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CASE NOTE

About Sacred Cultural Property: The Hopi Masks Case

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Translation by Marie Trape (CNRS-CECOJI), revised by Mary Baker

When alerted that 70 Katsinam masks by the Hopi Indians of Arizona,[1] gathered in an "exceptional collection built up between 1970 and 2000 by a French art lover,"[2] were being auctioned by French auction house Néret-Minet, Tessier et Sarrou, Association Survival International France ("the Association") tried to prevent the objects from being dispersed. In accordance with Paragraph 1, Article 809, of the French Code of Civil Procedure, summary proceedings were initiated. The Association applied for an order to suspend the auction and to order judicial sequestration of the masks pending a judgment on the merits, particularly on the issue of ownership.[3] Under Article 809 of the Code of Civil Procedure, the judge for urgent applications[4] can order protective measures, either to avoid imminent damage or to abate a manifestly illegal nuisance. There is a distinction between these two situations. The first concerns damage that has not yet occurred but will certainly occur if nothing is done to prevent it, whereas the second relates to a clear violation of a right or of a general principle of positive law. For the Association, there was imminent damage insofar as the group claiming ownership—that is, the Hopi people—would be unable to establish its ownership after the dispersal. The Association also expressed doubts as to whether the art collector could have been unaware that the nearly 100 items had been unlawfully acquired in the United States. The Hopi tribe, represented by its leader, declared itself a voluntary intervener in the case.

Such litigation is uncommon, especially before a judge for urgent applications, because plaintiffs generally have very little chance of success. In a similar case concerning the Pierre Bergé collection, an association also tried—in the interest of protecting Chinese art located in Europe—to oppose the dispersal of the collection and to stop the auction of sculptures looted from the Summer Palace in Beijing in

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the 19th century: two bronze animal heads, a rat head, and a rabbit head that were part of a fountain built during Qianlong's reign (1736–1795).[5] The Association said it had no intention of claiming the objects, nor did it question the good faith of the owner; it simply aimed to prevent the risk associated with dispersal of the objects. The risk was increased by the possibility of an online auction, which would make it very difficult to know the identity of the buyer. In the present case, the same risk was involved. In both cases, the Associations' arguments were rejected.

The auction took place undisrupted, by the courts at least.[6] This is not surprising in French law, but it provided an opportunity to discuss a number of key issues relating to restitution. Among such issues are the conditions for initiating summary proceedings, dispersal of objects the sacred nature of which had been emphasized, and the admissibility of the action—a complex question involving assessment of rights and interests, in particular property rights, and also the persons entitled to take action.

SACRED OBJECTS AS UNABLE TO BE GOODS SUBJECT TO COMMERCIAL TRANSACTIONS

Roman law created separate categories for religious things (*res divini juris*) and human things (*res humani juris*). The former mainly included sacred things, *res sacrae*, which could not be privately owned because they were dedicated to the gods during the pagan and Christian periods and were reserved for worship.[7] Alongside the *res sacrae*, Roman law distinguished *res sanctae* (holy things), which also could not be privately owned because they "had become venerable as a result of a religious ceremony," and *res religiosae*, in other words, tombs and burial places.[8]

The French Civil Code no longer contains any references to the sacred or the divine. However, in contemporary property law, this notion is not entirely unheard of: Owing to their nature, some objects cannot be subject to ownership. However, this legal category of unownable objects is constantly shrinking due to "the ceaseless expansion of trade."[9] Moreover, it is not a very homogeneous category. Very few of the objects in it actually relate to the sacred: Burial places, obviously, and the human body are protected owing to respect for the dead and the principle of human dignity, which one author has described as a modern version of the sacred.[10] Under Article 16-1 of the Civil Code, the human body may not be the subject of a patrimonial right; hence it is excluded from the category of ordinary goods and falls into the category of things "which can be used by men only in a certain way."[11] The rule introduced into Article 16-1 in 1994 has been complemented by the so-called bioethics laws. The Act of 19 December 2008 introduced a new Article 16-1-1, according to which, "the respect owed to the human body does not end with death." It also states that "the remains of the deceased, including the ashes in the event of cremation, shall be treated with respect, dignity and decency," and the court may take any measure needed to prevent or stop violation of this. The first judicial precedent on this matter was the "Our Body"

case, concerning an exhibition of human remains staged in active poses[12] held in Paris by Encore Events. Two associations (Ensemble contre la peine de mort and Solidarité Chine) initiated summary proceedings so that the exhibition could be banned. They claimed that it constituted a clearly unlawful disturbance within the meaning of Article 16*ff* of the Civil Code, and they also suspected that it involved the trafficking of Chinese prisoners' and executed people's dead bodies.

