



DEPARTMENT OF LAW

INTERNATIONAL LAW

**RESTITUTION OF LOOTED ART
IN INTERNATIONAL LAW**

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*Per chi c'è stato,
per chi c'è,
per chi ci sarà.*

INTRODUCTION

Armed conflicts, whether international or intrastate, pose multiple threats to cultural heritage. The looting of art is one of them. History provides many examples of victorious armies plundering the vanquished and bringing home war trophies –often justifying their actions by qualifying them as ' war damage reparations '.

The looting of art across Europe and beyond by Napoleon and his army is but one of several examples. Art theft and looting also occurred on a massive scale during World War II, among others by Nazi Germany and later by the Red Army, looting numerous works of art from their owners and displacing valuable artworks from their original location.

Recent conflicts, such as the wars in Iraq and Syria, show that the problem of looting is very much a contemporaneous one and far from concerning only last century's world conflicts, an additional concern being that looting is now used to finance terrorism.

This work addresses the subject of restitution of art looted in armed conflicts and wars and alternatives to court litigation under five aspects. The legal bases of restitution claims are questioned first .

The main legal difficulties relating to those claims are then identified. The second chapter focuses on the role of provenance research in this context. The next chapter deals with the resolution of disputes through court litigation and attempts to show the rising impact of alternative means . The work concludes with some recommendations for future policy in this field .

Since the second half of the 20th century, States have adopted multiple international instruments – such as the 1954 Hague Convention and its two Protocols, the 1970 UNESCO Convention, the 1995 UNIDROIT Convention, European Council Conventions and Recommendations, UN General Assembly and Security Council resolutions, etc.–in an effort to prevent and repair the

damage caused by the destruction and looting of cultural property during armed conflicts as well as in peace time. At the European level, the European Union and the Council of Europe have adopted a number of instruments that address the problem of the illicit trafficking and the question of the return of wrongfully removed cultural objects.

Soft law instruments, despite their non - binding character, also play an important role in inspiring States and non - State actors (such as museums). The existing international instruments appear sufficient, both on the prevention and the reparation / restitution sides; as such, there appears to be no need to change the body of

existing international law with additional norms. Some of the international and European instruments have had more success than others, but the current attention focuses more on harmonizing rules on offences relating to cultural property.

As for soft law instruments, they seem to have had tangible positive impacts so far. However, the most urgent issue is that international rules are still not uniformly enforced by States – including some European States – and they should be effectively and promptly implemented at the national level through appropriate legislative and administrative measures.

Indeed, in the absence of national laws rendering the international principles applicable in each State's domestic system, the value of such principles remains theoretical. Initiatives taken by Switzerland, Austria, the United Kingdom, the USA and Canada should notably inspire other States to that effect.

Due to the important quantity of art looted throughout the years, it is frequent that States, museums, galleries, auction houses and private collectors face restitution claims from the victims of plundering (and their heirs) .

Since art looted in armed conflicts and wars is more often than not exported out of the country where the looting took place, most restitution claims and the resulting judicial cases have an international element.

Unfortunately, claimants involved in cross - border restitution cases face

multiple legal obstacles, such as conflict of law and/or jurisdiction issues, the task of determining what constitutes looted art, the varying statutes of limitation, burden of proof issues and the applicability of anti - seizure legislation in some States.

These issues, unfortunately quite generalized throughout national legal systems, render the outcome of claims less than certain. Notwithstanding these legal difficulties, the rise of restitution claims and the resulting emphasis on ownership issues have made provenance research a major concern for all actors in the art market.

Legal and ethical standards relating to provenance have greatly developed over the years. Today, many European States and museums have created provenance research programs or commissions to ensure that they do not possess looted object in their collections.

This practice of provenance research certainly leads to a more transparent and responsible art market and discourages looting.

However, experience shows that collecting institutions have not yet been able to overcome the limits of such provenance research – such as the sometimes too short timespan covered by research, the inaccessibility of private collections and the loss of documentation and evidence on provenance over the years – and hence to identify looted material .

For these reasons, disputes concerning ownership of looted art and requests for restitution remain frequent. Although dispossessed owners (or their heirs) can demand the restitution of their looted property

before domestic courts, the previously mentioned procedural hurdles and other shortcomings of court litigation make alternative means of dispute resolution (ADR) – such as arbitration, mediation, conciliation and negotiation – and the possible associated solutions reached through such means more appealing. Some States have put in place non - judicial bodies to help solve Nazi - looted art cases through procedures resembling conciliation.

Contrary to resolution through court litigation, where national judges are bound by the applicable rules of law (which on average tend to disadvantage

claimants), ADR means allow the parties to explore solutions based on other considerations, such as ethical principles and their reciprocal interests, in order to reach ' just and fair solutions ' that are often outside of a national court's jurisdiction.

States who encourage the settlement of looted art conflicts through ADR and/or who have put in place non - judicial bodies in that regard are excellent examples of ' good practices ' in this field.

However, these actions do not allow the preventing of plunder in the first place, nor are they sufficient to ensure subsequent restitution where it is required.

Uniformity of solutions seems to be the most urgent matter to ensure, from the global perspective, an appropriate resolution of looted art restitution cases. Both in private and in public law, this uniformity could be reached at the level of the determination of the applicable law, by applying the law of the place of origin (*lex originis*) instead of the generally applied law of the artwork's situation (*lex rei sitae*).

Uniformity could also be achieved if States were to adopt common standards and rules through the effective implementation of existing international conventions, as well as rules providing for indisputable state ownership on undiscovered cultural property, uniform due diligence standards and specific statutes of limitations applicable to looted art claims.

Moreover, it would also be advisable to set up some form of advisory body at the EU level, which would be in charge with proposing long term solutions and/or giving advice in specific cases.

The third chapter of this work focuses on the Italian Legislation System on restitution of stolen artworks, it investigates its evolution and its discipline during the time .

Therefore its analysis starts with the definition of ' cultural goods ' in the Italian system and describes its international and national circulation - for both public and private goods - underlining the differences between the two of them .

Therefore it has been examined the different adoption of international Conventions and Regulations in our system with the aim to provide a more inclusive discipline for the restitution and circulation of the ' cultural goods '.

CHAPTER I

1. Looting in general

For a long time in human history a consequence of wars, natural disasters and riots has been the taking and plundering the property of enemies or destroying it after their defeat.

Looting of art, archeology and other cultural property for a long time has not been regulated by any particular rule of international law. On the contrary, the taking was generally recognized as a 'right to booty' (*jus praedae*).¹

As Toman recalls, '*the appropriation of a nation's art treasures has always been regarded as a trophy of war which adds to the glory of the victor and the humiliation of the vanquished*'.²

The term 'looted art' reflects bias, and whether particular art has been taken legally or illegally is often the subject of conflicting regulations and subjective interpretations of governments and people; use of the term 'looted art' in reference to a particular art object implies that the art was taken illegally.

Related terms include *art theft* (the stealing of valuable artefacts, mostly because of commercial reasons), *illicit antiquities* (covertly traded antiquities or artefacts of archaeological interest, found in illegal or unregulated excavations), *provenance* (the origin or source of a piece of art), and *art repatriation* (the process of returning artworks and antiques to their rightful owners).³

It was only by the end of the nineteenth century that provisions protecting the

1 TOMAN Jiri, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth, Andershot, 1996, 3.

2 TOMAN, *supra* note 2, 337.

3 O'DONNELL T., '*The Restitution of Holocaust Looted Art and Transitional Justice : The Perfect Storm or the Raft of the Medusa ?*', *European Journal of International Law* (2011), Vol.22 no. 1.

enemy's property , including cultural property, found their place in international conventions codifying the laws and customs of war.

Article 56 of the Hague Regulations ⁴ prohibited explicitly ' *[a]ll seizure of, destruction or wilful damage done to institutions [dedicated to religion, charity and education, the arts and sciences], historic monuments, works of art and science* ' on occupied territory .

To prevent the looting of art both in times of peace and war, it is important that the concerned actors act together in a diligent manner.⁵ Especially in the case of museums where often looted art ends up.

The International Council of Museums (ICOM)⁶ provides, in its Code of Ethics, that museums should ensure before the acquisition that the object in question has not been illegally obtained. To this end, museums should conduct a provenance research aim to establish the full history of the object. ⁷

The provision applies to all new acquisitions and concerns art looted during wars, as well as illegally exported or stolen objects.

It is also promoted the possibility for the national museums association to take action in this respect. The AAMD requires that the museum directors do not ' *knowingly acquire or allow to be recommended for the acquisition any object that has been stolen, removed in contravention of treaties or international conventions to which the United States (U.S.) is in a signatory part, or illegally imported in the U.S.* ' . ⁸

The AAMD adopted specific Guidelines of Acquisition of Archeological Material and Ancient Art (2013) and recently, Protocols for Safe Havens for

⁴ Regulations Respecting the Laws and Customs of War and Land annexed to Hague Convention (IV) Respecting the Laws and Customs of War and Land of 1907.

⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970 .

⁶ *ICOM Code of Ethics for Museums* was adopted in 1986 and revised in 2004. It establishes the values and principles shared by ICOM and the international museum community. It is a reference tool translated into 38 languages and it sets minimum standards of professional practice and performance for museums and their staff. By joining ICOM, each member agrees to respect this code. An organisation created in 1946 by and for museum professionals.

⁷ ICOM Code of Ethics for Museums, adopted in 1986 and revised in 2004.

⁸ Code of Ethics . Adopted in June 1966; amended in 1971, 1973, 1974, 1991, 2001 and 2011.

Works of Cultural Significance from Countries in Crisis (2015) in support of the implementation of the Hague Convention.⁹

Article 4.3 of the Hague Convention concentrates in the concept of ownership which has to be established by the States on art works and archeological objects in particular, as it is explained in this aforementioned article the illicit removal of these objects from their sites will amount to misappropriation, but only if the States had declared their ownership in national laws prior to the removal.

To support States' effort in this matter, UNESCO and UNIDROIT prepared the Model Provisions on State and Ownership of Undiscovered Cultural Objects. This is an example of a soft-law instrument, which can become binding for the States willing to integrate such principles in their national laws and revise them accordingly.

1.1. Restitution of art looted during WWII

Cultural artefacts looted during the Nazi period are considered the last 'prisoners of war'.¹⁰

Numerically, Nazi kleptocracy¹¹ equalled all Napoleonic plunder¹² including 600,000 artworks looted from public and private collections in Europe and URSS.¹³ In Germany alone, US forces recovered 10.7 million art and cultural objects worth an estimated \$5 billion.

During the Nuremberg trial of Alfred Rosenberg (head of Einsatzstab Reichsleiter Rosenberg (ERR), a major looting body¹⁴) looting qualified as a

9 Available at <http://www.aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf>.

10 FEDORUK A., 'Ukraine: The Lost Cultural Treasures and the Problem of Their Return'.

11 PETROPOLUS J., 'Postwar Justice and Treatment of Nazi Assets', in J. Petropolus and J.K. Roth (eds), *Gray Zones* (2005), at 325.

12 FELICIANO H., 'The Great Culture Robbery: the Plunder of Jewish-owned Art', in A. Beker (ed.), *The Plunder of Jewish Property during the Holocaust* (2001), at 166.

13 PETROPOLUS J., 'Written Comments for House Banking Committee Hearing of 10 February 2000'.

14 The Einsatzstab Reichsleiter Rosenberg (ERR), the 'Special Task Force' headed by Adolf Hitler's leading ideologue Alfred Rosenberg, was one of the main Nazi agencies engaged in the plunder of

crime against humanity and a war crime.¹⁵ During the 1950s compensation negotiations, the Germans termed their strategy ' *Wiedergutmachung* ' ¹⁶ (' making whole ' or ' making good again ').

However, Auschwitz and Treblinka cannot be financially evaluated. In 1951 Israeli Knesset member Menachim Begin scorned that the murdered were seeking compensation from murderers. ¹⁷

Wiedergutmachung's use was specifically rejected in the 1990s by senior officers of the Conference of Jewish Material Claims Against Germany.

Without diminishing the legal entitlement, anxieties persist that Holocaust claims are unseemly, involving undue profits, grave robbing, blood money ; terrors of provoking anti-Semitic backlashes are realistic, for example the Swiss press' publication of anti-Semitic cartoons during the banking negotiations.¹⁸

In light of the Swiss experience, Austria's Jewish community leader, Pul Grosz, stressed the importance of understanding the success of Austrian art restitution.

Anxieties cannot pre-empt claims, but negotiations must safeguard against media exploitation while issuing reminders that ' life [or indeed death] does not have an ' undo button ' . ¹⁹

Looted art restitution casts light upon: the self-identity of Nazi perpetrators and associates; their view of victims; survivors' views of their pasts and the place of relics within those pasts; the role of heirs, and how law facilitates or hampers the reversal of thefts which foreshadowed mass murder.

Restitution cannot provide a whitewashing voucher, nor overlook reconciliatory objectives involving truth finding and healing processes.

cultural valuables in Nazi-occupied countries during the Second World War.

15 IMT Charter, 82 UNTS 279, Art.6, later de-emphasized as a ' grave breach ' in Art. 147 Geneva Convention IV 1949, 75 UNTS 87, and Arts 53 and 85 of Additional Protocol I, 1125 UNTS 3.

16 The German word *Wiedergutmachung* after World War II refers to the reparations that the German government agreed to pay in 1953 to the direct survivors of the Holocaust, and to those who were made to work as forced labour or who otherwise became victims of the Nazis.

17 EIZENSTAT S.E., ' *Imperfect Justice* ' (2003), at 14. See also Taylor, ' *Where Morality Meets Money* ', in Bazylar and Alford, ' *Holocaust Restitution* ' (2006), at 163-164; and generally J. Authers and R. Wolfe, ' *The Victims' Fortune* ' (2002).

18 See note 3.

19 ELSTER J., ' *Closing the Books* ' (2004), at 167; Cowen, 'How Far Should We Go? ', in J. Elster (ed.), *Retribution and Reparation in the Transition to Democracy* (2006).

Restitution and reconciliation must be mutually supportive.

Art claims (often of only symbolic value) seek the actual object's return. ' Holocaust survivors ' were ordinary people, with families, homes, possessions etc. Restitution can help the process of re-humanization, resurrecting stories, ' *dissipating shadows created by years of oblivion* ' .²⁰

The 2005 UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violence of International Human Rights Law and Serious Violations of International Humanitarian Law define restitution as also encompassing dignity, worth, identity and family.

A further restitutive aspect is these claims' capacity indirectly to try the Holocaust.

Also the Restitution claims highlight the inter-meshing of law, ethnicity and identity. As Title II of the US 1998 Holocaust Victims Redress Act notes, looting and racial annihilation shared a pathology of domination, subjugation and extermination.²¹

The ideological nexus characterized Jewish property as ' property stolen from the people '

(*geraubtes Volksvermögen*) . Looting constituted appropriate compensation for supposed pre-1933 sufferings.²² Himmler 's commissioning of museums comparing ' degenerate ' work and Aryan achievements sought to empathize gulfs between culturally consecrated Aryan ideals and ' valueless expressions of the ' *Untermenschen* ' .²³

Looting both presaged, and resulted from, genocide. Representing a key development to Hilberg's increasingly intensifying stages leading towards annihilation, looting reified the negation of those deemed unworthy treasures. Consciously or unconsciously ' *economic liquidation foreshadowed physical*

20 FELICIANO H., supra note 8; H. FELICIANO, ' The Lost Museum ' (1997), at 244.

21 FALCONER, ' *When Honour Will Not Suffice: the need for a legally binding international agreement regarding ownership of Nazi-looted art* ', 21 University of Pennsylvania Journal of International Economic Law (2000) 383, at 395-396, citing D. Roxan and K. Wanstall, *The Rape of Art* (1964), at 22.

22 BAJOHR F., ' *Expropriation and Expulsion* ', in D. Stone (ed.), *The Historiography of the Holocaust* (2005), at 54; F. Bajohr ' *Aryanisation in Hamburg* ' (2002), at 59.

23 *Untermenschen* is a term that became infamous when the Nazis used it to describe "inferior people" often referred to as "the masses from the East", that is Jews, Roma, and Slavs.

liquidation ' .²⁴

As *thefticide*, it is genocide's only reversible aspect, dubiously even reaching the standard of symbolic victory.

As noted during parliamentary debates on the UK Holocaust (Return of Cultural Objects) Act 2009, restitution affords some justice, legally and financially drawing one line under the Nazi era.²⁵

Interest in Holocaust restitution claims rose in the 1990s due to many fiftieth commemorative anniversaries. Survivors' attendance at such events cohered activism and arrested processes of decaying memory.

Research was aided by increased archival access and the internet. Swiss gold and banking scandals aided consciousness raising. States' anxieties regarding past complicities encouraged national legislation and (limited diligence) in returning Holocaust assets.

Further impetus arose from the establishment of the World Jewish Congress Commission for Art Recovery, and the 1998 Washington Principles²⁶ effectively internationalized the US Association of the Art Museum Directors' principles.

Restitutions claims of victims of Nazi looting and their heirs and the increasing awareness on this issue led States to think about principles which should guide the resolution of disputes in this field .

Regarding the legal regulation of Holocaust looted art it can be considered as paradoxical : sometimes too much law, at other times none.

The post-war restitution was resolved by inter-state treaties, casting aside private restitution, legal difficulties are considered from two perspectives : first, the historical context and legal resources available in the 1940s and, secondly, the legal context confronting later, private claims.

Even in 19th century, post-war restitution had a legal standing. Post-Napoleonic defeat, the Louvre was sacked and objects returned to places of

24 COTLER, ' *The Holocaust, Thefticide, and Restitution: a Legal Perspective* ', 20 Cardozo Legal Review (1998), at 607.

25 COUNT LAMBSDORFF, ' *The Evolution and Objectives of The Holocaust Restitution Initiatives* ' (Symposium on Holocaust Restitution), 25 Fordham International Law Journal (2001) 145, at 171 and 175 (hereinafter ' Symposium ').

26 Washington Principles on Nazi-confiscated Art , 1998

origin. This model focused on inter-state resolution and continued (Treaties of Versailles, Saint-Germain, and Trianon ²⁷) until 1940s.

Only armed conflict law criminalized, and thus ' personalized ' wartime plunder.

The 1907 Hague Convention Concerning the Laws and Customs of War on Land and Annexed Regulations forbade private property's confiscation²⁸ and pillage.

Property of municipalities, institutions dedicated to religion, charity, and education, the arts and sciences, even where state property, was to be treated as private .²⁹

Seizure of such institutions, historic monuments, works of art and science was forbidden and subjected to legal redress. Compensation was provided for. However, such laws pertained to occupying powers and were thus irrelevant as regards the 1930s plunder of German Jews' property.³⁰

Under the 1954 Convention for protection of Cultural Property in the Event of Armed Conflict, signatories could take enforcement against violations. The associated protocol stressed post-war property return.

However it was state focused with no dispute settlement mechanism, and was non-retroactive. Without countenancing private restitution, it simply reinforced state' obligations to negotiate.

Post-war the Allies undertook property forfeiture initiatives. US Military Government (MG) Law No. 52 contained denazification provisions which provided for property seizure from senior Nazi organizations and persons and also the applications of such rules to people residing outside Germany.

It blocked property transferred under duress, wrongful acts, and confiscation. MG could seize, take title to, and manage or control such properties.

Control Council Law No. 10 clarified that sanctions for those criminally convicted included restitution of property wrongfully acquired. US Military

²⁷ 112 BFSP 1, 112 BFSP 317, and 113 BFSP 486.

²⁸ Hague Convention Concerning the Laws and Customs of War on Land and Annexed Regulations, Art. 46 , adopted in 1907.

²⁹ Hague Convention Concerning the Laws and Customs of War on Land and Annexed Regulations, Art. 56, adopted in 1907.

³⁰ Looting was legal under the Nuremberg laws and illegal under unrepealed general theft laws : CURRAN, in Symposium, *supra* note 11, at 159; A. Barkai, *From Boycott to Annihilation* (1989).

Government Law No. 59 required Germans to report certain property. However as a compromise it was turned in only if held by war criminals.

Even the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which actually envisages recourses for private citizens, directs the Holocaust claimants towards other recovery routes.

Article 13 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property obliges states to ensure earliest possible restitutions of illicitly exported cultural properties and to admit actions for recovery of lost or stolen cultural property brought by or on behalf of rightful owners.

Article 7 (b) prohibits the import of cultural property stolen from museums or similar institutions. However, since negotiations were envisaged being made through diplomatic offices it relies on states acting on behalf of claimants. Further, the 1970 Convention fails to address cultural properties looted from, or possessed by, private individuals. It is simply a broad remedial measure aimed at preserving member states' cultural heritages.³¹

As noted, claimants are not aided by the 1995 UNIDROIT Convention and therefore continue to crowbar claims into existing general legal mechanisms.

In stolen property claims, Jewish law does not generally recognize time-bars. Decisions on when statutory periods commence are regularly left to judicial discretion.

A period often begins once a plaintiff discover or, exercising reasonable diligence, should have discovered an artwork's whereabouts. However, pre-Internet research was difficult and records existed in various languages and in libraries, offices, and homes throughout Europe.

The US imposed a time-limit on property recovery by Executive Orders in 1941 and 1942 which stated that ' *any property within the United States owned or controlled by a designated enemy country or national thereof could be transferred ... to Alien Property Custodian (operating within the Executive Office of the President) as ... necessary for the national interest* ' . Many

31 GARRETT, ' *Time for a Change ? Restoring Nazi-Looted Artwork to its Rightful Owners* ', 12 Pace International Law Review (2000) 367, at 390-391.

missed the deadline of spring 1955 .³²

Arguably, statutes of limitation should be legislatively suspended until the unique practical difficulties surrounding Holocaust claims dissipate.³³

Due diligence (itself an uncertain standard) imposes onerous duties on inexpert, under-resourced claimants, ignoring their anxieties regarding prejudiced backlashes and regularly intoned warnings of failure.

Due diligence seems unpalatable and circumstantially inappropriate, operating as a ' moral makeweight ',³⁴ reinforcing notions of ' survivor duties '. Diligence's antonym implies neglect, unhappily echoes ' lambs to slaughter ', and effectively blames victims . By contrast ' demand and refusal ' rules stall commencement of limitations periods until owners make demands for return which the possessor refuses .

Thefticide's criminal context may arrest time-limits .

The International Military Tribunal (IMT) denounced looting as constituting war crimes and crimes against humanity . Thus, looting becomes non-prescriptible, given Article 1 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against humanity . However, the US is a non-participant state, and the treaty envisages only state responsibility and individual criminal responsibility .

Further, although crimes committed in occupied territories (including Austria) are covered, it will not assist dispossessed German Jews because the IMT considered international law insufficiently crystallized to cover pre-1939 German confiscations³⁵.

The missed opportunity presented by the UNESCO Draft Declaration (which covered the dispossessed of both occupied and non-occupied peoples) is yet

32 McCarter Collins, ' *Has the ' Lost Museum ' Been Found ? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to ' Do Justice ' For Holocaust Victims on the Issue of Nazi-Looted Art* ', at 115-118.

33 Cuba, ' *Stop the Clock : the case to suspend the statute of limitations on claims for Nazi.looted art* ', 17 Cardozo Arts & Entertainment LJ (1999) 450.

