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Case Hopi Masks – Hopi Tribe v. Néret-Minet and Estimations & Ventes aux Enchères

Hopi Tribe – Néret-Minet, Tessier and Sarrou – Estimations & Ventes aux Enchères – Indigenous object/objet autochtone – Pre 1970 restitution claims/Demandes de restitution pre 1970 – Judicial claim/action en justice – Diplomatic channel/Voie diplomatique – Judicial decision/décision judiciaire – Request denied/rejet de la demande – Enforcement of foreign law/applicabilité du droit public étranger – Illicit exportation/exportation illicite – Inalienability/inaliénabilité – Ownership/propriété – Procedural issue/limites procédurales – Sale/vente – Repurchase/rachat – Donation

Between 2013 and 2014, dozens of Hopi's sacred objects were sold at auctions in Paris despite strong protests and legal actions launched by the Hopi tribe. These actions were unsuccessful because French judicial authorities denied legal standing to the Hopis and considered that the sales did not violate French law.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

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I. Chronology

Pre 1970 restitution claims

First Sale

- **March 2013:** Leigh J. Kuwanwisiwma, Director of the Hopi Cultural Preservation Office, was informed of an upcoming sale of Native American tribes' objects, among which Hopis *katsinam* (masks).¹ The sale was organized in Paris by the **auction house Néret-Minet, Tessier and Sarrou**. Mr. Kuwanwisiwma sent a **letter of objection** to the auction house. The letter was left unanswered.²
- **29 March 2013-9 April 2013:** Various directors of museums in the United States (US), the US ambassador in France Charles Rivkin, and the Chairman and Vice-Chairman of the Hopi tribe sent letters to Néret-Minet asking to delay the sale in order to allow the Hopis to research the provenance of the items.³ The Hopi's lawyer, Mr. Servan-Schreiber, also filed a request with the **Board of Sales**.⁴ A spokesman answered that the Board had no legal grounds to act.⁵
- **9 April 2013:** The association Survival International France summoned the auction house to appear in front of the **High Court of Paris en référé**, which is an emergency proceeding. The Association asked the Court to suspend the sale.⁶
- **12 April 2013:** The demand was **rejected**. Two hours after the ruling the sale was held and the auction brought in a total of \$1.2 million.⁷

Second sale

- **2013:** The French **auction house Estimations & Ventes aux enchères (EVE)** announced a sale of Native American objects to take place in Paris in December 2013.⁸ It specified in its catalogue that no objects had any provenance questions or problems attached to them.⁹
- **29 November 2013:** Survival International France and the Hopi tribe summoned the auction house EVE to appear in front of the **High Court of Paris en référé**. They asked the Court to withdraw 22 lots from the sale containing Hopi sacred objects.
- **6 December 2013:** The claim was **dismissed** by the High Court.¹⁰
- **7 December 2013:** The US embassy requested the auction house to suspend the sale but to no avail.¹¹

¹ Under Hopi beliefs, the *katsinam* embody spiritual spirits and are considered as sacred, hence outsiders who sell and collect them are committing sacrilege.

² Mashberg, "Hopis Try to Stop Paris Sale of Artifacts", L. 82-85, 86-87.

³ Perez, "Marchands et collectionneurs de sacré", L.31-45.

⁴ The Board of Sales (*Conseil des Ventes*) is the authority with the power to regulate auctions and other commercial dealings in France.

⁵ Associated Press, "Paris Auction House Sells Hopi Masks Despite Tribe's Objection", L. 30-32.

⁶ TGI Paris, interim order, 12 April 2013, RG n°13/25880, P.2.

⁷ Horoshko, "Sacred Art for Sale", L. 43-44.

⁸ See at: <http://www.auctioneve.com/html/index.jsp?id=20992&lng=fr&npp=10000>. Accessed 27 January, 2015.

⁹ Soltes, "HARP and the Hopi Tribe", L. 49-50.

¹⁰ TGI Paris, interim order, 6 December 2013, RG n°13/59110, P.2.

¹¹ AFP, "Les masques Hopis se sont très bien vendus à Drouot malgré les protestations", L.20-21.

