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The Recovery of Cultural Property in International Law: Collaborative Settlements of Disputes

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TABLE OF CONTENTS

INTRODUCTION.....7

I. THE RECOVERY OF CULTURAL PROPERTY: THE INTERNATIONAL LEGAL FRAMEWORK.....11

1. Issues of terminology: cultural property and related claims.....12
   - 1.1 The notion of cultural property.....12
   - 1.2 Cultural property-related claims: restitution v. return.....14
2. Cultural property removed in the event of armed conflict.....16
   - 2.1 The customary obligation of restitution: a historical perspective.....17
   - 2.2 The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols.....21
3. Cultural property stolen or illicitly exported in times of peace.....24
   - 3.1 The 1970 UNESCO Convention on the Means to Prevent and Prohibit the Illicit Import, Export and Transfer of Ownership of Cultural Property.....24
   - 3.2 The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects.....30
   - 3.3 European Union Law.....34
4. Shortcomings of a rule-oriented system.....40

II. THE INADEQUACY OF JUDICIAL AND QUASI-JUDICIAL MEANS OF DISPUTE SETTLEMENT.....42

1. The (limited) practice of international tribunals.....42
   - 1.1 An example: the case of Prince Hans-Adam II of Liechtenstein.....42
     - 1.1.1. The case before the European Court of Human Rights.....45
     - 1.1.2. The case before the International Court of Justice..46
   - 1.2 An appraisal: the limits of international adjudication in this area.....49
2. Shortcomings of litigating before domestic courts.....52
   - 2.1 The role of domestic courts in international law.....52
   - 2.2 The direct applicability of public international law in national legal systems.....54
   - 2.3 Issues of private international law.....57
     - 2.3.1. The identification of the competent jurisdiction.....57
     - 2.3.2. The applicable material law: the Goldberg case.....60
       - 2.3.2.1 Statutes of limitations and prescription.....62
       - 2.3.2.2 The protection of the good faith purchaser.....64
       - 2.3.2.3 The enforcement of foreign public law.....66
   - 2.4 An assessment of domestic litigation.....68
3. Arbitration as an alternative to litigation.....69
   - 3.1 A comparison: the *Altmann* case.....70

3.2 Benefits and limits of arbitration....73

III. CREATIVITY AND FLEXIBILITY: SHIFTING THE FOCUS TOWARDS COLLABORATIVE SOLUTIONS....76

1. Creativity: an interest-based approach....76
   1.1 The interests at stake in the world....76
   1.2 Proposed substantial solutions....78
2. Flexibility: procedural solutions to achieve cooperation....83
   2.1 Mediation....84
      2.1.1 An example: the agreement between Zurich and Saint-Gall....85
      2.1.2 International and non-governmental fora for mediation....87
   2.2 Negotiation....90
      2.2.1. Traditional negotiated settlements....91
         2.2.1.1. Private agreements....91
         2.2.1.2. International treaties....93
      2.2.2. State contracts....96
         2.2.2.1 The Long-Term Cultural Cooperation Agreement between Italy and the Metropolitan Museum....98
         2.2.2.2 The Memorandum of Understanding between Yale University and Universidad Nacional de San Antonio Abad del Cusco....100
3. Addressing the colonial past through cultural cooperation: a solution for the Benin bronzes....102
   3.1 Benin bronzes: the looting and the captivity....102
   3.2 The Benin Dialogue Group....104

CONCLUDING REMARKS....107

BIBLIOGRAPHY....111

Authors....111
Case-law....124
U.S. courts' decisions....124
Italian courts' decisions....125
French courts' decisions....125
U.K. courts' decisions....125
International and foreign courts' decisions....125
International treaties, EU law and national statutes....126
International treaties and agreements....126
EU law....128
National statutes....129

Documents and publications of international and non-governmental organizations....129
United Nations....129
European institutions....132
Other organizations....132
Newspaper articles....134
Miscellaneous....135

INTRODUCTION

In the last year, the issue of restitution and return of cultural property has made once again the headlines. In November 2018, a report commissioned by French President Emmanuel Macron called for changes in French legislation so as to allow permanent return of cultural objects removed from Africa during the colonial period and brought to France without the consent of the country of origin[1]. The scale of the looting that took place in African territory between the 19th and the 20th century is, indeed, astounding: according to the same report, 90 to 95 percent of Africa's cultural heritage has somehow ended up outside Africa and is now held by major museums around the world. Whatever the French executive will do now will, in any event, be a matter for politics to decide. What about the law?

International law has, indeed, attempted to regulate the circulation of cultural property and its restitution or return in case of theft or illicit removal from the territory of a state. However, the peculiar nature of cultural objects often makes the case for claims that are not backed by any legal standards, but rather are grounded in a feeling of injustice. Examples of these claims include both requests for the return of colonial-looted treasures and claims for the restitution of, for instance, artworks confiscated by the Nazis. In both cases, the application of strict legal doctrine may lead to frustrating results, either due to the non-retroactivity of the law, the application of laws particularly favorable to the *bona fide* purchaser, or the expiry of limitation periods.

The first chapter of this thesis aims precisely to give an overview of the international regime for the circulation of cultural property and the processes for its restitution or return. Preliminarily, it settles some terminological issues, motivating the decision to use the term 'cultural property' instead of 'cultural heritage', on the one hand, and outlining the distinction between 'restitution' and 'return' cases.

It then moves on to the existing legal framework for cultural objects removed from occupied territories in times of war. First, it accounts for the historical development of a rule of customary international law in this regard. Pursuant to such rule, the pillage and confiscation of cultural objects are prohibited by equating them to private property,

[1] F. Nayeri, 'Museums in France Should Return Cultural Property, Report Says', The New York Times, 21 Nov 2018, available at https://www.nytimes.com/2018/11/21/arts/design/france-museums-africa-savoy-sarr-report.html accessed 21 June 2019.

irrespective of their legal status. Moreover, were this prohibition violated, cultural objects removed from occupied territories may in no event be retained as war reparations and must be returned to the country of origin. These principles are now enshrined by the 1954 Hague Convention and its First Protocol, to which a Second Protocol was added in 1999.

A separate framework has been set up with regards to cultural goods stolen or illicitly exported in peacetime. In past decades, indeed, the illicit trafficking of art, nurtured by the seemingly insatiable demand of the billions-worth Western art market, has reached dimensions so worrisome that the international community could not turn a blind eye anymore. Prompted by the newly independent countries, in 1970 the UNESCO adopted the cornerstone Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property. Its text will be thus analyzed, focusing on provisions relevant to the issue of our concern.

The UNESCO Convention, being an instrument of public international law, is unfit to tackle issues of private international law which affect the art trade. Hence, some twenty years after its adoption, the Unidroit was asked to draft a convention in this regard. Like for the UNESCO Convention, the 1995 Unidroit Convention on Stolen or Illicitly Exported Cultural Goods will be analyzed by reference to those articles regulating processes for the restitution or return of cultural objects.

Finally, mention will be made of the European framework for the circulation of cultural property within and outside the European borders, through the analysis of the relevant treaty provisions and secondary legislation.

The second chapter will instead assess the efficacy of judicial and quasi-judicial means of dispute settlement in applying such rules, based on the available case-law. Starting with international tribunals, the case concerning Prince Hans-Adam II of Liechtenstein will serve as a starting point to identify the reasons behind the dismaying paucity of relevant case-law in this regard. Such case has, indeed, been brought both before the European Court of Human Rights and the International Court of Justice, but both proceedings have led to unsatisfactory results.

The chapter then examines the practice of domestic courts dealing with claims for the recovery of cultural property before domestic courts. On the one hand, the role of national judges' in applying the relevant international framework will be assessed, based on the leading case *Mazzoni c. Finanze dello Stato*. On the other, the complex issues facing applicants will be accounted for. First, instruments of public international law may not always be part of the applicable law by a domestic judge. Second, issues of private

international law make the outcome of such a claim highly unpredictable, the most crucial being the identification of the competent jurisdiction and the determination of the applicable law. Especially the latter factor has, indeed, led to factually similar cases resulting in opposing outcomes. As a matter of fact, the applicable material law determines the applicable statutes of limitations, the level of protection accorded to the good faith purchaser, and the applicability of foreign export regulations. This analysis will be once again based on relevant case-law from tribunals of various jurisdictions, both of civil and common law.