34 Weil, ' *The American Legal Response to the Problem of Holocaust Art* ', 4 Art, Antiquity & Law (1999), at 292-293.

35 Although Control Council Law No. 10 did not require a ' war nexus ' for crimes against humanity , there was tribunal disagreement regarding this omission's significance : see the *Einsatzgruppen* (*US v. Otto Ohlendorf et al.*, 4 CCL No. 10 Cases 411 (1948)), *Flick* (*US v. Friedrich Flick*, 6 CCL No. 10 Cases 1187 (1947)), *Ministries* (*US v. von Weizsaecker et al.* 13 CCL No. 10 Cases 112 (1949)) and *Justice* (*US v. Alstoetter et al.*, 3 CCL No. 10 Cases 954 (1947)) cases.

again striking . Rather than providing a basis for private claims, criminal categorization may simply render statutes of limitation inapplicable .

The 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), guarantees various property rights , especially appears claimant-friendly, given the partial horizontalization in the UK via the Human Rights Act 1998, claimants could pursue other individuals.

However, Article I, Protocol No. 1's generality and difficulties regarding retroactivity dilute the ECHR's utility. Conceivably, artwork looted pre-ECHR is a violation which continues into the ' active ' period of ECHR jurisdiction.³⁶

The Association of American Museum Directors suggested that normal legal defences be resisted in Holocaust claims. Specialized legal changes could diminish litigation obstacles while highlighting restitution's moral imperative. However, this implies a privileging of Holocaust claims over those of other art-theft victims,³⁷ thus raising questions regarding equal protection under law. Exclusive legal rights are not unknown (unique predicament of the Native Americans) .

It seems constitutionally untenable to allow Jewish victims' claims while denying identical non-jewish claims. However, Jewish looting's intertwining with genocide perhaps justifies different treatment .

If looting was racially motivated would this be presumed if involving Jewish victims (thus excluding defences) but require proof if involving other groups ? There are allegations regarding Roma and Sinti that these were targeted for supposed criminal tendencies (rather than ethnic origins) initially operated to exclude their eligibility to compensation .³⁸

There are basically two options for lawmakers – a wide or narrow principle.

If we adopt a wide principle regarding all war victims' entitlement to restitution is sought then it is unacceptable to give Nazi victims rights above other war victims.

³⁶ App. No. 214/56, *De Becker v. Belgium*, Comm. Dec., (1959-60) 2 Yrbk (ECHR) 214.

³⁷ WALTON, 'Leave no stone unturned : the search for art stolen by Nazis and the legal rules governing restitution of stolen art ', 9 Fordham Intell Prop Media & Entertainment LJ (1999), at 600.

³⁸ WOOLFORD and WOLEJSZO, ' Collecting on Moral Debts: reparations for the Holocaust and Porajmos ' 40 L & Society Rev (2006) , at 880, 886-887.

Otherwise a narrowed principle concentrates on recognizing the enormity of the Jewish Holocaust via legal amendment . This is implied by the 2009 Terzenin Declaration and exemplified by the UK Holocaust (Return of Cultural Objects) Act 2009.³⁹ The downside of this approach implies that future victim-groups must surpass Holocaust-paradigmatic standards of suffering.

Claims have proliferated without any corresponding development in governing legal frameworks. Consequently, some argue that an international treaty could provide more formalism regarding substantive and procedural clarity . Multilateral treaties envisage inter-state frameworks and continue to elide secondary rules of state responsibility with remedying breaches of International Law .

Individual could put pressure on their own state if it was lax in negotiating on their behalves. Alternatively individuals could force ' foreign ' states hosting artworks to conduct ownership investigations. However, claimants remain at the mercy of state actors acting haltingly or not at all.

Treaties also militate against international law trends favouring principles of compliance – soft law – rather than rule-breach.

Indeed, bespoke soft law instruments like Washington Principles, Vilnius Declaration, Terenzin Declaration 2009 , represent soft law, more suited perhaps to Alternative Dispute Resolution (ADR) than courts . The road to Hell is always paved with good conventions.⁴⁰

Litigation is time-consuming, expensive and unpredictable. Negotiation , conciliation, and mediation are spreading, especially endorsed by the US Association of Art Museum Directors . Even in the context of inter-state disputes over representative national treasures , the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its countries of origin or its Restitution in case of Illicit Appropriation has accepted the addition of mediation and conciliation to its mandate, recently adopting rules and procedures in this connection .⁴¹

³⁹ Terenzin Declaration on Holocaust Era Assets and Related Issues, 2009.

⁴⁰ Bernard Victor Aloysius Röling.

⁴¹ Rec. No. 4 Sept. 2010, available at : <http://unesdoc.unesco.org/images/0018/001896/189639E.pdf>

Art world experts might constitute more suitable panels than courts and, along with a title registration scheme, might even create positive economic incentives for desirable behaviour. The New York Holocaust Claims Processing Office (HCPO)⁴² utilizes inter-disciplinary experts, drawing upon diverse legal, historical, economic and linguistic backgrounds.

This facilitates the art-historical background research . Unlike lawyers, the HCPO pursues claims where investigative expense outstrips artworks' value and focuses on all restitution avenues out-with the court system.

Another important point is the Identity of the Claimants . In fact if living victims could criticize compensation negotiations as ' *resolution by remote control* ' ,⁴³ heirless property produces further complications.

If owners/heirs remain untraceable, how should museums proceed in order to avoid charges of unjust enrichment ?

Museums can contribute to Holocaust restitution fund , auctions of artworks may raise proceeds for funds, basically the ADR may offer fora more suitable for resolving such issues.

The World Jewish Restitution Organization (subsidiary organ of the World Jewish Congress) works in conjunction with the German Claims Conference (GCC), whose work is described as ' the collective accomplishment of world Jewry ' .⁴⁴

The GCC was appointed the legal successor to unclaimed Jewish property, including that of dissolved Jewish communities and organizations . Thus, Jewish assets still unclaimed after filing deadlines did not simply remain with modern owners or revert to Germany.

The Holocaust restitution movement is the result of contemporary liberal societies accepting their inter-generational responsibilities, increasingly acknowledging and apologizing for past injustices.

and Draft Rules and Procedures, available at :

<http://unesdoc.unesco.org/images/0018/001834/183433e.pdf>

42 The Holocaust Claims Processing Office (HCPO) has advocated on behalf of Holocaust victims and their heirs, seeking the just and orderly return of assets to their original owners. In fulfilling this mission, the HCPO has facilitated the restitution of millions in bank accounts, insurance policies, and other material losses and the resolution of cases involving more than 56 works of art.

43 FRUMKIN, ' Why Won't Those SOBs Give Me My Money ? ' , at 95.

44 MILLER, ' The Conference on Jewish Material Claims Against Germany ' , at 580-581.

There are also other similar movements concerning Japanese World War II crimes, the Roma Holocaust, dispossessed Palestinians, Armenian Genocide victims, and African-American slavery which are an after-growth of the Holocaust restitution initiative.⁴⁵

Property restitution may represent a final stage in the Holocaust's legal reckoning while simultaneously acknowledging that perpetrators cannot establish moral virtue by ' *buying a just and ethical past* '.⁴⁶ At worst restitution is confused with or substitutes for responsibility . However, rather than a conclusion , it could be a component in a process of recognition.

2. Legal difficulties relating to restitution claims

Due to the important quality of the art looted throughout the years , it is not uncommon that States, museums, galleries, auction houses and private collectors face restitution claims from the victims of the plundering and their heirs.

Art looted during armed conflicts and wars is generally exported out of the country in which was looted; as such, most restitution claims and the resulting judicial cases have an international characteristic.

Unfortunately, claimants involved in such cross-boarder restitution cases could face multiple legal obstacles, such as the correct definition of what constitutes looted art in general , the conflicts of law or jurisdiction often arising in such cases, the different statutes of limitation, burden of proof issues and last but not least the applicability of anti-seizure legislation in some States which contribute to the cases' uncertain outcome.

Basically cases addressing these issues exist in multiple States throughout and outside the European Union , which underlines the currently constitute generalized problems in the international community.

⁴⁵ BAZYLER, ' The Holocaust Restitution Movement in Comparative Perspective ' , 20 *Berkeley J Int'l L* (2002) 11.

⁴⁶ FOGELMAN , in Symposium, supra note 17, at 167.

Indeed, it is difficult, currently, to identify States where the restitution claims brought before courts encounter most or less problems. However, it appears that the States with the best practices are the ones who encourage the settlement of conflicts through means of alternative dispute resolution (ADR) or who have put in place non-judicial bodies to help solve looted art cases.

Today, not only States members of the European Union but also museums have created provenance research programs to ensure that they do not possess looted art objects in their collections.

Certainly this practice has helped to obtain a more transparent and responsible art market that discourages looting. However, this system has its limits – such as too short timespan covered by research, the inaccessibility of the private collections and the loss of documentation and the evidence on provenance over the years – and hence to identify looted material is difficult.

For these reasons , disputes concerning ownership of looted art and requests for restitution remain frequent.

Dispossessed owners or their heirs can demand restitution of looted property before domestic courts , which have procedural hurdles and other shortcomings , make the possibility to use alternative means of dispute resolution (ADR) and the possible solutions reached through these means more appealing as we said before.

Some States have created non-judicial bodies to help solve Nazi-looted art cases through procedures similar to conciliation. ADR allow the parties to explore solutions based on their consideration which are different from as the applicable rules of law – such as ethical principles and their reciprocal interests, with the main objective been reaching ' just and fair solutions ' that are often outside of a national court's jurisdiction.

However, these practices do not prevent plunder in the first place, not are they sufficient to ensure the restitution where it is required.

2.1. The notion of 'Looted Art'

Art looting has a long history, the winning party of armed conflicts often plundering the loser, and in the absence of social order, the local population often joining in. The contents of nearly all the tombs of the Pharaohs were already completely looted by grave robbers before the invasion of Egypt by Alexander The Great in 332 BCE. There have been a total of seven sackings of Rome.

Other famous examples include the Roman Sack of Corinth in 146 BC, the Sack of Constantinople by the Fourth Crusade, the Sack of Baghdad, Herman Cortes and the looting of the Aztec gold. In only some of these was the removal of artworks for their own sake a primary motivation.

After the looting of Europe by Napoleon, others copied the institutionalized model of systematic plunder and looting. During the American Civil War, legal frameworks and guidelines emerged that justified and legalized the plunder and looting of opposing parties and nations.

Henry Wager Halleck, a United States Army officer, scholar, and lawyer argued: '*No belligerent would be justifiable in destroying temples, tombs, statutes [sic], paintings, or other works of art (except so far as their destruction may be the accidental or necessary result of military operations.) But, may he not seize and appropriate to his own use such works of genius and taste as belong to the hostile state, and are of a moveable character?*'⁴⁷

In July 1862, Francis Lieber, a professor at Columbia College, who had worked with Halleck on guidelines for guerrilla warfare, was asked by Halleck, now General-in-Chief of armies of the Union, to develop a code of conduct for the armed forces.

⁴⁷ HALLECK, International law, or, Rules regulating the intercourse of states in peace and war. Ch. XIX, Sections 10–11. (1861)

The code of conduct, published as General Orders No. 100 on April 24, 1863, signed by United States President Abraham Lincoln, later became known as the Lieber Code⁴⁸ and specifically authorized the Armies of the United States to plunder and loot the enemy – a mindset that Hitler's armies copied one century later.

The Lieber Code said in Article 36: ' If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation.

The ultimate ownership is to be settled by the ensuing treaty of peace.
⁴⁹Russian and American forces relied on similar frameworks when they plundered Germany after the defeat of the Nazis.

The Lieber Code further defined the conditions of looting and the relationship between private plunder and booty and institutionalized looting ' *All captures and booty belong, according to the modern law of war, primarily to the government of the captor.* ' , ' *Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate.*' and ' ... *[I]f large sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government.* ' ⁵⁰

During World War II, the Nazis set up special departments ' for a limited time for the seizure and securing of objects of cultural value ' .⁵¹

The legal framework and the language of the instructions used by Germany resembles the Lieber Code, but in the Nuremberg Trial proceedings, the

48 LIEBER, LL.D. Instructions for the Government of Armies of the United States in the Field. Originally Issued as General Orders No. 100, Adjutant General's Office, 1863, Washington 1898: Government Printing Office

49 HARTIGAN, R. SHELLY, ed. Lieber's Code and the Law of War. Chicago: Precedent, 1983.

50 LIEBER, *supra* note 36.

51 Letter from Rosenberg to the Reich Commissioner for the East and Reich Commissioner for the Ukraine, April 27, 1942, as cited in: Nuremberg Trial Proceedings Vol. 4. Twenty-Second Day. December 18, 1945, Morning Session, Document 153-PS, Exhibit USA-381

victorious Allied armies applied different standards and sentenced the Nazis involved as war criminals.

Article 6 of the Charter of the International Military Tribunal of Nuremberg, detailing the Jurisdiction and General Principles, declares the ' *plunder of public or private property* ' a war crime⁵², while the Lieber Code and the actions of the Allied armies in the aftermath of World War II allowed or tolerated the looting. The main objective of the looting is made clear by Dr. Muhlmann, responsible for the securing of all Polish art treasures: '*I confirm that the art treasures ... would not have remained in Poland in case of a German victory, but they would have been used to complement German artistic property.*'⁵³

2.1.1. The notion of art

Cultural objects are often of major cultural, artistic and historical importance. In addition, in many cases countries assert spiritual, emotional ties with iconic cultural materials as they are important for the national identity.

Cultural heritage items are most important to the people who created them or for whom they were created or whose particular identity is bound up with. In addition, works of art and antiquities may have a significant financial value, which is established by the market and hence by the demand and supply rule. The illicit trafficking in cultural objects is due to this latter reason.

Because of the artworks' uniqueness and values, as well as the emotional link between dispossessed owners and objects, those deprived of their artworks have often sought restitution instead of financial compensation.

⁵² Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal, II. Jurisdiction and General Principles, Article 6. Yale.edu. Retrieved on 2011-06-12.

⁵³ Nuremberg Trial Proceedings Vol. 4. Twenty-Second Day. December 18, 1945, Morning Session. Yale.edu. Retrieved on 2011-06-12.

It is hence the uniqueness and the cultural importance of artworks that justify a different treatment from ordinary commodities.

However, having specific rules dedicated to the protection of art objects implies that the notion of art be defined, and this is one extremely difficult thing to do. Since national and international law instruments do not provide a definition of ' art ' or ' culture ' , the question will be left to judges, arbitrators or the parties themselves in each case, which may create uncertainty. As explained above, it is submitted that what makes art different is its uniqueness and the element should be decisive.

2.1.2. Looting vs forced sale

An important difference that has to be underlined is the definition of looted art and forced sale to try to understand better the problems that claimants have to face when they start the process of restitution.

The notion of looting refers to the situation whereby an object is taken from a person, against a latter's will and in breach of existing legislation, generally in times of military and political disorder - ' *[l]ooters sometimes have a direct ancestral tie to the crafts of excavated materials. They often have few employment options [...]. Essentially, the money illicit excavators earn from unearthing antiquities often goes to feed their families* '.⁵⁴

Although there are a lot of examples which show looters in a position of power over their victims, it is important to note that cultural property is also often stolen, excavated or looted by the impoverished population living in conflict zones.

On the other hand the notion of forced sale, however, is more difficult to define. The main difference is that a forced sale happens when State

⁵⁴ ALTERMAN and DAHM, ' National Treasure : A Comparative Analysis of Domestic Laws Criminalizing Illicit Excavation and Exportation of Archeological Objects ', Mercer Law Review, 2013, 431-465, 437.

authorities seize someone's property in view of its own appropriation.

Not all forced sales are illegal. It is common in many national legislations to authorize the forced sale of the goods of a debtor, under certain conditions . However, during a conflict illegal forced sales happen , especially when an authoritarian State or the occupying force decide that certain people are not allowed to own anything – as it happened during the Nazi regime – or some specific items. In such cases forced sales resemble looting, especially when the proceeds of the sale are confiscated, and not given to the owner or the goods.

It could happen for example that the owner is forced to sell his goods to cover fees such as ' departure taxes ' with the proceeds of sale – for example by racist rules, such as the Nuremberg laws of 1933.

In such a case, the price paid for the goods will be of central significance, in fact, if the price obtained for the sold goods is fair, it will be difficult to speak of looting, however forced the sale might be. On the other hand, if the price of the goods is clearly below the market price at the time of the sale then it is a case of ' partial looting ' .

Another complicated case could be when the reason for a sale is not clear and not readily available. A person may have sold art to honour outstanding personal debts or to feed his family during times of persecution – ' indirect ' looting.

For these reasons, victims of forced sales often face specific difficulty that does not appear in cases of outright looting : demonstrating that they are victims and must benefit either from restitution or from some form of indemnification.

These are the reasons why, in certain cases, it may be difficult for a court to distinguish between those two occurrences – legal and illegal forced sales amounting to looting – especially when little or no evidence is available to question.

2.1.3. Statutes of Limitations and Legal Certainty

Various aspects of the problem of property looted during World War II have been the subject of international agreements. One issue remains outstanding: the problem of cultural goods whose ownership is likely to be contested.

All legal systems subject the initiating of the proceedings to certain time limits which may start from the time of the theft, from the discovery of the location of the object or of the identity of the holder or when the claim was rejected by the possessor.⁵⁵

Statutes of limitations often create difficulties for claimants in restitution matters. The main concern of these statutes is to secure a minimum of legal certainty.

However, laws are not only dedicated to the protection of the victims, but also to offer legal security of commercial transactions and encourage business transactions.

In this regard, it would be difficult to imagine an efficient legal art market if a *bona fide* purchaser who possesses an artwork peacefully for decades could still not have good title over said artwork.

Statutes of limitations are therefore necessary and the difficulty is finding the right balance between the protection of the interests of the victims of theft or looting and those of the market.

Although the problem of looted cultural goods is a matter of public knowledge, it has often proved remarkably difficult for private claimants to recover their property.

One reason for this is that many European nations have chosen to ignore international law regarding the status of this property, and permit a thief - or

⁵⁵ REDMOND-COOPER, ' Limitation of Actions in Art and Antiquity Claims ', Art Antiquity and Law, 2000, 185-206.

those in the chain of possession from the thief - to pass valid title to buyers under national law.

In addition, looted cultural goods cases often become enmeshed in complex issues of choice of law and statutes of limitation, based on where the art was looted, where it has been over time or where it was found.

Finally, claimants have faced significant hurdles in researching their claims, due to varying standards of archival access over Europe.

Immediately after World War II, various national laws dealing specifically with looted property were adopted, many of which were then allowed to lapse. Many private organisations began to work actively on the issue of looted cultural goods, and various national commissions and working groups were established to scrutinise archives, enquire into the provenance of works of art and, in some cases, examine individual requests for restitution.

Unfortunately, it is generally acknowledged that the problem of looted art in Europe did not end in 1945. During the war the United Nations made it clear that looted property recovered by States was to be restored to its nation of origin for return to its original owner.

This looted property was then granted special status by the Nuremberg Tribunal, which expressly ruled that under Article 6(b) of the Nuremberg Charter, the looting of private property during the war could constitute a crime under international law.

In its final judgment, the Tribunal specifically ruled that certain looting conducted after September 1, 1939 was a crime against humanity.⁵⁶ The panel did not excuse looting from Jews before that date, finding only that it was not a war crime. Germany itself recognised the earlier looting as illegal in various post-war treaties.

Numerous post-war treaties also recognised that States had a duty to recover looted property, notwithstanding transfers to seemingly innocent purchasers,

⁵⁶ Judgment of the International Military Tribunal, 30 September 1946. ² Resolution 1205, adopted on 4 November 1999.

and a duty to care for and maintain that property pending return to the nation of origin. Thus, under international law, States became custodians for looted property, not owners of it.

National laws adopted after the war in Switzerland, Belgium, France, Germany, Greece, Italy and the Netherlands recognised this concept, creating a presumption in favour of the original owner of property looted during this period.

Today, however, the majority of these national laws have lapsed or expired owing to statutes of limitations, and there is no international convention applicable to the World War II period. Given that the problem is recognised, States are still seeking legal instruments to harmonise discrepancies in national laws.

At institutional level, the Parliamentary Assembly of the Council of Europe has adopted a Resolution on Looted Jewish Cultural Property.⁵⁷ In addition to these rules, on the occasion of a diplomatic conference in Washington on Holocaust Era Assets on 3 December 1998, 44 States including all EU Member States adopted ‘non-binding’ principles and morally undertook to return looted cultural goods.

The participating States recognised the mass of looted cultural goods still in circulation and enacted eleven recommendations by which they agreed to (i) take all measures to identify and distribute a list of works of art of doubtful origin, (ii) develop mechanisms allowing the resolution of ownership issues and taking into account the difficulties claimants often have to establish their title, and (iii) ease the requirements regarding the burden of proof faced by claimants seeking return of looted property.

The follow-up October 2000 Vilnius International Forum on Holocaust Era Looted Cultural Assets aimed at bringing the Washington principles and the Council of Europe Resolution into effect.

Some EU Member States and third countries such as Russia have recently

⁵⁷ Parliamentary Assembly of the Council of Europe, Resolution 1205 (1999) : Looted Jewish Cultural Property.

adopted measures for victims of looted art, for example examination of recovery claims, relaxation of the rules of tort and property law, such as limitation periods, and the establishment of Parliamentary Commissions to study this subject.

At European level, Directive 93/7/EEC of 15 March 1993 addressed the return of cultural objects unlawfully removed from the territory of a Member State. This Directive aimed to establish cooperation between Member States and create mutual recognition of the relevant national laws in the field of cultural national treasures.

However, it did not establish a level playing field for individual claims, which must still rely on extremely varied national legal requirements. The Parliament has subsequently adopted two resolutions on the issue of looted cultural goods, one in 1995 on the return of plundered property to Jewish communities and the other, on the restitution of property belonging to Holocaust victims, in 1998.

Thus the European Union has rightly taken steps to recognise the historical fact of art-looting between 1933 and 1945, but it has not yet established a comprehensive framework to resolve the remaining legal problems arising from looted art, which have an effect on the freedom of circulation of all works of art in the Internal Market.

The legal situation in this area is at present entirely unclear, so that museums, art dealers, victims and heirs have been unable to recover looted goods or fill the gap in provenance of art ownership.

Claimants face a bewildering array of legal problems, many driven by the sheer accident of where looted property happens to be found. Access to data varies from nation to nation, as do the legal standards regarding such fundamental issues as determining the applicable law, proving ownership, assessing when a claim must be brought and the effect of intervening transfers to allegedly innocent transferees.

There is a need for a legal and institutional framework that will be fairer to

claimants, current holders and state-owned and not-for-profit entities. Moreover, this is very much a European problem which requires a European solution, and the forthcoming enlargement of the European Union makes the issue still more important as it directly affects a number of candidate Member States.

There is no doubt that this is a legal problem. Firstly, the systematic and discriminatory plunder of property by totalitarian regimes was and remains a serious violation of the human right, recognised by the ECHR and the Charter of Fundamental Rights of the European Union, to peaceful enjoyment of property. Deciding how the rights of those affected by these violations should be addressed raises distinctly legal issues.

Secondly, the problem posed by such looting arises from conflicts of law which result in different treatment across the EU for similarly situated claimants, depending on where their property has come to rest.

Thirdly, addressing looted cultural goods issues entails sorting through legal questions relating to public international law, the operation of various treaties, private international law, access to information, property rights, the burden of proof and prescriptive periods.

The current legal system relating to looted cultural goods is neither consistent nor predictable; it does not encourage the voluntary or efficient settlement of claims, protect the rights of victims seeking recovery of looted property or accomplish the stated goals of international law established by the nations of the world after World War II.

