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Phillip v. Federal Republic of Germany: D.C. Circuit Refines Foreign Sovereign Immunity Doctrine in Art Restitution Case

By: Emma Kleiner[1]

In what has been called "the greatest art theft in history," the Nazis seized an estimated 650,000 works of art throughout Europe during the Holocaust.[2] In July 2018, the United States Court of Appeals for the District of Columbia issued a decision in *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018) concerning the fate of forty-two medieval works of art. Those works, known as the Guelph Treasure, were subject to a forced sale during the Holocaust.[3] While that number may appear inconsequential compared to the magnitude of the Nazis' campaign, the *Philipp* decision concerns a critical art law issue – the circumstances in which sovereign immunity is abrogated in cases involving Holocaust-looted artwork – thereby defining under what circumstances other heirs might seek restitution of artwork. In the decision, the D.C. Circuit held that heirs of victims of the Holocaust may proceed in U.S. courts against the German agency that oversees the museum where the collection is located, although not against the Federal Republic of Germany.

The Guelph Treasure, named for the royal house that amassed it, is a collection of medieval art and relics created mainly from the eleventh to fifteenth centuries.[4] The royal house of Brunswick held the collection for hundreds of years,[5] and the works were housed for generations in Germany's Brunswick Cathedral.[6] In 1929, a consortium of Frankfurt-based Jewish art dealers bought the Guelph Treasure, and in 1935, facing increasing state-sponsored persecution, the dealers sold the works to the Nazi-run Prussian state for below market value.[7] When the *Philipp* lawsuit commenced in 2015, the Guelph Treasure was located in Berlin's Museum of Decorative Arts, which is overseen by a German agency, the Stiftung Preussischer Kulturbesitz ("SPK"). At that time, the heirs of those Jewish art dealers sued the Federal Republic of Germany and the SPK, seeking restitution of the collection or its value, estimated at $250 million (USD).[8]

Central to the *Philipp* case – at both the trial and appellate level – was the application of the Foreign Sovereign Immunities Act ("FSIA"). The FSIA generally immunizes foreign states, including a state's agencies, from claims in the U.S. courts, unless there is a specifically delineated exception.[9] One such exception is the "expropriation exception," which abrogates foreign sovereign immunity where a claim implicates "rights in property taken in violation of international law" and the 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 . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . ."[10] The expropriation exception is relevant to looted artwork and can, in certain circumstances, serve as a jurisdictional hook for claimants to hale foreign states and their agencies into U.S. courts. The question presented in the *Philipp* case was whether the exception applied to these facts, thus allowing the claimants to bring suit against Germany and the SPK.

The District Court denied sovereign immunity to Germany and the SPK. In evaluating the applicability of the expropriation exemption, the District Court grappled with seemingly contradictory precedent from the D.C. Circuit as to the necessary commercial connections for a foreign state versus an agency. Ultimately, it concluded that the expropriation exemption was applicable to Germany and the SPK.[11] Denials of sovereign immunity are subject to interlocutory appeal, and the Defendants appealed to the D.C. Circuit.[12]

The D.C. Circuit largely affirmed the district court's decision, with the notable exception that it remanded with the instruction to dismiss Germany from the action on the basis of foreign sovereign immunity.[13] The court's analysis of foreign sovereign immunity contains elements that, depending on the specific facts of a case, may serve to strengthen or lessen a claimant's ability to seek restitution of Holocaust-looted art.

First, the Court analyzed whether the forced sale of the Guelph Treasure constituted a taking in violation of international law, as required under the expropriation exception. The sale was an intrastate taking of artwork, meaning "a foreign sovereign's taking of its own citizens' property," which does not, in itself, "violate the international law of takings."[14] The court held, however, that an intrastate taking violates international law where the taking itself constitutes an act of genocide. This was an issue of first impression: Could the seizure of art be a genocidal act? Reasoning that the seizure of the Guelph Treasure was part of the near-complete exclusion of Jews from all aspects of life and work, the court responded: "The answer is yes."[15] This holding will likely enhance the ability for future claimants in Holocaust-looted art cases to bring suit against foreign states.