Finally, this chapter will assess the suitability of arbitration as an alternative to litigation. Through a comparison between the two, it appears that such method of dispute resolution allows, indeed, to overcome many shortcomings of litigating claims for the recovery of cultural property. However, the quasi-judicial nature of arbitration entails that it shares the same adversarial approach as litigation, thus leading to non-optimal solutions in our field of concern.

The third chapter will therefore attempt to identify the necessary features for a dispute resolution method to allow to reach such an optimal solution. It is argued that creativity is required. This assumption is based on the analysis of recent cases where arrangements alternative to outright restitution or return have been agreed upon by the parties. Such substantial arrangements, however, require on the formal side flexible dispute resolution methods which may take into account other parameters in addition to strict legal doctrine and encourage the parties to consult and co-operate with each other.

Hence, the chapter provides an overview of more flexible alternative dispute resolution (ADR) methods, namely mediation and arbitration, which provide for the necessary flexibility for creative solutions to be struck. First, mediation is dealt with. Again, the method chosen is to start from a real-life example, the mediated agreement between the Swiss Cantons of Zurich and Saint-Gall, to imply the features which make this method a suitable one in claims for the recovery of cultural property. Indeed, mediation's potential in this field has been acknowledged even by international and non-governmental organizations, a number of which have even set up specific rules and procedures for the mediated settlement of art-related disputes. An overview of these fora for mediation is provided.

The chapter goes on to recognize negotiation's prominence in this field. Indeed, it is a particularly fitting method especially for those above-mentioned claims that, for a variety of reasons, may not be covered by legal standards. The different types of legal solutions that

may be reached through negotiation are, thus, examined. First, traditional negotiated settlements are accounted for, including both private agreements and international treaties, and examples of both are provided. Second, more innovative solutions are taken into consideration, involving cultural institutions in negotiated settlements which, in addition to and beyond outright restitution or return, provide the basis for future cultural and scientific co-operation between the parties. Recently, in order to reach this kind of settlements the instrument of State contracts has been employed, these being agreements of which one Party is a State and the other a foreign national. It is argued that cultural co-operation may be the most efficient instrument to deal with claims based on moral grounds of substantial justice.

A further advancement of this technique is the practice of having cultural institutions directly negotiating a mutually acceptable settlement among them. This is, for instance, the option that is being explored with regard to Nigeria's claim over the Benin bronzes. Indeed, in 2007 a consortium of European museums holding the majority of such artefacts and Nigerian cultural institutions has been set up to initiate direct negotiations on this matter. The latest proposal of the Benin Dialogue Group is finally supported, concerning the creation of a museum in Benin City where Benin art should be permanently displayed through collaboration between European and Nigerian partners. This work, indeed, concludes that such a collaborative approach is preferable over, for instance, the solution put forward by the French report, in the view of achieving a re-pacifying settlement.

I. THE RECOVERY OF CULTURAL PROPERTY: THE INTERNATIONAL LEGAL FRAMEWORK

The removal of cultural objects from their Countries of origin is a practice as old as civilization. Generally, it either follows armed conflicts, theft or clandestine excavation, or even the illicit export of lawfully acquired property. Just as old is the question as to the existence of an obligation of restitution of such property. Indeed, while on the one hand cultural goods, especially those of particular significance, belong to the common heritage of mankind, on the other they bear witness of the national identity of the Countries where they originated, which therefore have an interest in the preservation of such objects within their territory. Such an interest explains why the circulation of movable cultural property is subject to substantive restrictions on part of multiple sources both at the national and international level, which may directly impinge on individual property rights. Indeed, the intrinsic and immaterial values embedded in cultural objects call for the public interest to prevail over the private one, which may well hinge solely on their economic value.

The issue of restitution is, instead, the issue of the legal consequences that shall follow from the violation of the above restrictions. In this context, indeed, the typical consequence will be primarily a specific obligation of restitution, the content of which is the restoration of the *status quo ante*, *i.e.* the situation which existed before the wrongful act was committed (*restitutio in integrum*), and only in a subsidiary way will an obligation of reparation in the form of either restitution in kind or compensation arise. As a matter of fact, considering that cultural objects are non-fungible goods which possess an intrinsic value, such a rule is substantially consistent with Article 35 of the International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts[2].

Therefore, the legal regimes that are set up by national statutes and international conventions, as well as by the relevant European Union legislation, deal with the both of the above-mentioned issues. However, before delving into the analysis of relevant international legal instruments, certain preliminary questions of terminology should be settled.

[2] ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/83.

1. Issues of terminology

1.1 The notion of cultural property

The problem with identifying a legal definition of 'cultural property' is that, at present, there is not a uniform notion of such term. Indeed, definitions vary substantially both in content and legal method, depending on the instrument embedding them and both the cultural and legal tradition within which they arise. A unitary definition may only be found, thus, through the identification of shared common elements.

The term 'cultural property' only made its first appearance in English in a legal context in 1954 with the adoption by the United Nations Educational, Scientific and Cultural Program (UNESCO) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)[3]. Indeed, though being a concept already known in civil law systems[4], previous international instruments preferred to lay down a list of objects worthy of protection rather than establishing a synthetic category[5]. By contrast, Article 1 of the 1954 Hague Convention, in addition to listing a number of goods falling under its scope of protection, gave a definition of cultural property as 'movable or immovable property of great importance to the cultural heritage of every people'[6].

Such a notion is consistent with the one which may be inferred by a comparison of statutory definitions that are found today in national legislation which, at least in Europe[7], tend to hinge on a good's artistic, historical, archaeological as well as scientific, technical, literary, architectural or even archival or ethnoanthropological value[8]. Similarly, the Black's Law Dictionary defines 'cultural property' as '[m]ovable and immovable property that has cultural significance, whether in the nature of antiquities and monuments of a classical age or important modern items of fine arts, decorative arts, and architecture'[9]. In any event, what is apparent is that any definition of cultural property would require recourse to extra-

[3] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 Art 1.
[4] *E.g.* 'biens culturels' in French, 'beni culturali' in Italian and 'politistika agata' in Greek.
[5] *See e.g.* Article 56 of the 1907 Hague Regulations which covers 'the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and science, ... historic monuments, works of art and science'.
[6] 1954 Hague Convention Art 1.
[7] European Commission, 'Study on Preventing and Fighting Illicit Trafficking in Cultural Goods in the European Union' (2011), available at https://www.obs-traffic.museum/study-preventing-and-fighting-illicit-trafficking-cultural-goods-european-union-0 accessed 21 June 2019.
[8] M. Frigo, 'La nozione di bene culturale: origine, contenuto e contesti' in A.M. Benedetti, V. Roppo, P. Sirena (eds) *Vendita e vendite: vendita, sottotipi di vendita, vendite* (Giuffré, 2014) 897.
[9] B.A. Garner, H. Campbell Black, *Black's Law Dictionary* (8th edn, St. Paul, MN: Thomson/West, 2004) 1145.

juridical notions derived from other branches of knowledge such as aesthetics, sociology, history of art, archaeology and anthropology.