In order fully to appraise the issues raised by looted cultural goods, the European Parliament held a hearing in March 2003 with a view both to raise public awareness and to identify potential EU solutions to the problems posed.

2.1.4. Conflict of Law and Jurisdiction

When claiming the restitution of looted art, the claimant must of course act at the proper venue (choice of jurisdiction) and demonstrate ownership under the applicable law (choice of law) .

However, the forum and the applicable law will depend on various factors, and some are specific looted artworks. Due to the diligent private international law rules in force in each State, multiple national courts may, by basing themselves on various different connecting factors, have jurisdiction over the same claim.

Normally, the authorities where of the place where the looting took place might claim to have jurisdiction, as well as the authorities of the place where the artwork was brought after the looting and sold , along with the authorities of the place where the artwork is located presently, the authorities of the place where the contract related to the artwork is to be performed or even the authorities of the place where the current possessor resides.

Unfortunately there are not harmonized conflict of jurisdiction rules at the international level. The result is uncertainty as to which courts are competent in each case, and encourages claimants to choose the court most likely to provide a favourable judgement for example.

In Europe, supranational instruments such as the Brussels I-bis Regulation⁵⁸ and the Lugano Convention⁵⁹ aim at determining in advance which court or courts will have jurisdiction (without regard to each State's private international law rules), thus minimizing the uncertainty.⁶⁰

However, the problem remains. First, generally these instruments apply only when both the claimant and the defendant are domiciled in EU or European

⁵⁸ 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 judgements in civil and commercial matters.

⁵⁹ Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial matters, Lugano, 30 October 2007.

⁶⁰ Directive 93/7/EEC, Article 1 point 1 ' on the rights to recover a cultural object in the courts for the place where the cultural object is situated at the time when the court is seised ' (Art. 7 (3) Brussels I-bis Regulation).

Free Trade Association (EFTA) Member States.

Claims involving parties domiciled outside of Member States – such as the United States – do not fall within the scope of those European instruments.

In those cases, the jurisdiction of the courts of a seized State shall be determined by the international law rules of the State⁶¹, thus bringing the parties to the beginning.

Courts may also dismiss restitution claims on grounds of lack of jurisdiction due to sovereignty immunity.⁶²

In common law countries such as the UK, the U.S., Australia and Canada, courts which are otherwise competent – as per applicable private international rules – may decline jurisdiction based on the principle of *forum non conveniens* when there is more appropriate forum available to the parties for example when another forum has a stronger links with the case or the parties.

Moreover, jurisdiction conferred to one court does not mean that the applicable law will be the law of the court.

It is possible to have a national court apply foreign law. There are no harmonized conflict of law rules in force either at the international or European level.⁶³

In looted art cases, the applicable law will generally be the law of the artwork's situation (*lex rei sitae*), but in some cases the applicable private international law rules may also point to the law applicable to the contract relating to the artwork or the place of destination - if the artwork is in transit . It might also be important to take into account the law applicable to the past transactions regarding the artwork.

In looted art cases, the determination of the law applicable to both substantial and procedural issues is crucial since it will often influence the outcome of the claim. It will determine which limitation period is applicable when it started to

61 Article 6 of the Brussels I bis Regulation.

62 *Andrew Orkin v The Swiss Confederation and Others*, 09 Civ 10013 (LAK) 770 F. Supp 2d 612, US Dist Lexis 4357 (2011), U.S. Lexis 24507 (S.D. N.Y. 2011), U.S. App. Lexis 20639 (2011).

63 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations provide harmonized rules to help to help determine the applicable law to specific disputes such as contractual and tort disputes, but they have no relevance in looted art disputes.

run.

In cases where the actual possessor of the item acquired it in good faith, the chosen law may also or close - common law systems - or open – civil law systems – the door to a ' good title ' defence – the whole under certain conditions which also considerably vary, even between systems.

Similarly situated claimants may face completely different treatment of their cases across different States, determine the applicable law.

The UNIDROIT Convention represents an important instrument in that it aims at resolving the problems resulting from the differences among national rules. More specifically, it establishes a compromise between civil law and common law jurisdictions at its Articles 3 and 4. Pursuant to these norms , ' *[t]he possessor of a cultural object which has been stolen shall return it ' , but ' shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object ' .*⁶⁴

On the one hand, this means that the *nemo dat quod non habet* principle is respected. On the other hand, the security of the commercial transaction is safeguarded by the condition that purchasers of cultural objects can be protected provided they can prove having exercised the required due diligence.

2.1.5. Burden of Proof and Good Faith

Generally, the claimants must demonstrate that what they allege is true, more specifically they carry the burden of proof.

In looted art matters, this implies that claimants has to face a lot of challenges to obtain the necessary proof, in particular :

- ❑ proving that their ancestors or themselves were the owners of the artwork until it was looted;

⁶⁴ UNIDROIT Convention 1995, Articles 3 and 4 on the Principles regarding the compromise between civil law and common law jurisdictions.

- ❑ proving that the artwork was actually looted;
- ❑ demonstrating that the present possessor did not acquire the artwork by good title, which basically imply that no one must have acquired such good title between the looting and the beginning of the litigation.

2.1.5.1. Proof of past ownership

Claimants have to demonstrate that they had prior ownership of a specific artwork until the moment it was looted. In the case of Holocaust-related disputes, the problem of proving ownership is particularly difficult.

One of the problem is definitely the fact that half a century has passed since World War II, evidence is now lost or extremely difficult to collect.

Although many of those involved have passed away, those who are still alive of their descendants may not have documentation, photos, or witnesses, and even if they can find the latter after such a long time they are not always fully reliable.

Defendants in such cases use the fact that uncertainty remains regarding whether the artwork was sold before the looting actually occurred – sometimes for good reasons, it could be possible that a particular artwork was sold before the war without anyone's knowledge – or regarding whether the claimants even ever owned the artwork in the first place.

Today is easier because the electronic records can be used as evidence of ownership will help future claimants, but these issues remain regarding claims for older looted art.

As for looted archeological heritage, the legislation of many States unequivocally vests ownership of certain categories of objects in the State. Consequently, a State with such legislation may base a restitution claim on its law making it the sole owner of such objects.⁶⁵

⁶⁵ Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd. (2007) EWHC 705 QB.

However, not all legislations are drafted in clear terms and interpretation issues can arise, especially when the matter is judged before a foreign court. This is often the case as looted antiquities are generally exported from the countries of origin.

Moreover, in certain cases prior ownership by a third party can be established, for instance by the person who buries a cultural object belonging to him/her in order to protect it during a conflict, intending to retrieve it later so that he/she has not abandoned ownership.

If States cannot obtain clear evidence on the origin of illicitly excavated antiquities, it is not possible to obtain the restitution from possessors located in a foreign country. As mentioned above, in some States the relevant national legislation is too vague and does not unequivocally vests ownership of archeological artefacts in the State.

In order to address this specific issues, the UNESCO and UNIDROIT Secretariats have adopted the '*Model Provisions on State Ownership of Undiscovered Cultural Objects*' (2011) (Annex 3).

These provisions are intended to assist domestic legislative bodies in the establishment of a legal framework for heritage protection containing sufficiently explicit legal principles to guarantee the State ownership of archaeological artefacts and hence to facilitate restitution in case of unlawful removal.⁶⁶ In particular, Provision 3, on State Ownership, suggests that national legislation should provide that : '*Undiscovered cultural objects are owned by the State, provided there is no prior existing ownership*'.⁶⁷

2.1.5.2. Proof of looting

If a claimant succeeds in proving ownership, he must then demonstrate that

⁶⁶ UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects 2011 (Annex 3).

⁶⁷ See note 54, Provision 3.

the particular object or collection was looted. With notable exception of the Nazis, looters rarely keep record of what they loot, when and to whom. Proving that one specific object was looted might hence be difficult, especially when witnesses are unavailable.

The situation might be slightly more favourable to claimants when it is admitted or common place that looting took place frequently during a specific conflict or in specific areas.

Proof of looting may be especially problematic when items are unearthed from archeological sites, since their existence had never been acknowledged by State authorities prior to the clandestine looting. Provision 4 of the UNESCO-UNIDROIT ' *Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects* ' (2011) attempts to address this difficulty by suggesting that States provide in their national legislation that ' *cultural objects excavated contrary to the law or licitly excavated but illicitly retained are deemed to be stolen objects* '.⁶⁸

However, this provision may not help States to prove looting in cases where the provenance of an item is not obvious – for examples if it has no distinctive features allowing experts to connect it to a particular State or population.

2.1.5.3. Good title: the good faith argument

Generally, it is presumed that the person who is the current possessor of an object is its owner.

In looted art matters this implies that the claimant has the burden of proof to demonstrate that the current possessor does not have the good title over the artwork that is the object of the dispute.

Good faith could be gained in civil law systems following different circumstances such as peaceful possession in good faith over a certain period

⁶⁸ See note 54, Provision 4.

of time, acquisition in good faith or acquisition from someone who had good title.

Provided that claimants have the burden of proof, the good faith of the people involved in a transaction is presumed, they have to prove that :

- ❑ the current possessor did not acquire the artwork in good faith;
- ❑ the current possessor did not keep the artwork in peaceful possession for sufficient time;
- ❑ no one since the artwork was looted acquired the artwork the artwork in good faith nor kept it in peaceful possession for sufficient time.

These questions are central in every restitution claim subject to civil law systems. However, the conditions concerning the legal title to good faith purchaser vary between civil law countries and are often linked to the applicable limitation periods.

For instance, Italy is the most benevolent European civil law State with regards to the protection of a good faith purchaser since the Italian Civil Code provides that the good faith purchaser immediately acquires valid title, except when artworks belong to public collections.⁶⁹

In contrast, in France, a good faith purchaser of a work of art gains title with possession, but the original owner of movable property that has been lost or stolen may reclaim it within three years from the date of the loss or theft.⁷⁰

In Switzerland, it will depend on when the theft occurred – a good faith purchaser of cultural property can acquire superior title to that of an original owner after five years if the theft or loss occurred before 1 June 2005⁷¹ and thirty years if the event occurred on or after that date.⁷²

In the common law countries these questions are of much lesser importance because of the *nemo dat quod non habet* rule⁷³, which provides that the good

69 Art.1153 of the Italian Civil Code. PROWDA B. Judith, ' The Perils of Buying and Selling Art at the Fair: Legal Issues in Title ' . in VADI Valentina and SCHNEIDER E.G.S. Hildegard, Art, Cultural Heritage and the Market: Ethical and Legal Issues, Springer, 2014, 141-153, 147.

70 Art. 2276 of the French Civil Code.

71 Arts. 728 (1) and 934 (1) of the Swiss Civil Code.

72 Arts. 728 (1ter) and 934 (1bis) of Swiss Civil Code. See PROWDA, supra note 57.

73 RENOLD Marc-Andr , ' Stolen Art: The Ubiquitous of Good Faith ' , in iNternational Bureau of the Permanent Court of Arbitration, Resolution of Cultural Property Disputes, The Hague, Kluwer Law International, 2004, 251-263.

title cannot pass to the purchaser of stolen property, even if the purchaser was made in good faith.

Relying on this well-settled principle of common law, Anglo-American courts will generally order the return of looted art to its original owner, no matter how many subsequent owners buy in good faith and how long these subsequent owners have possessed the item.

Difficulties arise when one does not know where the artwork was during a certain period of time, and especially when said period is long enough for a statute of limitations to intervene, others issues may arise in cross-boarder cases where relevant facts can be connected with both civil and common law States.

Lawmakers have developed specific solutions with the respect to the issue of good faith.

In Switzerland, for example, the possessor of an artwork cannot rely on his good faith if he cannot demonstrate that he paid sufficient attention regarding the circumstance at the moment of the acquisition.

Every buyer has to verify the artwork they are interest in and the status of the transferor or whether it has been legally dealt with. If the standards of care regarding the engagement in reasonable efforts to investigate the provenance of art to be bought or sold are not meet it means that the buyer has failed in its duty.

In a recent case, the Swiss Federal Tribunal ruled that an art collector failed to comply with the due diligence obligation in the acquisition of the Malewicz painting as he had ignored a ' rumour ' as to the fact that a Malewicz painting had been stolen.⁷⁴

The Swiss Federal Law on the International Transfer of Cultural Property⁷⁵ imposes high standards of due diligence on sellers and their agents. Article 16 of the law states that dealers or auctioneers cannot enter into any art transaction if they have any doubt as to the provenance of the objects. Therefore, the burden lies not only on the purchasers' shoulders, but also on

⁷⁴ A. v. B., ATF 139 III 305, 18 April 2013, Journal des Tribunaux 2015 II 79.

⁷⁵ 20 June 2003, RO 2005 1869. GABUS Pierre and RENOLD Marc-Andr , *Commentaire LTBC, Loi f d rale sur le transfert international des biens culturels*, Z rich Schulthess, 2006.

those of the traders.

This type of solutions allows restitution claims to have an actual chance of success and forces the actors of the art market to pay attention to provenance.⁷⁶

2.2 Anti-Seizure Legislation

Another problem claimants may encounter when seeking the return of cultural objects are the national laws that grant immunity from seizure to items temporary on loan from abroad.

Museums also started to consider the protection of loaned art from seizure one of their central concerns. Museums exhibitions expose art to the public and, inevitably, to the scrutiny of potential claimants causing the arising of various controversies. In effect, adoption of these due diligence laws is mainly due to an increasing number of legal disputes.

One of the most common scenarios occurs when an ownership claim is filed in the borrowing State by an individual claimant.⁷⁷

In this case, claimants base their action on the theft of the artwork, from them or their ancestors – more often than not as a result of expropriations ordered by Communist regimes in Eastern Europe or the Nazis during WWII – and on the inability of any later alienation to extinguish the original title.

When claimants are not people but States, the action is based on ownership laws. Claims are filled in the borrowing State because action or enforcement are often not available in the lender State.

Basically the purpose of the anti-seizure statutes can be summarized as twofold : to prevent the seizure of loaned artworks by the courts of the borrowing State for reasons extraneous to the loan agreement and to facilitate

⁷⁶ Art. 4.4 of the UNIDROIT Convention and art. 10 (2) of the EU Directive 2014/60.

⁷⁷ KAYE M Lawrence, ' Art Loans and Immunity from Seizure in the United States and the United Kingdom ', International Journal of Cultural Property, 2010, 335-359,353.

inter-State exchanges of artworks by defeating the reluctance of museums and collectors to loan their artworks to foreign jurisdictions.

Along with the purposes is important to underline two major problems that arise with anti-seizure legislation .

First, no judicial proceedings are allowed in the forum State – the State where the requested object is on loan – with regard to objects on loan. In essence, claimants in international art loan cases factually do not have the opportunity either to contest the title of the lending entity or to challenge the granting of anti-seizure immunity prior to the loan.⁷⁸

Second, the efficacy of the legal instruments deployed to curb the illicit trade in cultural objects is jeopardized. It could happen that anti-seizure statutes can clash with treaty obligations requiring States to return wrongfully taken objects, such as the Hague Convention, the 1970 UNESCO Convention and the UNIDROIT Convention.⁷⁹

78 WELLER Matthias, ' Immunity for Artworks Loan ? A Review of International Customary Law and Municipal Anti-Seizure Statutes in Light of the Liechtenstein Litigation ', *Vanderbilt Journal of Transactional Law*, 2005, 997-1024, 1013.

79 24 June 1995, 34 ILM 1322 (1995).

CHAPTER II

The International Legislative System on Restitution of Stolen Artworks

1. Legal bases of claims for the restitution of looted art in Europe

At the European level, the European Union (EU) and the Council of Europe (CoE) have adopted a number of instruments that addressing problems related to the illicit trafficking and the question of the return of wrongfully removed cultural objects.

The establishment of the Internal Market by the EU Treaty prompted the adoption of specific measures on the protection of cultural property. The internal market required the abolition of the internal frontiers, which would have undermined the power of EU Member States to prevent the illicit movement of cultural objects through the application of border controls, the Community enacted Regulation 3911/92 on the Export of Cultural Goods⁸⁰ and Directive 93/7 on the Return of Cultural Objects Illegally Exported from the Territory of a Member State.⁸¹

Member States retained the right to define ' national treasures ' and to take measures to protect them, and given impossibility of reaching a broad consensus between Member States in this field, Regulation 3911/92 and Directive 93/7 aimed at fostering Member States' reciprocal recognition of domestic provisions designed to fight the illicit trade in antiquities.

Regulation 3911/92 has been reviewed and replaced by Regulation 116/2009 of 12 December 2008.⁸² This text aims to prevent the export outside of the EU of works of art that have been unlawfully removed from one of the EU

⁸⁰ OJ L395/1, 31 December 1992.

⁸¹ OJ L74/74, 27 March 1993.

⁸² OJ L39, 10 February 2009.

Member States through the exploitation of the more relaxed rules of other EU Member States.

It creates a procedure according to which the antiquities defined as national treasures within the meaning of Article 36 of the Treaty on the Functioning of the European Union (TFUE) and belonging to one of the categories listed in the Annex can be exported to the third countries only if accompanied by an export certificate issued by the Member State of origin.

The export of antiquities not falling within the definitions included in the Annex are regulated by national rules. National authorities can refuse to issue the licence if, pursuant to national laws, the objects must be retained within the country.

Directive 93/7 has been entirely revised and replaced by Directive 2014/60 of 15 May 2014 concerning the return of cultural objects unlawfully removed from the territory of a Member State.⁸³

It centres on the circulation of cultural objects within the EU, and provides a system under which the judicial authorities of the Member State where a cultural object has been unlawfully imported must order its return to the requesting Member State.

Particularly, the new Directive covers objects that are classified or defined as 'national treasures' by national authorities, but it no longer requires that objects belong to categories or comply with thresholds related to their age and financial value in order to qualify for return.

National government agencies from EU Member States are required to cooperate with each other and exchange details on unlawfully removed objects by means of the EU's internal market information system.

More importantly it describes in detail, in line with art. 4.4 of the UNIDROIT Convention, the characteristics of due diligence in the art market (art. 10.2 of the Directive).⁸⁴

⁸³ OJ L159/1, 28 May 2014.

⁸⁴ Art. 4.4 of the UNIDROIT Convention states the following : ' In determining whether the possessor exercised due care and attention, consideration shall be given to all circumstances of the acquisition, in particular the documentation on the objects's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a

The CoE has adopted a number of conventions on the protection of various aspects of cultural heritage . These include the European Cultural Convention (1954), the European Convention on the Protection of the Archaeological Heritage (1969, revised 1992), and the European Convention on Offences relating to Cultural Property of 1985 (1985 Convention).

The 1985 Convention was adopted to combat illicit trafficking in cultural property through criminal law, to promote co-operation between States, and to raise public awareness of the damage caused by the illicit trade.

It thus served as a complement to the European Convention on Mutual Assistance in Criminal Matters and the European Convention on Extradition.

However, the 1985 Convention has never entered into force. Only six States have signed it, and none have ratified it. Arguably, the Convention has not attracted much international support because of its formulation.

In particular, the specification of the categories of cultural property and the criminal offences which fall within the scope of the Convention is achieved by way of enumerations in Appendix II (which lists examples of cultural objects) and Appendix III (which lists types of criminal offences).

The lists provided for in Appendices II and III are subdivided into two sections. The first section of the two appendices enumerates the categories of cultural property and of criminal offences in respect of which the implementation of the Convention is mandatory.

However, States were given the possibility to enlarge the scope of application of the Convention by including one or more of the categories of cultural property and offences listed in the second section of Appendices II and III. Under Article 26 on the reciprocity rule, a State has a duty to co-operate with another State ' *in so far as it would itself apply this Convention in similar cases* '.

It is possible to submit that most States decided not to ratify the 1985 Convention because some of the classical offences against cultural property were not among the core offences listed in the first section of Appendix III, namely the destruction or damaging of cultural property.

reasonable person would have taken in the circumstance. '

Finally, it can be argued that the 1985 Convention has not been ratified by CoE Member States because of political/commercial reasons. It cannot be excluded that the lobbies of merchants and collectors have put pressure on their governments either to negotiate or adopt weak text, or not ratify treaty.

At present, a revision of 1985 Convention is being considered by the CoE Committee on Crime Problems in order to simplify and streamline its language and structure and to ensure the harmonization of the relevant rules of criminal law.

As such, the new Convention could become an important instrument to enhance inter-State cooperation and punishing the criminal offences that affect the cultural heritage of European countries and beyond.

1.1. International Law Provisions

The nature and extent of the Nazi art looting and the massive destruction of cultural property during WWII led to the adoption of the first international convention dedicated exclusively to the protection of cultural property : the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts (the Hague Convention).⁸⁵

The 1943 London Declaration principles have heavily influenced the drafting of the Hague Convention.⁸⁶ This Declaration publicized and warned against the extent of Nazi plunder intended ' *to do their utmost to defeat the methods of dispossession practiced by the Nazis* '.⁸⁷

In particular, the Allies declared ' *invalid any transfers of, or dealings with*

⁸⁵ UN Security Council Resolution 2199 (2015) of the 12 February 2015, Art. 16, which states: ' ISIL, ANF and other individuals, groups, undertakings and entities associated with Al-Qaida, are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archeological sites, museums, libraries, archives, and other sites in Iraq and Syria '.

⁸⁶ Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, London, 5 January 1943, 1943, 8 Department State Bulletin 21.

⁸⁷ RONALD, ' Hitler's Art Thief : Hildebrand Gurlitt, the Nazis, and the Looting of Europe's Treasures ', 2015, St. Martin's Press.

property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect of the Governments with which they are at war '.

However, the London Declaration did not introduce new international law obligations, it merely reiterated the prohibitions set in the Hague Regulations. The Hague Convention was adopted together with the Protocol for the protection of Cultural Property in the Event of Armed Conflict (First Protocol).⁸⁸

This regulates the circulation of cultural property in time of war, by contemplating obligations for occupying powers to prevent and avoid any export of cultural objects from occupied territories and, in the event that such export would occur, to provide for their return.

Recently, the Hague Convention was completed by the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Second Protocol) of 1999.⁸⁹

The adoption of the Protocol was necessary to reinforce the protection system of the Hague Convention as a result of the disastrous cultural losses undergone, for instance, by Cyprus following the Turkish invasion of 1974, Croatia and Bosnia during the balkan war, and Iraq and Kuwait during the First Gulf War.⁹⁰

The Hague Convention and its two Protocols are the main specific body of international law applicable to the protection of cultural property in armed conflicts.

However, there are other international instruments which contain provisions applicable to the looting of art during armed conflicts, such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),⁹¹ and a number of resolutions of the United Nations (UN)

⁸⁸ 14 May 1954, 249 UNTS 358.

⁸⁹ 26 March 1999, 38 ILM 769 (1999).

⁹⁰ BOYLAN, ' Implementing the 1954 Hague Convention and Its Protocols : Legal and Practical Implications ', February 2006, 3, Working Paper <https://culturalpolicy.uchicago.edu/implementing-1954-hague-convention-its-protocols-legal-and-practical-implications>.

⁹¹ 17 November 1970, 823 UNTS 231.

1.1.1. Prohibition and Prevention

The Hague Convention establishes that the theft, pillage, or misappropriation of works of art and other items of public or private cultural assets in the course of armed conflicts is unlawful. Article 4 provides for the obligation of respect for cultural property ' *State Parties must prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property* '⁹² and to ' *refrain from requisitioning* ' such property situated in the territory of another state party.