The reasons for the decisions by the various courts to which the case was referred, from the High Court to the Court of Cassation, show that it was really difficult for the judges to find bases for a ban. During the summary proceedings, the judge recognized that such exploitation of the human body was a manifestly unlawful disturbance, and argued that it was prohibited to turn the human body into a commodity and that the aesthetic display of the corpses had no scientific legitimacy. "Arbitrary colours" and "unrealistic staging" were mentioned.[13] The appellate judges delivered very different reasons, claiming that the origin of the bodies was uncertain and that there was no proof that the people whose remains were displayed had given their consent.[14] The event's organizer was unable to provide information on the source of the bodies, and a dubious origin was suspected (they may have been the bodies of Chinese people sentenced to death). For its part, the Court of Cassation applied the Civil Code strictly.[15] Pursuant to Article 16-1-1, Paragraph 2, which requires treating human remains with respect, the Court stated that "the display of corpses for commercial purposes fails to comply with this requirement" and that "the appellate judges, in finding that the exhibition was pursuing such ends, rightly exercised their powers under Article 16-2 of the Civil Code when they banned it."[16] The ban was clearly a consequence of the "commercial" nature of the exhibition. The Civil Code prohibits any lucrative trade in human bodies. In this case, it was not the exhibition per se but its commercial purposes that the judge found to be in violation.

No one shall trade in a part of the human body. Based on this, could the Hopi masks have been subject to the same protection as human remains, owing to the fact that they are ritual objects and have the status of sacred things that cannot be owned? In reality, the Civil Code's rules governing trade in human bodies are not intended to apply to artifacts. The judge for urgent applications explicitly said that their mere symbolic value was not sufficient. The principle of dignity is intended to protect the human body in all its states, as well as tombs containing human remains, but in no case should it apply to funeral rites and associated objects. While for the Hopi people these masks may "have sacred value, be of a religious nature, or embody the spirits of the ancestors of those persons, it is clear that they cannot be likened to human bodies or pieces of the bodies of living or dead persons that could be protected on the basis of general principles accepted in positive law and contained in Article 16-1-1 of the Civil Code." Contrary to other legal systems, French civil law does not provide that the sacred nature of an object has consequences on how the law applies to it.[17] Likewise, the broader category of unownable things does not prevent these objects from being governed by ordinary law.

In addition to the rules on the status of the human body and tombs, the Association also referred to the case law on family property. However, this was actually of no help considering that this category applies only to certain items owned by a family and generally by the rules applicable to those objects. On one hand, long-term possession or family attachment is not enough: The objects should also be identifiable as family objects; that is, they should intimately convey the memory of the family (family portraits, family archives). On the other hand, as regards the status of such family objects, property that is legally recognized as conveying family memories can no longer be shared under the common rules and heirs can oppose dispersal of it. However, such property is not inalienable. The heirs may come to an agreement to sell it. In addition, third persons can be granted rights over the property, notably if they possess it in good faith. It can also be seized because of debt.

French law does not recognize the sacred nature of these objects. However, under United States Native American law, these objects may not be sold. Could this law not have been applied? When Iran claimed a collection of antiques a few years ago, English judges granted the demand for restitution on the basis of Iranian legislation on cultural heritage protection.[18] Nonetheless, in French courts, as in most other national courts, judges refuse to take foreign public law into account on the grounds of the territoriality principle, which discourages most people from taking legal action.[19] Hence the judge's decision in the present case is not very surprising.[20]

It still may be possible to invoke international agreements. When Sotheby's recently auctioned pre-Colombian objects from the Barbier-Müller collection, the Peruvian Minister of Culture announced that he would "ask the Ministry for Foreign Affairs to claim the objects through diplomatic channels, in accordance with international treaties" (Duchesne and Simode 2013). However, these agreements need to prove effective in terms of both time and space.[21] In that respect, and more particularly with regard to the notion of the sacred, international texts are not always of great assistance. The *Declaration on the Rights of Indigenous Peoples* adopted by the UN General Assembly in 2007 includes provisions on the right to repatriate certain objects, including human remains. However the requirements concerning restitution of ceremonial objects are not very restrictive. The declaration recommends that states should "seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession."[22] In any event, as the judge pointed out, this resolution "cannot be the legal basis of action taken against a commercial auction house hired by an individual to sell goods that the latter claims to own."