Second, with regard to the commercial nexus condition of the expropriation exemption, the court held that the analysis for foreign states is distinct analysis from that for their agencies or instrumentalities. Relying on D.C. Circuit precedent,[16] the Court found that the commercial nexus requirement "is satisfied [as to foreign states] only when the property is present in the United States."[17] Because the Guelph Treasure is located in Berlin, the Court held that Germany had sovereign immunity and should be dismissed.[18] Because that requirement does not exist with regard to claims against state agencies or instrumentalities, the D.C. Circuit determined that U.S. courts may exercise subject matter jurisdiction over the claims against the SPK.[19]

Although the Guelph Treasure consists of a modest quantity of objects amongst the Nazis' plunder, these forty-two pieces may have made a momentous mark on the legal landscape. The fate of the Guelph Treasure will likely remain in limbo until the conclusion of a trial, but *Philipp* will have an immediate effect on Nazi-looted art cases. Now, claimants can more readily establish that the plunder or forced sale of artwork constitutes a genocidal taking. And the law is clear that claimants can bring suit against foreign states only when the property of which they are seeking restitution is present in the United States. These holdings will provide much-needed guidance to future litigants and courts. ♦

[1] Barbara A. Ringer Honors Fellow at the U.S. Copyright Office. The opinions expressed in the article belong to the author and do not represent the views of the Copyright Office.

[2] Alex Shoumatoff, *The Devil and the Art Dealer*, Vanity Fair (Apr. 2014), https://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment; *see also Nazi loot case: Much art still untraced – expert*, BBC (Nov. 4, 2013), https://www.bbc.com/news/world-europe-24801935.

[3] *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406, 409, 412 (D.C. Cir. 2018).

[4] *Id.* at 409.

[5] https://www.jstor.org/stable/4300877?seq=1#page_scan_tab_contents

[6] *Philipp*, 894 F.3d at 409.

[7] *Id.*

[8] *Id.* at 410.

[9] 28 U.S.C. §§ 1603–04.

[10] *Id.* at §1605(a)(3).

[11] *Philipp v. Fed. Republic of Ger.*, 248 F. Supp. 3d 59, 67-–74 (D.D.C. 2017), *aff'd and remanded*, 894 F.3d 406 (D.C. Cir. 2018).

[12] *Philipp*, 894 F.3d at 410.

[13] *Id.* at 419.

[14] *Id.* at 410.

[15] *Id.* at 411.

[16] *Simon v. Republic of Hung.*, 812 F.3d 127 (D.C. Cir. 2016); *De Csepel v. Republic of Hung.*, 859 F.3d 1094 (D.C. Cir. 2017).

[17] *Philipp*, 894 F.3d at 414.

[18] *Id.*

[19] *Id.*

Fourth Circuit Again Rewrites Cultural Property Implementation Act — *U.S. v. 3 Knife-Shaped Coins etc.*

By: Armen R. Vartian[1]

On August 7, 2018, the U.S. Court of Appeals for the Fourth Circuit affirmed a decision ordering forfeiture of 15 coins imported into the U.S. by the Ancient Coin Collectors Guild, a nonprofit advocacy group for rare coin collectors and dealers. In doing so, the Fourth Circuit adopted an interpretation of the Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601 *et seq.* that places bilateral Memoranda of Understanding (MOUs) between the U.S. State Department and foreign countries above the careful compromises Congress built into the CPIA to balance the need to deter looting with the fact that the vast majority of art and collectible items imported into the U.S. are not connected with unlawful activities.

The CPIA authorizes import restrictions on archaeological objects "first discovered with-

in" and "subject to export control by" a specific State Party to the 1970 UNESCO Convention that are illicitly exported from that same State Party after the effective date of implementing regulations. 19 U.S.C. §§ 2601, 2604, 2606. Congress granted U.S. Customs and Border Protection broad discretion to detain artifacts on "designated lists" for investigation, while giving importers the right to contest seizures in court, under procedures requiring the Government to prove by expert testimony or other admissible evidence that the objects were illicitly exported from the State Party after the effective date of the regulations. 19 U.S.C. §§ 2606, 2610.

The Guild imported certain Cypriot and Chinese coins into the U.S. without identifying their "find spots", in order to precipitate a test case. The Panel focused on the uncontested fact that the coins were of types found on "designated lists" negotiated between the U.S. State Department and the governments of Cyprus and China in 2007 and 2009 respectively under the UNESCO Convention rubric. The Fourth Circuit had earlier approved the seizure of these same coins without considering the coins' possible forfeiture. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection* (*ACCG v. CBP*), 698 F.3d 171 (4th Cir. 2012). In this second appeal, the court applied its earlier dicta as binding precedent, but examined the bases for it anyway.