Under this provision the occupying State has more than an obligation to refrain from such acts : it should also take all measures to restore the public order by putting a stop to the commission of such acts by, for instance, the local population or the opposing armed forces.⁹³

Furthermore, Article 1 of the First Protocol obliges State Parties to prevent the export of cultural property from a territory occupied by them.⁹⁴

The Second Protocol obliges the State Parties not only to prevent but also to prohibit ' any illicit export, other removal or transfer of ownership of cultural property ' in relation to an occupied territory .⁹⁵

Furthermore, Article 15 of the Second Protocol strengthens Article 4 of the Hague Convention by establishing that ' *theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention* ' constitute war crimes committed internationally.⁹⁶

The Second Protocol also makes it an offence to cause internationally '

92 TOMAN, supra note 1-2 ; O'KEEFE, ' The Protection of Cultural Property in Armed Conflict, Cambridge, Cambridge University Press, 2010, 22-34.

93 O'KEEFE, supra note 75, 133.

94 Art. 1 First Protocol to the Hague Convention of 1954.

95 TOMAN, Cultural Property in War : Improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Paris, UNESCO Publishing, 2009, 154.

96 O'KEEFE, supra note 75, 133.

extensive destruction or appropriation of cultural property ' ⁹⁷.

Article 15 of the Second Protocol also establishes that States Parties should adopt ' *such measures as may be necessary to establish as criminal offences under their domestic law* ' the offences set forth in Article 15 ' *and to make such offences punishable by appropriate penalties* ' ⁹⁸.

The 1970 UNESCO Convention considers illicit the ' export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power ' ⁹⁹.

This provision supplements the Protocols to the Hague Convention by considering illicit such export and transfer with respect to all Parties to the 1970 UNESCO Convention, and not only the occupying State. ¹⁰⁰

Regarding archaeological excavations, the illicit removal of archaeological objects from sites is regarded as misappropriation within the meaning of Article 4 (3) of the Hague Convention, provided that the law of the occupied State vests ownership of such *object* in the State, even without physical possession. ¹⁰¹

The Second Protocol further provides that States Parties must prohibit and prevent ' *any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property* ' in the occupied territory ¹⁰².

The UN Security Council has adopted a number of resolutions under Chapter VII of the UN Charter that address the question of cultural objects looted in the context of armed conflict, thereby contributing to the implementation of the First Protocol.

All these resolutions provide an ' embargo ' on the trade of cultural objects removed from conflict zones. This was the case of the resolutions adopted following the invasion of Kuwait by Iraq ¹⁰³ and the entry of US forces into

⁹⁷ See note 93, Art. 15 (1) lit c.

⁹⁸ See note 93, Art. 15 (2).

⁹⁹ See note 93, Art. 11 .

¹⁰⁰ TOMAN, *supra* note 78, 156.

¹⁰¹ TOMAN, *supra* note 78, 294-295. O'KEEFE, *supra* note 75, 134.

¹⁰² See note 93, Art. 9 (1) (b).

¹⁰³ UN Security Council Resolution 661 (1990) of 6 August 1990 on the situation between Iraq and Kuwait : ' all States shall prevent the import into their territories of all commodities and products originating in Iraq or Kuwait ' (para. 3 (a)).

Iraq in 2003.¹⁰⁴

Recently with Resolution 2199 (2015), the UN Security Council called on all States to ' *take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items* '.¹⁰⁵

The UN Office on Drugs and Crime (UNODC) after recognising the criminal character of the trafficking in cultural property and its devastating consequences for the cultural heritage of humankind, developed – in collaboration with UNESCO and INTERPOL – the ' *International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and other Related Offences* '.

Adopted in 2014 by the UN General Assembly, these guidelines recognize the ' *growing involvement of organized criminal groups in all forms and aspects of trafficking in cultural property* ' and call on UN Member States to assess and review their legislation, procedures, and practices in light of the Guidelines ' in order to ensure their adequacy for preventing and combating trafficking in cultural property and related offences'.¹⁰⁶

1.1.2. Restitution

States Parties to the First Protocol of the Hague Convention undertake to return cultural property exported in contravention of the obligation contained in its Article 1 at the end of hostilities.

¹⁰⁴UN Security Council 1483 (2003) of 22 May 2003 : ' Member States shall take appropriate steps to [prohibit] the trade in or transfer of [Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 2 August 1990] '.

¹⁰⁵ See supra note 68, para. 17. See also UN Security Council Resolution No. 2249 (2015) of 20 November 2015.

¹⁰⁶ General Assembly Resolution 69/196 of 26 January 2015.

The First Protocol clearly expresses that ' *such property shall never be retained as war reparations* ' ¹⁰⁷. The return is unconditional and there is no time limit for bringing a claim for return.¹⁰⁸

In case of return, the occupying State will pay an indemnity to the holders in good faith¹⁰⁹. This obligation creates a sort of liability for the occupying State whose obligation was to prevent the export from the occupied State.

The nature of such an indemnity remains a question of private law to be decided by the State Parties or national courts.¹¹⁰

There is a further stipulation in the First Protocol further provides that each State Party should ' *take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory* ' upon importation or at the request of the authorities of the occupied territory ¹¹¹.

Cultural property deposited in another State Party's territory for the purposes of protection against the dangers of an armed conflict should be returned at the end of hostilities to the authorities of the territory from which it came ¹¹².

The Hague Convention does not as such contain provisions on the return of looted art. Nonetheless, it can be affirmed that the obligation to return illicitly taken cultural objects is inherent in the obligation to respect cultural property and in the prohibition on seizing and pillaging of cultural property.

If cultural objects should not be seized, then, a fortiori, they should be returned in case they have been wrongfully exported.

Accordingly, the obligation to return follows the obligations contained in art. 9 of the Second Protocol: ' *[A] Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory: a. any illicit export, other removal or transfer of ownership of cultural property; b. any archaeological excavation [...]; c. any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence* ' .¹¹³

¹⁰⁷ First Protocol to the Hague Convention of 1954, Art .1 (3).

¹⁰⁸ TOMAN, *supra* note 78, 345.

¹⁰⁹ See note 106, Art. 1 (4).

¹¹⁰ TOMAN, *supra* note 78, 346-347.

¹¹¹ See note 106, Art. 1 (2).

¹¹² See note 106, Art. 1 (5).

¹¹³ HENCKAERTS and DOWALD-BECK (eds.), Customary International Humanitarian Law,

Regarding Article 11 of the 1970 UNESCO Convention, it is not clear whether it allows the recovery of cultural property exported or transferred under compulsion (against the will of the owner) during occupation.

There has been some people that believe that by recognizing that the export and transfer of ownership under compulsion is illicit, the 1970 UNESCO Convention declares such acts null and void and makes possible the recovery of the property at the end of the occupation.¹¹⁴ Others comment that the illicitness of a transaction will depend on ' *the legal system being asked to implement it* '.

Therefore in ensuring return and restitution, the Protocols are considered more effective than the 1970 UNESCO Convention: they provide that if cultural property is taken outside of the territory, it must be seized and returned.¹¹⁵ The question of the return of looted cultural assets has also been addressed by the UN Security Council.

With Resolution 686 (1991), the Security Council imposed on Iraq the obligation to ' *return all Kuwait property seized by Iraq, the return to be completed in the shortest possible period* '.¹¹⁶

The same demand was included in Resolution 1483 (2003), in which the Security Council established that States should ' *facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 2 August 1990* '.¹¹⁷

Besides, with Resolution 2199 (2015), the UN Security Council called on all States to ' *take appropriate steps to prevent the trade in Iraqi and Syrian cultural property, thereby allowing for their eventual safe return to the Iraqi and Syrian people* '.¹¹⁸

Rules, Vol.I, Cambridge, Cambridge University Press, 2003, 137.

114See FRAOUA, Convention concernant les mesures a prendre pour interdire et empêcher l'importation l'exportation et le transfert de propriété illicites des biens culturels, Commentaire et aperçu de quelques mesures nationales d'exécution, 85, available at : <http://unesdoc.unesco.org/images/0007/000723/072383fo.pdf> .

115O'KEEFE, *ibid.*, 15.

116UN Security Council Resolution 686 (1991) of 2 March 1991, para. 2 (d).

117UN Security Council Resolution 1483 (2003) of 22 May 2003 para. 7.

118UN Security Council No. 2199 (2015) of 12 February 2015, para. 17.

A reference to the 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) adopted by the International Institute for the Unification of Private Law, at the request of UNESCO is necessary to complete the analysis of the restitution regulation.¹¹⁹

The main objective of the UNIDROIT Convention is to contribute to the fight against the illicit traffic in cultural objects by increasing solidarity between States. The UNIDROIT, as a specialized organization for the harmonization of national laws, aimed to rectify some of the weaknesses of the 1970 UNESCO Convention.

The UNESCO Convention, in fact, admits no private action, contains a restricted restitution procedure, makes no reference to limitation periods, and does not deal with the question of the impact of its rules on domestic laws concerning the treatment of bona fide purchasers.

Specifically, the UNIDROIT Convention applies to claims of international character and deals with both theft and illicit exportation of cultural materials.¹²⁰

As far as theft is concerned, the Convention contains an outright obligation of restitution, even if stolen cultural objects are recovered in those systems of law that protect the good faith possessor.¹²¹

Any claim for restitution must be made within specific time limits.¹²²

Upon restitution of the claimed artefact, the Convention entitles the bona fide purchaser to a ' *fair and reasonable compensation* ' if it is proved that he ' *exercised due diligence when acquiring the object* '.¹²³ Art. 4.4 defines quite precisely the factors to be taken into consideration to establish such due diligence.

As for illegal export, the Convention establishes that a Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the

11924 June 1995, 34 ILM 1322 (1995

120 Article 1.

121 Article 3 (1).

122 Article 3 (3) and 3 (4).

123 Article 4.

requesting State provided two conditions are fulfilled.¹²⁴

First, the requesting State must demonstrate that the removal of the object from its territory significantly impairs the physical preservation of the object or of its context, the preservation of information of a scientific or historical character, the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State. Second, the requesting State must act within the prescribed time limits.¹²⁵

Such rules are obviously of importance when it comes to claims on works of art which were looted in times of conflict and later entered into the art trade during peace-time.

2. Importance and difficulties of provenance research

2.1 Researching of Provenance

Provenance is defined in the ICOM's Code of Ethics for Museums as '*the full history and ownership of an item from the time of its discovery or creation to the present day, through which authenticity and ownership are determined*'.¹²⁶

It is important to underline that until recently, provenance research was regarded as the main responsibility of historians who were dealing with attribution and authenticity.

Has been placed more emphasis on ownership matters, especially after the rise of restitution claims related to, among others, Nazi-looted art. Provenance research has become a major concern for all the actors in the market.

Museums have an ethical, if not legal obligation to ensure that '*any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been*

¹²⁴ Article 5 (1) and 5 (3).

¹²⁵ Article 5 (5).

¹²⁶ ICOM's Code of Ethics for Museums.

illegally obtained'.¹²⁷

Given that this task is really complex, it is not surprising that museums are now hiring specially trained staff to work exclusively on the provenance of objects.

Regarding the market side, buyers need to be more diligent when acquiring artworks, as the standards for establishing their good faith have risen. As for auction houses, who normally act like intermediaries, they conduct their own provenance research while advising the owners in particular in case of potential Nazi-looted art works.¹²⁸

2.2 Importance of Provenance Research

Considering the purely legal prospective, provenance research is strictly intertwined with the necessary due diligence a possessor is required to prove when his title over an artwork is challenged.

The scope of the research will depend on the circumstances of the case. Buyers have to conduct the necessary provenance research to prove their valid title over the objects and overcome possible restitution claims.

Furthermore, acquiring, knowingly or by negligence, stolen artworks might be punishable under certain national laws.¹²⁹ Discussing the ethical level, provenance research allows the identification of looted artworks and their restitution to the legitimate owners or the adoption of 'fair and just' solutions – based on the Washington Principles.

Recently, many European States and museums have initiated provenance research schemes in order to ensure that they do not possess looted items in their collections.¹³⁰

¹²⁷ Article 2.3 of the ICOM Code of Ethics for Museums, *supra* note 106.

¹²⁸ Christie's Guidelines for Dealing with Nazi-era Art Restitution Issues, June 2009.

¹²⁹ Article 24 of Swiss Law on the International Transfer of Cultural Property and the U.S. National Stolen Property Act (18 USC 2314-2315).

¹³⁰ International organizations like Interpol (www.interpol.int/Crime-areas/Works-of-art/Works-of-art) or private institutions such as Art Loss Register (www.artloss.com) maintain databases on stolen art in general. ICOM's Red Lists classify the endangered categories of archaeological

France for example, created an online database of the ' Musées Nationaux Récupération ' (MNR) regrouping artworks entrusted to the national museums for safekeeping after the WWII .¹³¹

The research has been helpful for the families of the victims of Nazi spoliations can consult the database and bring claims for restitution. France took an addition step to identify the legitimate heirs of the objects that may have been looted in the MNR collections .¹³²

Similarly, the Netherlands conducted research on the objects of the Nederlands Kunstbezit (NK) collection, which were recuperated from Germany after World War II and managed by the State since then .

The purpose of the research was to establish provenance in order to identify the original owners of the looted artworks .¹³³ Moreover, the Museum Association in the Netherlands initiated an ' *investigation into the provenance of museum collections in connection with the theft, confiscation and sale of objects under duress between 1933 and 1945* ' .

In this context, many museums investigated on a voluntary basis the provenance of their collections .¹³⁴

In the UK, public museums (national and not-national institutions) examined the provenance of the objects in their collections, which may have looted by the Nazis. Their ' List of Works of Incomplete Provenance for 1933-1945 ' is published online .¹³⁵

In Austria, the Commission for Provenance Research investigates the federal collections to identify looted objects and to trace their history .¹³⁶

In Switzerland, the provenance of the federal collections has been examined as well .¹³⁷ The provenance research in Swiss museums is performed on a

objects or works of art to prevent their illicit exportation and transfer (<http://icom.museum/resources/red-lists-database/>).

131 <http://www.culture.gouv.fr/documentation/mnr/MnR-accueil.htm> .

132 ' Rapport définitif du groupe de travail sur les provenances d'œuvres récupérées après la seconde guerre mondiale du 27 novembre 2014 ' , 9-10, available at : <http://lootedart.com/web/images/pdf2014/20141127 MCC-Rapport-MNR.pdf> .

133 <http://www.herkomstgezocht.nl/en/10/home/> .

134 <http://www.musealeverwervingen.nl/en/10/home/> .

135 <http://www.collectionstrust.org.uk/2015-11-03-15-25-31/cultural-property-advice/cultural-property-and-provenance/provenance/research-for-1933-45> .

136 <http://www.provenienzforschung.gv.at/?lang=en> .

137 ' Rapport du groupe de travail de l'Office fédéral de culture Biens culturels de la Confédération

voluntary basis .¹³⁸The federal state supports them by creating tools and information material to facilitate the research process,¹³⁹ as well as by helping with funding.

Conclusively, in Germany, the Lost Art Foundation provides financial support to public institutions – such as museums, archives and libraries – and privately funded institutions and individuals (provided that they adhere to the Washington Principles) to conduct provenance research on Nazi-looted art .¹⁴⁰ Its Lost Art Database is an important tool as well .¹⁴¹

More generally, the practice of provenance research certainly leads to a more transparent and responsible art market, and discourages looting. This is, particularly because the ethical and legal constraints described above may reduce the market for looted materials, whether with or without false provenance .

2.3 Difficulties of Provenance Research

States' efforts mentioned above indicate certain limits of the provenance research. First of all, the research may cover only the artworks recuperated after the war and not the totality of public collections – such as the French and Dutch cases . Secondly, private collections usually remain inaccessible.

Establishing the ownership history of an artwork can be a difficult task. Research consult primarily documentary records such as archives, sales catalogues, dealer stock books and payment to artists (receipts).¹⁴²

Enquête sur la période de 1933 à 1945 ' , available at : <http://www.bak.admin.ch/kulturerbe/04402/04711/04756/index.html?lang=fr> .

138 Confederation's 2011 Report on the state of research provenance in Swiss museums : ' Rapport SFI/SFAE sur l'état des travaux dans le domaine de l'art spolié à l'époque du national-socialisme, notamment dans le domaine des recherches de provenance ' , available at : <http://www.bak.admin.ch/kulturerbe/04402/04711/04757/index.html?lang=fr> .

139 Information material for museums available at : <http://www.bak.admin.ch/kulturerbe/04402/04711/index.html?land=fr> .

140 <http://www.kulturgutverluste.de/en/> .

141 <http://www.lostart.de/Webs/EN/Datenbank/Index.html> .

142 Getty Provenance Index Databases at <http://www.getty.edu/research/tools/provenance/charts.html#overview> .

Examining the object itself for labels, inscriptions or stamps is also essential . Unfortunately, those materials often get lost in events such as wars. In addition, private owners may have not saved them over the years. In other cases, galleries and dealers may not longer be in business.

Nevertheless, the declassification of war records in the end of the 1990's facilitated the provenance research related to Nazi-looted art.¹⁴³

The so called ' catalogues raisonnés ' are also an important tool for researching and provenance.

A catalogue raisonné is a ' *detailed compilation of an artist's work and often includes some provenance information, exhibition history, and other identifying features of the work such as dimensions, inscriptions and condition*

' .¹⁴⁴

However, researchers should be careful not to interpret each gap in provenance as an indicator for looting.

3. Resolution of disputes through courts and alternative means

It is common for dispossessed owners or their heirs to demand the restitution of their looted art before the domestic courts . However, as a result of procedural hurdles and other shortcomings of court litigation it has become more common and more appealing to use alternative means of dispute resolutions instead of national and international courts.

For instance, the Washington Principles on Nazi-confiscated Art (1998) recommend States to establish alternative dispute resolution mechanisms for resolving ownership issues, in order to reach ' *just and fair solutions* ' .¹⁴⁵

¹⁴³ See at <http://www.ifar.org/provenanceguide.php> .

¹⁴⁴ See note 123.

¹⁴⁵ Principle 8 of the Washington Principle states : ' If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case ' .

3.1 Resolution through courts

There are different reasons that can determine the claimant's decision to select court litigation .

First of all, by going before courts, claimants will eventually dispose of a final decision proving their ownership over looted objects.

This decision could subsequently be enforced through the ordinary judicial machinery if need be, since domestic courts have enforcement and sanctioning powers that are non-existent or weak in supranational legal systems and non-judicial means.

Secondly, litigants may not want to enter into a dialogue with their counterparts, thus preventing the access to negotiation, mediation, conciliation, and arbitration – the ADR means – which are only available on consensual basis.

Last but not least, resorting to litigation may exert pressure on the defendant , who may then become more willing to abandon an overly legalistic approach and to agree on a negotiated solution.

This is proven by the fact that many lawsuits regarding cultural heritage have not been pursued further as the parties have reached an out of court settlement. However, litigation usually remains a matter of last resort in the cultural heritage field ; it has been reported that only ten Holocaust-related suits were filed in the US courts in the period between 1945-1995 .¹⁴⁶

Institutions, individuals and/or States generally go before courts extra-judicial methods have failed or are not available, since litigation presents certain flaws that can dissuade from bringing an action.

The first problem is the possibility to access to the court system. Even if several constitutions guarantee the right to bring a claim for the protection of individual rights and legitimate interests, legal action sadly is not always

¹⁴⁶ BAZYLER, ' Nuremberg in America : Litigation the Holocaust in United States Courts ' , University of Richmond Law Review, 2000, 1-283, 165 .

available.

Legal hurdles such as limitation periods or the lack of evidence to prove ownership reduce the likelihood of restitution.¹⁴⁷ It may also be added the principle of non-retroactivity of international conventions .

The uncertainty of the outcome, the frequent necessity to have the judgement recognized and enforced in a foreign jurisdiction before it can be executed and the possible embarrassment an adverse ruling might represent considerations that can deter potential claimants from starting a lawsuit before a court .

More importantly, resorting to litigation entails considerable economic and human expenses.

In fact, litigants may not only suffer the loss of time – in some jurisdictions it may take years before a final judgement is rendered – but also the burden of paying the counsel fees and legal costs of lengthy as a consequence of the intricate issues of fact and law involved in transnational cases.

Lastly, litigation may cause antagonism between the parties and victims.

Of course, courts of law are not equipped to achieve solutions that make all the parties happy and reporting to litigation implies that the parties will have to live with a decision based on the applicable legal principles : either the Court will recognize the initial owner's title or it will give effect to the actual possessor's claim .

Unfortunately, rigid adherence to legalistic one-sided stances often hardens into inflexible positions, thus worsening relations .

In contrast and as will be explained in more below, ADR allows the tailoring of an original solution founded on the parties' reciprocal interests, thus increasing their chances of maintaining a good relationship .

147 RENOLD Marc-Andr  and CHECHI Alessandro, ' Just and Fair Solutions : An Analysis of International Practice and Trends, in CAMPFENS E. 8 ed.), Fair and Just Solutions? Alternatives to Litigation in Nazi-looted Art Disputes : Status Quo and New Developments, The Hague, Eleven International Publishing, 2015, 187-200 .

3.2 Resolution through Alternative Means

The shortcomings listed above make easier to understand the appeal of ADR methods such as negotiation, mediation, conciliation and arbitration . In fact, the majority of the disputes concerning looted art objects which have arisen in the past four decades have been settled out of courts .¹⁴⁸

Negotiation is always voluntary , it's a non-binding mechanism that allows all the parties involved to maintain control over the process without the intermediation of any neutral third party.

It allows disputants that do not want to use courts to find a solution that can satisfy all parties involved, solutions are creative and mutually satisfactory outcomes are envisaged and existing legal obstacles are set aside.¹⁴⁹

It is also very common that during a lawsuit, parties would reach an agreement and eventually settle the dispute out of court.¹⁵⁰

A mediator is a necessary figure when the antagonism between the parties impedes direct negotiations, parties may need the intervention of a neutral third party.

The mediator has the limited purpose of assisting the litigants to reach a mutually satisfactory agreement, in a flexible, expeditious, confidential, and less costly manner. Because of this, ICOM and WIPO have established in 2011 a special mediation process for art and cultural heritage disputes, the Art and Cultural Heritage Mediation Program.¹⁵¹

There are not many publicized mediations due, *inter alia*, to the confidentiality

148 BAZYLER, *supra* note 123 . See also BORODKIN, ' The Economics of Antiquities Looting and a Proposed Legal Alternative ', Columbia Law Review, 1995, 377-417, 403 ; and COGGINS ' A Licit International Traffic in Ancient Art : Let There Be Light ! ', International Journal of Cultural Property, 1995, 61-80, 75 .

149 Raphael CONTEL, Anne Laure BANDLE, Marc-Andr  RENOLD, ' Affaire Fresques de Casenoves – Mus e d'Art et d'Histoire de la Ville de Gen ve et la France ', Platform ArThemis, Art-Law Centre, University of Geneva.

150 Raphael CONTEL, Giulia SOLDAN, Alessandro CHECHI, ' Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum ', Platform ArThemis, Art-Law Centre, University of Geneva.

151 ICOM-WIPO Mediation Rules, see at <http://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/>.

that mediation guarantees to the parties; however, we can still find some examples where mediation has been used in looted art contexts.¹⁵² In one case in particular, the Art Loss Register claims to have played the role of mediator in the settlement of a dispute between the current possessor of a Picasso painting and the heirs of its pre-WWII owner.¹⁵³

A number of States established non-judicial bodies¹⁵⁴ - such as the Spoliation Advisory Panel (UK), Kommission für Provenienzforschung (Austria), Commission pour l'indemnisation des victimes de spoliations (France), De Restitutiecommissie (the Netherlands), Beratende Kommission (Germany) - to handle Nazi-looted art cases.

