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## International Art and Cultural Heritage Law

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**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

## **International Art and Cultural Heritage Law**

KATHLEEN NANDAN, DAVID BRIGHT, HALEY S. ANDERSON, AND  
ALEXANDRA HARRINGTON\*

This article reviews significant legal developments during 2017 in international art and cultural heritage law in the areas of foreign sovereign immunity and stolen art, looted antiquities, Holocaust restitution, and reparations for destruction of cultural and religious sites.

### **I. Foreign Sovereign Immunity And Stolen Art: Williams V. Nat'l Gallery Of Art**

The heirs of Margaret (Greta) Moll sued Great Britain, the National Gallery, London, and the American Friends of the National Gallery, London, Inc. (the Defendants) in an effort to recover a painting by Henri Matisse entitled *Portrait of Greta Moll* (the Painting). Focusing largely on foreign sovereign immunity, the court dismissed the lawsuit.<sup>1</sup>

#### **A. BACKGROUND**

In 1908, Oskar Moll purchased a portrait of his wife, Greta, from Henri Matisse, from whom he had commissioned the work.<sup>2</sup> The Molls lived in Berlin when World War II began; they and the Painting survived the war.<sup>3</sup> In 1946, given the turmoil of post-war Berlin, the Molls decided to move to Wales, and, to protect the Painting from looting, they decided to send the Painting to Switzerland to be held by an art dealer.<sup>4</sup> Oskar's former student offered to take the Painting to Switzerland, and, in 1947, after Oskar's death, the student took the Painting, ostensibly to deliver it to the Swiss dealer.<sup>5</sup> But she illegally converted the Painting and kept the proceeds, later

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1. *Williams v. Nat'l Gallery of Art*, 2017 U.S. Dist. LEXIS 154445 (S.D.N.Y. Sept. 21, 2017).

2. *Id.* at \*2-3.

3. *Id.*

4. *Id.*

5. *Id.*

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

422 THE YEAR IN REVIEW

[VOL. 52]

confessing to Greta that she used the Painting to secure a loan from the art dealer.<sup>6</sup> Greta ultimately “lost track of the Painting.”<sup>7</sup>

A New York art gallery acquired the Painting in 1949.<sup>8</sup> Thereafter, the Painting was transferred a number of times and, in 1979, two years before Greta died, the National Gallery—a public entity wholly owned by Great Britain—acquired the Painting.<sup>9</sup> One of the heirs’ ancestors learned that the National Gallery held the Painting in the late 1970s or early 1980s.<sup>10</sup> Another ancestor appeared in a photograph next to the painting in a 1992 news article.<sup>11</sup>

At some time after 1979, the heirs “informed the National Gallery that the Painting had been stolen from” Ms. Moll. In March 2011, the heirs’ counsel and the National Gallery began to exchange correspondence about the Painting’s provenance, and the heirs advised the National Gallery that it lacked good title to the Painting. In November 2012, the National Gallery sent the heirs a letter rejecting their claims, asserting that the gallery had good title and that it “had conducted reasonable due diligence when it” acquired the Painting.<sup>12</sup>

In 2014, the heirs filed a request for return of the Painting with the British Spoliation Advisory Panel (SAP), a body that resolves Holocaust era art claims. A year later, SAP declined to adjudicate the request, noting that it lacked jurisdiction; the painting was lost in 1947, and SAP’s jurisdiction was limited to the Nazi era, that ended in 1945. Thereafter, the heirs demanded the painting’s return from the National Gallery, and several months later, the National Gallery notified the heirs’ counsel that it would not return the Painting. The next year, in September 2016, the heirs filed suit in federal district court in the Southern District of New York alleging conversion, replevin, constructive trust, unjust enrichment, and seeking declaratory relief. The Defendants—Great Britain, the National Gallery, and American Friends (a U.S.-based non-profit that operates for the benefit of the National Gallery and that the heirs alleged was the Gallery’s alter ego)—moved to dismiss. The court granted those motions, finding that the heirs’ claims were barred by the Foreign Sovereign Immunities Act (FSIA).<sup>13</sup> The Court also found the claims barred by the statute of limitations and the doctrine of laches.<sup>14</sup>

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6. *Williams*, 2017 U.S. Dist. LEXIS 154445, at \*37.

7. *Id.* at \*3.

8. *Id.*

9. *Id.*

10. *Id.* at \*35.

11. *Williams*, 2017 U.S. Dist. LEXIS 154445, at \*37.

12. *Id.* at \*28-37. (For the foregoing paragraph).

13. Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, *et seq.* (the FSIA).

14. *Williams*, 2017 U.S. Dist. LEXIS 154445, at \*4-5, 28. (For the foregoing paragraph).

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**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

ART &amp; CULTURAL HERITAGE 423

**B. THE FOREIGN SOVEREIGN IMMUNITIES ACT**

The FSIA “provides the sole basis for obtaining jurisdiction over a foreign state,” including its agencies and instrumentalities, such as the National Gallery.<sup>15</sup> The FSIA generally confers immunity from U.S. jurisdiction upon foreign states, but it also provides for a number of exceptions to this general rule.<sup>16</sup> The heirs argued that three exceptions to foreign sovereign immunity applied to this case: (1) the expropriation exception; (2) the commercial activity exception; and (3) the waiver exception.<sup>17</sup> The court rejected each of these arguments.