It shall be mentioned that Black's definition goes on to acknowledge that some authors prefer the broader term 'cultural heritage' over that of 'cultural property'[10]. Indeed, professors L.V. Prott and P.J. O'Keefe among others have noted that the very concept of 'property' answers to a different, at times clashing policy from that of 'cultural heritage'[11]. Indeed, while the former is designed to guarantee the rights of the possessor, the latter aims at securing the protection and enjoyment of cultural expressions for present and future generations. The inherent contradiction lies in that the regime of cultural heritage may, and in fact does, involve serious curtailments to the former rights (for instance, the separation of access and control from ownership)[12]. Critics of the term 'property' have further warned about the risks of the 'commodification' (or 'commoditization') of art[13]. Besides the ethical implications of conceiving cultural artefacts only in view of their commercial value, without due regard to their non-economic one[14], they claim that the commodification of art also brings about practical consequences, such as increased theft and looting aimed to supply an ever-growing art market. However, the main argument against the use of the term 'cultural property' is that international protection should be extended beyond the physical expressions of culture to include its intangible dimension. This includes both the information that cultural artefacts convey about the societies which created them and the context within which they are found, and the intangible elements of culture, like folklore, rituals and traditional skills, which add up to the very cultural identity of many non-Western societies[15].

It is our view that, while accepting that 'cultural heritage' is a broader category, capable of encompassing the above-mentioned intangible elements of culture, 'cultural heritage' and 'cultural property' should not be understood as two interchangeable terms[16]. As is apparent by the definition of 'cultural property' by Article 1 of the 1954 Hague

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[10] *Ibid.*
[11] L.V. Prott and P.J. O'Keefe, ''Cultural Heritage' or 'Cultural Property'?' (1992) 1 International Journal of Cultural Property 307, 310.
[12] J. Blake, 'On Defining the Cultural Heritage' (2000) 49 Int'l & Comp L Q 61; A. Chechi, *The Settlement of International Cultural Heritage Disputes* (Oxford University Press, 2014) 14.
[13] Prott and O'Keefe, ''Cultural Heritage' or 'Cultural Property'?', 311 (n 10).
[14] J.H. Merryman, 'A Licit International Trade in Cultural Objects' (1995) 4 International Journal of Cultural Property 13.
[15] Blake, 'On Defining the Cultural Heritage' (n 12) 66.
[16] G. Magri, *La circolazione dei beni culturali nel diritto europeo: limiti e obblighi di restituzione* (Edizioni scientifiche italiane, 2011) 9.

Convention[17], the latter is, instead, a sub-group within the former. As a matter of fact, while the term 'cultural property' is used, for instance, by the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property (1970 UNESCO Convention)[18] as well as the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 1999 (Second Protocol)[19], both dealing with the circulation of movables, the term 'cultural heritage' is employed in instruments which also aim to cover either the above-mentioned intangible elements of culture[20] or the natural heritage[21]. Therefore, considering that the object of this work is precisely the circulation of movable cultural goods, which as Frigo put it, 'can and indeed ha[ve] been conceived as a sub-group within cultural heritage'[22], the specific term will be preferred over the more general one[23].

1.2 Cultural property-related claims: restitution v. return

Disputes regarding movable cultural property mostly concern claims for the recovery of objects lost either during war, occupation or colonization, or as a result of theft or illicit trade in peacetime, as opposed to other categories of cultural heritage-related disputes which concern the protection of built heritage from both war-like situations and non-violent processes (like the development of foreign investments)[24]. However, a further distinction can and should be drawn within the former types of claims[25]. Indeed, the independence of former colonies in the latter half of the 20th Century posed a problem of terminology with regard to newly independent Countries' claims for the restoration of their cultural heritage, which in many cases had been removed to the territory of the colonial power under

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[17] *Ibid* 67.
[18] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.
[19] Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Second Protocol) (adopted 26 March 1999, entered into force 9 March 2004) 38 ILM 769.
[20] *See e.g.* Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1.
[21] *See e.g.* Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.
[22] M. Frigo, 'Cultural Property v Cultural Heritage: A 'Battle of Concepts' in International Law?' (2004) 86 International Review of the Red Cross 367, 369.
[23] L. Zagato, *La protezione dei beni culturali in caso di conflitto armato all'alba del secondo Protocollo del 1999* (G. Giappichelli Editore, 2007) 32, 241.
[24] A. Chechi, 'Some Reflections on International Adjudication of Cultural Heritage-Related Disputes' (2013) 10(5) Transnational Dispute Management https://www.transnational-dispute-management.com/article.asp?key=1994 accessed 21 June 2019.
[25] W.W. Kowalski, 'Claims for Works of Art and Their Legal Nature' in The International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes: Papers Emanating from the Seventh PCA International Law Seminary May 23, 2003* (Kluwer Law International, 2004).

formally lawful circumstances. Indeed, while originally the term 'restitution', originating in the context of war-looted cultural property (*v. infra*, § 2.1), was applied to such situations as well[26], starting from the late 1970's the term 'return' emerged to specifically refer to this type of claims[27].

Such a distinction was later formally recognized through the creation of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRC). The practice of this body provides, indeed, some useful guidance. Pursuant to the Guidelines for the Use of the Standard Request for Return or Restitution[28], the term 'restitution' should be used 'in case of illicit appropriation', *i.e.* when objects have been removed by their countries of origin illegally, according to the relevant national legislation and with particular reference to the 1970 UNESCO Convention. By contrast, the term 'return' should apply to cases 'where objects left their country of origin prior to the crystallization of national and international law on the protection of cultural property', with specific reference to transfers of ownership made from a colonized territory to the territory of the colonial power or from a territory under foreign occupation, which in many cases, though being of questionable legitimacy, complied with the laws existing at the time[29].

The distinction between these two terms has even been transposed to the protection of cultural property in peacetime, as is apparent under the International Institute for the Unification of Private Law (Unidroit) Convention on Stolen or Illegally Exported Cultural Objects (1995 Unidroit Convention)[30]. Indeed, Article 1 of the Convention expressly provides that, while the term 'restitution' applies to claims for the recovery of stolen cultural property, the term 'return' shall be used for claims concerning cultural objects removed from the territory of a State contrary to its export rules, which, as we will see, are generally deemed not to bind foreign judges. Consequently, the two categories are dealt with in separate chapters and are subject to different regimes. Also, European Union secondary

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[26] *See e.g.* UNGA Res 3187 'Restitution of Works of Art to Countries Victims of Expropriation' UN GAOR 28th Session UN Doc A/Res/3187(XXVIII) (1973).

[27] UNESCO, Director-General, 1974-1987 (M'Bow, A.M.), 'A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It; An Appeal by Mr. Amadou-Mahtar M'Bow, Director-General of UNESCO' (1978) available at https://unesdoc.unesco.org/ark:/48223/pf0000046054 accessed 21 June 2019.

[28] ICPRC, ICOM, 'Guidelines for the Use of the 'Standard Form Concerning Requests for Return or Restitution'' (30 April 1986) CC-86/WS/3.

[29] *Ibid* 11.

[30] Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998) 34 ILM 1332.

legislation in the field of cultural property seems to confirm this classification. As a matter of fact, the directive dealing with the recovery of cultural objects unlawfully removed from the territory of a Member State employs the term 'return'[31]. The purpose of the system set up by the relevant EU norms is, indeed, to protect the integrity of the national cultural heritage of member States, while leaving out issues of ownership[32] (*v. infra*, § 3.3).

In conclusion, while the category of 'restitution' applies to claims aimed at restoring the legal status of cultural property face the violation of a universally recognized legal standard, *i.e.* the prohibition of either war looting or ordinary theft, 'return' concerns claims for the restoration of cultural objects to their countries of origin, be it former colonies or countries from which they were illegally exported, which are more controversial as they are often based on extra-juridical grounds.

2. The obligation of restitution of cultural property removed in the event of armed conflict

War-time pillage and seizure of cultural property are today undoubtedly the object of a norm of international customary law prohibiting them, and setting out that the violation of such prohibition, as mentioned above, primarily entail a specific obligation of restitution and only in a subsidiary way a general obligation of reparation. Indeed, these principles are well-rooted in the practice of States in the wake of armed conflicts since at least the 1815 Vienna Congress, before being crystallized in the 1954 Hague Convention. As a matter of fact, though there is a minority opinion which denies the existence of a customary norm based on the argument that pillage, theft and destruction of movable cultural property have been undertaken even in most recent armed conflicts[33], the circumstance that these incidents have invariably been treated as violations of a legal standard is rather conclusive of the opposite.