The court emphasized the process by which the "designated lists" of items subject to seizure and forfeiture are created. In particular, the court noted that Congress created a Cultural Property Advisory Committee (CPAC) made up of a diverse group of what the court called "experts and stakeholders in 'the international exchange of archeological and ethnological materials.'" In the court's view, the "designated lists" are created only after CPAC "conduct[s] an investigation and prepare[s] a report detailing whether import restrictions are warranted", the President considers that report before entering into MOUs, and then the State department prepares lists accordingly.

The Guild challenged whether this process was, in fact, followed with respect to the "designated lists" of coins created pursuant to the Cyprus and China MOUs. It alleged that (1) CPAC recommended against import restrictions on Cypriot coins and was not allowed to make any recommendations on Chinese coins; (2) the State Department misled the Congress and public about CPAC's true recommendations on Cypriot coins in official government reports; and (3) there was at least an appearance of conflict of interest involving "the decision-maker [who] approved import restrictions on Cypriot coins" based on her connections with a prominent campaigner for import restrictions on cultural goods. The import of all this, according to the Guild, was that CBP

was authorized to seize the Guild's coins without any evidence that the coins were "first discovered within" and "subject to export control by" the countries to which they were being repatriated, and that Congress's extremely narrow statutory framework was being ignored. While all these same arguments had been made during the first appeal, the Guild re-emphasized their importance when the due process rights of U.S. citizens were at stake.

The Fourth Circuit's response was simple. Having conceded that the coins in the Government's forfeiture complaint were on the "designated lists", and that they knew this to be the case at the time of importation, the Guild could defeat forfeiture only by establishing that the coins either had been exported from Cyprus or China before the restrictions took effect, or by lawful license thereafter, citing 19 U.S.C. §2606(c)(2)(A) and (B). The court rejected the Guild's contention that the Government had to prove that these particular coins were "first discovered in" or "subject to export control by" Cyprus or China, finding that those requirements applied only at the initial stage of CPAC reporting, MOUs, and creation of the lists themselves. The court cited both its earlier non-forfeiture decision and the courts' inability to "second-guess[] the executive branch's international negotiations regarding issues of cultural heritage". In evaluating the Guild's due process challenges, the court noted that the Government's initial burden was such that successful forfeitures would not happen without such strong evidence that the importer must have had "fair notice" that the items were on designated lists and, therefore, subject to forfeiture. The court noted that the Guild did not contend that the lists themselves were insufficiently "specific and precise" to notify it that the coins they were importing would be subject to forfeiture.

Implicit in the Fourth Circuit's opinion is the fact that Congress established a certain process for creating the "designated lists" of items subject to seizure, and that this process involved diplomatic and scholarly judgments that courts are not competent to revisit in the context of litigation. In effect, the court was telling the Guild to direct its "first discovery" and "subject to export control by" arguments to the CPAC and State Department in order to influence the lists themselves, rather than litigate over whether items concededly on the lists should be seized by CBP and forfeited.[2] While superficially attractive, this view condones the usurpation of power by executive agencies beyond that given by Congress, a situation that federal courts deal with continually without difficulty. It is true that the whiff of foreign policy considerations often frightens courts into accepting executive actions, in this case the Fourth Circuit was dealing with the CPIA a U.S. domestic statute intended to restrict the use of the CBP on behalf of foreign governments to a somewhat narrow sphere of items provably looted from those countries. This decision is a step backward in honoring Congress's intent.♦

[1] Founder and Partner, Law Offices of Armen R. Vartian. The Author was counsel to amici Professional Numismatists Guild, Inc,, American Numismatic Association, and International Association of Professional Numismatists in this case. The views expressed herein are his own, and may or may not agree with those of the above organizations.

[2] The Fourth Circuit, like the district court before it, rejected as irrelevant all attempts by the Guild to establish that "circulation patterns" of Cypriot and Chinese coins made it unlikely that the coins at issue in this case had been found in Cyprus or China in in the 20th century, much less after the import re-

California's *droit de suite* Statute Pre-empted by Copyright Act — *Chuck Close et al. v. Sotheby's et al.*

By: Laura Tiemstra[1]

On July 6, 2018, the Ninth Circuit ruled that a California statute providing artists with the right to seek royalties for resales of their works under certain circumstances (often referred to as *droit de suite)* can was preempted by the 1976 Copyright Act and, therefore, could not be applied to sales after the effective date of that Act, namely January 1, 1978.