The expropriation exception to foreign sovereign immunity limits immunity in cases involving “property taken in violation of international law.”<sup>18</sup> For the exception to apply, a plaintiff must show that: (1) rights in property are at issue; (2) property was taken; (3) the taking was in violation of international law; and either (4)(a) the property is in the United States in connection with commercial activity being undertaken by the foreign state; or (4)(b) the property is owned or operated by the foreign state’s agency or instrumentality that is engaged in commercial activity in the United States.<sup>19</sup> Because Oskar Moll’s former student had originally stolen the painting, and “[b]ecause conversion by a private individual is not an FSIA taking,” the heirs argued that the National Gallery’s 2015 refusal to return the painting constituted an unlawful taking.<sup>20</sup> The court was not persuaded. It observed that the act of taking property is very different from the act of refusing to return property and that to hold otherwise would be to “drastically broaden” the “carefully crafted expropriation exception” and undermine Congressional intent to minimize interference in foreign relations related to litigation in U.S. courts.<sup>21</sup> As such, the court concluded that the expropriation exception did not apply.

The commercial activity exception limits immunity in cases based upon commercial activity undertaken by the foreign state.<sup>22</sup> Under this exception, a foreign sovereign does not enjoy immunity from U.S. jurisdiction when the “action is based upon”: (1) a commercial activity undertaken in the United States by the foreign state; (2) an act performed in the United States in connection with the foreign state’s commercial activity conducted elsewhere; or (3) an act outside of the United States taken in connection with a foreign state’s commercial activity that “causes a direct effect in the

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15. *Id.* at \*5. (quoting *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 443 (1989)).

16. *Id.* at \*5-6.

17. *Id.*

18. 28 U.S.C. § 1605(a)(3).

19. *Williams*, 2017 U.S. Dist. LEXIS 154445, at \*7 (citing *Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006)).

20. *Id.* at \*9.

21. *Id.* at \*10, 12.

22. 28 U.S.C. § 1605(a)(2).

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

424 THE YEAR IN REVIEW

[VOL. 52]

United States.”<sup>23</sup> To satisfy the elements of this exception, an action must be “based upon the particular conduct that constitutes the gravamen of the suit,” and the court “must identify the act of the foreign sovereign state that serves as the basis for plaintiffs’ claims.”<sup>24</sup> Here, the heirs alleged that they satisfied the exception because the National Gallery: (1) conducted commercial activities in the United States (including the incorporation of American Friends); (2) published images of the Painting in the United States and loaned the Painting to a New York museum; and (3) sent its letter refusing return of the Painting to counsel in New York.<sup>25</sup> The court rejected these arguments because it found that none of these activities were “core to the suit” nor bore upon “the core issue in this case: do Plaintiffs have superior title to the Painting.”<sup>26</sup>

The waiver exception limits immunity in cases where the foreign state has waived its immunity.<sup>27</sup> The heirs argued that, because Great Britain is a signatory to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,<sup>28</sup> Great Britain and the National Gallery had waived sovereign immunity.<sup>29</sup> But because waivers must be “clear, complete, unambiguous, and unmistakable,” because implicit waivers “must be construed narrowly,” and because nothing in the 1970 Convention suggested that its signatories intended to subject themselves to foreign jurisdictions, the court concluded that the waiver exception did not apply.<sup>30</sup> The court therefore granted Great Britain’s and the National Gallery’s motions to dismiss for lack of jurisdiction.

### C. TIMELINESS

After concluding that it lacked jurisdiction under the FSIA to hear the heirs’ claims, the court also held that the heirs’ claims against all of the Defendants were time-barred under both the statute of limitations and under the doctrine of laches.<sup>31</sup>

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23. *Williams*, 2017 U.S. Dist. LEXIS 154445, at \*17 (citing *Garb*, 440 F.3d at 586, and quoting 28 U.S.C. § 1605(a)(2)).

24. *Id.* at \*17, 18 (quoting *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 107 (2d Cir. 2016)).

25. *Id.* at \*19-20.

26. *Id.* at \*21. The court also found the third argument unpersuasive in that it would allow the heirs to manufacture jurisdiction simply by corresponding with the foreign state.

27. 28 U.S.C. § 1605(a)(1).

28. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289. (the 1970 Convention).

29. *Williams*, 2017 U.S. Dist. LEXIS 154445, at \*23-24.

30. *Id.* at \*24-25. (quoting *Aguinda v. Texaco, Inc.*, 175 F.R.D. 50, 52 (S.D.N.Y. 1997); *Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 325 (2d Cir. 1993)).

31. *Id.* at \*26-27.

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 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

ART &amp; CULTURAL HERITAGE 425

Under New York law, a three-year statute of limitations governs actions to recover chattel or damages for the taking of chattel. Those actions accrue against a good faith purchaser once the true owner makes a demand for the chattel's return and the demand is refused. Claims against a bad faith possessor accrue immediately.<sup>32</sup> Assuming that the gallery was a good faith purchaser, the court held that the heirs' claims accrued upon receipt of the gallery's November 2012 letter refusing to return the Painting. The court rejected the heirs' argument that this letter was ambiguous and was not a final determination and that it therefore should look to the 2015 refusal instead.<sup>33</sup> As such, the court found the heirs' claims were untimely.