Also, an analysis of State practice in the context of armed conflicts highlights the emergence of another rule, concerning the partial inapplicability, at least to inter-State requests, of domestic rules on the transfer of property and circulation of movables (*e.g.* statutes of limitation) to war-looted cultural property. It is noteworthy that an equivalent norm cannot be recognized with concern to the obligation of restitution of objects that have

[31] Directive 2014/60/EU of the EP and the Council on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State (2014) and amending Regulation (EU) 1024/2012, OJ L 159 (Recast) Art 1.
[32] W.W. Kowalski, 'Types of Claims for Recovery of Lost Cultural Property' (2005) 57 Museum International 85 97.
[33] Zagato, *La protezione dei beni culturali in caso di conflitto armato* (n 23) 219.

been thieved or illicitly exported in peacetime, as sanctioned by relevant international conventions. Indeed, in that context the same limitations on the circulation of movables and on the non-applicability of ordinary rules are only now, and much more slowly, starting to be applied[34].

2.1 The customary obligation of restitution: a historical overview

From a historical perspective, though the practice of war-time plunder of cultural objects had been perpetrated since Biblical times[35] and had been morally condemned even by ancient writers[36], it was not until the Renaissance that the first legal arguments were raised against it. The Polish jurist Jacob Przyluski first put forth that works of art should be respected by belligerents merely for the sake of their artistic value[37]. These ideas brought slow progress which finally led to clauses for the restitution of looted works of art and other cultural property being incorporated in the peace treaties which were concluded after the Peace of Westphalia of 1648 to put an end to the Thirty Years War. For instance, the Treaty of Oliva of 1660 between Sweden and Poland provided for the restitution of the Polish royal library, while the Treaty of Whitehall of 1662 between England and the Netherlands included the restitution of works of art belonging to the Stuarts' collection[38].

The concept of restitution became increasingly popular during the Age of the Enlightenment thanks to the theories elaborated by the like of John Locke, Jean-Jacque Rousseau and Emer de Vattel. Accordingly, war concerns a conflictual relationship between States[39] and should, thus, avoid involving private citizens and their property[40]. The tendency was, then, to extend the regime of private property to objects of artistic or scientific importance, hence excluding them from the right of spoils irrespective of their legal status as private or public under domestic law. This idea was soon generally accepted, so much

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[34] M. Frigo, *La circolazione internazionale dei beni culturali: diritto internazionale, diritto comunitario e diritto interno* (2nd ed, Giuffrè Editore, 2007) 82-83.

[35] For a study of war plunder in the Bible, *see* D. Elgavish, 'The Division of Spoils of War in the Bible and in the Ancient Near East' (2002) https://www.academia.edu/2583270/The_Division_of_the_Spoils_of_War_in_the_Bible_and_in_the_Ancient_Near_East accessed 21 June 2019.

[36] Like the Greek historian Polybius, cited in C. de Visscher, 'Les monuments historiques et les oeuvres d'art en temps de guerre et dans les traités de paix' (1935) 16 Revue de droit international et de législation comparée 246 247.

[37] J. Przyluski, *Leges seu statuta ac privilegia Regni Poloniae* (1553) cited in S.E. Nahlik, 'Protection of Cultural Property' in UNESCO (ed), *International Dimension of Humanitarian Law* (UNESCO 1988) 203; *see also* J. Gentilis, *Dissertatio de eo quod in bello licet* (1690) 21 *ibid.*

[38] Frigo, *La circolazione dei beni culturali* (n 34) 84.

[39] E. De Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite des nations et des souverains* (1758).

[40] J.J. Rousseau, *Du contrat social ou principes du droit politique* (1796).

so that during the Napoleonic wars, though such principle was patently violated, a formal title was generally sought for apprehensions of cultural objects, thus confirming that recourse to the Roman *jus predae* was not deemed a sufficient legal basis anymore[41]. Even more so, at the end of the war in 1815, the Allies upheld that, in the words of a memorandum circulated by Lord Castlereagh, the removal of works of art taken to France by Napoleon had been 'contrary to every principle of justice and to the usages of modern warfare'[42] and agreed on their restitution.

The granting of a privileged status to cultural property was later crystallized for the first time in Article 34 of the United States of America War Department's Instructions for the Governance of the Armies of the United States in the Field of 1863 (Lieber Code)[43], and the first international codification followed closely. Indeed, in 1874 the Project of an International Declaration concerning the Laws and Customs of War (Brussels Declaration)[44] was drawn up, providing at Article 8 that property of communes or establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, be treated as private property, which pursuant to Article 38 could not be confiscated.

While the Brussels Declaration was never formally ratified as an international treaty, the same principles were substantially reproduced in Articles 56 and 46 respectively of both the 1899 Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention (II) Respecting the Laws and Customs of War on Land (1899 Hague Regulations)[45] and the 1907 Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land

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[41] *See e.g.* Armistice of Bologna (Vatican State) (23 June 1798) in G.F. von Martens, *Recueil des principaux traités d'alliance, de paix, de tréve, de neutralité, de commerce, de limites, d'échange, etc. et de plusieurs autres acts servant à la connaissance des relations étrangères des puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les puissances et Etats d'autres parties du globe, depuis 1808 jusqu'à présent* (Dieterich, 1817) VI 641; Armistice with the Duke of Modena (3 June 1796) *ibid* 634; Armistice with the Duke of Parma (8 May 1796) Art 4 *ibid* 624; Treaty of Milan (Republic of Venice) (16 May 1797) Art V *ibid* VII 132.

[42] Von Martens, *ibid* 632.

[43] F. Lieber, 'Instructions for the Government of Armies of the United States in the Field' (Lieber Code) (24 April 1863) in D. Schindler, J. Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (3rd ed, Martinus Nihjoff Publisher, 1988) 8.

[44] Brussels Conference, 'Project of an International Declaration concerning the Laws and Customs of War' (Brussels Declaration) (27 August 1874) in D. Schindler, J. Toman (eds), *The Laws of Armed Conflicts* (2nd ed, Sijthoff & Noordheff/Hendry Dunant Institute, 1981) 27.

[45] Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention (II) Respecting the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900).

(1907 Hague Regulations)[46]. Noticeably, none of these instruments expressly provided for an obligation of restitution. However, professor Stanislaw Nahlik has pointed out that this omission should be attributed to the fact that such an obligation had by then already been accepted as being a rule of customary international law, rather than being interpreted as proof of a lack of consensus on such a norm[47].

It must be noted at this point, however, that such principles were only accepted in relations among European countries. Indeed, in those same years, massive plundering of art treasures was being carried out in African territories by the imperial powers, so much so that the very basis for a customary rule to exist, *i.e.* consistent State practice, is simply non-existent in this regard. It is ironic to point out that what is perhaps the most infamous episode of colonial pillage, the looting of Benin City, occurred only two years before the adoption of the 1899 Hague Regulations (*v. infra,* ch. III).

All the above notwithstanding, and despite the provisions of the two Hague Conventions[48], massive pillage and seizure of works of art occurred once again during the two World Wars. The peace treaties concluded after World War I confirmed the obligation of restitution with regard to all identifiable objects which had been apprehended or illicitly transferred during the conflicts[49] or, in numerous cases, even before hostilities had begun[50], and even included some examples of restitution in kind[51]. The same obligation of restitution or, secondarily, restitution by equivalent was embedded in the peace treaties following World War II[52], which even expressly provided for the ineffectiveness of any transfer of ownership which might have occurred with third parties.

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[46] Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 (adopted 18 October 1907, entered into force 26 January 1910).

[47] S.E. Nahlik, 'La protection internationale des biens culturels en cas de conflit armé' in The Hague Academy of International Law (ed), 120 *Recueil des cours* (Brill, 1967) 90.