Nevertheless, an object with important symbolic value may evidently prompt voluntary restitution. The Louvre (the "state" would be more appropriate since the Louvre holds national collections) was not forced to return the Tetiky frescoes to Egypt, and it can reasonably be said that the fact that it did so was due to the sensitive situation. Some texts actually encourage public institutions to take into account so-called "sensitive" objects. In Article 4-3 concerning the exhibition of sensitive material, the International Council of Museums (ICOM) Code of Ethics states: "human remains and materials of sacred significance must be displayed in

a manner consistent with professional standards and, where known, taking into account the interests and beliefs of members of the community, ethnic or religious groups from whom the objects originated." It further refers to "usage of collections from contemporary communities [that] requires respect for human dignity and the traditions and cultures that use such material" (Article 6-7; ICOM Code of Ethics 2004).

On the contrary, the French circular dated 26 April 2007,[23] which was greatly inspired by the ICOM Code of Ethics, provides few requirements. A paragraph entitled "Respecting human remains" simply reminds us that we must ensure that "human remains are studied, preserved and displayed in accordance with professional standards and with respect for human dignity." In the French system, symbolic and ceremonial objects can be subject only to voluntary restitution unless it can be proven that they were unlawfully removed. The case of the Tetiky murals is a significant example. In order to cancel the sale, it would have been necessary to question the good faith of the Louvre, the outcome of which would have been very uncertain, but in any event the restitution could not be based merely on the sacred nature of the property.

In the present case, the issue of ownership was also discussed and must be linked with the legal interest in bringing the action.

ADMISSIBILITY AND ISSUES OF OWNERSHIP: THE GROUP'S RIGHT TO TAKE ACTION

The admissibility of the action is evidently a key issue when summary proceedings are initiated to stop a sale. According to Article 31 of the Code of Civil Procedure, "taking action is the right of all those who have a legitimate interest in the success or dismissal of a claim, without prejudice to those cases where the law confers the right of action solely upon persons whom it authorizes to raise or oppose a claim, or to defend a particular interest." When the law does not limit the right of action to certain persons, legal interest in taking action becomes crucial. No interest means no action. The judge for urgent applications had to rule on this question. The Association argued that the purpose provided for in its statutes gave it the right to act. Néret-Minet, Tessier et Sarrou claimed that the Association could not "take action on behalf of a third party, namely, the Hopi Tribe," and that it could "take action only within the limits of the Association's purpose of defending the collective interests of the Association's members." On the contrary, the judge ruled that the action was admissible because the interests defended fell within the purpose of the Association, which is "to help minority indigenous peoples everywhere in the world to exercise their rights to survival and self-determination, to ensure that their interests are taken into consideration in an appropriate manner in all decisions that could affect their future, and to make sure they are guaranteed ownership and use of sufficient land and other resources necessary to them." The Association was taking action within the limits of its purpose and not in the interest of the Hopi tribe.[24] The judges indeed noted that the Hopi objects

offered at the sale were "items necessary for expression of their beliefs that enable them to communicate with their ancestors."[25] However, neither the presence of imminent damage nor a clear violation of legislation or of a principle accepted in positive law were acknowledged. On the first point, the Association failed to establish "that it will be absolutely impossible for it to institute proceedings on the merits against the possible acquirers of the objects placed on sale."

The Hopi tribe intended to voluntarily intervene in the proceedings on principal basis. Intervention will be principal where it raises a claim to the benefit of the party filing it (Art. 329 of the Code of Civil Procedure). However, the voluntary intervention was declared null since the adversarial principle was not respected: The auction house was informed on very short notice and did not have time to prepare its defense.[26] The issues of whether the Hopi tribe had the legal capacity to take action and whether it had legal interest in taking action were not addressed in the judgment. However, one can wonder what might have been decided, had the claim been submitted on time.

Difficulties would have arisen concerning the applicable law and the possibility for a tribe to take legal action.[27] Regarding the first issue (this is a traditional solution in private international law) the capacity to take action falls within personal law. For legal entities, the incorporating statutes prevail. Hence United States Amerindian law might be invoked, provided that the Hopi tribe is fully considered as a legal entity under such law. In another case, the Court of Appeal of Paris ruled that a tribe from Easter Island "failed to establish that it was, by reference to its own customary institutions and principles, a legal entity entitled to take action to defend collective or individual interests that it would have the special power or mission to defend, and finally, with respect to the conditions applying to its representation, it cannot be recognized as having civil personhood, [...] and the indigenous group does not have the capacity to take legal action."[28] As pointed out by E. Agostini in a very critical commentary, if it was not possible to identify this legal institution in foreign law, the judge should have applied French law and ruled the group's action admissible, as did the High Court.[29]

