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The "*Head of a Young Woman*" case: a new Example of International Illicit Traffic of Cultural Property?

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Abstract: If the "*Head of a Young Woman*" case is considered as a case of international illicit traffic of cultural property, it is feasible to think about its prevention by the authorities of Spain as the painting's State of origin and about its repression by the authorities of Spain, France and Switzerland as States of origin, transit and destination respectively. However, the comparison between this case and other cases involving P. Picasso paintings shows the doubts raised in determining the *locus originis* of his artwork. When the authors might be qualified as international (or even universal) authors, the idea of belonging of their work to the heritage of a particular State is not clear at all.

Keywords: cultural property – export - international illicit traffic – heritage – protection - restitution.

FACTS, AND THE DIMENSIONS OF THE CHALLENGES AHEAD

1. Whenever a lawsuit arises over a cultural good with possibilities to be declared as belonging to the Spanish Cultural Heritage, some media do not hesitate to present it in sensational terms, attributing, in the most radical way to some of the factors involved, the commission of crimes such as theft, piracy or smuggling, even during the preliminary proceedings, where, because of their secrecy, they should not be able to have access. One of the clearest examples in this sense was the approach of the well-known "*Odyssey*" case as a history of treasures and pirates.[1] During the first fortnight of August this year, a new case provided the opportunity to the press to present it to us as a smugglers' history.

The cultural good in question is the Picasso painting "*Head of a Young Woman*", seized on Friday July 31 by the French Customs in Corsica, in the Calvi Marina, from the vessel *Adix*, flying a British flag and owned by Jaime Botín, a Spanish cictizen. It was prepared for transfer by air to Switzerland for the purpose of sale. This story begins with the painting's export permission by the customs, from Madrid to London, filed on December 5, 2012 by whom calls himself Mr. Fructuoso, representing *Christie's Ibérica, SL* and under the quality of owner of the artwork. The permission was denied by decision of the Director General of Fine Arts and Cultural Goods and Archives and Libraries of December 19, 2012, at the proposal of the Board of Qualification, Assessment and Export of the Spanish Historical Heritage Goods. Notified this decision to Mr. Fructuoso and *Christie's Ibérica, SL*, its legal representation requests to consider the permission as not being submitted by containing several errors, clarified by the fact that the picture was not on Spanish territory and that

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[1] For two different vissions on this case see M.J. Aznar, "Treasure hunters, sunken State vessels and the 2001 UNESCO Convention on the protection of Underwater Cultural Heritage", 25 *The International Journal of Marine and Coastal Law* (2010) 209-236; and José L. Goñi Etchevers & Victor Fuentes Camacho, "Otro punto de vista sobre el caso *Odyssey*", en 28 *Revista Electrónica de Estudios Internacionales* (2014).

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its direct owner was the panamanian entity *Euroshipping Charter Company Inc*. By order of 28 December 2012, the Secretary of State for Culture, in the exercise of his powers delegated by Minister of Education, Culture and Sport, declared the painting un-exportable. He agreed to require the competent Autonomous Community to instruct the file in order to be declared an item of cultural interest. The aforementioned resolution and order were under appeal, submitted by Mr. Fructuoso on his behalf and by Mr. Jesús María on behalf of *Euroshipping Charter Company Inc*. Dismissed both actions by decision of the Minister of Education, Culture and Sports of 26 July 2013, the action was brought before the Contentious-Administrative Courtroom of the National High Court (*Audiencia Nacional*). In May 20, 2015, the Courtroom also dictated a negative judgement under appeal to the Supreme Court.[2] This appeal being pending for decision, the seizure of the painting in the Corsican port took place, to be sent later to Spain and deposited in the Reina Sofia Museum stores until the case is settled by the court.

2. In general, the "*Head of a Young Woman*" case raises the question of determining whether it is a case of illegal traffic of a cultural good of the Spanish Cultural Heritage. So it has been considered, at least, by the various administrative, judicial and police authorities involved along its development. All the facts lead us to pay true attention to the various mechanisms to struggle against the phenomenon of illegal international traffic of cultural property: the picture's export demand by Spain to the United Kingdom, its prevention by denying it by the Ministry of Education, Culture and Sport and by our Administrative jurisdiction; the subsequent discovery of the good in the port of Calvi, its repression in the intra-EU dimension through bringing actions before the competent criminal and/or civil jurisdictions. If added to such facts, the export to Switzerland which would have been materialised if not being blocked by the intervention of the Customs in Corsica, its potential repression could be considered as a case of extra-EU illicit traffic, also through the courts.