- **9 December 2013:** The sale took place at the Hotel Drouot. The 24 *katsinam* were sold for the total amount of 520.375 euros.¹²

Third sale

- **June 2014:** EVE planned a new sale of Native American tribes' objects.
- **25 June 2014:** Survival International France and the Hopi tribe summoned the auction house to appear in front of the **High Court of Paris** *en référé*. They asked the Court to withdraw 27 lots from the sale containing Hopi sacred objects.
- **26 June 2014:** Seized by the same claimants, the **Board of Sales** ruled that neither the Hopis nor any other Native American group had legal standing to challenge the sale in France.¹³
- **27 June 2014:** The High Court **rejected** the request made by the Hopis and American officials to issue an injunction to delay the sale. The sale took place as planned but only 29 Hopi headdresses were sold (less than a third of the masks)¹⁴ for a total of \$187.000.¹⁵

Fourth sale

- **9 December 2014:** The **Holocaust Art Restitution Project (HARP)** seized the **Board of Sales** in order to protest against a sale of Navajo and Hopi's cultural items to be held by EVE. The sale included 25 Hopi masks and 8 Navajo masks.
- **12 December 2014:** The Board of Sales **rejected** the claim by HARP considering that the sale was "legal".¹⁶
- **12 December 2014:** The Hopi tribe and Survival International France brought a **judicial action**. This time, they requested the names of the sellers and of the buyers-to-be. The Court **rejected** the claim.¹⁷
- **13 December 2014:** The American ambassador wrote a letter to the auction house asking to delay the sale to allow Hopi and Navajo representatives to determine if the items on sale had been stolen.¹⁸
- **15 December 2014:** The sale was held despite the protests. It brought in a total of 929.425 euros.¹⁹

II. Dispute Resolution Process

Diplomatic channel – Judicial claim – Judicial decision

- The Hopi tribe attempted to prevent the sale of *katsinam* by various means. First, the claimants seized the Board of Sales but their actions were unsuccessful as the Board answered that it

¹² AFP, "Les masques Hopis se sont très bien vendus à Drouot malgré les protestations", L.4-6.

¹³ Mashberg, "Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France", L. 25-30.

¹⁴ Boehm, "Scared Hopi Tribal Masks Are again Sold at Auction in Paris", L. 31-32.

¹⁵ Mashberg, "Despite Legal Challenges, Sale of Hopi Religious Artifacts Continues in France", L. 61-63.

¹⁶ Mollard-Chenebenoit, "Une vente controversée de masques Hopis à Paris", L. 5-6, 10-12, 13-14.

¹⁷ Doiezic, "Drouot: les indiens Hopi contestent une vente de masques «sacrés»", L. 21-22 and L. 28-30.

¹⁸ Saspotas, "La vente controversée d'art amérindien à Paris totalise près d'un million d'euros", L. 13-18.

¹⁹ Saspotas, "La vente controversée d'art amérindien à Paris totalise près d'un million d'euros", L. 6.

had no legal grounds to act (first sale), that neither the Hopis nor any other Native American group had the legal standing to challenge a sale on French soil (third sale), or that the sale was legal (fourth sale). Second, the Hopi tribe (supported by the French branch of the non-governmental organization Survival International) seized the High Court of Paris to obtain “interim relief”. They asked the Court to delay the sale, withdraw the controversial items or to order the auction houses to produce the sellers and the buyer’s identities. All claims were rejected by the Court on different grounds.

- In support of Hopi’s (extra-judicial and judicial) actions, a number of US officials intervened in order to prevent the sales of the disputed objects. Not only did US ambassadors write to the concerned auction houses to ask them to delay the sales, but they also invited an expert to raise awareness on Native American issues before the third auction of June 2014. However, these diplomatic actions were all unsuccessful.

III. Legal Issues

Due diligence – Enforcement of foreign law – Illicit exportation – Inalienability – Ownership – Procedural Issues

- The Hopi Tribe and Survival International France, before each sale, initiated summary proceedings before the High Court of Paris on the ground of Article 809, paragraph 1, of the French Code of Civil Procedure. Pursuant to this provision, the Court can order protective measures either to avoid imminent damages or to abate a manifestly illegal nuisance. The claimants argued that there was imminent damage since the Hopi would be unable to establish their ownership after the sale (and hence the dispersal) of the items.²⁰ The Hopi tribe’s actions under Article 809, paragraph 1, of the French Code of Civil Procedure were rejected by the High Court of Paris. In the first order the Court ruled that the Hopi’s action was inadmissible because the auction house did not have adequate time for the preparation of its defence.²¹ The second and third orders dismissed the tribe’s claim on the ground that it lacked legal personality.²² However, the Court found that the association Survival International France had legal grounds to defend the Hopis’ interests.
- Another issue Survival International France was confronted with was the refusal of the Court of Paris to enforce foreign law. The first order acknowledged the existence of the 1978 American Religious Freedom Act (ARFA), but considered that no provision prohibiting the sales of objects used in religious ceremonies outside the US was applicable in France.²³ The second and third orders mentioned ARFA and the 1990 Native American Graves Protection and Repatriation Act (NAGPRA), but the Court ruled that it is not established that US law