The court also found that the doctrine of laches, an equitable defense grounded in unreasonable delay in prosecuting a claim and resulting prejudice to the defendant, barred Plaintiffs' claims insofar as the heirs and their ancestors had known for decades that the National Gallery held the Painting but took no steps to recover it until 2011.<sup>34</sup>

## II. Forfeiture of Looted Antiquities: Hobby Lobby

In July 2017, Hobby Lobby entered into a settlement with the U.S. Attorney's Office for the Eastern District of New York for violating federal law prohibiting the importation of falsely identified cultural property.<sup>35</sup> In addition to the fine, Hobby Lobby also agreed to forfeit thousands of ancient cuneiform tablets and clay bullae (clay balls with imprinted seals) originating in the region that is now Iraq.<sup>36</sup> This matter had originated with the United States of America filing a Verified Complaint *In Rem* Against Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets and Approximately Three Thousand (3,000) Ancient Clay Bullae (Complaint).<sup>37</sup>

Specifically, the Complaint was brought to condemn and forfeit the defendants to the use and benefit of the United States pursuant to 19 U.S.C. 1595a(c)(1)(A), as merchandise that was introduced or attempted to be introduced into the United States contrary to law.<sup>38</sup> Section 1595a(c)(1)(A)

32. *Id.* at \*26-27 (citing N.Y. CLRP Law § 124(3) (Consol. 2018)).

33. *Id.* at \*27-34.

34. *Id.* at \*35-37 (in the context of stolen artwork, an examination of a plaintiff's diligence "focuses not only on efforts by the party to the action, but also on efforts by the party's family")(citing *Bakalar v. Vavra*, 819 F. Supp. 2d 292, 303 (S.D.N.Y. 2011), *aff'd* 500 F. App'x 6 (2d Cir. 2012). *Bakalar* has been discussed in previous editions of this publication. See Patty Gerstenblith, David Bright, Jacqueline Farinella, Michael McCollough, & Kathleen Nandan, *International Art and Cultural Heritage*, 47 INT'L LAW. 423, 431 (2013); David Bright, Jacqueline Farinella, Patty Gerstenblith & Laina Lopez, *International Art and Cultural Heritage*, 46 INT'L LAW. 405, 415-17 (2012); and Patty Gerstenblith, *International Art and Cultural Heritage*, 45 INT'L LAW. 395, 403-04 (2011).

35. Stipulation of Settlement, *United States of America v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets Et Al*, No. 1:17-cv-3980-LDH (E.D.N.Y. Jul. 5, 2017).

36. *Id.*

37. Complaint, *United States v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets Et Al*, No. 1:17-cv-3980 (E.D.N.Y. July. 5, 2017).

38. *Id.* para. 1.

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 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

426 THE YEAR IN REVIEW

[VOL. 52]

provides that merchandise that is introduced or attempted to be introduced into the United States contrary to law shall be seized and forfeited if it is stolen, smuggled, or clandestinely imported or introduced.<sup>39</sup> Merchandise is deemed smuggled or clandestinely imported or introduced if it was imported contrary to 18 U.S.C. sections 542 or 545.<sup>40</sup>

The Complaint alleged that beginning in or about 2009, Hobby Lobby Stores, Inc. (Hobby Lobby) “began to assemble a collection of historically important manuscripts, antiquities and other cultural materials (the Collection).”<sup>41</sup> The president of Hobby Lobby (President) approved these purchases and was advised by a consultant retained by Hobby Lobby (Consultant).<sup>42</sup>

Around July 15, 2010, the President and Consultant inspected a large number of items offered for sale (Artifacts) in the United Arab Emirates (UAE).<sup>43</sup> About two weeks later, Hobby Lobby’s in-house counsel (In-House Counsel) contacted an expert in cultural property law (Expert) to request a presentation to Hobby Lobby.<sup>44</sup> “The Expert offered to address the legal issues relevant to the acquisition of historical works and antiquities, actions to take in carrying out due diligence and provenance research, and the particular legal issues pertaining to cultural property.”<sup>45</sup>

In early August 2010, the Expert made a presentation at Hobby Lobby’s headquarters.<sup>46</sup> In mid-October 2010, the Expert then provided Hobby Lobby with a memo summarizing the Expert’s advice, including with respect to Iraqi cultural property.<sup>47</sup> That memo was received by In-House Counsel but was not shared with anyone else at Hobby Lobby involved in the investigation of the Artifacts.<sup>48</sup>

Approximately two months later, the President signed a purchase agreement for the sale of the Artifacts to Hobby Lobby.<sup>49</sup> In 2010 and 2011, Hobby Lobby tasked its International Department with facilitating the importation and customs clearance of merchandise it purchased, but that department was bypassed during the purchase of the Artifacts.<sup>50</sup>

Around November 23, 2010, the Artifacts were shipped to Hobby Lobby, with misleading labels, and to various other addresses that were associated

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39. *Id.* para. 8.

40. *Id.* para. 19.

41. Complaint, *Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets*, No. 1:17-cv-3980 para. 20.

42. *Id.* para. 22.

43. *Id.*

44. *Id.* para. 23.

45. *Id.* para. 26.

46. Complaint, *Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets*, No. 1:17-cv-3980 para. 27.

47. *Id.* para. 31.