[48] Hague Convention (II) Respecting the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900); Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 (adopted 18 October 1907, entered into force 26 January 1910).

[49] Treaty of Versailles (Germany) (28 June 1919) in G.F. von Martens, *Nouveau recueil general des traités* (Dietrich, 1875) 3 XI 323 Art 238; Treaty of St Germain-en-Laye (Austria) (10 September 1919) in K. Strupp, *Documents pour servir à l'histoire du droit des gens* (2nd ed, 1923) IV 1006 Art 184; Treaty of Sèvres (Turkey) (10 August 1920) *ibid* XII 664 Art 420; Treaty of Riga (Russia, Ukraine, Poland) (18 March 1921) *ibid* XIII 141 Art XI.

[50] *See e.g.* Treaty of Versailles (n 48) Art 245, which extends restitution of cultural property to include the spoils of the Franco-Prussian War of 1870-71.

[51] *Ibid* Art 247; Treaty of Riga (n 48) Art XI.7.

[52] Paris Peace Treaty (Bulgaria) (10 February 1947) 41 UNTS 21 Art 22; Paris Peace Treaty (Hungary) (10 February 1947) 41 UNTS 135 Arts 11, 24; Paris Peace Treaty (Italy) (10 February 1947) 49 UNTS 126 Arts 12, 75.

The vast scale of the problem of objects removed during the Second World War, spanning in the numbers of millions, had, indeed, led to restitution being announced even before the end of hostilities, in the 1943 Declaration of the Allied Nations Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (London Declaration)[53], and confirmed in following documents[54]. For instance, in 1946 the Allied Control Council approved a set of principles containing practical instructions for the allied forces entering Germany, contained in a document called 'Definition of Restitution'[55]. There, crystallized among others were the principle of identification (cultural property clearly identified as being removed from occupied territories is to be returned); the criterion of force or duress (the acquisition of goods in regular trade transactions are excluded from restitution); the principle of public international law (the required return of looted goods is a consequence of the violation of norms of public international law); and the principle of territoriality (injured states could identify and recover all goods removed from their territory, irrespective of the type of property, the status of the owner and that of the holder at the time of plunder)[56].

To sum up, State practice previous to the 1954 Hague Convention confirms the existence, since at least the latter half of the XIX century, of three norms of customary nature with regard to the circulation of movable cultural property in the context of armed conflict: (i)plunder and seizure of cultural property are prohibited, irrespective of the latter's legal status under domestic law as private or public property; (ii) the violation of such prohibition entails a specific obligation of restitution in the form of *restitutio in integrum* with regard to all identifiable objects; and (iii)ordinary domestic norms regulating the transfer of ownership and circulation of movables are (at least partially) inapplicable to war-looted cultural objects.

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[53] Declaration of the Allied Nations Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (5 January 1943) 1943 8 Dept of State Bulletin 21.

[54] *See e.g.* International Bank for Reconstruction and Development, Resolution VI: Enemy Assets and Looted Property, in United Nations Monetary and Financial Conference (Bretton Woods, New Hampshire, 1 July to 22 July 1944), Final Act and Related Documents (1946); Annex 1: Resolution on Subject of Restitution, in Final Act and Annex of the Paris Conference on Reparations.

[55] Coordinating Committee of the Allied Control Council, 'Definition of Restitution' (12 December 1945) in W.W. Kowalski, *Art Treasures and War: A Study on the Restitution of Looted Cultural Property, pursuant to Public International Law* (Institute of Art & Law, 1998) 106 Annex 5.

[56] Kowalski, 'Types of Claims for Recovery of Lost Cultural Property' (n 32) 94.

2.2 The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocols

In the wake of the destructions and pillage perpetrated during World War II, initiative was immediately taken to improve the protection of cultural property[57]. Eventually, a diplomatic conference was convened under the auspices of the UNESCO in April-May 1954. The Conference of The Hague was attended by representatives of 56 States and resulted in the first international convention entirely dedicated to the protection of cultural property[58].

Because no agreement could be reached, instead, on the prohibition of trafficking of movable cultural property from occupied territories[59], a separate Protocol was concluded and opened to signature on the same date to deal with this topic. Nonetheless, there are a few relevant provisions even in the body of the Convention. Indeed, pursuant to its Article 4 the notion of 'respect for cultural property' includes the obligation of States to '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' as well as to 'refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party'[60]. Further, Article 14 provides that cultural property enjoying special protection under Article 8, as well as the means of transport exclusively engaged in the transfer of such property, be immune from seizure, placing in prize or capture[61].

As to the First Protocol, Parts I and II set out a number of international obligations within the competence of States, while overlooking the private law aspects of restitution which had been put forward during negotiations by the Unidroit and taken up by the Swiss delegation[62]. More specifically, paragraph 1 sets forth that the occupying State is under an obligation to prevent the exportation of cultural property from the occupied territory,

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[57] J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Protocol, signed on 14 May 1954 in The Hague, and on Other Instruments of International Law Concerning Such Protection* (UNESCO/Dartmouth Publishing, 1996) 21.

[58] Protocol for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358 (First Protocol). For the full text of both the Convention and the Protocol, *see* P.J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)* (UNESCO, 1993) Annex I 147.

[59] Nine States attending the Conference signed the Convention but refused to sign the Protocol: Andorra, Australia, Hungary, Ireland, Israel, New Zealand, Portugal, Romania, United Kingdom and the United States of America. *See* P.J. Boylan, *ibid* 99.

[60] 1954 Hague Convention Art 4.

[61] *Ibid* Art 14.

[62] Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (n 57) 340.

irrespective of whether that territory belongs to a High Contracting Party or not[63]. On the other hand, all States Parties endeavor to take into custody cultural property imported into their territory either directly or indirectly from an occupied territory[64] and to return any such property to the competent authorities of the latter territory (and not to individuals!) at the close of hostilities[65]. Restitution is unconditional and is not subject to any time-limit for the lodging of claims[66]. Paragraph 3 further specifies that in no event can any such property be retained as war reparations. Moreover, occupying States whose obligation it was to prevent the exportation of cultural property from the occupied territory must pay an indemnity to the *bona fide* holders of cultural property which eventually has to be returned[67]. Finally, the Protocol deals with cultural property deposited by a High Contracting Party in the territory of another Party before the breakout of an armed conflict, as a precautionary measure, and provides for its restitution, at the end of hostilities, to the competent authorities of the territory from which it came[68].

Though the 1954 Convention and its Protocol were indeed a major breakthrough in international law, their practical application has left much to be desired. Spurred by the new ethnic conflicts which were resulting once again in the pillage and destruction of cultural property, particularly in the former Yugoslavia, in the early 1990's preparatory work was undertaken to reinforce the implementation of the provisions of the Convention[69]. Indeed, in 1993 the UNESCO commissioned Professor P.J. Boylan a report on the Hague Convention, where he pointed out how he could not find any examples 'of States Parties to the Protocol taking action of any kind in order to bring its provisions into practical effect in order to 'freeze' trade in, or other transfers or movements of, cultural property from areas affected by either international or internal armed conflicts. On the contrary, regularly over the past few decades the showrooms of dealers and auction salerooms on the major art 'importing' nations have seemed to be full of material that should have raised grave suspicions that they had originated from countries and regions of the world afflicted by

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[63] 1954 First Protocol §1.
[64] *Ibid* §2.
[65] §3.
[66] On ratifying the Protocol, Norway entered a reservation, according to which 'restitution of cultural property in accordance with the provisions of Sections I and II of the Protocol could not be required more than 20 years from the date on which the property in question had to come into possession of a holder acting in good faith', which, however, was withdrawn by *date verbale* of 3 October 1979.
[67] 1954 First Protocol §4.
[68] *Ibid* §5.
[69] J. 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* (UNESCO, 2009) 20.

international and civil wars.'[70]. In other words, the failure of States Parties to the Protocol to adopt the domestic measures necessary to implement its provisions, in utter disregard of paragraph 11 *lit* a) pursuant to which 'each State Party to the Protocol on the date of its entry into force shall take all necessary measures to ensure its effective application within a period of six months after such entry into force'[71], had made it extremely difficult for the restitution system envisaged by the Hague Convention to be applied, leading to its substantial failure[72].