In French law, the question of whether a group without legal personality can take action is an issue that would certainly arise. In reality, it is a controversial issue in the courts, and arises mostly in cases involving tribes. In a landmark 1954 decision, the Court of Cassation ruled that works committees had legal personality, even though this concept was not set out in any law, because legal personality "is not created by law" and "belongs to any group that is able to express itself collectively in order to defend licit interests which may later on be legally recognized and protected."[30] According to the judge, this was implicit from the fact that the committees established by law are dedicated to managing "collective interests having the nature of rights that can be defended in justice." In light of this reality doctrine, one could say that the Hopi tribe falls into the category of groups that express themselves collectively as they defend the interests of their ritual practices and the possession of artifacts supporting those practices. The High Court of Paris came to this conclusion in the Bunlap tribe case, ruling that the tribe was "an organised

group of Melanesian origin, with religious and traditional unity, with patrimonial rights and a qualified representative in the person of its leader, and whose members [had] licit collective interests, for which the group [had] legitimate grounds to take action" (High Court of Paris, 12 March 1975).

However, this reasoning was not followed by the Court of Appeal, which ruled that groups could take legal action only if they were created by law, and in most decisions, when a group is not established by law, the right to take action is not ruled admissible.[31] In contrast with this trend, the Court of Appeal of Noumea (in New Caledonia) has admitted actions instituted by clans on several occasions. In one particular judgment, Melanesian clans were granted the right to take action. The Court of First Instance had ruled that they were lacking legal personality, arguing that there was no legislation on clans, contrary to the situation respecting tribes, which are protected by special laws. The Court of Appeal reversed this decision: Pursuant to Articles 4 and 5 of the Territorial Assembly's 14 May 1980 Deliberation No. 116 on land reform, it recognized that the clan was a group governed by special local rules.[32] In a more significant case on the contested use of collective lands, it was judged that "for Kanak people, given the social and symbolic importance of land, a clan as possessor of land rights is the essential pillar of Kanak society; the clan is the pillar around which social life is structured" […] and "denying that the clan has legal personality would be a form of complete denial of this indigenous society as this people because if this were done, this structure, which is the only one invested with duties and thus prerogatives, would be denied the right to take action in its own defence" (Court of Appeal of Noumea, 22 August 2011, decision no. 10/531). The judges referred to the Noumea Accord according to which the Kanak identity is based on a particular relationship with land: "each individual and each clan defined itself in terms of a specific link to a valley, a hill, the sea or a river estuary and carried in its memory the acceptance of other families on its land."[33] These are shining examples of the reality doctrine, but such decisions remain rare.

Beyond this first difficulty, another issue that would have arisen was the nature of the legal interest that could have been invoked by the Hopi tribe. Several arguments might have been put forward: freedom of religion on one hand and property rights on the other. Indeed, the objects belong to the Hopi tribe, and the ownership issue is most often at the heart of restitution cases. Sometimes the interest in taking legal action derives from it, both in summary proceedings and, on the merits, in the outcome of the claim. In summary proceedings, the judge may order protective measures, for instance, that the sale be suspended or that the disputed property be placed in judicial sequestration. Challenging the ownership of the masks might have justified these measures. In this particular case, the Association did not claim ownership of the objects, so, in consequence, there was no dispute on this point and the association did not show "a clear violation of an applicable law or of a general principle accepted in positive law." Under these conditions, the judge could not order protective measures. In the Bergé case concerning the Chinese artifacts, it was also mentioned that "it is not possible to see what could […] justify these

measures, when the association does not claim ownership [of the objects]" (see note 5). The court also indicated that, even though the objects were in the Chinese public domain, and inalienable as such, the association could not replace the authorized representatives of the People's Republic of China who did not intervene in the proceedings. The current owner failed to take action and he was, according to the judges, the only one in a position to do so. Protective measures might have been ordered in response to a violation of property rights, had the owner invoked it.

If the Hopi tribe's action had been declared admissible, granting it a potential property right might have been a problem in regard to the special nature of the claimed property, a form of collective property to which French law is generally hostile. In France, the dominant proprietary model is that of individual property, defined under Article 544 of the Civil Code. However, collective property does exist in French positive law, for example, in rural and forestry matters and in intellectual property law,[34] and the Court of Noumea recently admitted that a Kanak clan had a legitimate right to collective lands.