Droit de suite (which translates literally to "right of following on") is the right of an artist to receive a royalty on all resales of their original works. The right is only extended to visual artists, such as painters or sculptors, because artists creating literary or recorded works are deemed able to profit from subsequent reproductions of their works by controlling those reproductions. *Droit de suite* originated in France in 1920, and the right was codified in the 1948 Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention). However, the Berne Convention does not require signatories to adopt *droit de suite* into their domestic laws, but merely provides for reciprocity between

those signatories who do.

In 1976, California enacted the California Resale Royalties Act ("CRRA"), which requires sellers of fine art to pay the artist a 5% resale royalty after its effective date of January 1, 1977.[2] The CRRA applies only to works of fine art (1) by an artist who is a U.S. citizen or a California resident; (2) which are sold in California during the artist's life or within 20 years of the artist's death; (3) for more than $1,000 and at a profit to the seller. The CRRA places the burden of locating the artist who is owed the royalty payment on the seller or seller's agent, who must do so within 90 days of the sale. If the artist cannot be located, the royalty goes to the California Arts Council, who are also directed to attempt to locate the artist or otherwise hold the royalty for the artist to collect for up to 7 years, following which the council may use the funds to acquire fine art for public buildings. Despite having been enacted over 40 years ago, the Ninth Circuit cited secondary sources that suggest the CRRA has not resulted in significant royalty payments to artists; while about 400 artists have realized royalty payments under the CRRA, the amount of those royalties have totaled approximately $328,000 as of 2018.

The U.S. has considered adopting *droit de suite* at the federal level since the 1970's, even going so far as to include it in a 1987 draft of the Visual Artists Rights Act of 1990 ("VARA"). Ultimately, VARA instead ordered a study on feasibility. The VARA study reported that there were insufficient economic or copyright policy justifications for *droit de suite* at the federal level. A 2013 report from the Copyright Office reversed this position and endorsed a resale royalty right in the U.S. Despite the Copyright Office's position and the fact that the U.S. has been a signatory to the Berne Convention since 1989, Congress has never acted on this endorsement. To date, the CRRA in California provides the only resale royalty rights in the U.S.

The CRRA's potential conflict with federal copyright law was challenged almost immediately after it took effect, when an art dealer, Howard Morseburg, brought an action alleging that it conflicted with the 1909 Copyright Act.[3] Morseburg argued that a resale royalty to the artist was a "restriction" on the sales of the artist's work beyond the first sale and therefore conflicts with copyright law's first sale doctrine which limits an artists rights to restrict the sale of their works to only the initial sale. In *Morseburg*, the Ninth Circuit found that the resale royalty did not allow the artist to restrict the sale but merely receive a portion of the proceeds after a sale occurred. Therefore, there was no conflict between the CRRA and federal copyright law but rather the CRRA created an additional right for artists. *Morseburg*, however, did not address whether the 1976 Copyright Act, which did not take effect until 1978, preempted the CRRA.

In 2011, the CRRA was again challenged, when the artists Chuck Close and Laddie John Dill, as well as the Sam Francis Foundation, filed class-action complaints against Sotheby's, Christie's, and eBay, alleging claims under the CRRA for failure to make the sale. The defendants argued that the CRRA was preempted by federal copyright law, both through conflict and express preemption, and the District Court agreed. On an interlocutory appeal, the Ninth Circuit consolidated the three class actions and issued an order on July 6, 2018.

The Ninth Circuit held that *Morseburg* still applied to the extent that there is no conflict preemption by the 1909 Copyright Act. However, the court then looked to the 1976 Copyright Act and affirmed the District Court's finding that it expressly preempts the state's ability to grant the copyright owner any rights to sales beyond the first sale. The first sale doctrine was established in the context of a need to resolve disputes over a copyright owner's rights in relation to subsequent sales of their works. Therefore, the court reasoned, resales of a work fall within the area of copyright law addressed in the 1976 Act's preemption provision (codified at 17 U.S.C. §301). Therefore, the Ninth Circuit ruled that the CRRA is preempted by federal copyright law, except to the extent of any claims for sales that occurred during the twelve months between when the CRRA took effect on January 1, 1977 and when the 1976 Copyright Act took effect on January 1, 1978.