PREVENTION BY THE AUTHORITIES OF THE STATE OF ORIGIN

3. In its first stage, the "*Head of a Young Woman*" case is set as an assumption to permit the final export demand of the litigious good. Not having yet been exported, the struggle against its international illicit traffic is a preventive struggle, aimed at preventing its departure from Spain to UK. Being specified in the preceding paragraph the most significant interventions to that effect from the Spanish cultural authorities, it is now appropriate to stand in the analysis of the judgment of the National Court of 20 May 2015; in particular, in their two substantive issues.

4. As a first substantive issue, it was solved, in the fifth legal basis of the decision, the determination of the place where the painting was located when the export demand was requested and denied. According to the judgment itself and the information disseminated by the press, it was argued by the appellants that the work of art was not located in the Spanish territory because it was constantly

[2] The text of the Judgement (in Spanish) may be found at http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7400725&links=&optimize=20150608&publicinterface=true.

travelling aboard a vessel with British flag, and should therefore be subject to English law. It is thus posed certain affection of the cultural good to its conveyor vessel which reminds us of two recent and famous cases of underwater archaeology. Chronologically: the case of the bell of the "*Santa María*", which led us to write a paper arguing that such a circumstance could get to justify the belonging of the good to the Spanish heritage and the consequent applicability of the Spanish legislation to the case[3], and the "*Odyssey*" case, where the same circumstance leads the Atlanta Federal Court to consider that the coins aboard the frigate "*Nuestra Señora de las Mercedes*" deserved the privilege of sovereign immunity of State ships.

This time it was not yet about assets belonging to underwater cultural heritage, not even cultural goods not being qualified in this sense, which, at some point, had come to be submerged, but only a painting aboard a vessel. Neither problems of private international law were raised concerning the determination of the competent jurisdiction and the applicable law leading to international litigation before the ordinary civil jurisdiction. What it was discussed was not the affection of the painting to its conveyor vessel and its possible legal consequences, but instead the location and its incidence in setting the territorial jurisdiction of the Spanish cultural authorities to exercise the powers conferred by the laws that protect our historical heritage. In accordance with Article 21 of the UN Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982[4], the Court considered the boat, anchored in the port of Valencia at that time, submitted to the rules of the coastal State, in this case to the Spanish administrative rules. As a result, our Administration was competent to declare the good un-exportable.

5. As a second substantive question, it was brought to the National Court to decide on the ownership of the painting. Both the appeal brought before it as the withdrawal previously pronounced by Mr. Fructuoso, were based on the fact that the good was not really his, but the property of *Euroshipping Charter Company Inc.*, to which it was provided one year after its establishment, for which reason it does not appear in writing. Against this, the Court meant in the sixth legal basis of its Judgment that the owner [of the work] was Mr. Fructuoso; mainly because, in the export demand, he appeared as the owner and because the private documentation provided only credited to the Panamanian entity the transfer of the painting and not the property.

However, for the purposes of determining the ownership or not of the painting to the Spanish Heritage, the fact that it belongs to Mr. Fructuoso or to *Euroshipping Charter Company Inc.* is not so important. It is well known that in cases such as the present one, relating to goods of special importance to the cultural heritage of a State owned by a subject of private law, it exists for the State a property right "second degree" that should prevail over the property right "first degree" or merely civil because they find their foundation in state public interests which prevail over private interests. It is precisely this circumstance which determines that, in accordance with Article 33 of Law 16/1985 of

[3] "El caso de la campana de la *Santa María*: un discutible ejemplo de tráfico ilícito intracomunitario de bienes culturales", versión inicial publicada en *La Ley. Unión Europea*, año XXVII, núm. 6494, 31 de mayo de 2006, pp. 1-4, y versión revisada publicada en *Revista de la Facultad de Derecho de la Universidad de Granada. Sección monográfica "Arte, cultura y Derecho"*, 3ª época, núm. 10, 2007, pp. 240-256.

[4] BOE, 14 February 1982.

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June 25 of Spanish Historical Heritage[5] and 50 of Royal Decree 111/1986, of 10 January, partially developing Law 16/1985 of 25 June, of Spanish Historical Heritage[6], the declaration of value of assets comprising our heritage contained in their export demand is considered as an irrevocable offer of sale in favour of the General Administration of the State.

REPRESSION BY THE AUTHORITIES OF THE STATES OF ORIGIN, TRANSIT OR DESTINATION

(1) Illicit traffic intra-EU Spain-France?