A Second Protocol[73] was eventually agreed upon on 26 March 1999. This was adopted as an additional and supplementary text to the Convention, meaning that it would neither amend it nor apply to States Parties unless they ratified it[74]. For what concerns the circulation of movable property from occupied territories, however, the Protocol tackles the issue solely on the side of limitations to exportation, while remaining silent on the question of restitution. Indeed, Article 9 *lit* a) expands the obligation of occupying States under the First Protocol to include the prohibition of export, in addition to its prevention, as well as other removal or transfer of ownership of cultural property[75]. Further, such provision circumscribes the ambit of prohibition to *illicit* export, whereby pursuant to Article 1 *lit* g) 'illicit' means 'under compulsion or otherwise in violation of the applicable rules of the domestic law of the occupied territory or of international law'[76]. Moreover, Article 21 *lit* b) specifies the above-mentioned provision of Article 11 *lit* a) by setting out the obligation of the occupying State to adopt 'such legislative, administrative or disciplinary measures as may be necessary to suppress ... any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol'[77].

The choice of leaving out the issue of restitution is utterly regrettable. Indeed, considering the above-mentioned lack of implementation of the First Protocol, it leaves the issue to be regulated through other instruments specifically designed for being applied in

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[70] P.J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict: The Hague Convention of 1954* (UNESCO, 1993) 101 109. For an opposite view, *see* E. Clément, F. Quinio, 'La protection des biens culturels au Cambodge pendant la période des conflits armés, à travers l'application de la Convention de La Haye de 1954' (2004) 86 Revue international de la Croix-Rouge 389.
[71] 1954 First Protocol §11 *lit* a).
[72] Zagato, *La protezione dei beni culturali* (n 23) 53.
[73] For the full text of the Second Protocol, *see* Toman, *Cultural Property in War* (n 69) annex 3 827.
[74] For the other possible options which were considered, *see* Boylan, *Review of the Convention for The Protection of Cultural Property in the Event of Armed Conflict* (n 70) 37.
[75] 1999 Second Protocol Art 11.1 *lit* a).
[76] *Ibid* Art 1 *lit* g).
[77] Art 21 *lit* b).

times of peace, which are obviously inadequate to protect the cultural property of a State whose territory is partially or totally under foreign occupation.

3. Restitution and return of cultural property stolen or illicitly exported in times of peace

The illicit excavation, theft and illegal exportation and trade in cultural objects in times of peace is just an equally alarming phenomenon, considering its enormous proportions. The insatiable demand of the international art market, mainly located in Western countries, has led to prices for works of art rocketing in recent years[78], ultimately encouraging theft and clandestine excavations. In 2013, the UNESCO estimated trafficking in cultural property at $ 2-6 billions per year[79]. This poses a serious threat especially to economically weaker Countries, which do not have the resources to patrol all their cultural and archaeological sites[80] and risk seeing their cultural heritage devastated. For instance, archaeologists have reported that up to 95 per cent of Belize's pre-Columbian sites may have been destroyed by looting[81]. Indeed, while most States have enacted pieces of legislation aimed to protect their cultural property[82], the international nature of the art market calls for improved international co-operation in the field.

3.1 The 1970 UNESCO Convention on the Means for Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

Attempts to regulate the circulation and restitution of objects in times of peace first came by national legislators. In the XIX century many civil law countries, such as Greece (1834), Italy (1872) and France (1887), adopted legislative measures in their domestic systems to protect their cultural property[83], while it was not until after World War I that the issue started being discussed in an international context. Indeed, in the 1930's the Office international des Musées (OIM) prepared two draft conventions which it submitted to the

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[78] P. Askérud, E. Clément, *Preventing the Illicit Traffic in Cultural Property: A Resource Handbook for the Implementation of the 1970 UNESCO Convention* (UNESCO, 1997) 11.
[79] G. Borgstede, 'Cultural Property, the Palermo Convention and Transnational Organized Crime' (2014) 21 International Journal of Cultural Property 281 282.
[80] P.M. Bator, 'An Essay on the International Trade in Art' (1982) 34 Stanford Law Review 275.
[81] M.A. Gutchen, 'The Destruction of Archaeological Resources in Belize, Central America' (1983) 10 Journal of Field Archaeology 217.
[82] UNESCO, 'UNESCO Database of National Cultural Heritage Laws' (2019) https://en.unesco.org/cultnatlaws accessed 21 June 2019.
[83] P.J. O'Keefe, *Commentary on the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (2nd ed, Institute of Art and Law, 2007) 3.

League of Nations in 1933 and 1936[84]. However, negotiations were delayed by the reluctances of the main art-market States (namely, the United States of America, the United Kingdom, the Netherlands and Sweden) to the point that they had to be set aside due to the outbreak of the Second World War[85], only to be resumed in the latter half of the XX century under the aegis of the UNESCO. The adoption of two important recommendations in 1956 and 1964[86] paved the way for the preparation of a Convention, which was finally adopted at the 16th General Conference in November 1970.

Though being the most important legal instrument in this area, the text of the Convention is under many aspects the result of the anxiety to ensure that major art market States, especially the United States, sat at the table. As a matter of fact, in order to accommodate their requirements many of the provisions of the original draft had to be watered down. This is particularly true for those norms regulating the international circulation of cultural property. Indeed, while the original draft encompassed a strict system of export controls consisting of a mandatory certificate to be issued for all licitly exported goods (Article 7) and a corresponding import controls system, by which the import of any cultural good would be prohibited unless accompanied by such document[87], in the final text the latter function of export certificates has been eliminated. Indeed, though under Article 6 States have the obligation to introduce such requisite for the export of cultural property[88], import controls were limited to property stolen from public institutions pursuant to Article 7(b)(i)[89].

According to some commentators, it would follow from such provision that both property from public institutions which is not stolen and cultural property, even if stolen, from private collections fall outside the scope of the controls set up by the Convention[90].

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[84] Respectively, the 'Convention on the Repatriation of Objects of Artistic, Historical or Scientifical Interest, which have been Lost, Stolen or Unlawfully Alienated or Exported' and the 'Convention for the Protection of National, Historic and Artistic Treasures'.

[85] I. Stamatoudi, *Cultural Property Law and Restitution: A Commentary to International Conventions and European Union Law* (Edward Elgar Publishing, 2011) 31.

[86] UNESCO, 'Recommendation on International Principles Applicable to Archaeological Excavations' (1956) Res CPG.57.VI.9 in UNESCO, *Records of the General Conference, 9th Session, New Delhi, 1956: Resolutions* (UNESCO, 1957) 40; UNESCO, 'Recommendation on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property' (1964) in UNESCO, *Actes de la Conférence Générale, treizième session, Paris, 1964: Resolutions* (UNESCO, 1965) 155.

[87] Frigo, *La circolazione dei beni culturali* (n 34) 10.

[88] 1970 UNESCO Convention Art 6.

[89] *Ibid* Art 7(b)(i).

[90] R.D. Abramson, S.B. Huttler, 'The Legal Response to the Illicit Movement of Cultural Property' (1973) 5 Law and Policy in International Business 932 961; R. Fraoua, *Convention concernant les mesures à prendre pour interdir et empecher l'importation, l'exportation et le transfert de propriété illicites des biens culturels* (UNESCO Doc CC-86/WS/40, 1986) 73.