The Ninth Circuit left open for the District Court to consider whether the CRRA might also constitute an unconstitutional taking. The Ninth Circuit previously held in *Morseburg* that the 5% royalty did not effect a fundamental right sufficient to violate the Due Process Clause, and stated here that the the Takings Clause defense is essentially a repackaging of the same argument. The Court further likened the resale royalty to minimum wage or rent control, which is government control that imposes a real economic cost without qualifying as a governmental taking, casting significant doubt that the CRRA should be considered violative of the Takings Clause. However, the Court noted that the CRRA applies to sales of art which were acquired prior to the enactment of the CRRA, and implied that there might be an unconstitutional taking where the 5% royalty is imposed on the resale of an artwork purchased as investment before the investor could have known there would be a 5% royalty charged at its resale. If the District Court agrees, the scope of the CRRA could then be limited to only works that were both purchased and resold in California between January 1 – December 31, 1977. ♦

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[2] While the CRRA also originally applied to sales outside of California by a California seller, the Ninth Circuit invalidated that portion of the statute as violative of the dormant Commerce Clause, and severed it from the remainder of the statute.

[3] *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980).

Cranachs Remain at Norton Simon under Act of State Doctrine

By: Amelia L.B. Sargent[1]

Introduction

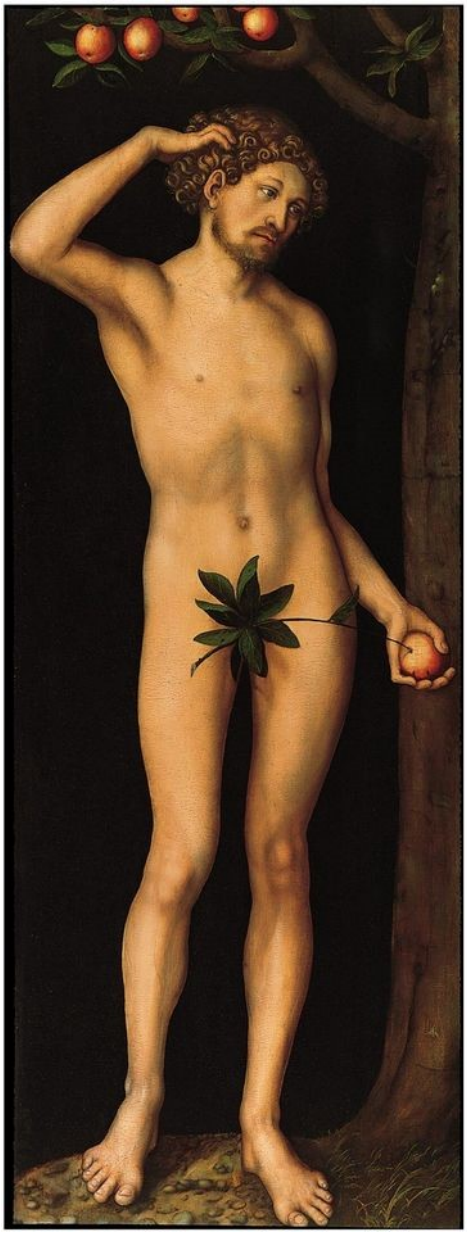
More than a decade of litigation may finally have ended with the Ninth Circuit's July 30, 2018 decision affirming summary judgment in favor of the Norton Simon Art Foundation and Museum in Pasadena, California, allowing them to retain ownership of the 16th century diptych "Adam and Eve" by Louis Cranach the Elder. The two paintings (the "Cranachs") had been in the possession of famed Jewish art dealer Jacques Goudstikker when he fled the Netherlands after the Nazi invasion during World War II, and were subsequently sold in a forced sale to Nazi Reichsmarschall Hermann Goering. Restituted to the Netherlands by Allied forces, the Netherlands eventually sold the Cranachs to an heir of the Stroganoff family, who subsequently sold them to American art collector Norton Simon.

The litigation's many twists and turns were flashpoints in the debate on restitution of art looted during the Holocaust, between the idea of seeking determinations of such cases "on the merits" in line with ethical or moral policy articulations such as the 1998 Washington Conference Principles, versus invoking legal or "technical" defenses available to defendants at the pleading stage, such as jurisdiction, the statute of limitations, or preemption.