The procedures put in place by these institutions resemble conciliation. Conciliation involves an independent commission or an individual acting as third party.

The conciliator's main task is to investigate the dispute and propose a non-binding solution to the parties. Hence, conciliation combines the basic features of mediation and inquiry, therefore requiring a more in-depth study of the dispute as compared to mediation.

In 2006 the UK conducted a *Consultation on Restitution of Objects Spoliated in the Nazi-Era* and, in 2009, the *Holocaust (Return of Cultural Objects) Act*¹⁵⁵ was adopted by the Parliament of the UK. This Act allows 17 cultural institutions, including the British Library Board, to transfer an item of their collections if this action was recommended by the Panel and approved by the Secretary of State.

All the alternative methods mentioned so far have a non-binding character. Arbitration is different ; once parties voluntarily refer a dispute to arbitration, they are bound by the final result. Arbitration is one of the principal non-forensic methods of settling international disputes very often used in the fields

152 Anne Laure BANDLE, Raphael CONTEL, Marc-Andr  RENOLD, ' Case Ancient Manuscripts and Globe – Saint-Gall and Zurich ', Platform ArThemis, Art-Law Centre, University of Geneva.

153 Laetitia NICOLAZZI, Alessandro CHECHI, Marc-Andr  RENOLD, ' Affaire Nature morte au tableau de Picasso – H ritiers Schlesinger et Phillips ', Plateforme ArThemis, Centre du droit de l'art, Universit  de Gen ve.

154 MARCK Annemarie and MULLER Eelke, ' National Panels Advising on Nazi-looted Art in Austria, France, the United Kingdom, the Netherlands and Germany ', in CAMPFENS (ed.).

155 Holocaust (Return of Cultural Objects) Act 2009 (2009 c. 16).

of international trade and investments.

The most important benefit of arbitration resides in the parties' power to shape the process to fit their needs. Disputants have the possibility to agree, *inter alia*, the applicable law and the rules of evidence to be applied after the selection of one or more arbitrators.

Litigants can also include clauses which allow arbitrators to decide according to ' *equity* ', ' *good conscience* ' as well as principles other than those part of the rules of the selected system of law.

Arbitration is however not yet commonly used to resolve looted art claims.¹⁵⁶

There is only one Nazi - looted art case that has been settled through arbitration, the Altmann case, which involved several paintings by Gustav Klimt, which were confiscated by the Nazis in 1938 from Ferdinand Bloch - Bauer, the Jewish uncle of the claimant, Maria Altmann.

Despite the fact that Maria Altmann initially filed a judicial claim in the U.S. against the Republic of Austria and the Austrian National Gallery, the parties involved reached an agreement to end the litigation and submit the dispute to arbitration in Austria.

The arbitration panel ruled that Austria's National Gallery should return the five Klimt paintings which were confiscated by the Nazis from Ferdinand Bloch - Bauer, to his niece Maria Altmann as his sole descendant.¹⁵⁷

After an analysis on the case there are grounds to affirm that Alternative Dispute Resolution methods provide the necessary flexibility for handling Nazi - era art claims and facilitating consensual, mutually satisfactory settlements. One of the main reasons is that these techniques are available at any time, either together with, or as a part of, other processes. Generally, negotiations often run parallel to lawsuits.

Alternative Dispute Resolution methods also allow the parties to take into account ethical and moral principles in addition to – or in replacement of –

156 DALY, ' Arbitration of International Cultural Property Disputes : The Experience and Initiatives of the Permanent Court of Arbitration ', in HOFFMAN (ed.), *Art and Cultural Heritage. Law, Policy and Practice*, Cambridge University Press, 2009, 465-468.

157 Caroline RENOLD, Alessandro CHECHI, Anne Laure BANDLE, Marc-Andr  RENOLD, ' Case 6 Klimt Paintings – Maria Altmann and Austria ', Platform ArThemis, Art-Law Centre, University of Geneva.

purely legal principles.

In addition, and as will be explained in more detail under section 4.3., Alternative Dispute Resolution methods allow parties to find original, ' fair and just ' solutions which are not limited to restitution or rejection of the demand.¹⁵⁸

Nevertheless, Alternative Dispute Resolution methods are characterized by some shortcomings.

First and foremost is the voluntary essence of Alternative Dispute Resolution mechanisms. Indeed, outside the realm of contractual disputes, litigants may be reluctant to resort to negotiation, mediation or arbitration in the absence of significant incentives.

It can often be the case that a party has no interest in going into arbitration as long as they cannot be brought in via litigation. They would rather ignore the claim or rely on their rights under the general law of possession and ownership.

This problem is highlighted by the Altmann case, where the Republic of Austria rejected the initial proposal of Maria Altmann to submit the dispute to arbitration.

Secondly negotiation and mediation do not guarantee that a final accord is achieved and subsequently enforced given the lack of a mechanism by which parties can be compelled to honour the settlement.

Finally, it should be noted that Alternative Dispute Resolution methods are not always less costly and less time - consuming than litigation. However, this benefit is not always attainable by resorting to arbitration.

It is important to remember that the entire arbitration process, including the recognition and enforcement of the award, is not always expeditious and may end up being more expensive than judicial litigation when taking into account the arbitrators' remuneration.

In part, this explains the marked contrast between the rarity of arbitrated settlements and the abundance of negotiated agreements.

¹⁵⁸ CORNU Marie and Marc-Andr  RENOLD, ' New Developments in the Restitution of Cultural Property : Alternative means of Dispute Resolution ', International Journal of Cultural Property, 2010, 1-31.

3.3 Fair and Just Solutions to Looted Art Disputes

Alternative Dispute Resolution methods allow the parties involved to find 'fair and just' solutions which do not necessarily imply the immediate restitution or rejection of the claim.

The first solution to be analysed is the compensation. In many Nazi-looted art cases the heirs of victims preferred to be compensated rather than obtaining the restitution of the disputed object.

There are also cases in which the claimant wants its ownership recognized without necessarily having possession of the artworks – in many cases, the claimants are not opposed to leaving the artwork in a museum or another cultural institution to preserve public access – and more importantly museums can consider repurchasing them and or obtaining a long-term temporary loan.

Another option is the possibility of sale to a third party. This particular solution entails that the parties agree to sell on the market the actual claimed work of art in order to divide the proceeds of the sale.

Lastly, in disputes where parties cannot agree on sole ownership of an artwork, notably where there have been several possessors for long periods of time, parties could also consider sharing its ownership – co-ownership.¹⁵⁹

One important solution which is often overlooked is the simple recognition of a dispossessed owner's original ownership title and the misappropriation suffered during the war.

For obvious reasons, looted art cases are highly emotional for the claimants and sometimes the owners' heirs are not interested in keeping ownership of the artwork today, but rather look for some form of recognition for the injustices their ancestors were subjected to.

159 RENOLD Marc-Andr , ' Cultural Co-Ownership: Preventing and Solving Cultural Property Claims ', *International Journal of Cultural Property*, 2015, 163-176, 167.

4. Policy Recommendations

4.1 General Considerations

If war and plunder are unfortunately closely interconnected, the States' reaction is very different in the light of how different interests are taken into consideration. It is generally recognised a need for uniformity which seems to be the most urgent matter and this uniformity can be reached either at the level of the determination of the applicable law or at the level of the national standards and legislations – mainly through the implementation of the international conventions and their protocols .

In any event, it would be advisable to set up some form of body at the EU level in charge with proposing long term solutions and/or giving its advice in specific cases .

4.2 Uniformity of Solutions with a common new conflict of laws rule, valid both for Private and Public Claims

In private law, for example in what regards the acquisition of ownership of a cultural object, the long standing principle is that of the application of the *lex rei sitae*, specifically the law of the place where the object is situated at the time of its acquisition.

Regarding looted cultural objects this can lead to the loss of ownership of the person or the State whom it was illegally taken from. It is suggested that such principle should be revised in order to take into consideration the law of the place of origin, the *lex origins* .

Admittedly it will not always be easy to determine the origin of the cultural object, especially if several States have some historical or cultural connection to it, but at

least when the origin is clear, it will make the acquisition contrary to the law where the object comes from simply impossible.

In public law, it seems, at least some of the recent bilateral Conventions on illicit traffic, that more importance is nowadays given to the law of the state of origin. A good example of agreements where the principle is given an effect are some of the bilateral agreements recently signed between Switzerland and art-exporting States such as Greece, Italy, Egypt and a few others.¹⁶⁰

According to these agreements the import in Switzerland is illegal if it does not respect the rules of the State report of export – this is clearly giving effect to the *lex origins*.

It could also easily be imagined that States accept that in emergency situations, such as what it is happening today with art looted in Iraq and in Syria, the principle be the application of *the lex origins*, even if their general conflict of law rule is the *lex rei sitae*.

The UN Security Council, when it requests in its resolutions that States prevent the trade in looted art, could at the same time require that they take the laws of the States of origin into consideration.

Recently, there have been steps taken in the direction of applying the *lex origins*,¹⁶¹ but these have very much remained academic until now .

4.3 Uniformity of standards and Legislations

There is another way to reach uniformity of the decision according to similar standards is for States to adopt uniform standards and rules. In this particular case could be identified three different avenues of reflection .

First of all, seeing that many States have ratified the Hague Convention and its Protocols, there is no need to propose the adoption of a new international convention.

On the international scene efforts should be made to encourage those States

¹⁶⁰ Available at : <http://www.bak.admin.ch/kulturerbe/04371/04377/index.html?lang=fr> .

¹⁶¹ Institute of International Law, Basel Resolution of 1991 (International Sale of Works of Art from the Angle of Protection of the Cultural Heritage), Wiesbaden Resolution of 1975 (The Application of Foreign Public Law).

who have not yet ratified these Conventions to do so , or to adopt preventive measures – such as the possibility to create safe havens proposed by Switzerland in its 2014 law – or to make sure the rules of the first Protocol can be applied directly by Courts – for example by adopting rules similar to the Netherland's 2007 Act .

Secondly, the status of undiscovered cultural property – both underground or underwater – should be made clear, States' laws should be made to reflect clearly what the UNESCO-UNIDROIT model rules provide – for example indisputable state ownership.

Terminating, as for claims, the legal context in which they ought to be made must be clearer from a legal prospective.

There may be two different ways to improve matters : generalize the uniform due diligence standards adopted in the EU Directive of 2014 ¹⁶² and the UNIDROIT Convention¹⁶³ ; or adopt specific statute of limitations such as the proposed recent U.S. Federal law .

4.4 The setting up of an International Platform : Advisory Body

The issues relating to claims for the restitution of looted art are complex and that it might not be the best solution to have them solved by national courts. It is believed that they would be better understood and adjudicated if they could be decided by, or with the help of, some form of Advisory Body .

This Advisory Body tasks could be advising States on their implementation of the international conventions and protocols and the setting up of the above-mentioned standards or advising existing agencies or courts in the resolution of disputes relating to looted and cultural property or, lastly, helping to solve conflicts by acting as a mediator or conciliator specialized in claims relating to

¹⁶² EU Directive of 2014 , Art. 10 section 2 .

¹⁶³ UNIDROIT Convention , Art. 4 section 4.

looted cultural property .

However, it seems premature to propose rules relating the composition of this body or to its procedural functioning .

CHAPTER III

The Italian Legislation System on Restitution of Stolen Artworks

1. Evolution of the Italian System

The first legislative initiatives for the protection of the national artistic and cultural heritage date back to Italy pre-unification period¹⁶⁴, but you have to wait for the constitution of the unitary state to track an attempt to comprehensive legislation regulating these issues: the Law no. 1089 of 1939 - Bottai Law.¹⁶⁵ This piece of legislation has regulated the protection of the artistic heritage and national cultural for over half a century, only to be repealed and replaced by the Consolidated 1999.¹⁶⁶

The law of 1939 does not even speak of ' cultural heritage ': the discipline contained in it is aimed at ' *things, real and personal, that have artistic, historical, archaeological or ethnographic* '¹⁶⁷, remaining in fact rooted in a purely material conception good. In this context, what characterizes cultural heritage and differentiates them from other cases of artistic and cultural importance, it is precisely the element of materiality, their being ' *things* '¹⁶⁸.

It will be during the IV legislature that will begin to take shape the modern

164 SPERONI M., La tutela dei beni culturali negli Stati italiani pre-unitari, vol. 1, Giuffrè 1988.

165 Law 1089/39, ' *Tutela delle cose di interesse artistico e storico* ', published in G.U. n.184/39.

166 D. Lgs. n. 490/99, ' Testo Unico delle disposizioni legislative in materia di beni culturali ', drafted ex. Art. 1 Law n. 352/1997, published in G.U. n. 302/1999.

167 Cfr. L.1089/39, art. 1 : '*Sono soggette alla presente legge le cose, immobili e mobili, che presentano interesse artistico, storico, archeologico o etnografico, compresi: a) le cose che interessano la paleontologia, la preistoria e le primitive civiltà; b) le cose d'interesse numismatico; c) i manoscritti, gli autografi, i carteggi, i documenti notevoli, gli incunaboli, nonché i libri, le stampe e le incisioni aventi carattere di rarità e di pregio. Vi sono pure compresi le ville, i parchi e i giardini che abbiano interesse artistico o storico. Non sono soggette alla disciplina della presente legge le opere di autori viventi o la cui esecuzione non risalga ad oltre cinquanta anni*'.

168 CERULLI IRELLI V., I beni culturali dell'ordinamento italiano vigente, in Beni Culturali e Comunità Europea, Giuffrè 1994, 3.

notion of ' cultural property ', thanks to the intense work carried out - in the years 1964 to 1966 - by the ' *Inter-Parliamentary Commission of investigation for the protection and enhancement of the things historical, archaeological, artistic and landscape* ', also known as ' Franceschini Commission ' , by its President of the name.¹⁶⁹

Mission of the Franceschini Commission¹⁷⁰, as provided by the law establishing it, was to perform an accurate survey of conditions in which the national artistic and cultural heritage, in order to put forward proposals for revision of protective laws, structures and administrative systems, sorting staff and for the adjustment of the financial means.

The intense activity¹⁷¹, which lasted nearly two years, ended with the production of eighty-four declarations, nine recommendations and a final order of the day, all collected in three volumes¹⁷², the reading of which reveals a very alarming picture of the state of decay and neglect besetting the national artistic and cultural heritage.

Among the main merits the articulated work of the Commission, there was no doubt that of introducing - for the first time at the national level - a single definition of the concept of cultural heritage as a ' *material witness having the force of civilizations* '¹⁷³, which deeply innovated, compared to tradition of ' *things category, real estate and furniture, which have artistic, historical, archaeological or ethnographic* '¹⁷⁴ fixed by the above mentioned Bottai law.

In the aspect of terminology, the use of the word ' good ' also highlighted the economic function of the artistic heritage, while the use of the term ' cultural ' emphasized the importance of the enhancement of the national heritage that expression of historical and social factors Country.¹⁷⁵

It was not a purely terminological innovation: definition introduced by the

169 On. Francesco Franceschini.

170 Law n. 310/64.

171 The Commission delivered its works on 10th of March 1966.

172 Published in 1967, cfr. AA.VV., *Per la salvezza dei Beni culturali in Italia, in Atti e documenti della Commissione d'indagine per la tutela e la valorizzazione del patrimonio storico, archeologico, artistico e del paesaggio*, Colombo, 1967.

173 See note 161, Art.1 .

174 See note 156.

175 SEVERINI G., La nozione di bene culturale e le tipologie di beni culturali, in *Il Testo Unico sui beni culturali e ambientali*, Giuffrè 2000.

Franceschini Commission wanted to reflect a new way of understanding the policy of protection of cultural heritage in Italy.¹⁷⁶

Until then, in fact, the Bottai law had governed the things of art by pointing only to a conservation of 'static', through a system of constraints and the fact of alienation and export bans¹⁷⁷. In that light, things of art were regarded as '*an object to be kept away from contact with life, rather than to citizens as an instrument of culture*'¹⁷⁸.

He was missing in the law a provision that would characterize '*positive social function of our cultural heritage by placing in order to ways of enhancing or stimulating the private sector to improve the conservation of the goods in their possession*'.¹⁷⁹

Franceschini Commission did not want to give a similar design of public policy, to point instead to a direct action of the legislature to ensure the community a broad and effective enjoyment of cultural value kept in good, pointing not only to the preservation of cultural heritage and their protection by maintenance and restoration, but especially to their assessment.¹⁸⁰

Despite the commitment of its members and the innovative contribution of his statements, the Franceschini Commission never saw his work translated into a bill, and - in fact - the term 'cultural goods' continued to be absent from the national legislation.

Its formalization, at legislative level, came only in 1974, with the Decree Law n. 675 dated December 14, with which it was instituted the Ministry for Cultural and Environmental Heritage.

Such acts, however, merely refer to the term 'cultural goods', do not follow the same definition. It will be only with the Decree. N. 112 of 1998¹⁸¹ that the

176 The Franceschini Commission identifies four types of cultural heritage: the archaeological, artistic and historical heritage, the environmental goods and archival heritage.

177 TARASCO A.L., *Beni, patrimonio e attività culturali : attori privati e autonomie territoriali*, Ed. Scientifica 2004, 11.

178 SANTORO PASSARELLI F., *I beni della cultura secondo la Costituzione*, in *Studi in memoria di Carlo Esposito*, Cedam 1973, vol.I, 1421.

179 ROLLA G., *Bene culturale e funzione sociale*, in *Scritti in onore di M.S. Giannini*, vol. I, Giuffrè 1988, 568.

180 L. n. 5/1975.

181 D. Lgs. n.112/1998, 'Conferimento di funzioni e compiti amministrativi dello Stato alle regioni ed agli enti locali, in attuazione del capo I della legge 15 marzo 1997 n. 59', published on G.U. n. 92/98.

legislator will introduce, by way of legislation, the definitions of ' cultural property ' and ' environmental good ', as well as those of protection, management, enhancement and promotion of the assets.

Art.148 of the said decree, letter a) of the first paragraph, identifies as a cultural heritage ' *those that make up the historical, artistic, monumental, demo-ethno-anthropological, archaeological, archival and library and others who constitute testimony having the force of civilization as identified under the law* '.

This definition, considerably wider, still strongly influenced by the eco Declaration. 1 prepared by the Commission Franceschini - despite the long period of time that separates them - but presented as the main novelty, the elimination of the reference element of the ' materiality ' of the cultural property.¹⁸²

Legislative Decree 112/98 also helps to make things clear - even in the field of goods and cultural activities - the repartition of powers between State, Regions and local governments.¹⁸³

The reorganization of the legislation started work with the Legislative Decree no. 112/98, merged into the subsequent Legislative Decree no. 490/99, the first Consolidated field of cultural heritage.

With this measure he finally tried to collect, rationally and rearrange in an organic and homogenous a long series of instructions issued over the years, so often messy.

The legislature, with Articles 2.3 and 4 of the Consolidated Law (TU), developed a definition of cultural heritage much more highly detailed, picking up the legacy of the innovations introduced by Legislative Decree of 1998 and support the enumerations of ' things of art ' present in the law of 1939 (now repealed) and in the subsequent provisions.¹⁸⁴

It came qualified cultural everything in considerate its historical, artistic or archaeological had undergone, in any way, the protection by a regulatory

182 CHITI M.P., *La nuova nozione di bene culturale del Dl Lgs. 112/98 : prime note esegetiche*, in *Aedon – Rivista di arti e diritto on line*, 1/98, www.aedon.mulino.it .

183 See note 170, Art. 149 .

184 See note 150, Art. 2.

provision.

In addition to billings articles models 2 and 3, Article 4 of T.U. it resumed the final unit and the principle of cultural elaborate by the doctrine, enabling it to detect, through legislative provision, new goods not included in the previous articles, that they were '*of civilization testimony*'.

While the broad definition of cultural property contained in T.U. 1999, has recently been amended and revised by Decree. n. 42, 2004, containing the Code of Cultural Heritage and Landscape.

After only five years, the Legislature has warned, in 2004, the need to re-reform the matter, despite the rationalization work and tidying work with T.U. The main motivation of this reform, leading to the adoption of Legislative Decree no. 42/2004, was the need to harmonize and make compatible the discipline in the field of cultural heritage with the new Title V of the Italian Constitution, as amended by Constitutional Law. n. 3 of 2001.

Based on the new institutional balances produced by the reform, the Code of Cultural Heritage and Landscape (henceforth Code), aims to further legislative simplification and a radical reform of matter, in order to create a coordinated system planned for the protection and promotion of cultural heritage involving State, regions and local governments.

To lo identify its scope, the Code distinguishes - in its article 2 - the ' cultural heritage ' by ' cultural goods ', specifying how the first is made up of all cultural and landscape heritage, while the latter are identifiable in the '*real and personal things that, under articles 10 and 11, have artistic, historical, archaeological, ethno-anthropological, archival and bibliographic and other things identified by law or under the law as testimonies having value of civilization*'.¹⁸⁵

The Code thus retains a mixed system, that if on the one hand takes up the notion of cultural list already well in Bottai law and later taken over by TU, on the other leaves open the possibility of including in the category any other good that, according the law, both identified as '*witness having value of*

185 Artt. 10 and 11 of the Code of Cultural Heritage and Landscape.

2. Definition of the ' Cultural Goods '

The discipline of the Code does not provide, in contrast to what happens in other European countries, a classification system of cultural heritage relevant to the protection and, more specifically, affixing of restrictions on the circulation of the same.

The Cataloging Tools in fact, although provided for in Article. 17 of the Code, are not involved in the submission process in the bond of a particular item, but rather detects the purpose of development and preservation.

If in fact this is true - in parallel to what happened in other European countries - even in Italy in the nineteenth century was spreading the practice of inventorying of the national cultural heritage and the inclusion of the property in special catalogs brought with it significant legal effects - including the export ban, the inalienability or the rise of a right of first refusal in favour of the state - it is equally true that soon became evident the enormous limit of this system: frequent incompleteness of the lists, due both to the slow pace of government departments in introducing the same is the enormity of the national heritage to be inventoried.

Therefore, in order to avoid that such incompleteness determinate absolute uncontrollability of exports and the movement of those goods not yet cataloged, in 1909¹⁸⁷ the Italian approach to cataloging suffered a significant breakthrough, removing themselves the constitutive function of the catalog and instead attributing a purely declaratory function .

The lists became so of cultural heritage survey tool, not necessary for the regulation of export but for internal use.

¹⁸⁶ Art. 2 of the Code of Cultural Heritage and Landscape, previously contained in articles 2 and 3 (regarding cultural goods) and articles 138-139 (landscapes) of the T.U. Of 1999, by operating in this way an important simplification of matter.

¹⁸⁷ Law n. 364/09, published in G.U. n. 150/09 so- called ' Rosadi Law '.

The work of cataloging therefore, even if no legal significance, had as useful and necessary information support to the activity of protection and is in those terms that, even today, is understood.

Over the decades, it has been established - in the legislature as in the industry - the belief that the fundamental objective of the catalog is a preliminary finding inquiry for the purpose of proper and effective implementation of laws, in particular the rules on enhancement and conservation of the assets.

The responsibility of cataloging today, as enshrined in article 17 of the Code, the Ministry of Heritage and Culture, which coordinates the activities relative through the Central Institute for Cataloguing and Documentation (ICCD). Regions and other local governments also contribute, each according to assets belonging to the inventory of cultural heritage, thanks to the direct knowledge of the area.