However, this consequence may be avoided when Article 6 is read in relation to Article 3[91], which provides that 'the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the State parties thereto, shall be illicit'[92]. Indeed, while the above-mentioned authors have interpreted the latter provision as being ineffective[93], the best interpretation of Article 3, which instead gives it some meaning and is therefore preferable pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties[94], is that State Parties are required to render imports 'illicit' under their domestic law when they are 'illicit' exports from another State[95]. Among State parties, both Canada and Australia have adopted this interpretation of Article 3[96]. On top of that, such reading ultimately has the makings of international co-operation, which is expressly called for in the Preamble of the Convention[97]. In light of the above, Article 6 would then guarantee that States which set up export controls in accordance with the Convention have them recognized and supported by other State Parties to the Convention[98]. In other words, the combined interpretation of Articles 3 and 6 allows to go beyond Article 7(b)(i).

Article 7 is, indeed, based on the United States' alternative draft and has replaced the provision which complemented the export control provision in Article 6 through requiring States to prohibit import of all cultural property illegally exported from its State of origin[99]. By contrast, the final text has limited import controls to few specific categories. First, Article 7(a) sets out the obligation of States Parties to take 'the necessary measures, *consistent with national legislation*, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported'[100]. The expression 'consistent with national legislation', which was added at the request of the United States, sensibly weakened this provision, as it was interpreted so as to

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[91] A.F.G. Raschèr, M. Bauen, Y. Fischer, M.-N. Zen-Ruffinen, *Cultural Property Transfer* (Bruyland/Schulthess, 2005) 20.
[92] 1970 UNESCO Convention Art 3.
[93] P.M. Bator, 'An Essay on the International Trade in Art' (n 80) 377.
[94] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Art 31.
[95] O'Keefe, *Commentary on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (n 82) 41.
[96] Canadian Cultural Property Export and Import Act (1975) section 31; Australian Protection of Movable Cultural Heritage Act (1986) sections 3, 14.
[97] *See* 1970 UNESCO Convention Preamble §8.
[98] O'Keefe, *Commentary on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (n 83) 54.
[99] Abramson, Huttler, 'The Legal Response to the Illicit Movement of Cultural Property' (n 90) 951.
[100] 1970 UNESCO Convention Art 7(a) (emphasis added).

restrict its effect to those museums whose acquisition policies are controlled by the State[101]. One proposed solution to expand its scope to private institutions has been to tie financial support by the Government to regulation of acquisition policies[102]. For instance, in England registration with funding sources is conditioned to adherence to ethical codes adopted by the International Council of Musems (ICOM) and the Museum Association[103].

Further, as mentioned above, Article 7(b)(i) limits import controls to cultural property stolen from a museum, a religious or secular public monument or a similar institution, provided that such property is documented in the inventory of that institution[104]. Not only does this wording leave out other culturally important property; it is also unclear what a 'public monument' or a 'similar institution' are for the purposes of this provision. Moreover, the inventory requisite leaves out of the scope of protection of the Convention cultural property which has been clandestinely excavated, which is by definition not inventoried[105].

Article 13, also, deals with limitations to the circulation of cultural property by requiring States Parties 'to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property'[106]. However, in addition to being conditional upon consistency with the laws of each State, this is a rather general obligation, leaving States a considerable margin of action in deciding which implementing measures they deem appropriate[107], which, indeed, vary considerably from State to State[108]. On the other hand, subsection (d) requires States to recognize the right of any other State Party to declare certain cultural property as inalienable[109]. This is particularly relevant because the important consequence of inalienability, as De Visscher pointed out,

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[101] O'Keefe, *Commentary on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (n 83) 56.
[102] J.A.R. Nafziger, 'Article 7(a) of the UNESCO Convention' in L.D. DuBoff (ed), *Art Law: Domestic and International* (Fred B. Rothman & Co., 1975) 388; Swiss Working Group, *International Transfer of Cultural Objects: UNESCO Convention of 1970 and UNIDROIT Convention of 1995* (Federal Office of Culture, 1999) 31.
[103] O'Keefe, *Commentary on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (n 83) 57.
[104] 1970 UNESCO Convention Art 7(b)(i).
[105] O'Keefe, *Commentary on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (n 83) 59.
[106] 1970 UNESCO Convention Art 13(a).
[107] Fraoua, *Convention concernant les mesures à prendre pour interdire et empecher l'importation, l'exportation et le transfert de propriété illicites des biens culturels* (n 90) 88.
[108] UNESCO, 'Reports on the Measures Taken for the Implementation of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership. Of Cultural Property' (15 October 2015) Doc 38 C/29.
[109] 1970 UNESCO Convention Art 13(d).

is that these objects can be claimed back at any time by the State, irrespective of any transactions which might have occurred in another State[110].

The Convention also deals with the issue of restitution of cultural property, though in a rather contradictory way. Indeed, while on one hand Article 13(b) sets out the obligation of States Parties to 'ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner'[111], on the other not all such property is subject to the simplified procedure laid down by Article 7(b)(ii)[112], which is instead available solely for cultural property falling under the narrow definition of Article 7(b)(i). Moreover, it is unclear who the 'rightful owner' is in the context of the Convention. Article 13(c) further imposes upon States Parties the obligation to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners[113]. This is a procedural obligation, namely 'to provide a judicial remedy for the vindication of a property right if one exists'[114]. However, considering that such provision is, like all others under Article 13, 'consistent with the laws of each State'[115], it is clear that it does not require an extraordinary or uniform procedure, but only that one exist. Hence, because the majority of States Parties to the Convention already admit a replevin action in their domestic systems[116], this being a basic provision of any legal system[117], Article 13(c) does not seem to do more than stating what already exists.

Besides the replevin action, Article 7(b)(ii) provides for an expedite procedure for the restitution of cultural property falling within the category of Article 7(b)(i). Accordingly, States Parties are required, at the request of the State party of origin, to take appropriate steps to recover and return any such cultural property[118]. Restitution under the Convention is therefore a State restitution, as opposed to the original Secretariat draft which allowed actions by 'the owner of the cultural property in question, his authorized agent or the State

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[110] C. De Visscher, 'La protection internationale des objets d'art et des monuments historiques' (1935) 16 Revue de droit international et de législation comparée 32 48.
[111] 1970 UNESCO Convention Art 13(b).
[112] J.B. Gordon, 'The UNESCO Convention on the Illicit Movement of Art Treasures' (1971) 12 Harvard International Law Journal 537 554; Fraoua, *Convention concernant les mesures à prendre pour interdire et empecher l'importation, l'exportation et le transfert de propriété illicites des biens culturels* (n 90) 87.
[113] 1970 UNESCO Convention Art 13(c).
[114] M.B. Feldman, R.J. Bettauer, 'Report of the United States Delegation to the Special Committee of Governmental Experts to examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property' (UNESCO, 1970) 18.
[115] 1970 UNESCO Convention Art 13.
[116] Fraoua, *Convention concernant les mesures à prendre pour interdire et empecher l'importation, l'exportation et le transfert de propriété illicites des biens culturels* (n 90) 91.
[117] O'Keefe, *Commentary on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (n 83) 84.
[118] 1970 UNESCO Convention Art 7(b)(ii).

of which he is a national'[119], as is now the case under the 1995 Unidroit Convention. The requesting State, which to this aim shall use diplomatic offices, has the burden to furnish, at its expense, the documentation and other evidence necessary to establish its claim and to bear all other expenses incident to the return and delivery of the cultural property. On the other hand, the importing State is not to charge customs or other duties on the return of such property. More importantly, the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. The latter provision clearly reaches into domestic rules as to transfer of property and protection of the *bona fide* possessor and would require action to modify and unify national laws in this regard[120].

In any event, what 'appropriate steps to recover and return' are pursuant to Article 7(b)(ii) is a matter for the importing State to decide. For instance, the Australian legislation implementing the Convention provides for a special seizure procedure[121]. The same solution, though on the basis of bilateral agreements rather than statutory provisions, has been adopted by the United States. By contrast, in a number of cases Canada has prosecuted itself the importer[122]. In conclusion, whatever approach is taken, the wording of Article 7(b)(ii) seems to require as a minimum that some active steps are taken to assist recovery and return. Indeed, this is the only interpretation which provides for a remedy not already available under existing legal processes[123].