²⁰ Cornu, “About Sacred Cultural Property”, P. 451.

²¹ TGI Paris, interim order, 12 April 2013, RG n°13/25880, P. 4.

²² TGI Paris, interim order, 6 December 2013, RG n°13/59110, P. 2, and TGI Paris, interim order, 27 June 2014, RG n°14/55733, P. 3. On the question of the admissibility of the Hopi tribe to take action, see Cornu, “About Sacred Cultural Property”, P. 455-456.

²³ TGI Paris, interim order, 12 April 2013, RG n°13/25880, P. 5.

prohibited the sale of Native American tribes' items. As regards the second action, counsel for the Hopis argued that the items put on sale had been illicitly exported in contravention of the 1970 UNESCO Convention.²⁴ However, the Court considered that it was not demonstrated that the litigation fell under the scope of this convention.²⁵

- The central issue of the case under consideration related to the ownership of the sacred items claimed by the Hopis, which entailed two problems.

First, the question was to determine whether the Hopi tribe had a title on these objects. The question was raised by the Court because under French law only the true owner can bring an action for the recovery of property. Yet, according to the Hopis' beliefs, sacred objects do not belong to a single person but to the tribe as a whole.²⁶ French law is hostile to such a form of collective property because in France the dominant proprietary model is that of individual property as defined by Article 544 of the French Civil Code.²⁷

Second, the question was to establish whether the sellers had a title over the Hopi items. It seemed that all of these objects were removed in the 1930s-1940s by travellers or missionaries who stole or bought them. According to Hopi leaders, even in the case where the objects were not stolen but sold, their acquisition cannot be considered legitimate as there is a possibility that the sales were made under duress.²⁸ In order to challenge the sellers' ownership, Survival International France argued that the sellers could not have ignored the suspicious provenance of the items. This argument served to prevent the application of Article 2276 of the French Civil Code, which considers that when one acquires a movable object in good faith, "possession is equivalent to a title". By arguing that the sellers ignored the suspicious provenance of the objects and that they did not comply with their ethical obligations, the claimants challenged the good faith of the defendants and therefore tried to avoid the application of Article 2276. However, whereas the third order addressed the issue of good faith,²⁹ the other orders did not focus on the issues of ownership and good faith.

- Another interesting issue relating to the sale of tribal objects is that of the legal characterization of this type of transaction under French law. Survival International France argued that the disputed sacred objects could not be sold under Articles 16-1 and 1128 of the French Civil Code. Article 16-1 specifies that burial places and human remains cannot be sold due to the respect owed to the human body. The argument of the claimants was that the Hopi masks should be granted the same protection as human remains because the tribe considers that they embody the spirit of their ancestors and that they have sacred value. This argument was dismissed.³⁰ Article 1128 of the French Civil Code bans the sale of "non-

²⁴ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, adopted 17 November 1970, entered into force 1972 (823 UNTS 231).

²⁵ TGI Paris, interim order, 6 December 2013, RG n°13/59110, P. 4.

²⁶ Horoshko, "Sacred Art for Sale", L. 20-25; Mashberg, "Hopis Try to Stop Paris Sale of Artifacts", L. 42-43.

²⁷ Cornu, "About Sacred Cultural Property", P. 458.

²⁸ Mashberg, "Hopis Try to Stop Paris Sale of Artifacts", L. 38-43; Horoshko, Sonja, "Sacred Art for Sale", L. 1-5.

²⁹ The Court established that EVE had complied with its ethical obligations. TGI Paris, interim order, 27 June 2014, RG n°14/55733, P. 5.