Pursuant to paragraph 3 of art. 17, even the universities are involved in the activity, foreseeing their collaboration to the definition of programs of study and research in the field of cataloging and inventory methodologies.

The Code therefore, in order to identify its scope, does not refer to any list of goods, introducing instead a system based on testing - case by case - the culturalism of the good. In this sense, the matter is greatly innovated compared to T.U., though - then as now - is necessary to make a clear distinction between the verification of culturalism performed on public property from having instead to subject private goods.

With reference to the first, the T.U. provided for the mechanism of so-called ' Descriptive lists '¹⁸⁸ an instrument by which they were identified the assets of publicly owned cultural relevance.

The article 5 provided that public entities other than the state and private non-profit present it to the Ministry (if by chance even with subsequent amendments) a list of the things belonging to them with - presumably - artistic, historical, archaeological or ethno-anthropological.

The verification of the culturalism of the property owned by other private entities, it was rather - case by case - to the Ministry, using the appropriate

¹⁸⁸ In perfect coherence with the system introduced by the Bottai Law of 1939.

release ' declaration '.

The descriptive lists - even when validated by the Ministry - had character purely declaratory and non-inclusion in them was not preclude the application of the protection rules, provided that things present cultural interest, the author no longer living, go back to over fifty years.¹⁸⁹

For the cultural heritage of public belonging operated therefore a ' *general alleged culturalism* '¹⁹⁰: in the absence of precise evaluation criteria and arrangements for special expert committee, underwent a constraint whatever good public membership even when - in fact - the good, even going back to over fifty years, it was clearly lacking in a significant.

This detection system of public cultural heritage, a source of great uncertainty about the actual level, has experienced significant innovations, by the ' *Regulations on the disposal of real estate of historical and artistic domain* ', adopted by the D.P.R. n. 283/2000¹⁹¹, a little less than a year after the entry into force of T.U. value.

The regulations introduced the possibility of alienation of state property of territorial authorities other than State properties, thus changing the very concept of ' State property ' rooted in our legal system.¹⁹²

Contextually, even the original discovery procedures of immovable were amended: the system of descriptive lists was abandoned, with the provision that even in respect of goods belonging to similarly advertising agencies as already in place for private goods - would require a formal procedure for verification of the existence of culturalism.

This approach, was taken up and completed within the Code, which, in Article. 12 which introduces the mechanism of ' *cultural interest occurs* '¹⁹³ required to be carried all the goods that are more than fifty years belonging to the State, regions, other local governments, as well as to any other entity and institution

189 Cfr. T.U., Art. 5 paragraph and Art. 2 paragraph 6.

190 SCIULLO V.G., *La verifica dell'interesse culturale (art.12)*, in *Aedon* 1/04, on www.aedon.mulino.it . And also of the same author *Commento all'art.5*, CAMMELLI M., *La nuova disciplina dei beni culturali e ambientali*, 2000, 40, *I beni*, and BARBATI C., CAMMELLI M., SCIULLO G., *Il diritto dei beni culturali*, Il Mulino 2003, 34.

191 D.P.R. issued according to Law n. 448/98 (Financial Law).

192 See note 180 .

193 Mechanism ex Art. 127 of D.L. 269/03, converted in Law n. 326/2003.

public or private non for profit, on the owner's request or on its own, so it is established - definitively - that the requirement of culturalism and consequently the subjection of goods within the constraints of the Code.

Pending the outcome of the verification process - and this is the most important novelty - the good public is subject automatically and provisionally, to the discipline code.

When in doubt, therefore, the requirement of culturalism is alleged, only to verify the absence.

In this way, the legislator has wanted to take precautions against possible errors in the evaluation made by the owner of the property, in order to ensure greater negotiating certainty.

If the method of verification is successful, the good - movable or immovable - is added definitely to the category of ' cultural heritage ' and subjected to the Code's discipline.

Instead if the verification has a negative outcome, to these goods will not applicable the provisions of the Code and so they will be freely alienable.

As for private property - belonging to private entities other than legal persons with no dine-profit -, it was not in the TU, and there is still in the Code, any presumption of culture services, prescribing instead the opportunity to submit such property to bond only after the adoption, by the appropriate Ministry ' *cultural interest declaration* '.

The procedure for issuing the declaration may be initiated on the request of the owner of the well, the superintendent, the Region or any other local authority concerned to verify whether or not a cultural issue.

Precondition for the imposition of the alley is, obviously, the expression of judgment on the part of the competent administrative authority, which must in turn be preceded by an analysis of the asset and its features designed to assess the interest subsistence ' exceptional ' or ' very important ' that the good must play in order to be qualified as cultural.¹⁹⁴

The declaration is based on a technical-discretionary opinion of the Administration and be disputed at the time of legitimacy; it, as any act that

¹⁹⁴ Cfr. Art. 10 of the Code, paragraph 3 .

affects subjective legal position must be properly motivated, having to indicate the factual requirements and legal reasons that led to the final decision.

3. Cultural Goods' circulation

The rules laid down by the Italian Code of Cultural Heritage and Landscape regarding the circulation - international and national - of cultural property does not meet, as happens in other examined reality, differentiation based on traditional dichotomy movable-immovable property.

The current legislation is rather more differentiated depending on the institutional titles of note: the alienability and, more generally, the availability of cultural assets in public ownership, is subject to a particularly strict regime, instead reserving a less strict system to privately owned property .

The distinction made by the code of cultural heritage belonging to public and private property belonging therefore reflects both the identification mode on the protection of the same.

3.1. Public Property

The circulation of cultural goods belonging to the State and the territorial authorities is ruled by Articles 53 to 57 of the Code of Cultural Heritage and Landscape, by which the legislature aims to shed light on the problem, strongly felt both in doctrine and in case law, the coordination between the general discipline in respect of public land and the special legislation on cultural heritage.

According to the provisions in Articles. 822, 823 and 824 of the Civil Code, in fact, recognize the buildings of historical, archaeological and artistic, as well as the collections of museums, art galleries, archives and libraries that are owned by the state, provinces or municipalities are subject to state property regime (establishing specifically the ' cultural domain '¹⁹⁵) and as such are inalienable and can not be the subject of rights in favour of third parties, except in the manner and within the limits established by the laws that affect them.

The provisions of the Civil Code, however, have opposed for years the special legislation on cultural heritage, creating some confusion as to the applicable rules of unavailability.

The Code of Cultural Heritage and Landscape tries to shed light on the issue, creating - for cultural assets belonging to the state - to the regions and local authorities, a three-tier system.¹⁹⁶

The first level consists on the goods for which there is an absolute prohibition and final alienability, as state-owned cultural assets: real estate in areas of archaeological interest, property recognized national monuments with acts having the force of laws, collections of museums, art galleries, galleries and libraries, archives.¹⁹⁷

The second level encompasses some of immovable cultural property belonging to the cultural domain, for which it is expected the exceptionally alienability only after receipt by the special ' *authorization by the Ministry of Cultural Heritage and Activities and Tourism to alienate* '.

In accordance with art. 55 co.2, such authorization may be granted subject to the alienation ensure the protection and enhancement of the property, it does not affect the enjoyment of the public and provides it a destination of use compatible with the historical and artistic character, which does not cause damage to property preservation.¹⁹⁸

¹⁹⁵ Italian Civil Code, 1942, Artt. 822, 824 and 824.

¹⁹⁶ Legislative Decree 42/2004 abrogates the previous laws regarding ' *restituire omogeneità allo statuto proprietario dei beni culturali, ponendosi come disciplina esclusiva della materia* ' (M. Buonauro, comment to art. 53 of the Code, in *Commentario al Codice dei Beni culturali e del paesaggio*, G. Leone and A. L. Tarasco, Cedam 2006, 378 .

¹⁹⁷ See note 195, Art. 54.1 .

¹⁹⁸ See note 195, Art. 55.1 .

the authorization was granted by the Minister entails automatically ' *sdemanizzazione* ' ¹⁹⁹ of the good, which by that time will be treated as a cultural asset, but no more state property.²⁰⁰

In the third level includes all the remaining public cultural goods, not belonging to the category of state property, for the sale of which will anyway need prior authorization being issued by the Ministry of Culture.

Any owner of a cultural institution that wants to proceed to its total or partial alienation must submit to the Ministry, according to the provisions of art. 57, special authorization to alienate request, accompanied by an indication of the intended use and the program any necessary conservation work.²⁰¹

Should the asset for which authorization is requested falls within those belonging to the second level above, you will proceed to necessary ' *sdemanializzazione* ' the same.

If the good is a cultural public one but not state property, it shall be sufficient that the alienation does not result in harm to the preservation or public enjoyment.

Failure to comply to the formalities relating to prior authorization determine the nullity of the alienation²⁰² and the application of the sanctions provided by Art. 173 of the code.

Within thirty days of the alienation, whether for consideration or free of charge, the vendor or transferor detention will be required to submit the appropriate complaint with the Superintendent of the egg where the property is situated.²⁰³

This transfer report must contain data identifying the good and the parties, including domiciles in Italy for any communications, the indication of the place where the property is located and the nature and conditions of the transfer agreement.

Where circumstances so require, the complaint automatically establishes the

199 Termination of membership of a good character of the state property, resulting in a certain measure of public administration.

200 Cfr. Cass. Civ. Sez. , sent. n. 2635/93, Cass. Civ. Sez. II sent. n.4089/96, Cass. Civ. Sez. II sent. n. 3451/96, Cass. Civ. Sez. II sent. n. 1480/96.

201 See note 195, Art. 57 .

202 See note 195, Art. 164 .

203 See note 195, Art. 59.2 lett. b.

artistic preemption procedure governed by the code in articles. 60, 61 and 62.

3.2. Private Property

The belonging of cultural heritage to private entities determines a plurality of legal systems of movement, according to a similar scheme - for certain aspects - the one designed for the goods belonging to the public ones, however, without being able to prescind from the constitutional principles of protection and freedom of private property.²⁰⁴

The presence of a public interest in the use of these assets reflects on the imposition of a special legal regime regarding their availability, their use and maintenance and conservation duties incumbent on the owners.

With particular reference to circulatory matters, the legislature makes distinctions under both subjectively - distinguishing legal entities operating non-profit organization by other private individuals - and objective, depending on whether the good is or is not the work of a living author and has more than fifty years.

On this basis, it is also possible for the goods of private property to identify a system of three levels of protection.

In the first-level fall both movable and immovable cultural property - owned by non-profit legal entities and having more than fifty years - to which it is possible to apply an absolute inalienability procedure unless a *sdemanializzazione* procedure of the same ones.²⁰⁵

The second level consists, on a residual basis, for which there is a relative inalienability regimen, with subjection to an enabling decision ²⁰⁶ one less severe than expected for the assets belonging to public entities: the authorization and alienate will in fact denied only where it finds that may

²⁰⁴ Italian Constitution, 1948, Art. 42.

²⁰⁵ See note 195, Art. 54. 2 lett a.

²⁰⁶ See note 195, Art. 57 (5).

result in serious damage to the public conversation and enjoyment of their property.²⁰⁷

For all other cultural property belonging to private entities exists instead a free disposal regime, attenuated only the obligation to transfer complaint, which could be followed by the exercise of the right of first refusal by the State or regional or local authorities concerned.

4. International Circulation of Cultural Goods

In general, the regulations on cultural heritage of art in rich States restricts the movement of their cultural property, especially if it comes to objects belonging to categories of ‘ nationalized ‘ goods, such as the archaeological material when said property of the nation where they have been found.

In Italy the system of alienation of much of the cultural material present on its soil is founded on ministerial authorization, but the competent authorities have not shown almost no interest in trading these assets.²⁰⁸

The laws in the field of cultural heritage have been used to believe the goods within the country's borders and thus limit the legal trade in restricted categories of objects. For example the cultural assets belonging to public bodies may be sold if the Ministry of Culture and cultural activities goods agrees and if they met certain specific conditions for use and an object ²⁰⁹ conservation status.

The objects belonging to a private may be alienated once met specific conditions.²¹⁰ In any case, the Ministry has a right of first refusal on the object, exercisable within 60 days.²¹¹

If it is a particularly important object the law requires that it remains on Italian

207 See note 195, Art. 57.5, BUONAURO M., comment to art. 57 in *Commentario al Codice*, 392.

208 Law n. 42/2004, from Art. 53 to 64, recently modified by the corrective decretes 62 and 63 of 2008.

209 Artt. 55 to 57.

210 CAMMELLI M., *Il Codice dei beni culturali e del paesaggio*, Il Mulino, 2007.

211 Artt. 57-61.

soil even in the case where the buyer is a foreigner.²¹² This object may possibly be temporarily exported after obtaining authorization from the Ministry.²¹³

Until now, especially in the context of ancient cultural objects, as well as archaeological finds, the lawful export was limited mostly to items belonging to private or public entities acquired prior to the 1909 legislation, which can legitimately be traded.²¹⁴

The alienation of these goods, while possible, in fact poses a problem of proof at the time of application for the export permit. Overall, the flow of objects legitimately operable is limited and can not satisfy the international application which requires a greater degree of high-quality items.

This question is therefore directed at cultural heritage result of illegal activities.²¹⁵

At the supranational level, the trade in cultural goods is governed by the 1970 UNESCO Convention and the UNIDROIT Convention of 1995. These are international treaties that are meant to provide a framework for cooperation between nations in order to combat illicit trafficking of cultural goods.²¹⁶

Both Conventions define the standards that are not directly applicable but before becoming executive in a member state must be ratified and transposed into national law.²¹⁷

The 1970 UNESCO Convention has been ratified by 120 countries including Italy in 1978 and the United States in 1983.²¹⁸

This tool encourages all Member States to identify and protect cultural property on their territory and to engage in the fight against illicit trafficking. It proposes a uniform supranational agreement that can regulate the international market for these objects through the introduction of a mechanism that simplifies how to return of cultural objects unlawfully removed from their respective home countries.

212 Art. 54.

213 Artt. 66-67.

214 Art. 91.

215 FELCH J. AND FRAMMOLINO R., *Chasing Aphrodite*, Houghton Mifflin Harcourt, 2011, 1-5.

Also ISMAN F., *I predatori dell'arca perduta*, Milano, Skira, 2009.

216 UNESCO Convention of 1970 and UNIDROIT Convention of 1995.

217 General Introduction to the Standard -Setting Instruments of UNESCO.

218 Law n. 873/78 ratified the UNESCO Convention.

This return mechanism that allows states to claim the cultural heritage in accordance with your national legislation promotes a restrictive business model that inhibits the formation of a solid international market of such goods. The UNIDROIT Convention, which substantially completed the effort to curb the illicit circulation introduced by the 1970 Convention, has been ratified by Italy in 1999 but not by the United States.²¹⁹

The implementation of the Convention of 1970 in the US is a significant event because the interest and demand for many types of cultural goods by private collectors and museums have made the United States one of its biggest markets.

The most important auctions take place in New York, and the collections of the Metropolitan Museum of Art, the Getty, the Museum of Fine Arts in Boston and many others have acquired great fame for the quality of their objects from the Mediterranean region.

It is important to point out that the implementation of the Convention was not in the least in the US interest for two main reasons: the first concerns the fact that being poor and not of particular interest in the international market, the American cultural heritage had no particular need of protection guaranteed by the Convention.

The second reason is that the introduction of a rule that would make more difficult the work of dealers and curators would reduce the sale of these objects and consequently the global prestige achieved by important American collections.

In fact, most of the participants in the market of cultural objects in the United States was opposed to any kind of order capable of limiting the international trade in these objects.

This opposition was not successful, mainly because it fragmented into a plurality of lower interest unable to agree, and this facilitated the lobbying work of the AIA (Archeological Institute of America), which persuaded the US Congress to ratify the Convention as an act diplomatic, and moral

²¹⁹ SAVINO M, *Il traffico illecito*, CASINI L., *La globalizzazione dei beni culturali*, Bologna, Il Mulino, 2010, 160; GERSTENBLITH P., *Identity and Cultural Property : The Protection of Cultural Property in the United States*, in *The Boston University Law Review*, 75, 1995.

leadership - a gesture that would have facilitated collaborations between American archaeologists and those of the countries of origin .²²⁰

The Convention was transposed into national law through the CPIA in 1983. The CPIA introduced in the United States a mechanism that prohibits the import of cultural property documented in national inventories when contained in provisions of bilateral agreements between Member States and the members' countries of origin of the Convention .

The CPIA was designed to protect American institutions from claims based solely on the infringement of foreign regulations by establishing an internal audit mechanism to redefine the need of control rules on imports.²²¹ Consequently a member country of the Convention may formally ask the United States to limit the import of certain categories of cultural goods .

In 2001 the US government signed a bilateral agreement with the Italian government that the United States limited the import of certain categories of cultural heritage including archaeological finds of the classical age, pre-classical and imperial . The bilateral agreement was renewed and expanded for the first time in 2005, and then again in 2011, with the opportunity to include certain categories of ancient coins.

The US administrative body that assesses applications and renewals of these agreements is the Advisory Committee on Cultural Property (CPAC). Restrictions on imports are permitted if the eleven members of the Committee, composed of archaeologists, museum officials, experts and public interest representatives are in agreement on the fact that the cultural heritage of the requesting State is in danger of further looting.

In taking this decision the committee members are expected to consider the ' general interest of the international community in the interchange of cultural property among nations for scientific, cultural and educational ' .

Overall, the CPAC grants import limits of broad categories of archaeological material, but not necessarily those at highest risk, strictly limiting the trade in cultural goods.

²²⁰ EFRAT A, *Governing Guns, Preventing Plunder: International Cooperation against Illicit Trade*, Oxford University Press, 2012, 86-87.

²²¹ BATOP P., *An Essay on the International Trade*, in *The Stanford Law Review*, 34, 1982.

The fact that the CPIA has been transformed into a mechanism that ensures virtually automatic return of cultural objects is not in line with the objectives set by the US Congress in the act of ratification of the 1970 Convention, including the right to ' *allow art free flow honestly and honourably acquired to the United States* ' .²²²

Instead of stimulating international trade and the fight against illicit trafficking enabling countries of origin to claim the return of important cultural property this section showed that overall, the UNESCO Convention of 1970, the rules on Italian cultural heritage and the CPIA American, have also hindered the legal trade in cultural objects.

The existing legal instruments do not solve the problems related to the work of clandestine diggers and illicit trade and, not recognizing the market transactional utility as a place of exchange for these assets, ignoring the interest of the application, which includes the wishes of traders , collectors and museums in the market nations.

The overall effect of the regulation analysed in this section was to inadequately hit the illicit trafficking and to discourage legitimate trade in cultural goods.

5. Cultural Goods outbound

The international movement of cultural goods is governed by the Code by introducing a much more rigorous treatment than that previously in force with the Testo Unico of 1999.²²³

The Code changes the precedent discipline, in fact, it is not longer necessary the subordination of the prohibition of cultural heritage to leave the country if it could bring any harm to the natural and historical heritage, moreover it is not longer necessary either to eliminate the presence of the damage so that it

²²² See note 209.

²²³ See note 195,V Title, II Part, Artt. 65 to 87.

can be possible to export.

General principle underlying the entire discipline, as dictated by Article 65, is the prohibition to export cultural property from the territory of the Republic.²²⁴

To this basic rule may be departed from only in the manner and in cases stipulated by the Code: in case of issuance of free movement certificate, pursuant to the wording of Articles. 65.68 and 69, or in case of temporary output for events, exhibitions or art exhibitions of high cultural interest.

5.1. Temporary outbound of Cultural Goods from the territory

With reference to the temporary outbound of cultural property hypothesis from the territory of the Republic, the rules provided by the Code appears to be less severe than the requirements for a final exposure.

Pursuant to the provisions of articles 66,67 and 71, it may be possible the temporary exit - aimed at participation in events, exhibitions or art exhibitions of ' high cultural interest ' - not only of those goods for which the final export is permitted, but also of those, listed in paragraphs 1 and 2 of art. 65, for which there is the final exit ban.²²⁵

For the possibility to obtain the permission for a temporary output, it will be essential to ensure the integrity and security of the asset: will therefore not be permitted in any case in which the good in question is considered likely to be damaged in transport or stay in unfavourable environmental conditions and it will also be barred from exporting temporary of assets in the following cases :
' *the main fund of a specific and organic section of a museum, art gallery, gallery, archive or library or an art collection or bibliographic* ' .²²⁶

The temporary exit of the goods is subordinate to the appropriate release of a '

224 See note 195, Art. 65. 1.

225 See note 195, Art. 65. co.1-2 .

226 See note 195, Art. 66. 2 lett. b.

certificate of temporary movement ' .²²⁷

Similarly to the above for the temporary outbound, the interested party must submit the appropriate complaint with the office of export and present on site the good, indicating the market value.

In this case, however, the indication of the value of the asset is not required for purchasing reasons not even for an ' enforced purchase ' - as in the case of definitive export -, but rather to evaluate the extent of insurance necessary to cover the risks that the property may run in the transport and stay abroad.

Whereas for the first goal of the temporary exit of cultural objects from national territory is, by the legislature, to be able to ensure greater usability of national assets abroad as well as promote cultural exchanges, the threat of a possible compulsory purchase by the state it would be a disincentive undoubtedly misplaced.

Within forty days of the request, with a reasoned opinion, the competent office must issue or deny a certificate of temporary movement - following the judgment to the general framework provided by the Ministry - and the person concerned, in case of failure, may appeal within thirty days to the Minister.

If the issue of the certificate proceeds and it is accepted , the certificate will indicate all the requirements to be followed in the process of transportation and stay abroad, as well as the deadline for the return of the property, and it will be possible to present a request to extend it but for never more than eighteen months.²²⁸

The temporary exit of the property is subject to the presence of specific guarantees: in the case of property in private ownership, will have to show, by the submission of the application, the person in charge of any custody abroad; It will also be required, in respect of the person, an insurance on goods, to the value indicated in the complaint.

However, where the case of exhibitions and events at the state participation - promoted abroad by the Ministry, public entities, from Italian cultural institutes abroad or by supranational bodies - the insurance may be replaced by

²²⁷ See note 195, Art. 67 .

²²⁸ See note 195, Art. 68 .

the direct assumption of risk by the State, by special ministerial decree.

In such circumstances, in fact, it may be the primary interest of the Ministry or the state that a particular good or it could happen that the organization of the event offers guarantees such as to preclude the need for further private interventions.

For certain private property is finally required to pay a deposit, which consists of surety policy issued by a bank or an insurance company for an amount exceeding 10% of the value of the thing or the good, determined in the of demand of temporary outbound of the cultural property.

The deposit is intended to prevent that the temporary exit of the asset can become definitive, the expiry of the deadline: if the goods do not return home, it is expected that the receipts State bails the deposit.²²⁹

With reference to public property, is equally required that the applicant for the temporary output to indicate in his application the person responsible for the care abroad, as well as to ensure appropriate security - in this case also it could be replaced with a risk-taking by the State .

It is however not due in such cases a deposit, resulting unlikely that public authorities may be willing to facilitate the illicit final output of a good or, anyway, they are negligent in the management of the return of its own good.

The export offices are called to check and certify not only the output cases - permanent or temporary - of cultural heritage, but also the entrance and the ' lawful presence ' of these assets in the national territory, according to the provisions of Art. 72, which follows without anything to change the discipline of T.U. 1999.

In the event that indeed a good cultural face his entry into Italian territory, at the request of the office of export must issue, on the basis of ' *appropriate documentation to identify the thing and proving their origin* ' a ' *certificate of post-import* ', provided that the goods come from a third country or a ' certificate of import ', in the case of goods from a EU member country.

