December 1918, the Bolsheviks declared that the art collection of Morozov was state property and confiscated it.⁹⁶ In the collection was a wonderful Cézanne painting, *Madame Cézanne in the Conservatory*.⁹⁷

Leonid Krasin, a previous employee of the Morozov family, became the leader of the system of these laundering transactions.⁹⁸ Krasin then established the Soviet Trade Delegation in Berlin that served as a transit point for stolen works that were sold abroad. The Matthiesen Gallery in Berlin became the shipping hub to send the artworks to the

86. *Chabad*, 128 F.Supp.3d at 244.

87. *Chabad*, 128 F.Supp.3d at 244.

88. *Chabad*, 128 F.Supp.3d at 243.

89. *Chabad*, 128 F.Supp.3d at 244.

90. *See generally* Jennifer A. Kreder, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. INT'L L. 1199 (2005) (describing enforcement problems when cultural property is located in a jurisdiction unwilling to return it).

91. Amended Complaint of Pierre Konowaloff at ¶¶ 37–38, *Konowaloff v. Metropolitan Museum of Art*, 702 F.3d 140, 143 (S.D.N.Y. 2012) (No. 10-CV-9126 (SAS)).

92. *Id.* at ¶ 6.

93. *Id.* at ¶ 8.

94. *Konowaloff v. Metropolitan Museum of Art*, No. 10-cv-9126, 2011 WL 4430856, at *1 (S.D.N.Y. Sept. 22, 2011).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at *2.

West.⁹⁹ From Matthiesen, the Cézanne was shipped to London and from there to Knoedler & Company in New York City, where Stephen Clark, a trustee of the Metropolitan Museum of Art, purchased it.¹⁰⁰

When Clark died, in 1960, he bequeathed the painting to the Met. Forty-two years later, Konowaloff became the official heir of the Morozov collection.¹⁰¹ He learned, in 2008, that the Cézanne was part of the collection.¹⁰² In accordance with New York law, he then demanded, in 2010, that the Met return the painting to him.¹⁰³ After the Met refused, Konowaloff filed suit.¹⁰⁴

Konowaloff tried to overcome the act of state doctrine with the following arguments. Because the decrees targeted Morozov and only one other family that owned high-end art and cultural property, they violated international non-discrimination law.¹⁰⁵ He also alleged that because the U.S. did not diplomatically recognize the USSR until 1933, the act of state doctrine could not insulate the taking from judicial inquiry.¹⁰⁶ Moreover, the Politburo officials who conducted the sale were not acting in accordance with Soviet laws restricting the export of cultural property, the sales should not have qualified as acts by governmental officials for purposes of the act of state doctrine.¹⁰⁷ They were engaging in “illegal private trade with western capitalists.”¹⁰⁸

The U.S. District Court for the Southern District of New York dismissed the case on act of state doctrine and other grounds.¹⁰⁹ The court characterized the case as concerning taking of a foreign government’s own citizen’s property within its own territory.¹¹⁰ The court also noted that the act of state doctrine applied even if the taking

99. *Id.* at *2.

100. *Id.* at *2.

101. *Id.* at *3.

102. *Id.* at *3.

103. *Id.* at *3.

104. *Id.* at *3.

105. Amended Complaint of Pierre Konowaloff, *supra* note 91, at ¶ 46.

106. Amended Complaint of Pierre Konowaloff, *supra* note 91, at ¶ 45.

107. Konowaloff v. Metropolitan Museum of Art, 702 F.3d 140, 142 (2d Cir. 2012).

108. *Id.*

109. *Id.* at 141.

110. *Id.* at 141.

violated non-discriminatory principles of international law.¹¹¹ The U.S. Court of Appeals for the Second Circuit affirmed the lower court.¹¹²

Konowaloff also claimed another prized painting from the Morozov collection, Van Gogh's *The Night Café* worth an estimated \$200 million, from Yale University.¹¹³ Morozov had bought the painting in 1908.¹¹⁴ Clark, a Yale alumnus, bought the painting from Knoedler in 1933 or 1934.¹¹⁵ He then donated it to Yale in 1960.¹¹⁶ The university moved for summary judgment on act of state grounds.¹¹⁷ The U.S. District Court for the District of Connecticut followed the Met precedent and ruled in favor of Yale.¹¹⁸

Courts are understandably reluctant to assert their authority against other foreign states, but in the Konowaloff cases, no foreign sovereign was being sued.¹¹⁹ Moreover, it is important to remember a 1990 U.S. Supreme Court case, *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, wherein the Court stated, “[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.”¹²⁰ The Court cautioned against applying the act of state doctrine too broadly and emphasized the need to evaluate each case individually.¹²¹

IV. CONCLUSION

In the U.S., the common-law mantra that one cannot get title from a thief is dogmatic; it is taught in every law-school property course throughout the country. In New York, specifically, doctrines such as

111. *Id.* at 141; see *Banco Nacional de Cuba v. Sabbatino*, 84 S.Ct. 923 (1964) (discussing how Communist countries recognize no obligation by the taking country).

112. Konowaloff, 702 F.3d at 148.

113. *Yale v. Konowaloff*, 5 F.Supp.3d 237 (D. Conn. 2014).

114. *The Night Café–Morozov Heirs v. Yale University*, ART L. CTR. UNIV. OF GENEVA (last visited Oct. 16, 2016), <https://plone.unige.ch/art-adr/cases-affaires/the-night-cafe-painting-2013-morozov-heirs-v-yale-university> [<https://perma.cc/Q5DQ-4FT4>].

115. *Id.*

116. *Id.*

117. Konowaloff, 5 F.Supp.3d at 237.

118. Konowaloff, 5 F.Supp.3d at 237.

119. Konowaloff, 5 F.Supp.3d at 239 (providing that the only parties involved were Yale University and Konowaloff).

120. *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 409 (1990).

121. See *id.* at 406 (stating that the act of state doctrine should only be used when necessary).

the demand and refusal rule were designed to favor the theft victims to prevent the world's premiere art market from corruption.

Just because a case implicates facts arising from historical, political events as extreme as war and revolution does not mean that a court is incapable of resolving it. When the art in question is located in the U.S., it is highly unlikely that the FSIA or the act of state doctrine should prevent the court from hearing the dispute. While other doctrines such as the statute of limitations might otherwise require dismissal, the risk of offending a foreign nation by accurately interpreting history does not excuse a court from performing its constitutionally mandated duty of resolving a case or controversy properly before it.