Procedural History

The previous two Ninth Circuit appeals in the *Von Saher* saga focused on precisely those types of legal defenses. In the first *Von Saher* opinion, the Ninth Circuit found a California statute creating a new limitations period specifically for "Holocaust-era artwork" unconstitutional on the grounds that it infringed the federal government's exclusive power to conduct foreign affairs, thereby rendering Von Saher's claim untimely.[2] A mere months after that decision, the California legislature passed an amended bill sufficiently curing the prior statute's facial infirmities to allow Von Saher's suit to continue.[3]

The second Ninth Circuit appeal focused on whether Von Saher's claims themselves were



preempted by United States' foreign policy. Despite the U.S. Solicitor General's opinion that they were preempted (expressed in a previously filed amicus brief urging denial of certiorari for *Von Saher I*), the Panel—taking the facts as pled in the complaint as true—determined that the Cranachs had never been subject to internal restitution proceedings in the Netherlands, and so adjudication of the case did not conflict with the United States' policy in favor of restitution of Nazi-looted art.[4]

This set the stage for litigation "on the merits." Litigating through the summary judgment stage, the parties amassed an extraordinary factual record—in many ways more suited to a history dissertation than a legal brief. The seventy-page cross-motions for summary judgment were accompanied by thousands and thousands of pages of exhibits drawn from European archives, and declarations from historians and legal scholars opining on the present-day effects of legal decrees and proceedings that took place more than seventy years ago.

The Factual Record

In July 1940, after Goudstikker and his family fled Nazi-occupied Netherlands, Goering and his cohort, Alois Meidl, bought the Goudstikker Firm and its assets through a series of forced agreements with a remaining employee of the Firm. Miedl acquired the Firm as a going concern, its real estate, and certain personal property including some of its paintings for 550,000 guilders. Goering purchased most of the Firm's remaining inventory, including the Cranachs, for two million guilders.[5] According to the Museum's brief, the combined payments for these transactions total more than $27 million in current U.S. dollars.

The Cranachs were recovered after the war by Allied forces and restituted back to the Netherlands in 1946 as part of the United States' policy of "external restitution" of artworks to their countries of origin rather than to individuals. The Dutch government then instituted its own internal restitution process, facilitated by a number of Royal Decrees. Under the basic framework, a claimant could petition the State for a restitution of rights in property wrongfully taken or coerced during the War. Importantly, however, claimants who had received money through forced sales were generally required to return that money as a condition of receiving their property. The Netherlands set a deadline for claims of July 1, 1951. Unclaimed property reverted to ownership of the State.[6]

Goudstikker's widow Desi returned to the Netherlands after the war to pursue restitution, becoming one of three directors of the Firm. Documented in a legal memorandum from October 3, 1950, on the advice of lawyers and consultants, the Firm decided "to pursue restitution of the Firm's real estate and other assets that had been 'sold' to Miedl, but decided not to pursue restitution of the artworks forcibly 'sold' to Göring (which included the Cranachs)."[7] The memorandum cautioned that the artworks, many of which were "unmarketable," would be difficult to sell, and would cause a "reduction in the [Firm's] liquid assets" because of the requirement to repay the two million guilders.[8]

The Netherlands at first objected to the Goudstikker Firm's strategy of piecemeal restitution, considering it "incorrect" for the Firm to seek restitution of the "detrimental" portion of the transaction—i.e., the Meidl transaction—while leaving out the "profitable" portion—the Goering transaction. *Id.* Notwithstanding the government's position, the Firm submitted only its claim for the Meidl transaction before the July 1, 1951 deadline, and the parties eventually settled the claim.[9]

Analyzing the effect of the Dutch restitution process and the factual record, the district court determined that good title to the Cranachs passed to the Netherlands after the Firm waived its rights to pursue them in 1951.[10]

The Third Appellate Decision

The Ninth Circuit affirmed the district court, but re-invoked the other side of the restitution debate—holding that the Dutch government's conveyance of the paintings to Stroganoff were but the culmination of its sovereign internal restitution process, and as such, an official act of state precluded from American court review.[11]

Specifically, the Court ruled that the "the administration of [the Royal Decrees], the settlement with von Saher's family, and the conveyance of the Cranachs to Stroganoff in consideration of his restitution claim constitute an official act of state that gives effect to the