³⁰ TGI Paris, interim order, 12 April 2013, RG n°13/25880, P. 5; TGI Paris, interim order, 6 December 2013, RG n°13/59110, P. 5.

commercial items” and French case law considers that “family souvenirs” fall under this prohibition. This argument was also dismissed.³¹

IV. Adopted Solution

Donation – Request denied – Repurchase – Sale

- The four sales took place despite the opposition of the Hopi tribe and their supporters as well as the protests of US officials.
- Pierre Servan-Schreiber, the attorney representing the Hopi Tribe, bought two masks (one at the first sale and one at the second sale) in order to return them to the tribe.³² At the second sale, the Annenberg Foundation purchased 24 artefacts for \$530.000. The Foundation declared that 21 objects would be returned to the Hopi Nation, whereas 3 works would be given to the San Carlos Apache Tribe.³³ Navajo officials bought back seven masks at the fourth sale.³⁴

V. Comment

- The case of the Hopi *katsinam* sold by French auction houses underlines the legal gap concerning the protection of the Native American tribes’ cultural heritage outside of the US. At the level of national law, the US has enacted the NAGPRA in 1990, which constitutes a legal basis for the tribes to request the repatriation of cultural items. However, the claims can only be made against museums and US federal agencies. ARFA protects and preserves the traditional religious rights and cultural practices of the American tribes. Nevertheless, as established by the High Court of Paris, this act is not applicable in France as it does not have the effect of prohibiting the sale outside the US of objects used in religious ceremonies.³⁵ At the level of international law, it appeared that no legal instrument was applicable. The 1970 UNESCO Convention may have been applicable *ratione materiae*, however it was not possible to establish whether the disputed objects had left the US after its entry into force for the States concerned. The UN Declaration on the Right of Indigenous Peoples (UNDRIP) was also relevant *ratione materiae* as it establishes the right for indigenous peoples to protect the “manifestations of their culture” (Article 11) and “to use and control their ceremonial objects” (Article 12). Article 31 explicitly establishes the right of indigenous people to protect their

³¹ TGI Paris, interim order, 6 December 2013, RG n°13/59110, P. 5.

³² Horoshko, Sonja, “Sacred Art for Sale”, L. 12-13; Mashberg, “Secret Bids Guide Hopi Indian’s Spirits Home”, L. 63-66.

³³ Annenberg Foundation, “Annenberg Foundation and Hopi Nation announce Return of Sacred Artifacts to Native American Hopi Tribe”, L.1-4.

³⁴ Adamson, “Navajos Buy Back Artifacts at Paris Auction”, L. 2-3.

³⁵ TGI Paris, interim order, 12 April 2013, RG n°13/25880, P. 5.

cultural heritage. However, the UNDRIP is not a legally binding instruments for signatory States.

- These are the reasons why Survival International France turned to French law and its prohibition to sell “non commercial item”. Although the argument was coherent with the Hopis’ beliefs and their apprehension of the sacred objects as living beings, it would not stand from a strict legal point of view. In the Court’s view, the reason is that, on the one hand, the masks cannot be characterized as human remains or as family souvenir. On the other hand, a tribe cannot be considered as a family under French law.
- Another point to be considered is the fact that the Paris Court dismissed the Hopi Tribe on the grounds that it lacked legal personality and therefore had no standing. This is a problem because the next judicial step in this case would have been a recovery action, which can only be brought by the owner of the chattels. If the judge ruling on the merits were to consider that the Hopi sacred objects belonged to the tribe as a whole and not to a single person, such an action would not have been successful. The only way out would be either for individual members of the tribe to bring an action for recovery, claiming that the objects belong to them, or for the Federal State of the US to act on the grounds that some of the objects were removed from Federal or tribal lands and are considered stolen under the Archaeological Resources Protection Act. However, the first solution would go against the Hopis’ beliefs that the sacred objects belong to no one. Moreover, these two legal options raise a problem of proof.³⁶
- As shown, some objects were bought at auction by Pierre Servan-Schreiber and by the Annenberg Foundation. Some scholars consider these moves as counterproductive as they “legitimize” the sale and hence the treatment of the objects at stake as commodities. They also argue that the repurchase of contested items makes “it harder to strengthen the law, ultimately rendering such safeguards the most viable option for indigenous group”.³⁷

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³⁶ Fincham, “Can the Hopi Thwart the Sale of Sacred Objects in Paris Next Week?”, L. 21-27.

³⁷ Birkhold, “Cultural Property at Auction”, P. 90.

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