Purpose of these certifications, which have a five-year validity - which may be extended on request - is to prove the lawful presence in Italy of goods,

²²⁹ See note 195, Art. 69.

providing and identifying possible cases of illicit importation.

In the analysis of the EU Regulation 3911/92, it has already been detected as the main Community limit our disposal was to not provide for the lawful arrival control mechanism of a good in a determinate country.

In practice, Member States tend not to carry out detailed investigations on the input lawfulness of a particular good, for this reason there are a lot of cases of issuing export licenses which effectively legitimize previous illegal outputs.

Italy, with the art. 72, means a best practice that is missing in other European countries, placing the relevant offices in a position to - and need - to verify the lawful presence in the territory of a determinate good.²³⁰

5.2. Definitive outbound of Cultural Goods from the territory

As for the definitive exit of cultural objects from national territory, the Code distinguishes the 'delivery' within the Community and the 'export' beyond the European Union's borders, reconnecting the two hypotheses regulatory regimes, at least in part, differentiated.²³¹

In the case of intra-Community dispatch of the goods, it will be required that the person concerned has a '*freedom of movement certificate*', valid for three years; if instead the good is directed towards a Third country, certificate of free movement must be added the export license already provided by Regulation 3911/92, which has an half-year validity.

Not all cultural heritage is permitted definitive exit of the national territory: the things that can be arranged and authorized it is listed exhaustively by the Code paragraph 3 of art. 65: archives and documents belonging to private individuals, things belonging to anyone, not to be the work of a living author

²³⁰ See note 195, Art. 72.

²³¹ Law n. 88/88, which implemented in our system the 3911/92 Community Regulation modifying the exportation of cultural goods and differentiating the exit between inside and outside the EU.

and whose execution dates back to over 50 years, photographs, copies of cinematographic works, documentations of sound events or verbal still registered with more 25 years old, transport more than 75 years old, goods and tools interest in the history of science and technology more than 50 years.

Anyone who has interest in exporting definitively one of the items listed above, must present a special complaint and present concretely the good at the competent office of export, and will, within three days, notify the competent ministerial offices.²³²

These offices will have an additional period of ten days to report any relevant information related to the thing or the good intended final output.

Within forty days from the complaint, the office of export shall notify the applicant of the success or failure of the requested release of free movement certificate, giving reasons in both cases of its decision.

If successful, the certificate issued will be valid for three years: if the transfer does not happen within three years it will be required to undergo another inspection by the office of export.

In case the answer is no, and the issue of the certificate is denied, the person concerned - owner or shipper of the goods - may submit to the Ministry an appeal against the refusal certificate within thirty days, as provided by art. 69 of the Code.

If the application is granted, the Ministry will transmit the acts to the office of export, which will, in accordance with the dictates of the Ministry, in the next twenty days. When submitting the complaint, it must provide to the export office also the market value of the property, so that the Ministry can, if interested, purchase compulsorily the good.²³³

The institute of Compulsory Purchase was already present in both the 1939 Law in the Text of the 1999 Act, and is restated by the Code, with some important changes.

This is one of the typical acquisition tools by the State of privately owned cultural heritage, different from the already examined cultural preemption,

²³² Art. 68 of the Code which resumes art. 66 of the T.U. and it is adopted by the Law 88/88, with which it is constituted a ' Export License ' antecedently requested in the Bottai Law .

²³³ Art. 70.

because in this case is missing by the alienating the willingness to alienate the good, subsisting instead only the will to export .

By the end of the forty days, guaranteed to the export office for the issuance or denial of the certificate of free circulation, the same office may propose to the Ministry the compulsory purchase of the cultural exported well, for the value in complaint, giving simultaneous notice to the subject requesting the certificate is in the Region.

The Ministry will in ninety days from the reception of the complaint to pronounce whether to exercise the right to purchase, final deadline for the news of the possible purchase decision to the interested party.

To the latter, be it owner or shipper of the property - the co.2 art. 70 attributes the so-called ' *Waiver option* ', not contemplated in T.U. of 1999; until it did not attend the notification of the purchase order, the interested party can indeed give up the export of the object and provide for the withdrawal of an assessment.²³⁴

The power granted to the applicant for authorization to waive its request to prevent the compulsory purchase - as is evident in the doctrine - makes it clear that no question of a regulation of institutional titles of property, but an act attributable to a power supremacy in the country that meets the need to preserve the national cultural heritage by its dispersion.²³⁵

If the goods to be exported definitively needs to go beyond the EU borders, it will be necessary, as mentioned above, that the certificate of freedom of movement will also accompany a ' Export license ', the issue rests with those offices.

The license, in conformity with the standard model established by the Community legislation, is explicitly required ²³⁶ for non-EU exports of goods falling within Annex A to the Code, which incorporates - obviously - the contents of the Annex to Regulation Community.²³⁷

234 This right of renunciation, previously present in the Bottai Law even if in a limited form, it was abolished by Law 88/98.

235 FIORILLO M., comment to Art. 70 of the Code, in *Commentario al Codice cit.*, 458 .

236 CE Regulation n. 656/04, modified by the CE Regulation

237 Art. 74 of the Code and it is also disciplined by the 3911/92 CEE Regulation, in GUCE L 104 of 2004.

Clearance however, that even for goods that do not fall within the criteria set out in Annex, the final output may be subject to the issuance of such license or even precluded.

This is indicated the paragraph 4 of Art. 2 of the Community measure: '*direct export from the customs territory of the Community of goods of national treasures possessing artistic, historic or archaeological value which are not within the definition of cultural property under this Regulation is subject to the national law of the Member State export*'.

Not instead will apply the provisions relating to certificate and export permit, if the goods flowing in Italian territory, is already coming from another member country and accompanied by a valid export license, for the whole period of validity of the same.

6. Directive 93/7/CE

Directive 93/7 / EC was implemented in Italy with Law 88 of 1998, with a delay of almost five years compared to the schedule provided by the Community measure.

The law 88/98, now repealed, following the full implementation of its content in the Code ensured not only to regulate the return of the goods out illegally by a Member State (Directive reproducing the provision of the law), but also to specify the forms and the procedures for the issuing of export licenses, required by Regulation 3911/92 and the free movement of certificates required to legitimize the movement of Community goods.

Today the matter is governed by Section III of Chapter IV of the Code (arts. 75 to 86), but without a clear distinction between the action for restitution promoted by Italy and the action brought by another state for a good site Italy.

The Ministry of Heritage and Culture is identified as the reference authority and liaison with the European Commission and other member states for

everything related to the application of Directive 93/7, alongside the Agency which are assigned responsible for verifying the validity of the export license, in application of Regulation 3911/92.

The Italian legislation aims to foster collaboration between the various parties involved in combating illicit trafficking of cultural goods, providing for an exchange of knowledge takes place between the Minister and the European Commission, which will be regularly informed of the measures to be taken at national level.

The Minister will also require to report annually to Parliament on the implementation of the Directive in Italy and the member states.

Finally, it promotes art. 86, the creation by the Ministry of ' appropriate arrangements ' with the corresponding authorities of the Member States, in order to foster greater mutual understanding of the cultural heritage, legislation and organization of protection.²³⁸

These agreements do not qualify as international, even though it concerns subjects from different countries: rather than ' agreements ' in the technical sense, it is indeed appropriate to speak of more or less informal forms of cooperation, and more or less specific, to be implemented from time to time with the competent authorities in the performance of an obligation of cooperation - on a reciprocal basis - within the EU.

Important innovations introduced by the Code - compared to the original law transposing the Directive - is predicting the establishment of a new instrument of control of the outputs of the cultural heritage: the ' *database of cultural objects unlawfully removed from* ', established at the Ministry of Goods and Cultural Activities and Tourism.

Lacking, at art.85, a definition of the term ' stolen ' may well be inferred that refer to all cases where a cultural object is stolen, illegally exported, lost, hidden or simply there is no evidence that an loss or destruction.²³⁹

This database has been in fact replace, being included, the existing bank of works of art stolen data established in 1980 at the Carabinieri for the

²³⁸ See note 195, Art. 84 enforces ' preventive cooperation ' ruled by art. 4 of the Directive and Art.6 of 3911/92 Regulation.

²³⁹ See note 195, Art. 85.

protection of artistic heritage.

This instrument performs the dual function of providing purchasers of cultural goods indications regarding the suspected illegal origin of good and, at the same time, to ensure a constant transfer of updated information to other police forces.²⁴⁰

With reference to the action of restitution asked to Italy, for which the art.78 resumed the terms of the annual decline Directive and thirty-year prescription, the European Community provision on compensation payable to the holder is implemented in Italy faithfully reproducing the wording of the Directive: the compensation is in fact paid to the 'interested party' which proves that he used, *'at the time of acquisition, due diligence depending on the circumstances'*²⁴¹.

As regards the burden of proof, it is left to the national legislation of the Directive, and basically, the interested subject has the duty of the burden of proof, causing an exception to the general rule in force in our legal system, for the good faith it is presumed that was present at the time of purchase.²⁴²

Finally, with regard to the return action brought Italy, holder of the action is the Minister for Arts and Cultural Assets and Activities, together with the Ministry of Foreign Affairs and the State Attorney.

Where the case of a cultural property which is not owned by the State, the announcement of the return of the property has to be published in the Official Gazette: if within five years it is not received any request of redelivery or anyone is able to demonstrate the institutional titles of good, it will become part of the state property.

240 Comando Carabinieri Tutela Patrimonio Culturale, *Attività operativa 2007*, available at www.beniculturali.it/pdf/CartellaStampa17012009.pdf.

241 Directive 93/7/CE.

242 See note 153, Art 1147.

7. Italy and the 1995 Unidroit Convention

The 1995 UNIDROIT Convention was ratified with the Law No. 213/99 which led to the adoption three special regulations on cooperation in tracing cultural object illegally removed²⁴³, a shift in discharging the *onus probandi* with reference to good and bad faith holder of the object²⁴⁴ and an exclusion of the UNIDROIT Convention when the European Community rules are to be applied.²⁴⁵

There could be problems inside the Italian system regarding the ratification of the Convention, firstly because it gives different legal protection when dealing with the national claims on one side – ruled by national laws – and international ones on the other – ruled by the UNIDROIT Convention – even if they have uniform or equal content.

However, the national and international approaches will undoubtedly influence to a greater or lesser degree the revision of the indexes of evaluation of good and bad faith, but meanwhile constitutional issues for unequal treatment could be raised in those cases.

For instance, if the present possessor might avail him/herself of the *possideo quia possideo* rule, as it often happens for national claims, it will be on the claimant to prove bad faith.

On the other hand, the *onus probandi* his/her good faith shift on the possessor of the cultural item, when a claim of international character ruled by the UNIDROIT Convention is lodged.²⁴⁶

The UNIDROIT Convention had and has a strong impact at least in the interpretative phase. The procedures rubricated in the Italian system regarding the recovering of cultural items where possible thanks to the Convention.

²⁴³ Law No. 213/99, Art. 2 .

²⁴⁴ See note 195, Art. 4 .

²⁴⁵ See note 195, Art. 7.

²⁴⁶ Principal Operation of the 1995 UNIDROIT Convention – Italy .

It is important to underline that Italy has become party of the Convention on the Protection of the Underwater Cultural Heritage - adopted by UNESCO in 2001 – to the Convention for the Safeguarding of the Intangible Cultural Heritage – adopted by UNESCO in 2003 – and also to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions – adopted by UNESCO in 2005.

However, the Law 213/99 was not the only measure adopted to ratify the UNIDROIT Convention, in fact in 2004 with the Legislative Decree 42/04 was promulgated the Code of Cultural Heritage and Landscape in Italy which was reformed recently in 2016.

This Code designates cultural objects by categorization and it regulates the cases of theft and the restitution procedures that can be applied in these cases.

Moreover, it directs the cultural goods' – both public and private – circulation at a national and international level even if it is only temporary.

7.1. Legislative Decree 42/04

The 2004 Italian Code of Cultural Heritage and Landscape was modified in 2016, the Code was aimed at rationalising huge layers of multifaceted legislation regulating the field since the early past century – was adopted by Minister Urbani through the Delegated Decree 42/2004, according to Law 137/2002.²⁴⁷

It was further modified by Minister Buttiglione (Leg. Decrees 156/2006 and 157/2006) and by Minister Rutelli (Leg. Decrees 62/2008 and 63/2008), so much so that it can be defined as a complex and protracted ' bipartisan

²⁴⁷ Legislative Decree No. 42 of January 22, 2004, Code of Cultural Heritage and Landscape, as Mandated by Article 10 of Law No. 137 of July 6, 2002 (L.D. No. 42), GAZZETTA UFFICIALE No. 45 (Feb. 24, 2004), *available at* [NORMATIVA](#) (in Italian) (consolidated text updated with provisions effective Mar. 31, 2016).

endeavour '.

This monumental Codex, made up of 184 Articles, attempts to be all-embracing. After sanctioning a new, more extended and up-to-date definition of cultural goods, also inclusive of immaterial goods, it regulates in detail all the functions pertaining to the heritage, archives and libraries – protection, valorisation, management, national and international circulation of cultural goods, etc. – as well as to the landscape.²⁴⁸

The updated Code contains a number of new provisions to enhance protection of and promote the Italian cultural heritage. The Code excludes from the definition of cultural property the works of a living author whose creations do not go back more than 50 years and creations that are less than 70 years old.²⁴⁹

The Code adds the '*removal or demolition, even if followed by re-construction*', of legally protected cultural property to the types of conduct that require prior governmental authorization.²⁵⁰

The Code provides that the national police assigned to protect the national cultural heritage must be informed of any fortuitous discovery of protected cultural property, whether real estate or movable property.²⁵¹

The Code exempts from the need to obtain prior government authorization certain activities performed without a profit motive related to the study, research, or free expression of thought and creative expression aimed at promoting knowledge of the national cultural heritage.²⁵²

The Code strengthens the supervision mechanisms of the central government to protect cultural property located throughout the country.²⁵³ The Code also charges governmental entities, including local authorities, with the obligation to preserve and create inventories of cultural property under their

248 FIGUEROA D., 'Italy: New Code of Cultural Heritage and Landscape', Library of Congress, 2016.

249 See note 246, Art. 10.5 .

250 See note 246, Art. 21.1 .

251 See note 246, Art. 90.1 .

252 See note 246, Art. 108. 3-bis .

253 See note 246, Art. 18. 2 .

administration.²⁵⁴

In addition, it recognizes and strengthens cooperative activities between government and academic entities aimed at disseminating knowledge of the national cultural heritage²⁵⁵ and creates mechanisms for cooperative activities between public and private entities aimed at protecting the national landscape.²⁵⁶

The Code provides rules applicable to the upkeep of the colours of the facades of culturally protected buildings.²⁵⁷ It also expands the prohibition against placing or affixing signs or other means of publicity on buildings or in areas protected as cultural property.²⁵⁸

The Code regulates the payment of compensation in cases where the restitution of cultural property must be made²⁵⁹ and eliminates the statute of limitations on legal actions for the recovery of cultural property illegally removed from Italy.²⁶⁰

The Code sets forth a procedure for the issuance of a government authorization to transfer legally protected cultural property held in private hands or in the public domain,²⁶¹ eliminating the requirements of a prior authorization for the transfer of the property to the state and the payment of tax obligations.²⁶²

The Code also now contains a detailed procedure for the transfer to private ownership of public real estate subject to legal protection as cultural property.²⁶³

The Code regulates the procedure for the issuance of a ' *Declaration of Remarkable Public Interest* ' procured to protect real estate and other areas

254 See note 246, Art. 30. 4 .

255 See note 246 , Art. 119 .

256 See note 246, Art. 133 .

257 See note 246, Art. 154 .

258 See note 246, Art. 49. 1 .

259 See note 246, Art. 79.2 .

260 See note 246, Art. 78.3 .

261 See note 246, Art. 55. 2 and Art. 56. 2 .

262 See note 246, Art. 57.1 .

263 See note 246, Art. 57-bis .

with cultural value throughout the country.²⁶⁴

It sets forth stringent rules for the approval of landscape planning projects and activities²⁶⁵ and establishes the procedure for the approval of ' *Landscape Plans* ' affecting certain territories with cultural value in the country, a procedure that includes public participation and consultation mechanisms.²⁶⁶ It also grants legal recognition to the profession of intervenors in cultural property.²⁶⁷

The Code creates cooperation mechanisms for the control of the circulation of Italian cultural property outside the national territory.²⁶⁸ It adopts the United Nations Educational, Scientific and Cultural Organization (UNESCO) 2003 Convention for the Safeguarding of the Intangible Cultural Heritage into the Italian legal system.²⁶⁹

It also implements European Union legislation on the restitution of cultural property to its state of origin and on cooperative activities with other EU countries concerning cultural property stolen or illegally removed from Italy.²⁷⁰

The Code contains new provisions on the protection of cultural property granted to private parties by concession. It also includes new seminal measures to allow for the sponsorship by private parties of initiatives to protect the national cultural heritage.²⁷¹

The Code was designed to reinforce the importance of Italy's cultural heritage to the identity of the Italian people. Cultural heritage is composed of, among other elements, art, history, archeology, anthropology, archives, bibliographical libraries, museums, picture galleries, and art galleries.²⁷² In order to make preservation of the cultural a government responsibility, the

264 See note 246, Art. 138 .

265 See note 246, Art. 135 .

266 See note 246, Art. 143 and Art. 144 .

267 See note 246, Art. 9-bis .

268 See note 246, Art. 64-bis .

269 See note 229, Art. 7-bis; Convention for the Safeguarding of the Intangible Cultural Heritage, 2003 .

270 L.D. No. 42, Art. 22 and Art. 26.

271 See note 246, Art.120.1 .

272 See note 246, Art. 2.2 and Art. 10.2a .

Code created the Ministry for Cultural Assets and Activities (MCAA).²⁷³

Religious cultural property is to be protected by the relevant religious institution.²⁷⁴

The Code instituted the use of a ' Declaration of Cultural Interest ' certificate for certain properties, to be issued by the authorities, who also must maintain an online registry of such declarations.²⁷⁵ Additionally, the Code enables the regions and other public territorial entities to enter into financial agreements with foundations in order to implement activities that protect the cultural heritage.²⁷⁶

The Code establishes a procedure for carrying out renovations or changes or other forms of material intervention in protected cultural property, including environmental impact assessments.

The state and regional and local government entities are under the obligation to adopt measures for the protection and conservation of cultural property throughout the country.²⁷⁷ Under the Code, private owners of legally protected cultural property may be compelled to carry out conservation of such property.²⁷⁸

In addition, the MCAA may order the transportation of protected cultural property to public institutions that provide custody for movable cultural property and grant them temporary custody rights over such property.²⁷⁹

Cultural property may also be given in deposit to specific institutions for purposes of better protecting it.

The Code forbids the disposition of certain property from certain cultural domains, such as places of archaeological interest, national monuments, museums, galleries, libraries, and archives, among others.²⁸⁰

273 See note 246, Art. 3.1 and 4.1 .

274 See note 246, Art. 9.1 .

275 See note 246, Art. 10, 11 and 15.2-bis .

276 See note 246, Art. 121.1 .

277 See note 246, Art. 30 .

278 See note 235, Art. 34 .

279 See note 235, Art. 43 .

280 See note 235, Art. 54 a,b and c .

Furthermore, the Code mandates enforcement authorities to report all banned commercial activity carried out with the use of protected cultural property.

The Code makes international circulation of protected property subject to stringent requirements and restrictions.²⁸¹ The permanent removal of cultural property from Italian territory is generally forbidden, but the temporary exit of cultural property from Italian territory is allowed under strict conditions.²⁸² The MCAA maintains a database of all cultural property that has been illegally removed from Italian territory.

Although a large part of the huge pre-existing legislation dealing with this matter – from the first extensive law regulating the protection of the heritage, Law 1089/1939, up to the recent legislation in support of public-private partnership has been incorporated into this new Codex, some quite substantial changes have also been introduced over time.

The most controversial ones have been dealing with the alienation of public cultural property and the possibility to entrust private entities – both non-profit and profit – with the management of public museums, monuments and sites. Following a fierce debate, though, these two measures have been considerably softened in the following amendments to the Codex.

The possibility to hand over the management of public cultural property to the private for-profit sector was, in fact, explicitly excluded by Leg. Decree 156/2006, whereas new Decree 63/2008.

Further changes were introduced by Leg. Decrees 62 and 63/2008 (respectively devoted to the heritage and landscape), the former introducing new measures to prevent the improper alienation of public property, whereas the second endowed the Sovrintendenze with stronger powers with regard to landscape planning restrictions and the granting of permits.

However the safeguarding powers formerly granted to the Sovrintendenze have been subsequently somehow downgraded by Ministerial Decree 29 August 2014, the final say in landscape and heritage matters having been

²⁸¹ See note 235, Art. 64-bis .

²⁸² See note 235, Art. 66 and Art. 67 .

entrusted to the newly created, more plethoric, Regional Commissions for Heritage.

A further, much more controversial possible downgrading could be brought about by the implementation of Law 124/2015 on the reform of public administration (the so called Legge Madia), which provides for all administrative territorial branches – including the Sovrintendenze - to be incorporated into the prefectures, thus subordinating heritage safeguarding decisions to the prefects (Ministry of the Interior).

8. National Laws

States Parties to the Hague Convention and its Protocols are under an obligation to inform the UNESCO Secretariat about the measures adopted to ensure their implementation at the national level through periodic reports. A preliminary evaluation of the latest reports submitted by eighteen European States in the period 2011-2012²⁸³ shows that different methods have been put in place to ensure the implementation of these international instruments (Annes 1). While certain States have adopted specific implementing legislation – such as Switzerland – other revised their criminal codes or legislation on cultural property to integrate such rules .

With reference to the First Protocol, ten States claim having implemented its provisions in national legislation.

With only two exceptions, all European States claim to have established the acts under Article 15 of the Second Protocol as criminal offences under domestic law and to have them punishable by appropriate penalties . However, not all seem to provide specific clauses on the plunder and appropriation of cultural property in wartime (Annex 1).

²⁸³ See at <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/2015-2016-periodic-reports/#c1369634>.

Not just at European level provisions have been taken regarding improvements and innovations to the legislation of the Hague Convention – such as Switzerland, at European level, and Canada, at non-European level.

8.1 Austria

On November, 2009, Austria promulgated the Act Amending the Federal Act Concerning Restitution of Works of Art from Austrian Federal Museums and Collections – Bundesgesetzblatt I No.117/2009.²⁸⁴ This Act amends an Act of 1998, which provides for the restitution of Nazi-looted art - Bundesgesetzblatt I No. 181/1998.²⁸⁵ The Amending Act expands the scope of the original Act and alleviates some organizational problems.

As the Federal Government explained when submitting the bill to Parliament, reform was needed because practice had shown that the original Act had been drawn too narrowly - Regierungsvorlage, 238 Der Beilagen, Nationalrat 24. Gesetzgebungsperiode²⁸⁶.

The 2009 Amending Act broadens the original Act of 1998 by changing the definition of returnable art from ' works of art ' in the original Act to ' works of art and other movable cultural property ', thus making the Act applicable to objects of scientific or technical importance.

Secondly, by modifying the area of the lootings that give rise to restitution from the territory of Austria to all the territory under the rule of Nazi Germany changing the period of the relevant lootings from March 12, 1938, through May 8, 1945 - the period during which Austria was annexed by the Third Reich - to January 30, 1933, through May 8, 1945 - the duration of the Third

284 Available at

http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2009_I_117/bgbla_2009_I_117.html .