6. Despite having been declared un-exportable, the painting "*Head of a Young Woman*" travelled by boat to a Corsican port, where it was seized. This introduction of the good in France raises the possibility of considering the affair as a case of intra-EU illicit traffic of cultural goods to assess its mechanisms of combat that would have been used if not been resolved through cooperation between French and Spanish police authorities. Within these mechanisms is of particular interest the special action for restitution introduced by Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State[7], amended by Directive of the European Parliament and 96/100/EC[8] and Directive 2001/38/EC[9], abolished and replaced by Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (rewrite)[10]. Does the circumstance, that in the respective Articles 15 and 16 of the Directives of 1993 and 2014 this action is configured to be compatible "any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen", raise the question whether in the present case would have been more convenient to choose it or another that might be brought before the competent civil and/or criminal courts? While during the period of validity of Directive 93/7/EEC its several disadvantages lead us to be very critical of its special action, even considering that their biggest advantage was precisely its compatibility with other actions and advising totally let it in reserve to exercise at first criminal prosecution for theft or smuggling, currently our opinion tends rather to orientate in favour of the direct appeal than to the repeated special action. This change of mind is due, on the one hand, to improvements made by Directive 2014/60/EU versus Directive 93/7/EEC and, on the other hand, to the supplement provided by the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[11].

5 BOE, 25 June 1985.
6 BOE, 28 January 1986.
7 OJ L 74 27/03/1993.
8 OJ L 60 01/03/1997.
9 OJ L 187 10/07/2001.
10 OJ L 159 28/05/ 2014. *Corrigendum* OJ L 147 12/06/2015.
11 Hereafter, "Brussels I *bis* Regulation" (OJ L 351 20/12/2012).

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7. All of them highlighted and some of them analysed in detail elsewhere[12], the most notable innovations by which Directive 2014 favours the return of the cultural objects covered are specified as follows: the enlargement of its material scope to all cultural object qualified or defined as national treasures within the meaning of Article 36 TFEU by a Member State without belonging to the categories listed in the Annexes to Directives 93/7/EEC, 96/100/EC and 2001/38/EC and meeting the requirements of antiquity and economic value required by them [Whereas 9, 10 and 21 / articles 1 and 2.1)]; the intensification of cooperation and exchange of information between Member States' central authorities by providing the Internal Market Information System ("IMI") (Whereas 11 and 12 / articles 5 and 7); extension to six months of the period to check that the object in question is a cultural object within the scope of the Directive and extension to three years of the period of return proceedings after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder (Whereas 13 and 14 / articles 5.I.3 and 8.1); inclusion besides the ecclesiastical institutions other religious institutions as beneficiaries of special protection arrangements which may be established by the Member States and, accordingly, return proceedings shall be subject to a time-limit of 75 years (Whereas 15 / article 8.1), reinforcement of the reversal of the burden of proof timidly initiated by Directive 93/7/EEC by replacing the vague terms in which Article 9 is pronounced "provided that it is satisfied that the possessor exercised due care and attention in acquiring the object" by much stronger terms "provided that the possessor demonstrates that he exercised…", which is completed with an open list of criteria to be taken into account to determine if that happened or not (Whereas 17 and 19 / article 10).

8. To the improvements introduced by Directive 2014/60/EU from its predecessors in time it is added the improvement, in determining the *forum*, provided by the Brussels I *bis* Regulation: the establishment of criteria of the actual location of the object at the time of initiating proceedings as a special jurisdiction forum in matters relating to recover cultural objects within the scope of the directives on return [article 7.2)]. Important reasons of effectiveness, which can be summarised in which courts of the Member State where the cultural object is found at the time of the proceedings are those who are in a position for submission to interim protection and to directly execute the decision to end the main proceedings, advise the inclusion in the systems of rules on international jurisdiction of such specific criteria for real movable objects as an alternative to the general forum of the defendant's home. The gap that successive versions of the Brussels Convention and the Brussels I Regulation are presenting in this point had determined that, in cases of not coincidence of the location of the object and the defendant's home in the same Member State the assumption of competence by the State jurisdiction really able to settle their dispute could be frustrated both as a result of making or not making by the legal representation of the defendant [respectively, impugnment with full chances of success or absence (voluntary) with subsequent abstention from office]. This gap would be filled in the draft regulation submitted by the Commission with a global scope, for possession and any real rights over movable property regardless of their nature (article 5.3). Finally, the

[12] "Avances en la lucha contra el tráfico ilícito intracomunitario de bienes culturales", *La Ley. Unión Europea*, nº. 30, 30 de octubre de 2015, pp. 34-35.

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regulation has opted for a more restrictive approach, with a scope limited to special proceeding for return of cultural objects covered by successive EU directives on this subject; but at least for those specific proceedings ensuring that they can be exercised in the courts of the requested Member State not only by the representation of the Government of the requesting Member State (Article 5.1 of Directive 93/7/EEC and Article 6.1 of Directive 2014/60/EU), but also by the dispossessed owner of the good against his will.

(2) Illicit traffic extra-EU Spain-France-Switzerland?