48. *Id.* at 33.

49. *Id.* para. 34-36.

50. *Id.* para. 41.

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 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

ART &amp; CULTURAL HERITAGE 427

with Hobby Lobby.<sup>51</sup> Additional shipments occurred on December 19 and 20, 2010; and September 1, 2011.<sup>52</sup> Between December 26, 2010, and January 5, 2011, three shipments of pieces were delivered to Hobby Lobby via Federal Express (FedEx).<sup>53</sup> On or about January 19, 2011, U.S. Customs and Border Protection (Customs) seized five FedEx shipments of pieces.<sup>54</sup>

In March of 2011, Customs sent notices of the seizure to Hobby Lobby's President and Executive Assistant.<sup>55</sup> On or about May 16, 2011, Hobby Lobby filed an administrative petition with Customs seeking return of the seized pieces (the Pieces),<sup>56</sup> and in September of 2011, Hobby Lobby submitted a supplemental administrative petition to Customs.<sup>57</sup> On or about July 8, 2015, Customs sent amended notices of the Pieces to counsel for Hobby Lobby.<sup>58</sup> Counsel for Hobby Lobby subsequently responded to the amended notices by requesting referral of the Pieces to the United States Attorney's Office for the commencement of judicial forfeiture proceedings.<sup>59</sup> The parties subsequently entered into a series of tolling agreements, and the statute of limitations tolled from September 30, 2015 through June 2, 2017.<sup>60</sup>

On July 5, 2017, the parties filed a proposed executed Stipulation of Settlement with the Court.<sup>61</sup> On July 21, 2017, a signed Warrant for Arrest of Articles *In Rem* was filed with the Court.<sup>62</sup> On July 21, 2017, the parties filed a revised executed Stipulation of Settlement (the Stipulation).<sup>63</sup>

In the Stipulation, Hobby Lobby consented to the seizure and forfeiture of the \$3,000,000.00 and 144 cylinder seals to the United States (the Forfeited Assets).<sup>64</sup> Hobby Lobby waived any and all rights to the Pieces and the Forfeited Assets, and agreed "not to file a claim or petition the United States or any of its agencies for remission or mitigation of the forfeiture of the Defendants *in rem* or the Forfeited Assets."<sup>65</sup> It waived its rights to assert any statutory or constitutional defense related to the Pieces

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51. *Id.* para. 42.

52. Complaint, *Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets*, No. 1:17-cv-3980 para. 43.

53. *Id.* para. 44.

54. *Id.* para. 45.

55. *Id.* para. 46.

56. *Id.* para. 47.

57. Complaint, *Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets*, No. 1:17-cv-3980 para. 48.

58. *Id.*

59. *Id.*

60. *Id.*

61. Stipulation of Settlement, *United States of America v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets Et Al*, No. 1:17-cv-3980-LDH (E.D.N.Y. Jul. 5, 2017).

62. Warrant for Arrest, *United States v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets Et Al*, 1:17-cv-03980-LDH (E.D.N.Y. Jul. 21, 2017).

63. Stipulation of Settlement, *United States of America v. Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets Et Al*, No. 1:17-cv-3980-LDH (E.D.N.Y. Jul. 5, 2017).

64. *Id.* para. 11.

65. *Id.* para. 12.

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 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

428 THE YEAR IN REVIEW

[VOL. 52]

or the Forfeited Assets.<sup>66</sup> Further, Hobby Lobby released its claims, rights, title, and interest in the Pieces and Forfeited Assets.<sup>67</sup>

Additionally, Hobby Lobby agreed to fully assist the United States in effectuating the forfeiture of the Forfeited Assets, including payment of the \$3,000,000.00 and “executing any documents necessary to effectuate the transfer of title to the Forfeited Assets to the United States.”<sup>68</sup> It waived the filing of a civil forfeiture complaint in accordance with 18 U.S.C. section 983, any notice requirements pursuant to Rule G or otherwise, and any defenses to judicial or administrative forfeiture of the Forfeited Assets.<sup>69</sup>

The Stipulation provided that the United States will publish notice of the Defendants *in rem* and the Forfeited Assets and its intent to forfeit them on the government’s official website.<sup>70</sup> The Stipulation further provided that upon the issuance of the decree of forfeiture, “the Department of Justice, United States Department of Homeland Security, and their duly authorized agents and/or contractors shall be authorized to dispose of the Defendants *in rem* and Forfeited Assets in accordance with all laws and regulations.”<sup>71</sup>

The Stipulation included several additional actions by Hobby Lobby. First, Hobby Lobby represented “that it had adopted internal policies and procedures for the importation and purchase of cultural property.”<sup>72</sup> Additionally, Hobby Lobby agreed to “not sell, gift, assign, or otherwise transfer cultural property to another individual or institution unless such transfer [was] done in compliance with either” the Association of Art Museum Directors (AAMD) Guidelines on the Acquisition of Archaeological Material and Ancient Art or the AAMD Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis.<sup>73</sup>

Second, Hobby Lobby agreed that personnel who are identified in its policies as responsible for dealing with cultural property will be trained no less frequently than annually on customs, provenance, and due diligence regarding cultural property importation by qualified customs counsel,<sup>74</sup> and agreed “to engage a qualified customs broker to provide customs brokerage services for all importations of Cultural Property.”<sup>75</sup>

Third, Hobby Lobby agreed to provide quarterly reports to the United States Attorney’s Office regarding all cultural property acquired and/or imported by it, any changes to its cultural property policies, and dates and

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<sup>66.</sup> *Id.*

<sup>67.</sup> *Id.* para. 13.