If the tribe had been allowed to take legal action as owner of the objects, would the outcome of the dispute have been different given the specific rules governing such property? United States Amerindian legislation forbids the sale of ritual objects.[35] If they cannot be sold, there can be no owner. According to the Hopi people, "the spirits called 'Katsinam' are incarnated by the masks in question, known as 'Katsinam masks,' which are used in sacred ceremonies and belong to the tribe but to no individual in particular." The masks "are inalienable since they are considered by the Hopi as vectors through which the spirits of ancestors communicate with the living." However, as we have seen, French courts—like many others—do not take foreign public law into account. For this reason, it is stated in the decision that while the American Indian Religious Freedom Act of 11 August 1978, cited by the plaintiff, recognizes that American Indians have the right to practice their religion, "no provision prohibiting the sale outside the United States of objects having been used in religious ceremonies or that could be so used is applicable in France."[36]

The law of the jurisdiction in which the property is located is French, so it is the law that was applied.[37] In light of this, the restitution claim had hardly any chance of success given the rules governing acquisitions in good faith in France. Under Article 2276 of the Civil Code: "in matters of movables, possession is equivalent to a title." The person who acquires something in good faith becomes the owner. This rule not only proves ownership, but it also creates it. In the event of theft or loss of the good, the true owner may claim it within three years against the possessor in good faith. After that period, the latter fully owns the good. If he or she possesses the good in bad faith, the true owner may claim it within 30 years. In consequence, the Hopi tribe has no chance of getting the masks back. Moreover, it is common knowledge that major museums hold many such objects in their collections. The only way out is thus to negotiate or rely on compassion: for example, the Joe Dassin Foundation acquired some of the [Hopi] objects to give them back their community of origin.[38]

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APPENDIX

Survival International V. Néret-Minet, Tessier & Sarrou

[Hopi Masks case] Translated by Mary Baker*

HIGH COURT OF PARIS

RG No.:
13/52880

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9 April 2013
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SUMMARY ORDER PROCEEDINGS

Rendered on 12 April 2013

by Magali Bouvier, First Vice-President, High Court of Paris, by delegation from the President,

Assisted by Thomas Blondet, Clerk of the Court.

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PROCEEDINGS

At a public hearing on 11 April 2013 presided over by Magali BOUVIER, First Vice-President, assisted by Thomas Blondet, Clerk of the Court,

THE DISPUTE

Authorized to summon at the specified time on the basis of Article 485 of the Code of Civil Procedure by the Order of 9 April 2013, Association Survival International France, by the order issued on 10 April 2013, summoned the commercial auction house, Néret-Minet, Tessier et Sarrou, on the principal ground of Code of Civil Procedure Article 809.1, to apply for an order to suspend the auction sale entitled "Collection L.S.—masques katsinam des indiens Hopis de l'Arizona," scheduled to be held at 2:30 pm on Friday, 12 April 2013 at Hôtel Drouot, 75009 Paris, and to order the judicial sequestration of the movables that were the object of the sale into the hands of the Company, Néret-Minet, Tessier et Sarrou, until a judgement on the merits of the case was made, including granting of costs.

At the hearing, Association Survival International France maintained its application, arguing that members of the Hopi Tribe, who belong to the American Indigenous group of the Pueblos of North America, and who include 18,000 members living in Arizona, consider that the spirits called "Katsinam" are incarnated by the masks in question, known as "Katsinam Masks," which are used in sacred ceremonies and belong to the tribe but to no individual in particular.

The Association, which affirmed that it had recently learned that a large collection of 70 masks was being offered for sale at an auction to be held by the commercial auction house, Néret-Minet, Tessier et Sarrou, argued principally that the sale and dispersal of the masks would constitute imminent damage to the Hopi Tribe, justifying the measure requested; that the objects are inalienable since they are considered by the Hopi as vectors through which the spirits of ancestors communicate with the living; that the Tribe is their collective owner; and that their sale is prohibited by the Hopi Constitution of 1936.

It also claimed that there is doubt as to the ownership of the masks, since the owner who, according to the sale catalogue, had collected nearly 100 items in the United States, could not have been unaware of the illegal nature of the acquisitions thus made.

Finally, it argued that imminent damage would result from the fact that dispersal of the masks would prevent legal action for recovery of property that the Hopi Tribe is considering instituting, and the requested measure was intended to give the Tribe time to establish its rights.

It noted the case law regarding remains and tombs, and regarding family property.

On the admissibility of its action, Association Survival International France argued that the purpose provided for in its statutes gives it the right to act.

Néret-Minet, Tessier et Sarrou requested us to rule that the action of Association Survival International France was inadmissible, and also to rule that there were no grounds for an order granting costs.