285 Available at http://www.ris.bka.gv.at/Dokumente/BgblPdf/1998_181_1/1998_181_1.pdf

286 Available at http://www.parlinkom.gv.at/PG/DE/XXIV/I/I_00238/fname_162113.pdf#search=%22R%C3%BCckgabe%20von%20Kunstgegenst%C3%A4nden%22

Reich - and lastly, by altering the applicability of the Act from objects owned by Austrian federal museums and collections to all objects owned by the Austrian Federal Government.

Nowadays, the overall purpose of the Act is to return cultural objects to their rightful owners if the objects had been unlawfully taken from their owners or had been sold by the owners under duress; it also applies to objects that, after World War II, Austria acquired from the owners in return for granting export permits for other works.

Despite the increase in the Act's scope, it continues to apply only to objects held by the Federal Government.

Even though many well-publicized claims have been made for art works held by private parties, among them claims against an Austrian private foundation that obtains federal subsidies, the Act was not extended to restitution claims against private parties because it is not clear whether such a broadening of the Act would be constitutional.²⁸⁷

The organizational and procedural reforms of the amending Act deal with the Restitution Council, an appointed body that ultimately decides on restitution after a claim has been subjected to a thorough provenance search.

The Council consists of appointees from several stakeholder ministries and of experts on history and art history. The reform added a representative of the Ministry of Finance to the Council, whose members are now appointed for three years. Previously they were appointed for one year.

8.2 United Kingdom

Established in April 2000, the Spoliation Advisory Panel operates under the

²⁸⁷ Interview by *Die Presse* with Clemens Jabloner, President of the Austrian Administrative Court of Justice, and President of the Looted Art Restitution Council [in German], *DIE PRESSE*, Oct. 27, 2009, available at <http://diepresse.com/home/kultur/kunst/517684/print.do>.

auspices of the UK Department for Culture, Media, and Sport. It considers claims from anyone (including heirs) who lost possession of a cultural object during the Nazi era (1933–1945) where the object is now possessed by a UK national collection or one established for the public benefit. The SAP may advise on claims regarding items in private collections at the joint request of claimants and owners.

To date, the SAP has reported ten times.

While considering legal-title issues, the SAP's function is not to determine legal rights and its findings are not binding. Its proceedings take place in confidence.

Attempting to bridge apparent dichotomies between morality and law, the SAP considers both the moral strength of the claimant's case and an institution's moral obligations. The SAP decides on the balance of probabilities while recognizing claimants' specific difficulties.

Without being pro-claimant, the SAP seeks solutions equitable to both claimants and institutions. In fact, the SAP provided the model for the equivalent Dutch Restitution Committee to which restitution applications have been made to date.

Deaccessioning difficulties, whereby divestiture of museum collections was barred by trust terms or by safeguarding legislation, resulted in claims being upheld, but with *ex gratia* payment awards, not restitutions.

Attempts to read in additional exceptions to the statutory rules were unsuccessful. Such difficulties were mitigated by the Holocaust Return of Cultural Objects Act 2009, which enables relevant board trustees to transfer an object from specified bodies established by statute.

Indeed the legislation has allowed the SAP to recommend actual restitution of the aforementioned Italian medieval manuscript.

The advisory panel must have recommended the transfer and the Secretary of State - and Scottish Ministers in the case of Scotland - must approve that recommendation. The ultimate transfer decision remains with the trustees.

The ' *power to return* ' does not override any trust or condition subject to

which an object is held. The Act is not retrospective and it expires ten years from its passage, some 74 years after World War II's end, providing certainty for the public collections concerned.

Twenty disputed articles are estimated to be in British collections, although the legislation may prompt more claims. Of course, if whole families were exterminated, good and bad faith purchasers alike retain secure possession. The SAP cannot investigate *ex proprio motu*.

However, the art world has clearly assumed moral duties. Special exhibitions, explanatory labels, and provenance notes may not compensate for harm done, but they humbly recognize tainted possession.

8.3 Canada

Canada has implemented the 1954 Hague Convention and its two Protocols through the *Crimes Against Humanity and War Crimes Act*²⁸⁸ and some articles of the *Cultural Property Export and Import Act*²⁸⁹ and *Criminal Code*²⁹⁰.

All of these acts have created various criminal offences in the case of persons violating provisions of the Hague Convention and its Protocols, including those relating to the theft and exportation of cultural property, and provide various remedies allowing for the restitution of said property.

The Canadian *Crimes Against Humanity and War Crimes Act* adopts the same definition of 'war crimes' as in the Statute of the International Criminal Court. Accordingly are considered imprescriptible war crimes 'seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of the conflict'.²⁹¹

If cultural property is obtained through the commission – in Canada²⁹² or

288 Crimes Against Humanity and War Crimes Act, S.C. 2000, c.24 .

289 Cultural Property Export and Import Act., R.S.C. 1985, c. C-51.

290 Canada Criminal Code, R.S.C. 1985, c. C-46.

291 Crimes Against Humanity and War Crimes Act, Annex.

292 Crimes Against Humanity and War Crimes Act, Art. 4 (1).

abroad²⁹³ - of such crimes, the Act notably allows for its seizure in Canada, as well as its return to the lawful owner or the person who is lawfully entitled to its possession.²⁹⁴

This is an innovative measure in the field of international protection of cultural property; indeed, it has been said that ' *Canadian law is such that, for example, artworks appropriated during the Nazi-era could be returned to rightful claimants pursuant to the prosecution of individuals in Canada for crimes against humanity committed outside Canada that were connected with the way in which the property was originally appropriated* '.²⁹⁵

Other actions, while not serious enough to constitute ' war crimes ', may also be subjected to the extraterritorial jurisdiction of Canada and consequently be liable for prosecution in this country.

The *Cultural Property Export and Import Act* imposes sanctions for the export or removal of cultural property – as defined in Article 1 of the Hague Convention – from an occupied territory of a State Party to the Second Protocol and allows the Attorney General of Canada, upon request from the concerned State Party, to institute a judicial action for recovery and return to said cultural property.²⁹⁶

Therefore the Canadian experience appears to be a good example of implementation of the Hague Convention and its Protocols in national law.

8.4 Switzerland

On 20 June 2014 Switzerland adopted the Federal Law on Protection of Cultural Objects in the Event of Armed Conflict, Disaster and Emergency

293 Crimes Against Humanity and War Crimes Act, Art. 6 (1).

294 Canadian Criminal Code, Art. 490 (9) (d).

295 PATERSON K. Robert, ' Canada ', in KONO Toshiyuki (ed.), *The Impact of Uniform Laws on the Protection of Cultural Heritage in the 21st Century*, Leiden, Martinus Nijhoff Publishers, 2010, 233-246, 243.

296 See note 144, Art. 36.1.

Situations²⁹⁷ - this law replaced and repealed the Federal Law on the Protection of Cultural Property in the Event of Armed Conflict of 1966.

With this Act the Swiss Confederation express concern that the cultural heritage be protected from risks such as war, natural disasters and other emergency situations, and recognized the importance to prevent the looting and illicit trafficking in cultural objects.

Respecting the preventive protection of cultural objects, Article 12 of the Federal Law regulates the granting of ' safe havens/refuge ' to foreign States wishing to protect their cultural patrimony from the treats posed by war, terrorism, and disasters.²⁹⁸

According to Article 12 of the Federal Law, the Swiss Federal Government may provide a safe haven for the cultural objects of foreign countries if they are threatened by armed conflicts, disaster, or emergency situations.

The law defines ' safe haven ' as any protected space established and managed by the Federal Government pursuant to national law where movable artefacts belonging to the cultural patrimony of a foreign State can be stored temporarily for safekeeping, provided that such assets are seriously threatened in the territory of that foreign State.²⁹⁹

Article 12 of the Federal Law makes clear that the fiduciary safekeeping of threatened artefacts is provided under the auspices of UNESCO, and that the Swiss Federal Council has the exclusive competence to conclude international treaties with requesting States in order to implement this provision.³⁰⁰

Of particular interest is the fact that other States, including France, as well as professional associations – such as the American Association of Art Museum Directors (AAMD), are moving towards the development of schemes for the creation of safe havens.

From an historic point of view, it is interesting to note that, in 2008, the Committee on Cultural Heritage law of the International Law Association

297 Recueil systématique du droit fédéral 520.3.

298 Hague Convention (Arts 1 (b), 8 and 11) and the Second Protocol (Article 8) .

299 See note 143, Article 2 (c) .

300 A decree for the implementation of the Federal Law was adopted on 29 October 2014, Recueil systématique du droit fédéral 520.31.

(ILA) adopted the ' *Guidelines for the Establishment and Conduct Materials*³⁰¹ (Annex 2).

The Committee's interest in the concept of safe havens grew out of the observation that cultural objects may need to be removed from the source State temporarily in order to ensure their safekeeping because of various threats, such as armed conflict, natural catastrophes, civil disasters, and unauthorized excavations.

The main objective of the ILA Committee was to establish specific standards and procedures for rescuing, safekeeping, and returning cultural assets after the threats prompting their removal have come to an end and the materials can again be protected in the source State.

Therefore, it is obvious that the Guidelines were intended to be integrated into State legislation and the internal rules of museums, professional associations and non-governmental organizations.

8.5 USA

The US ratified the 1970 UNESCO convention in 1983 through national legislation, the Convention on Cultural Property Implementation Act (CCPIA).

While the US helped in the final stages of drafting the convention, was a signatory, and in 1972 the Senate gave its unanimous advice and consent to ratification, special legislation was needed for its implementation under US law. The CCPIA primarily implements Articles 7b and 9 of the convention.

' *State parties to the convention agree to prohibit the import of documented cultural property stolen from museums, religious or other public monuments*

301 Resolution 2/2008 adopted at the 73 Conference of the International Law Association, held in Rio de Janeiro, Brazil 17 - 21 August 2008 available at : <http://www.ila.org/en/committees/index.cfm/cid/13> .

in another state party '.³⁰²

Article 9 allows any state party whose archaeological or ethnological material is in jeopardy from pillage to request assistance from other state parties.

The implementation of Article 9 thus established an advisory body, the *Cultural Property Advisory Committee* (CPAC), that reports to the Assistant Secretary of State for Educational and Cultural Affairs.

This committee is made up of 11 members appointed by the US President to renewable three-year terms, with up to three member experts in archaeology, anthropology, ethnology, or related fields, another three knowledgeable in the international sale of cultural property, two representing the interests of museums and three, those of the general public.

The diverse composition is intended to represent many points of view and may be contrasted with the makeup of similar advisory bodies about looted art in European countries, which tend to be composed of lawyers, civil servants, art historians and museum experts, not dealers or those involved in the trade or members of the general public.

Here one might compare the UK Spoliation Panel, or the French *Commission pour l'Indemnisation des Victimes de Spoliations*.³⁰³

At the public hearings before CPAC in Washington, DC, conversation is vigorous, with considerable debate on the pros and cons of taking action.

The helpful actions envisioned concern the control of import, export and international trade in the specific cultural materials, but have also extended to offering assistance with other forms of cultural property protection in country, such as public awareness, conservation, education, the exchange of various sorts of expertise, law enforcement and training.

If approved, the resulting bilateral agreement, termed a Memorandum of

³⁰² Convention on Cultural Property Implementation Act (CCPIA), 1983 , Art. 7b.

³⁰³ GOLOMOZ C.,'s unpublished conference paper presented at the *Looted Art and Restitution in the Twentieth Century: Europe in transnational and global perspective* conference at Newnham College, Cambridge, 18–20 September, 2014.

Understanding (MOU) has a five- year limit, but the country may request its renewal an unlimited number of times.³⁰⁴

Because state parties that request such agreements must show both evidence of looting and the actions they have taken to thwart it, the measures for the most part react to pillage.

Upon the approval of an MOU, the US imposes import restrictions on the types of objects likely to have come from plundered contexts.

These restrictions are prospective, that is, they apply to objects that leave the state party in question only after the date the import curbs went into effect, and only for the five-year period of the agreement.

They do not apply to objects already outside the country of origin at the time the agreement and restrictions were put into effect.

One of the advantages of the five-year term is that for any subsequent renewal the country in question is required to show progress in the measures it has adopted to combat the pillage of its cultural heritage.

Implementation of the import restrictions at points of entry into the US falls to Immigration and Customs Enforcement and US Customs and Border Protection, branches of the Department of Homeland Security.³⁰⁵

The only sanction in such cases is the seizure and forfeiture of the object (s) illegally imported. Because it is a civil statute, the CCPIA has no provision for criminal sanctions against those who violate the restrictions. Indeed, some have categorized it as trade legislation.³⁰⁶

304 KOUROUPAS M., ‘ *United States Efforts to Protect Cultural Property: Implementation of the 1970 UNESCO Convention* ’, in TUBB K. (ed.), *Antiquities: Trade or Betrayed? Legal, Ethical and Conservation Issues* (London 1995), 83–90; MAGNESS-GARDINER B., ‘ International Conventions and Cultural Heritage Protection ’, in ROWAN Y. and BARAM U. (eds), *Marketing Heritage. Archaeology and the Consumption of the Past* (Walnut Creek, CA 2004), 27–39 and PAPA SOKAL M., ‘ *The U.S. Legal Response to the Protection of World Cultural Heritage* ’, in BRODIE N., KERSEL M., LUKE C. Luke and TUBB K. (eds), *Archaeology, Cultural Heritage and the Antiquities Trade* (Gainesville, FL 2006), 36–67. The texts of the agreements are available at <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> .

305 MAGNESS-GARDINER B., ‘ International Conventions and Cultural Heritage Protection ’, 2003, 34-7.

306 GERSTENBLITH P., *Art , Cultural Heritage and the Law* (3rd edn. Durham, NC 2012), 655.

But such pigeonholing misleads. While the MOUs always list the import restrictions in the first article (Article I), they also target cultural aspects under Article II, such as archaeological permits, exchanges of personnel, expertise and objects, and long-term loans for museum exhibitions.³⁰⁷

The CCPIA has clearly had an impact on the trade in antiquities, though that trade remains legal. Indeed, New York City is one of its major centers.³⁰⁸

But signs that the new norms are encroaching are evident even in parts of the market.

In September 2015, the symposium Conflict Antiquities, Forging a Public/Private Response to Save Iraq and Syria's Endangered Cultural Heritage, cosponsored by the US Department of State and the Metropolitan Museum of Art, featured a panel on ' *The Role of Private Institutions and Collectors in Fostering Best Practices and Public Education* ', that included the legal counsel from Christie's talking about the importance of educating collectors about provenance.³⁰⁹

Since 1997 the Holocaust Claims Processing Office (HCPO) has advocated on behalf of Holocaust victims and their heirs, seeking the just and orderly return of assets to their original owners.

In fulfilling this mission, as of December 31, 2015, the HCPO has facilitated the restitution of over \$173 million in bank accounts, insurance policies, and other material losses and the resolution of cases involving more than 114 works of art.

The HCPO works as a bridge between claimants and the various international compensation organizations and/or the current holder (s) of the asset be it a bank account, insurance policy or artwork.

Claimants pay no fee for the HCPO's services, nor does the HCPO take a percentage of the value of the assets recovered. Their goal is to advocate for

307 MAGNESS-GARDINER B., ' Long-Term Archaeological Loans from Italy: Summary of Roundtable Discussions ', American Journal of Archaeology, 107 (2003), 477–81 and LUKE C. and KERSEL M., U.S. Cultural Diplomacy and Archaeology (New York, NY 2013), 71–3.

308 MACKENZIE and PENNY, Criminology and Archaeology, 2.

309 Available at <http://www.state.gov/r/pa/prs/ps/2015/09/247298.htm> .

claimants by helping to alleviate any cost and bureaucratic hardships they might encounter in trying to pursue claims on their own.

We provide institutional assistance to individuals seeking to recover: assets deposited in banks and monies that insurance companies failed to pay policy beneficiaries.

Regarding the artwork that was lost, stolen, or sold under duress between 1933 and 1945 the response to the complex nature of restitution claims, which range from the purely anecdotal to partially or even fully documented, the HCPO developed a systematic method to handle cases.

After assessing the viability of a claim, the HCPO strives to document the prewar ownership, wartime loss and a claimant's postwar entitlement to an asset, this being a major hurdle faced by all parties in the restitution process. To accomplish this task, HCPO staff members undertake three types of research genealogical; archival research for prewar, wartime, and postwar records; and the search for the missing objects, provenance research being one component of this effort.

Once all of the HCPO's research is complete, and the missing asset has been located, our role changes from that of detective to advocate and facilitator.

At this stage the HCPO submits claim information to the appropriate companies, authorities, museums, or organizations with the request that a complete and thorough search be made.

By sharing all supporting documentation and through open and amicable discussion the HCPO facilitates cooperation between parties.

Our successes repeatedly demonstrate that candid dialogue between parties can lead to the mutually beneficial resolution of these disputes.

The continued success of the HCPO's work demonstrates that the non-litigious and fair resolution of Holocaust-era asset claims is possible.

8.6 Soft Law

Despite their non-binding character, soft law instruments provide an important source for the prevention of the looting art and its restitution.

A distinction should be made between soft law instruments applied to looted art in general and those which centre on specific issues, in particular the restitution of art looted during WWII.

In 1998 there was the Washington Conference on Holocaust Era Assets which adopted a set of principles called ' The Washington Principles ' .

These are the first international instrument focusing on the issue of Nazi-looted art following its re-emergence in 1990s. It was introduced the concept of ' just and fair ' solutions as a way to handle and solve restitution claims. Hence Principle VIII stresses that :

*' If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case. '*³¹⁰

In order to achieve this, principle XI states to *' develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues '*.³¹¹

A number of States – such as Austria, France, Germany and the United Kingdom – have established advisory committees to resolve cases involving Nazi-looted art.

At European level, the Council of Europe Resolution took action following the Washington Conference and adopted a resolution³¹² in 1999.

This text considers the restitution of Nazi-looted art as *' a significant way of*

310 Principles of the Conference of Washington, 1998, Principle VIII.

311 Principles of the Conference of Washington, 1998, Principle XI.

312 See note 45.

enabling the reconstitution of the place of Jewish culture in Europe itself'.³¹³

It revives that legislative changes are necessary to enable restitution, for instance with regard to statutory limitation periods and alienability³¹⁴ or anti-seizure statutes.³¹⁵

The role of dealers and intermediaries is also stressed : laws should require them to inform the authorities if they '*know or suspect a work they have in their possession to be looted*'.³¹⁶

The Vilnius Declaration³¹⁷ is the result of the Vilnius International Forum on Holocaust Era Looted Cultural Assets held as a follow-up to the Washington Conference of 1998.

The declaration at the end of the forum encourages governments to implement the Washington Principles and the Council of Europe Resolution .

It also encourages the governments to share all information they have³¹⁸, establish reference centres in each country³¹⁹ and organize periodical international meetings.³²⁰

The Terezin Declaration on Holocaust Era Assets and Related Issues³²¹ was adopted by the States participating in an international conference in Prague and Terezin held in 2009.

This Declaration covers different Holocaust-related issues – such as welfare of survivors, immovable property, memorial sites etc..

Provision 2 deals with Nazi-looted art and stresses the importance of provenance research in identifying potentially looted works of art : '*we stress the importance for all stakeholders to continue and support intensified systematic provenance research [...] and where relevant to make the results of this research, including ongoing updates, available via internet*'.³²²

Provision 3 urges the governments to '*ensure that their legal systems or*

313 See note 35, Art. 8.

314 See note 45, Art. 13.

315 See note 45, Art. 15.

316 See note 45, Art. 18.

317 ' Vilnius Forum Declaration ' , in CAMPFENS Evelien (ed.), Appendix 4.

318 See note 164, Art. 2.

319 See note 164, Art. 3.

320 See note 164, Art. 5.

321 See at <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> .

322 See note 168, Provision 2.

*alternative processes [...] facilitate just and fair solutions with regard to Nazi-confiscated and looted art '.*³²³

³²³ See note 168, Provision 3.

CONCLUSIONS

Contemporary liberal societies, accepting their inter-generational responsibilities, increasingly acknowledge and apologize for past injustices. The Holocaust restitution movement is within this phenomenon's vanguard. Other restitution campaigns concerning Japanese World War II crimes, the Roma Holocaust, dispossessed Palestinians, Armenian genocide victims, and African-American slavery represent the legal after growth of Holocaust restitution's initiative.

However, the reality of this ' legal launching pad ' is disputable.

Pursuing litigation apparently eschews lessons from Holocaust restitution, instead recreating them in an economy of suffering. Holocaust restitution's prototypical and paradigmatic nature is problematic.

Any attempts to associate with the Holocaust's extremities often pale in comparison, simultaneously privileging the Holocaust's uniqueness. Restitution's power depends upon its capacity to provide processes for negotiating rivalries and recognizing identities, not providing specific solutions.

Attributing national character to objects both legitimises export controls on objects and fuels desires for repatriation. Yet ' diaspora claims ' appear antithetical to models which contemplate only governments and individuals as agents.

This may explain the (not uncontroversial) collapsing of group identity and statehood within Israel's quasi-diplomatic protection claim. Unpleasant debates based on supposition and anecdote as to victims' self-identity arise, yet the impact of Nazi racial laws lays bare how complex and surprising this often was for victims.

In *Altmann's case*, it is clear that Klimt was Austrian, Adele Bloch-Bauer

probably considered herself Austrian, possibly Jewish. Dying in Swiss exile in 1945, Ferdinand undoubtedly considered himself Jewish, but still Austrian? Maria apparently refers to herself as Jewish American. What then is the appropriate national or cultural context of the paintings? It is unlikely to be clarified by litigation.

Property restitution may represent a final stage in the Holocaust's legal reckoning while simultaneously acknowledging that perpetrators cannot establish moral virtue by '[buying] a just and ethical past '.

At worst, restitution is coupled or confused with or substitutes for responsibility. Its dark legacy becomes that no one is responsible.

However, rather than a conclusion in itself, restitution should be a component in a process of recognition. Distinctions must be drawn between previous actors' guilt and contemporary actors' current, but differentiated, responsibility.

More importantly the restitution discipline that nowadays is applied in Italy and in other countries – such as USA, United Kingdom, Canada, Switzerland and Austria – is the result of the common goal to retribute to the injured parties – both Holocaust and theft victims – their goods.

The 1995 UNIDROIT Convention and the UNESCO Convention, alongside the Principles of the Washington Convention and other resolutions and conventions are the main sources of this changes .

It is clear that in most States not only the court system is used to resolve the different disputes, but also the alternative means of resolutions such as the UK's Advisory Panel or the USA's Cultural Property Advisory Committee which solve most of the restitution cases .

However, the Italian System has not provided an alternative method such as the ones which were born in other States , but has adapted the UNIDROIT Convention with the adoption of the Italian Code of Cultural Heritage and Landscape .

Even if this code regulates the circulation of the cultural goods in Italy, there is

not a direct reference to the instrument to be applied to the restitution claims different from the courts or the mediation which are available in other circumstances.

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- Although Control Council Law No. 10 did not require a ' war nexus ' for crimes against humanity , there was tribunal disagreement regarding this omission's significance : see the *Einsatzgruppen* (*US v. Otto Ohlendorf et al.*, 4 CCL No. 10 Cases 411 (1948)) , *Flick* (*US v. Friedrich Flick*, 6 CCL No. 10 Cases 1187 (1947)) , *Ministries* (*US v. von Weiszaecker et al.* 13 CCL No. 10 Cases 112 (1949)) and *Justice* (*US v. Alstoetter et al.*, 3 CCL No. 10 Cases 954 (1947)) cases.
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