<sup>68.</sup> *Id.* para. 15.

<sup>69.</sup> Stipulation of Settlement, *Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets*, 1:17-cv-3980-LDH para. 17.

<sup>70.</sup> *Id.* para. 22.

<sup>71.</sup> *Id.* para. 24.

<sup>72.</sup> *Id.* para. 27.

<sup>73.</sup> *Id.*

<sup>74.</sup> *Id.* para. 28.

<sup>75.</sup> Stipulation of Settlement, *Approximately Four Hundred Fifty (450) Ancient Cuneiform Tablets*, 1:17-cv-3980-LDH para. 30.

**PUBLISHED IN COOPERATION WITH  
 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

ART &amp; CULTURAL HERITAGE 429

subjects of any training during that quarter.<sup>76</sup> It will notify the United States Attorney's office of any failure to comply with the regulations and laws concerning cultural property or that any third party has provided it with any materially false information regarding the provenance or ownership history of any cultural property it imported.<sup>77</sup> Hobby Lobby agreed to be penalized \$2,000 per day for each day it fails to implement and maintain compliance measures, cause delivery of any quarterly report, or timely deliver notice of failure to comply or receipt of false information.<sup>78</sup>

**III. Resuscitating a Holocaust Restitution Claim: *Cassirer v. Thyssen-Bornemisza Collection***

In July 2017, the U. S. Court of Appeals for the Ninth Circuit resuscitated one of the longest-running Holocaust restitution cases in the U.S. federal courts.<sup>79</sup> The decision concerns a stolen Pissarro painting and provides insight in applying foreign law and new U.S. legislation in such claims.

Lilly Cassirer, daughter-in-law of Jewish industrialist and art gallery owner Julius Cassirer, fled Germany in 1939.<sup>80</sup> At that time, the "Aryanization" process by which German Jews were deprived of all property rights was well underway.<sup>81</sup> To receive an exit visa, Lilly<sup>82</sup> was forced to exchange a painting her father-in-law had acquired shortly after its completion three decades earlier, Camille Pissarro's *Rue Saint-Honoré, après-midi, effet de pluie* (the Painting). She was paid a paltry sum of "\$360 in Reichsmarks."<sup>83</sup>

After the war, Lilly returned to Germany and filed a claim through an Allied-established process for restoring expropriated property. The U.S. Court of Restitution Appeals (CORA) declared in a published opinion that Lilly owned the Painting.<sup>84</sup>

The German Federal Republic later established a legal process whereby Lilly initiated a compensation claim against the state for the Painting's wrongful taking. At the time, all parties involved believed the Painting was lost. Following this process, the parties entered into a settlement in 1958 that provided, *inter alia*, that Germany would pay Lilly the Painting's recent agreed value.<sup>85</sup>

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76. *Id.* para. 31-32.

77. *Id.* para. 33.

78. *Id.* para. 35.

79. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017).

80. See BRUCE L. HAY, NAZI-LOOTED ART AND THE LAW 137 (2017).

81. See Constantin Goschler & Philipp Ther, *Introduction to ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE* 3, 4 (Martin Dean et al., eds., 2007).

82. See *Thyssen-Bornemisza III*, 862 F.3d at 955 n.1 (The Ninth Circuit refers to Lilly Cassirer, Lilly Neubauer after remarriage, simply as "Lilly.")

83. *Id.* at 955.

84. *Id.* at 956.

85. *Id.* (For the foregoing paragraph).

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

430 THE YEAR IN REVIEW

[VOL. 52]

Meanwhile, the Painting sat in an American private collection having made its way there through an anonymous Berlin auction and a Beverly Hills gallery. Then, in 1976, the Baron Thyssen-Bornemisza (the Baron) purchased the painting through a New York gallery for \$275,000, approximately half of what would have been expected from a dealer sale. The Baron moved the Painting to Switzerland, where it became part of his collection until 1992.<sup>86</sup>

In 1988, the Baron agreed to loan his collection to Spain. As part of the agreement, Spain created a foundation, “TBC,” to manage the collection, and restored a Madrid palace to house it. When restoration ended in 1992, the Baron moved his collection to Spain. The following year, the Baron sold the collection to TBC for \$350 million, despite its \$1–\$2 billion value.<sup>87</sup>

In 2000 Lilly’s grandson, Claude, learned of the Painting’s fate. In May 2001, the Cassirer family filed an unsuccessful petition for restitution in Spanish court. Claude then filed another action for restitution in California district court in 2005.<sup>88</sup>

After a decade of litigation, during which, the case reached the Ninth Circuit multiple times,<sup>89</sup> the district court dismissed the Cassirers’ claims. The district court granted TBC’s motion for summary judgment, determining that TBC was the rightful owner of the Painting and the Cassirers’ claims were time-barred.<sup>90</sup> Both parties appealed the judgment.<sup>91</sup>

While the appeals were pending, Congress passed the Holocaust Expropriated Art Recovery Act of 2016 (HEAR).<sup>92</sup> Specifically targeting such cases, HEAR directs federal courts to apply a six-year statute of limitations running from the date of the claimant’s actual discovery of the artwork to any covered claims pending as of HEAR’s enactment.<sup>93</sup> This decision became the first application of HEAR’s statute of limitations by a circuit court. The court found that because the Cassirers “acquired actual knowledge of the Painting’s location in 2000” and filed this lawsuit in 2005, the Cassirers’ claims were timely under HEAR.<sup>94</sup>

Because its subject-matter jurisdiction is based on the FSIA,<sup>95</sup> the Ninth Circuit followed the Second Restatement of the Conflict of Laws to

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86. *Id.* at 956-57. (For the foregoing paragraph).