Its main argument was that the action by the Plaintiff Association was inadmissible on the basis of Article 31 of the Code of Civil Procedure owing to the Association's lack of right to act and the fact that it had no interest at stake, since it cannot take action on behalf of a third party, namely, the Hopi Tribe, and can therefore take action only within the limits of the Association's purpose of defending the collective interests of the Association's members.

It argued that no proof of imminent damage had been provided owing to the absence of applicable provisions in French positive law; that there were no grounds for asserting that the present owner could have had serious doubts about the ownership rights of the prior collectors or merchants with whom he had dealings; and that ruling on the merits of this issue is within the authority of the Court.

It also stated that other sales of Hopi masks had occurred recently, in particular, on 16 December 2012, when the Musée du Quay Branly had acquired a number of pieces, which contributed to raising awareness of Hopi culture.

It said that since there is nothing illegal about the sale of such objects, there should be no ruling in favor of the application, the only purpose of which was to give the Hopi Tribe time to gather evidence supporting its claim.

It noted that there was no dispute between the Plaintiff Association and itself as to the ownership of the masks.

The Hopi Tribe, represented by its Chairman, declared itself a voluntary intervener in the case, arguing that its intervention, which it described as being in the capacity of the principal, was admissible. Adopting the arguments of Association Survival International France, it made the same requests.

The Company, Néret-Minet, Tessier et Sarrou, asked us to find the voluntary intervention formulated by the Hopi Tribe at the hearing inadmissible because it was done so in conditions that did not permit the Company to prepare its defense since there was failure to comply with Articles 15 and 16 of the Code of Civil Procedure.

On this point, the Hopi Tribe said that it had been informed of the sale late, and had initially hoped to seek an agreement.

REASONS FOR THE DECISION

ON THE ADMISSIBILITY OF THE ACTION OF ASSOCIATION SURVIVAL INTERNATIONAL FRANCE:

According to Code of Civil Procedure Article 31, taking action is "the right of all those who have a legitimate interest in the success or dismissal of a claim, without prejudice to those cases where the law confers the right of action solely upon persons whom it authorizes to raise or oppose a claim, or to defend a particular interest."

An association can take legal action to defend the collective interests encompassed by its associative purpose.

In the case in question, the purpose of Association Survival International France is, according to its statutes, to help minority indigenous peoples everywhere in the world to exercise their rights to survival and self-determination, to ensure that their interests are taken into consideration in an appropriate manner in all decisions that could affect their future, and to make sure they are guaranteed ownership and use of sufficient land and other resources necessary to them.

In accordance with the principle of *nul ne plaide par procureur*, the Plaintiff Association cannot represent the Hopi Tribe or state the claims of the latter.

However, insofar as it is based on the assertion that the objects offered at the sale in question are, to the people of the Hopi Tribe, items necessary for expression of their beliefs that enable them to communicate with their ancestors, the Association's application for a temporary order has to be ruled admissible.

ON THE VOLUNTARY INTERVENTION BY THE HOPI TRIBE:

While it is not necessary to rule on the Hopi Tribe's legal capacity to take legal action, it remains that the Hopi Tribe is not authorized to summon the Company, Néret-Minet, Tessier et Sarrou, on very short notice, and that it was only at the hearing on 10 April 2013 that the Company was informed of the Hopi Tribe's intention to intervene in the proceedings, as the principal, as it has indicated.

The Company, Néret-Minet, Tessier et Sarrou, clearly did not have time to prepare its defense.

In accordance with the provisions of Article 16 of the Code of Civil Procedure, according to which the judge must under all circumstances ensure respect of and himself respect the adversarial principle, the Hopi Tribe's voluntary intervention must be declared null.

ON THE MERITS:

Pursuant to Paragraph 1, Article 809 of the Code of Civil Procedure, the President of the High Court "may always, even when confronted with a serious challenge, order in summary procedure such protective measure or measures to restore the parties to their previous state, as required, either to avoid an imminent damage or to abate a manifestly illegal nuisance."

In this case, Association Survival International France has not established that it will be absolutely impossible for it to institute proceedings on the merits against the possible acquirers of the objects placed on sale.

It should be noted that Association Survival International France does not claim that it is itself the owner of the masks in question.

Moreover, it has not shown a clear violation of an applicable law or of a general principle accepted in positive law.