9. According to information released by the press, the painting "*Head of a Young Woman*" would be exported to Switzerland. This fact leads us to consider the possibility that the introduction of the good in Switzerland had come to take place and the subsequent consideration of the affair as an extra-EU case to analyse the mechanisms for combating this other dimension of international illicit traffic of cultural property. From this perspective, it should provide special attention to the following regulatory instruments: first, to the Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (codified version)[13] and its Commission Implementing Regulation (EU) No 1081/2012 of 9 November 2012 for the purposes of Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (codified text)[14], in accordance with which should have made export; on the other hand, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, made in Rome on June 24, 1995[15], in accordance with which return of the object could have been requested.

10. Regulations No. 116/2009 and No. 1081/2012 share with Directive 2014/60/EU a serious disadvantage, and another one that the Directive has successfully overcome. The first is summarised in determining the *locus originis* of the goods to which ones and other instruments are applicable by fixing as reference date January 1, 1993, and we refer to the critical remarks made about it elsewhere[16]. The second is specified in the restriction of the material scope of both regulations to the goods listed in Annex I of Regulation 116/2009. In line with its regulatory background, the Regulations of 2009 and 2012 remain the option called "enumeration method", facing the most advantageous "categorisation method" for its flexibility, which allows to accommodate a greater number of goods. Thus, as it has been emphasised, there remains the obstacle that has ceased to stumble the Directive on the return of cultural objects unlawfully removed from the territory of a Member State since its version of 2014. If this one has happily come to abolish the Annex to Directives 93/7/EEC, 96/100/EC and 2001/38/EC, we believe that the same fate should run the accompanying successive regulations on the export of cultural goods in a future and necessary reform.

11. This affair being considered as a case of illegal export from Spain to Switzerland of the painting, its return could be requested in accordance with special rules contained in Chapter III (articles 5-7) of

[13] OJ L 39 10/02/ 2009.
[14] OJ L 324 22/11/2012.
[15] BOE, 16 October 2002.
[16] "Avances...", *loc. cit.*, p. 37.

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the UNIDROIT Convention of 1995. This regulatory instrument improves the system of EU regulations and directives prior to 2014 when, for the purposes of defining its material scope, it opts in the first moment by the method of categorisation with the broad definition of the notion of "cultural goods" made by its Article 2; but later unfortunately gave input to the enumeration method by demanding that the good belongs to one of the categories listed in Annex[17]. The Convention also deserves praise for dispensing the importance it deserves as a criterion conferring international jurisdiction to the actual situation of the good at the time of the request (article 8.1). Its main obstacle is that the return of unlawfully exported cultural objects to its State of origin may be subject to the consideration of compensation to the possessor in good faith, certainly nuanced through the system of reversing the burden of proof (article 6.1, *i.l.* and *i.f.*, respectively), but that together with other expenses incurred by the return of the good (article 6.4) may be excessively expensive to the requesting Member State.

FINAL REFLECTION

12. Also during that fortnight last August, so full of news about the case in question, some articles were published in newspaper with the new that another Picasso painting, "*The Hairdresser*", stolen fourteen years ago at the Centre *Pompidou* in Paris and found aboard a boat in Newmark (New Jersey), had been returned from the U.S. to France. In this other case the representations of the U.S. and French governments formalised the return of the good through a transfer certificate in which they agreed to declare it as belonging to the French cultural heritage. In which arguments are based this strong statement and the no less radical one that the painting "*Head of a Young Woman*" belongs to Spanish heritage? It is true that it had been declared un-exportable from Spain and that the canvas "*The Hairdresser*" was property of the French State (by legacy of his private owner) before being stolen; but it all leads primarily to the places and times when both pictures were painted [in chronological order: during the so-called "pink period", in transition to Cubism, Pablo Picasso spent in Gósol (Lleida) the summer of 1906, and in 1911, when he was already immersed in his cubist period in Paris]. Is it not somehow questionable to qualify an artwork by a particular author as belonging to the cultural heritage of one State or another by the simple fact of having been realised at a certain time and place?

The comparison between the cases "*Head of a Young Woman*" and "*The Hairdresser*" demonstrates the doubts raised in determining the *locus originis* in the artwork of Pablo Picasso. Some artists may be considered nationals of a particular State by linking exclusively to it all their work. But, for other artists, their work transcends the borders of the State of their nationality or residence, being therefore qualified as internationals; even, in some cases, as universal. This note of internationality or even universality of certain authors determines that the idea of ownership of their work to the Heritage of State X or State Y vanish and, then, we have to make it rely on the sometimes vague criterion of the time and place in which the artwork was created.

[17] K. Siehr, "The Protection of Cultural Property: the 1995 UNIDROIT Convention and the EEC Instruments of 1992/93 Compared", *Revue de droit uniforme*, 1988 – 2/3, pp. 676-677, 679-681 and 681-682.