87. *Id.* (For the foregoing paragraph).

88. *Thyssen-Bornemisza III*, 862 F.3d at 956-57. (For the foregoing paragraph).

89. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1037 (9th Cir. 2010) (One of these concerned the court’s jurisdiction. The Ninth Circuit found subject-matter jurisdiction based on the “expropriation” exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(3)).

90. *Cassirer v. Thyssen-Bornemisza Collection*, 153 F. Supp. 3d 1148, 1168 (C.D. Cal. 2015).

91. *Thyssen-Bornemisza III*, 862 F.3d at 958.

92. *Id.* at 960; Holocaust Expropriated Art Recovery (HEAR) Act, Pub L. No. 114-308, § 4–5, 130 Stat. 1525 (2016).

93. *Thyssen-Bornemisza III*, 862 F.3d at 960 (citing HEAR § 5(d)(1)).

94. *Id.*

95. *Id.* 961 (“[W]hen jurisdiction is based on the FSIA, ‘federal common law applies to the choice of law rule determination. Federal common law follows the approach of the

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

ART &amp; CULTURAL HERITAGE 431

determine Spanish law governs the parties' claims.<sup>96</sup> The Ninth Circuit held that Spain's law applies because it has the most significant relationship to the case. First, the Painting is situated in Spain, that gives Spain "the dominant interest in determining the circumstances under which an interest in the chattel [may transfer] by adverse possession or by prescription."<sup>97</sup> Second, the Restatement's § 6 factors, on balance, favor Spain.<sup>98</sup>

The core question of the case then became: Has TBC acquired good title to the Painting? If so, TBC is entitled to summary judgment denying the Cassirers' claims.

The court noted that the Spanish Civil Code's article 1955 states: "Ownership of movable property prescribes by three years of uninterrupted possession in good faith. Ownership of moveable property also prescribes by six years of uninterrupted possession without any other condition."<sup>99</sup> Article 1941 defines "possession" as being "in the capacity of the owner, . . . public, peaceful, and uninterrupted."<sup>100</sup>

The court found two triable issues of fact regarding TBC's title. Proceeding chronologically, the first is: Did the Baron acquire the Painting in good faith? "[I]f the Baron had good title to the Painting when he sold it to TBC, then TBC became the lawful owner of the Painting through the acquisition agreement."<sup>101</sup> Following Spanish choice-of-law rules, the court noted that Swiss acquisitive prescription governs the Baron's acquisition of title. Accordingly, whether the Baron meets the good faith requirement of Swiss acquisitive prescription is a triable issue of fact.<sup>102</sup>

While providing no explicit direction, the Ninth Circuit implied skepticism. The opinion lists many suspicious factors and repeatedly quotes the Cassirers' expert, referring to TBC's only in a footnote.<sup>103</sup> Among these factors are: the low price the Baron paid; that many Pissarro paintings succumbed to Nazi looting, demonstrated by Pissarro restitution cases<sup>104</sup>; a

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Restatement (Second) of Conflict of Laws." (quoting *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991)).

96. *Id.* at 961-963.

97. *Id.* at 963 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 246, cmt. a (AM. LAW INST. 1986)).

98. *Id.* 962-964.

99. *Thyssen-Bornemisza III*, 862 F.3d at 965 (quoting Spanish Civil Code [C.C.] art. 1955 (Spain)).

100. *Id.* at 965 (quoting Spanish Civil Code [C.C.] art. 1941 (Spain)).

101. *Id.* at 974.

102. *Id.* at 975-976.

103. Compare the discussion of Dr. Petropulos's "red flags", *id.* at 49-50, with the footnote mention of Dr. Ernst, *id.* at 49 n.28.

104. See, e.g., Annalisa Quinn, *French Court Orders Return of Pissarro Looted by Vichy Government*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html>; *Looted Paintings Found in Nazi Dealer's Safe*, SPIEGEL ONLINE (June 6, 2007, 01:11 PM), <http://www.spiegel.de/international/germany/stolen-works-of-art-discovers-in-swiss-bank-looted-paintings-found-in-nazi-dealer-s-safe-a-486999.html>.