Dutch government's 'public interests.'"[12] In framing the Stroganoff transaction this way, the Ninth Circuit honed in on another finding of district court: that the Netherlands' decision to sell the Cranachs to Stroganoff in 1966 was part of a settlement of Stroganoff's own claim to the works and two others in the Netherlands' possession (a Rembrandt and a Petrus Christus), which he claimed were unlawfully expropriated by the Soviets after the Russian Revolution before being sold at the 1931 Berlin auction where Goudstikker purchased the Cranachs.[13]

The Panel also determined that two other Dutch government "acts" constituted acts of state to which American courts must defer: a 1999 Dutch Court of Appeals decision denying Von Saher's restoration of rights in the paintings, and the Dutch State Secretary's binding opinion that Von Saher's restitution claim was "settled"—even though in spite of the settlement, *ex gratia*, the Secretary returned over 200 paintings from the Goudstikker collection still in Dutch possession.[14]

In applying this quintessential legal defense, the Ninth Circuit expressed the need to balance the two countervailing policy goals at issue in the case. It acknowledged that "[w]ithout question, the Nazi plunder of artwork was a moral atrocity that compels an appropriate governmental response. But the record on remand reveals an official conveyance from the Dutch government to Stroganoff thrice "settled" by Dutch authorities. For all the reasons the doctrine exists, we decline the invitation to invalidate the official actions of the Netherlands."[15] The act of state doctrine, it said, was "created" for "cases like this one," to "avoid embroiling our domestic courts in re-litigating long-resolved matters entangled with foreign affairs."[16]

Conclusion

In the end, both "on the merits" *and* on a "legal defense," the Museum prevailed. And certainly, the developed factual record on the merits must have given comfort to the Ninth Circuit in applying the Act of State doctrine. But it bears noting that a case like this—approaching resolution only after more than ten years of brute force litigation and untold amounts of legal fees[17]—does not seem a promising test case for future decisions "on the merits," and instead merits reflection the appropriate role for legal defenses *and* merits, together, in pursuing justice for past wrongs.

In her concurrence, Judge Wardlaw, who had been a member of the Panel in the prior two decisions as well, took a more pointed view. Indulging in a bit of well-earned exasperation with the long-wending case, Judge Wardlaw opined:

This case should not have been litigated through the summary judgment stage. The district court correctly dismissed this case on preemption grounds in March 2012. Those grounds did not require any further factual development of the record, and were valid even taking all of the facts in the light most favorable to Von Saher. So here we are in 2018, over a decade from the date Von Saher filed her federal action, reaching an issue we need not have reached, to finally decide that the Cranachs, which have hung in the Norton Simon Museum nearly fifty years, may remain there.[18]

Letting the opinion speak for itself, Judge Wardlaw then attached a full Westlaw printout of the Panel's 2014 decision remanding the case for factual development over her dissent.[19] ♦

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[1] Willenken Wilson Loh & Delgado LLP, Los Angeles, California. The author worked on this case as a summer associate while at a different law firm, and occasionally renders legal services to the Norton Simon Museum. The views set forth in this article are the author's own.

[2] *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960-68 (9th Cir. 2010) (*Von Saher I*); Cal. Code Civ. P. § 354.3 (2002).

[3] Cal. Code Civ. P. § 338(c)(3) (2010).

[4] *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 723 (9th Cir. 2014) (*Von Saher II*).

[5] *Von Saher v. Norton Simon Museum of Art at Pasadena,* No. CV 07-2866-JFW (SSX), 2016 WL 7626153, at *2 (C.D. Cal. Aug. 9, 2016), aff'd, 897 F.3d 1141 (9th Cir. 2018).

[6] *Id.* at **2-4.

[7] *Id.* at *4.

[8] *Id.*

[9] *Id.*

[10] *Id.* at *14.

[11] *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141, 1156 (9th Cir. 2018) (*Von Saher III*).

[12] *Id.* at 1151.

[13] *Id.* at 1150-51.

[14] *Id.* at 1151-1153.

[15] *Id.* at 1156.

[16] *Id.* at 1156.

[17] Von Saher has petitioned the Ninth Circuit for rehearing en banc, which as of the time of writing is pending.

[18] *Id.* at 1156.

[19] *Id.*

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