While the American Indian Religious Freedom Act of 11 August 1978, cited by the Plaintiff, who nonetheless did not provide a translation of it, recognizes that American Indians have the right to freedom of conscience and the right to practice traditional religions, no provision prohibiting the sale outside the United States of objects having been used in religious ceremonies or that could be so used is applicable in France.

Although, in accordance with Articles 11 and following of the United Nations Declaration on the Rights of Indigenous Peoples adopted by the United Nations General Assembly on 13 September 2007, the signatory states are committed to providing "...redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs," this cannot be the legal basis of action taken against a commercial auction house hired by an individual to sell goods that the latter claims to own.

Finally while the masks in question may, for people claiming to belong to the Hopi Tribe or practicing the traditional religion to which they are related, have sacred value, be of a religious nature, or embody the spirits of the ancestors of those persons, it is clear that they cannot be likened to human bodies or pieces of the bodies of living or dead persons that could be protected on the basis of general principles accepted in positive law and contained in Article 16-1-1 of the Civil Code.

The mere fact that the objects can be described as religious objects, symbols of a faith, or divine or sacred representations does not give them the status of inalienable goods so that their sale could be described as a manifestly illegal nuisance or giving rise to imminent damage, giving the President of the High Court ruling in summary proceedings the powers provided for in the above-mentioned Paragraph 1 of Article 809.

The action taken by Association Survival International France also cannot be admitted on the basis of Article 808 of the Code of Civil Procedure, according to which in all cases of emergency the President of the High Court may order in a summary procedure any measures that do not encounter any serious challenge or which the existence of the dispute justifies, given the strong, serious challenges by the Company, Néret-Minet, Tessier et Sarrou, and the lack of dispute between the parties concerning the ownership of the objects in question, which the Plaintiff Association does not claim for itself.

Therefore, there are no grounds for a summary order.

Fairness does not dictate application of the provisions of Article 700 of the Code of Civil Procedure.

FOR THESE REASONS

At a public hearing, made available at the Registry, in accordance with the adversarial principle and in first instance, the Court

Declares admissible the action of Association Survival International France;

Declares null the voluntary intervention by the Hopi Tribe;

Declares there are no grounds for an order;
Rejects the application based on Article 700 of the Code of Civil Procedure;
Finds Association Survival International France liable for the costs of the cause.
Done at Paris on 12 April 2013

The Clerk,	The President,
Thomas BLONDET	Magali BOUVIER

ENDNOTES

1. An American indigenous group of the Pueblos of North America, which has 18,000 members.

2. See V. Mortaigne, "Les masques Hopis n'ont pas trouvé preneur," *Le Monde*, 13 April 2013 [our translation].

3. For more details on this action, which aims at avoiding damage, see Lacabarats, "Compétence des juges des référés."

4. Revisor's note: In the official English version of the French Code of Civil Procedure, the judge for urgent applications is referred to as the "president of the High Court."

5. High Court of Paris, Summary order proceedings, 23 February 2009, No. 09/51666, *Association A.P.A.C.E. v. S.N.C. Christie's France*.

6. The Hopi sale was, however, quite agitated. See Mortaigne, "Les masques Hopis." The auction sale reached 931,435 euros.

7. See "res sacrae," Monier, *Vocabulaire de droit romain*.

8. Monnier, *Vocabulaire de droit romain*, see "res sanctae," see also "res divini juris" [our translation].

9. Revet and Zénati-Castaing, *Les biens*, no. 26*ff*. This would concern only "the public domain, tombs, family souvenirs, and rights relating to human persons, personhood and infringing objects" [our translation].

10. Labbée, "La valeur des choses sacrée ou le prix des restes mortels."

11. Pufendorf, *Droit de la nature et des gens*, 16 [our translation].

12. Using the plastination technique developed by Prof. von Hagens.

13. The relevance of these arguments is debatable given that there is no clear distinction between science and art when it comes to anatomical collections (High Court of Paris, 21 April 2009, Summary order proceedings, No 09/53100, reproduced on in *AJDA*, 2009, p. 797) [our translation].

14. Court of Appeal of Paris, 30 April 2009; the appellate judges were not so restrictive with regard to the possibility of exhibiting human bodies, considering that the provisions under Article 16-1*ff*. of the Civil Code "do not […] exclude the use of human remains for scientific or educational purposes; whereas the respect [owed to the dead] does not imply that society cannot look at death, at the rites—religious or not—associated with it in different cultures, which is why at a museum visitors may see mummies out of their tombs, even relics, without causing indignation or disturbance of law and order; given the expansion of knowledge, mainly due to modern methods; considering that nowadays this knowledge is not only for specialists and scholars but is also accessible to the general public, more and more curious and interested in acquiring new knowledge" [our translation].