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

432 THE YEAR IN REVIEW

[VOL. 52]

torn label from a Berlin gallery on the Painting; and the availability of information about CORA cases.<sup>105</sup>

The second triable issue of fact is whether TBC knew the Painting was stolen. If the Baron did not acquire the Painting in good faith, then under Spanish law TBC could only have acquired good title through acquisitive prescription. The Ninth Circuit agreed with the district court that TBC meets article 1955's requirements: TBC has possessed the Painting as an owner for more than six years, and during the relevant period its possession was public, peaceful, and uninterrupted. But the Ninth Circuit disagreed with the district court's interpretation of another provision of the Spanish Civil Code: article 1956.<sup>106</sup> This article extends the time of possession required for acquisitive prescription (1) where the relevant property was "robbed or stolen from the rightful owner (2) as to the principals, accomplices or accessories after the fact (*encubridores*)."<sup>107</sup>

Finding no dispute that the Painting was stolen from its rightful owner, this portion of the Ninth Circuit's opinion hinges on the legal definition of "*encubridor*" and particularly whether the term includes one who "knowingly benefits himself from stolen property." The parties presented conflicting definitions of "*encubridor*" provided in different versions of the Spanish Penal Code. The Cassirers argued that article 1956, enacted in and unmodified since 1889, should be interpreted according to the contemporaneous 1870 Penal Code. The 1870 Penal Code included persons knowingly benefitting themselves from stolen property in the "*encubridor*" definition. TBC noted the 1870 Penal Code was modified in 1950 and argued that "*encubridor*" should be defined according to the Penal Code in force when TBC acquired the Painting. In the later Penal Code, TBC argued, one could only be an "*encubridor*" if, after a crime took place, one "acted in some manner to aid those who committed the crime avoid penalties or prosecutions."<sup>108</sup>

Ultimately, the Ninth Circuit sided with the Cassirers. As a preliminary matter, the court determined that Spanish rules of statutory interpretation apply and instruct courts to construe rules according to 1) the "proper meaning of their wording," 2) their context, 3) their historical and legislative background, and 4) social reality at the time of application.<sup>109</sup> Finding the first and second factors inconclusive, the court determined that the historical and legislative background mitigates in favor of the 1870 definition.<sup>110</sup> First, Spanish rules of statutory interpretation indicate that a statute's "historical and legislative background" refers to the history that occurred before Article 1956 was enacted.<sup>111</sup> Second, two judges found that the 1950 amendment

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105. *Thyssen-Bornemisza III*, 862 F.3d at 976.

106. *Id.* at 966.

107. *Id.* at 967.

108. *Id.* at 960-67. (For the foregoing paragraph).

109. *Id.* at 968-69.

110. *Id.*

111. *Thyssen-Bornemisza III*, 862 F.3d at 968-69.

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**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

ART &amp; CULTURAL HERITAGE 433

to the 1870 Penal Code did not change the definition of “*encubridor*.”<sup>112</sup> Consequently, neither the later Penal Code nor the social reality in the early 1990s would indicate that article 1956 required something more than knowingly benefitting oneself from stolen property.<sup>113</sup>

**IV. Reparations for Cultural Heritage Crimes: The Prosecutor v. Ahmad Al Faqi Al-Mahdi**

In September 2016, the International Criminal Court (ICC) issued the verdict in *The Prosecutor v. Ahmad Al Faqi Al-Mahdi*, the first case in that the ICC examined the issue of culpability for the destruction of cultural heritage as a war crime.<sup>114</sup> *Al-Mahdi* involved the destruction of ten cultural and religious sites, including mosques and burial sites, that were essential to the local population in Timbuktu and had been designated as UNESCO World Heritage sites.<sup>115</sup> In this case, Al-Mahdi had been one of the leaders of the Ansar al-Dine movement, that took over the area and sought to impose a particular cultural and religious viewpoint by destroying these sites.<sup>116</sup> At the ICC level, Al-Mahdi became the first defendant to enter a plea of guilty to the crimes charged, including war crimes for cultural heritage violations, sending the issue of reparations for these crimes to the ICC for future determination.<sup>117</sup>

Subsequently, in August 2017, the ICC issued its reparations decision in *Al-Mahdi*. The claimants for reparations were 139 individuals, not including any international organizations that rendered financial and other assistance to the community in Timbuktu.<sup>118</sup> In this instance, the ICC went further and recognized that there were additional impacted communities, notably the Malian community as a whole and the global community, and that some form of reparation was required on their behalf as well.<sup>119</sup>

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112. *Id.*

113. *Thyssen-Bornemisza III*, 862 F.3d at 973 (Judge Bea wrote the opinion, with Judge Callahan concurring. Judge Ikuta concurred in all parts except those arguing the 1870 definition survived its 1950 amendment).

114. See UN GENERAL ASSEMBLY, *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (LAST AMENDED 2010), 17 JULY 1998, ISBN NO. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html>, art. 8(2)(e)(iv) (providing that the definition of war crimes includes “serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”).

115. *The Prosecutor v. Ahmad Al Faqi Al-Mahdi*, ICC-01/12-01/15, Procedural History, ¶ 1 (Aug. 17, 2017), [https://www.icc-cpi.int/CourtRecords/CR2017\\_05117.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF).

116. Stephanie Hon, *International Criminal Court Trial of Ahmad al-Faqi al-Mahdi*, COLUM. J. OF TRANSNAT’L L., <http://jtl.columbia.edu/international-criminal-court-trial-of-ahmad-al-faqi-al-mahdi/>.

117. *See id.*

118. *Ahmad Al Faqi Al-Mahdi*, ICC-01/12-01/15, Procedural History, ¶ 5, 52.

119. *Id.* Order for reparations against Mr Al Mahdi, ¶ 54-55.