15. Court of Cassation, 16 September 2010, Decision No. 09-6745.

16. Court of Cassation, 16 September 2010, Decision No. 09-6745 [our translation].

17. Quebec civil law used to refer specifically to things sacred by nature or by their intended use under Articles 2217 and 2218 of the Civil Code of Lower Canada. For an example of this notion, see the case on the objects belonging to the parish of L'Ange Gardien (Court of Appeal, 28 May 1987, Canada, Province of Quebec). The Superior Court of Quebec decided that these sacred objects had to be given back to the parish. On this case, and more generally on sacred objects, see O'Keefe, "The repatriation of sacred objects," 225. With respect to Quebec law today, see Civil Code Article 2876.

18. The Barakat case, *Government of the Islamic Republic of Iran v. The Barakat Gallery Limited* (Court of Appeal, 21 December 2007). See a commentary of this decision on the Art-Law Foundation website (University of Geneva) indicating that it constitutes a reversal of previous case law.

19. This also happens outside France.

20. But this conception of property law in regard to public law/private law is open to discussion.

21. For example, European texts (such as *Directive 93/7/EEC*) and international texts (such as UNESCO's *Convention on the Means of Prohibiting and Preventing the Illicit Import*, and UNIDROIT's *Convention on Stolen or Illegally Exported Cultural Objects*) can be applied in the states that have ratified them. France ratified the 1970 Convention only in 1997, which is why it could not be applied for a long time.

22. On the weakness of international legal instruments with respect to meeting indigenous peoples' demands, see "Bataille autour d'un héritage," *Le courier*, 24 September 2010, which evokes Karolina Kuprecht's thesis on the restitution and commercial trade of the cultural property and intangible heritage of indigenous peoples.

23. Circular No 2007/007, which created a code of ethics for heritage curators for the application of Article L. 442-8 of the French Code of Cultural Heritage.

24. Which would have been contrary to the rule *nul ne plaide par procureur* ("no one may plead by proxy").

25. On the evolution of associative action in civil and criminal courts, and the idea that an association is fully entitled to take action in the collective interest provided for in its statutes, see Bandrac, "Vérification de la qualité à agir," 102–160*ff*.

26. Pursuant to Article 16 of the Code of Civil Procedure, the judge must under all circumstances ensure respect of and himself respect the adversarial principle.

27. On this point, and on the issue of whether a tribe can take legal action, see the very insightful commentary by Agostini. The case involved a tribe from Bunlap (New Hebrides) who had taken action in order to ban the broadcasting of a documentary film, invoking a violation of their private life and a damage to the tribe's image (Court of Appeal of Paris, 20 December 1976), *Revue Dalloz*, 373.

28. Agostini, *Revue Dalloz*, 373 [our translation].

29. Agostini, *Revue Dalloz*, 376.

30. Court of Cassation, 28 January 1954, *Dalloz*, 1954, p. 217, note by Levasseur, *JCP* 1954.II.7978, conclusion by Lemoine [our translation].

31. On this reluctance of judges to accept the reality doctrine, see the strong criticism by Agostini, *Revue Dalloz*. See also Bandrac, "Vérification de la capacité d'ester en justice," in *op. cit.*, No 103.12.

32. Court of Appeal of Noumea, 9 April 1987. A "group governed by special local rules" is a legal structure specific to New Caledonia. On this bold parallel between a clan and this category, for which the law requires a number of conditions to be met for the group to be entitled to legal personality, without detailing the possible nature of these groups, see the commentary by Vivier.

33. Noumea Accord, 5 May 1998, Preamble.

34. On these notions and the relation to intellectual property, see CECOJI, *Les modèles propriétaires*.

35. Constitution of the Hopi tribe, 1936. On the relation between Native Americans' rights and American law, see Denolle's thesis, *La propriété des objets archéologiques*.

36. But one could question whether the right to property is governed by public or private law. In Quebec law, where private law prevails, the status of sacred things is laid down in the Civil Code and private property can be collectively owned. However, even in the event of a conflict between national laws, international private case law was not in favor of the Hopi Tribe.

37. On the issue of conflicts of laws in cases of restitution of cultural property, see the report by Cornu, *Protection de la propriété culturelle et circulation des biens culturels*; see also, CECOJI, *Study on Preventing and Fighting Illicit Trafficking*.

38. For 4500 euros, the Joe-Dassin Foundation acquired a "mud head," a clown mask dated 1910–1920, which consists of a cloth hood dyed with natural clay.