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**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

434 THE YEAR IN REVIEW

[VOL. 52]

Importantly for the use of the war crimes statute for cultural heritage damage and destruction, the ICC crafted a definition that was based on the ways in that UNESCO conceives of cultural heritage. Specifically, the ICC stated that, in the context of international war crimes, cultural heritage includes territory and sites on it, monuments, movable property and tangible items, and intangible heritage.<sup>120</sup> It also recognized that cultural property is reflective of the abilities of individuals and communities, and that this makes cultural heritage unique.<sup>121</sup> At the same time, the ICC provided that “world cultural heritage is a most important category. Greater interest vested in an object by the international community reflects a higher cultural significance and a higher degree of international attention and concern.”<sup>122</sup> With this in mind, it noted that damage to cultural heritage caused irreparable harm to the identity and collective memory of the community.<sup>123</sup>

One of the unusual aspects of the *Al-Mahdi* case was that UNESCO worked with the local community to rebuild the majority of the destroyed sites in the interim period between their destruction and the ICC’s decision. Al-Mahdi had attempted to use this as a mitigating factor for the award of reparations; however the ICC determined that this was not a viable reason for altering the award. Given the state of the repaired sites, however, the ICC determined that the appropriate use of a compensatory award was for the present and future assistance of the community as a whole.<sup>124</sup>

Another type of reparation in this case involved a public apology. Part of Al-Mahdi’s guilty plea included a public statement of apology for his crimes. The ICC found that this was a suitable form of reparation and that the apology should be broadcast widely throughout Mali and made available to the global community.<sup>125</sup>

For those bringing individual complaints, the ICC addressed reparations based on consequential economic losses, taking into account the amount of each person’s financial loss. Consequential economic losses for the community of Timbuktu as a whole were to reflect the amount of financial harm caused by the destruction of the cultural heritage sites as a whole. Further, claims were brought against Al-Mahdi for the moral damages caused to individuals who had family tombs impacted by the destruction of the cultural heritage sites as well as by the community as a whole. Individual reparations were designed to be addressed at the same level of impact

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120. *Id.* Overview, ¶ 15-18.

121. *Id.* Overview, ¶ 16. (stating that “Cultural items considered as cultural heritage are objects, monuments and sites that are considered to be testimonies of human creativity and genius. It is this exceptional quality which warrants their labelling as cultural heritage. Cultural heritage is important not only in itself, but also in relation to its human dimension. Cultural property also allows a group to distinguish and identify itself before the world community.”).

122. *Id.* Overview, ¶ 17.

123. *Id.* Overview, ¶ 22.

124. *Abmad Al Faqi Al-Mahdi*, ICC-01/12-01/15, Scope of liability, ¶ 122-128.

125. *Id.* Kinds of harm suffered, types of reparations and modalities, ¶ 68-71.

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 SMU DEDMAN SCHOOL OF LAW**

**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

2018]

ART &amp; CULTURAL HERITAGE 435

depending on the actual harms suffered and the community was to be compensated as a whole.<sup>126</sup>

In determining the full amount of reparations liability, the ICC examined the factual situation surrounding the command system for the acts of destruction and noted that, because there were other parties responsible for crafting and executing the decision to destroy these sites, it would be inappropriate to place the entire burden on Al-Mahdi.<sup>127</sup>

Arguments regarding the amount of liability to assess against Al-Mahdi included assertions by his counsel that his declared indigent status should be a factor in the determination, but the ICC refused to take the indigence claim into account. In its view, this would reduce the recognition of damages to the individual and collective victims inappropriately undermining the importance of cultural heritage losses.<sup>128</sup>

When setting the awards due, the ICC did take into account the amount spent by UNESCO on the repaired buildings, but as previously noted, required that this amount be used for the current and future benefit of the community.<sup>129</sup> The consequential economic losses figure assessed against Al-Mahdi – 2.12 million Euros – was the result of calculations that were heavily dependent on determining losses to the community due to losses from tourism to the cultural heritage sites themselves.<sup>130</sup> Determinations for financial valuation of moral losses were heavily influenced by the determinations of the Eritrea Ethiopia Claims Commission, and were ultimately assessed at 23,000 Euros per qualifying claimant.<sup>131</sup> In total, the assessed reparations against Al-Mahdi amounted to 2.7 million Euros.<sup>132</sup>

The case has moved to the implementation phase, in that further determinations regarding the ICC's decision will be made; key among them is whether there will be funds to cover the costs of the damages assessed. At the moment, there is a Trust Fund for Victims that exists as part of the ICC structure and is funded by voluntary contributions from ICC member states and others, however it is unclear the extent to that it will be able to provide financial assistance.

Beyond the amount of damages assessed and its ability to be implemented, the Al-Mahdi reparations decision is an important development in that it provides an understanding and definition of cultural heritage at the international criminal law level.

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126. *Id.* para. 52, 59.

127. *Id.* Scope of liability, ¶ 110.

128. *See id.* Scope of liability, ¶ 114.

129. *Id.* Scope of liability, ¶ 116-118.

130. *Abmad Al Faqi Al-Mahdi*, ICC-01/12-01/15, Scope of liability, ¶ 126-128.

131. *Id.* Scope of liability, ¶ 131-132.

132. *Id.* Scope of liability, ¶ 134.

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**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

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