Despite the undeniable importance of the 1970 UNESCO Convention and the great momentum it has brought to the international protection of movable cultural property, its compromise nature has watered down its provisions to the point that the system of controls over circulation and the procedures for restitution laid down therein have been substantially ineffective, with very few instances of such procedures being used for achieving the return of cultural property. While O'Keefe points out a number of plausible factors for this being so[124], Frigo considers that the main reason for it is the intrinsic inadequacy of a public law instrument to tackle issues involving the application of conflict of laws rules and private law norms of domestic law systems[125].

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[119] UNESCO Doc SHC/MD/3 Annex 4 Art 10(c).
[120] M. Frigo, *La protezione dei beni culturali nel diritto internazionale* (Giuffrè Editore, 1986) 27.
[121] Protection of Movable Cultural Heritage Act (n 96) section 14(1).
[122] *R. v. Heller* (1983) 27 Alta L.R. (2nd) 346; appeal decision (1984) 51 A.R. 73.
[123] O'Keefe, *Commentary on the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (n 83) 62.
[124] *Ibid* 151.
[125] Frigo, *La circolazione dei beni culturali* (n 34) 16.

3.2 The 1995 Unidroit Convention on Stolen or Illicitly Exported Cultural Property

In the years following the adoption of the 1970 UNESCO Convention, several reports have analyzed and isolated the aspects of private law which had an impact on and facilitated the passing of illegally acquired cultural objects into the licit market, and proposed solutions to avoid the exploitation of such loopholes. As early as in 1976, a study commissioned by the Commission of the European Communities suggested to change the *bona fide* purchaser rules of European countries to totally abolish protection for purchasers by stipulating restitution without compensation in all cases, in order to ultimately eliminate all dubious transfers of ownership[126]. In 1982, consulted by UNESCO, Professors O'Keefe and Prott proposed, instead, the adoption of common rules, first, establishing that the law of the country of origin be always applied to judge on the validity of the transactions; second, extending and unifying time limits for civil suits for illicit transfers of cultural property; further, reversing the *bona fide* purchaser rules in relation to cultural property; and finally, providing for the enforcement by domestic courts of foreign laws on illicitly exported cultural property[127] – all issues which, as we will see, seriously impinge on the predictability of the outcome of claims for the recovery of cultural property before domestic judges. Further, O'Keefe and Prott put forward that the above solutions should be adopted by an international convention and that a law unification body should be entrusted with its preparation.

The UNESCO took up this recommendation at a Meeting of Experts in 1983[128] and in 1984 it asked the Unidroit to undertake to work on the elaboration of the private law rules applicable to the illicit traffic in cultural objects, in order to complement the 1970 UNESCO Convention. The Unidroit began by preparing two expert reports confirming the desirability of a new international instrument in the field[129]. Subsequently, a Study Group of Experts comprising legal experts from different legal systems and from both 'source' and

[126] J. Chatelain, 'Means of Combating the Theft of and Illegal Trade in Works of Art in the Nine Countries of the EEC' (Commission of the European Communities Doc XII/757/76-E 1976) 114.
[127] P.J. O'Keefe, L.V. Prott, 'National Legal Control of Illicit Traffic in Cultural Property' (UNESCO Doc CLT-83/WS/16 1983) 126.
[128] UNESCO, 'Consultation on Illicit Traffic of Cultural Property' (4 March 1983) Doc CLT/CH/CS.51/4 Recommendation 4.
[129] G. Reichelt, 'International Protection of Cultural Property' (1985) 13 Uniform Law Review 43; G. Reichelt, 'Second Study Requested from Unidroit by UNESCO on the International Protection of Cultural Property with Particular Reference to the Rules of Private Law Affecting the Transfer of Title to Cultural Property and in the Light of the Comments Received on the First Study' (Unidroit Study LXX Doc 4 1988) 39.

'market' states prepared the text of a Preliminary Draft. Finally, on 24 June 1995 the Convention on Stolen or Illicitly Exported Cultural Objects was adopted[130].

A comparison between the two Conventions highlights a number of differences. First, while the definition of cultural property is substantially the same (with the difference that the new Convention recognizes no competence to States Parties' designation: *v. supra*, § 1.1), the scope of application of the 1995 Unidroit Convention's provisions on restitution is wider than that of the UNESCO Convention[131]. Indeed, while the latter's Article 7(b)(ii) only encompasses the restitution of objects which have been stolen from public institutions and have been documented in such institutions' inventories, Article 3(1) of the Unidroit Convention provides for the recovery of all stolen objects[132]. As to the return of illicitly exported cultural objects and the problem of recognition of foreign public law, the latter Convention clearly identifies certain classes of objects which are to be returned[133]. Though this is apparently a narrower scope than the broader interpretation of Article 3 of the UNESCO Convention[134], it is indeed wider than the latter's Article 7(b)[135]. Hence, because no market state has ever implemented the obligation under Article 3 as referring to all illegally exported cultural property, in practice this provision represents an advancement[136]. Furthermore, in the Unidroit Convention clandestinely excavated objects, which had been left out by the scope of the previous Convention, were reconducted under the notion of 'stolen' cultural property under Article 3[137], on the one hand, and under the categories identified by Article 5(3) *lit* (a), (b) and (c) as objects in relation to which there exists a duty to return, on the other[138].

Another difference is, indeed, that the Unidroit Convention deals separately with the restitution of stolen cultural property and the return of illegally exported objects (*v. supra*, § 1.3). As to the former, Article 3(1) establishes an outright obligation on the possessor to

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[130] L.V. Prott, 'UNESCO and Unidroit: A Partnership against Trafficking in Cultural Objects' (1996) 1 Uniform Law Review 59 61.
[131] Stamatoudi, *Cultural Property Law and Restitution* (n 85) 75.
[132] 1995 Unidroit Convention Art 3(1).
[133] *Ibid* Art 5(3).
[134] 1970 UNESCO Convention Art 3.
[135] *Ibid* Art 7(b).
[136] Prott, 'UNESCO and Unidroit' (n 129) 64.
[137] 1995 Unidroit Convention Art 3(2).
[138] Article 5(3) of the Unidroit Convention provides for the return of an illegally exported cultural object if the requesting State establishes that its removal significantly impairs (a) the physical preservation of the object, (b) the integrity of a complex object, (c) the preservation of information of, for example, a scientific or historical character, or (d) the traditional or ritual use of the object by a tribal or indigenous community, or if it establishes that the object is of significant cultural importance for itself.

return all stolen cultural property[139] irrespective of his good faith, thus substantially departing from those legal systems, especially of civil law, that are inspired by the principle '*en fait de meubles, la possession vaut titre*'. These systems, indeed, tend to favor the good faith purchaser against the dispossessed owner, either by allowing him to acquire ownership of the object after the lapse of a short period of time[140] (or even immediately[141]) or by recognizing him the right to the payment of a compensation. By contrast, such provision represents a move towards the *nemo dat* rule adopted by common law systems, according to which no one can pass a title which he does not possess and, subsequently, no one can acquire ownership of an object he has purchased from a thief. Civil law Countries eventually accepted this rule as an exception based on the peculiar nature of cultural property, due to the increasing frustration with unsatisfactory outcomes of claims for the recovery of stolen objects resulting from the application of ordinary norms[142]. Article 3(3) further provides that any claim must be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of the possessor, and in any case within a period of fifty years from the time of the theft[143], with the exception of claims for the restitution of cultural objects belonging to a public collection or forming an integral part of an identified monument or archaeological site, which may be brought at any time[144] (though States Parties may decide to subject them to a time limitation of 75 years or longer according to their national legislation)[145].

Moreover, Article 4 provides for the payment of a 'fair and equitable compensation' to the possessor of the cultural object[146], with a wording which corresponds to the prevalent international practice in the field (and is indeed the same as adopted by relevant EU secondary legislation)[147]. This provision is again a compromise between the divergent views of proponents of the total abolition of any compensation and supporters of the possessor's right to full payment at market value[148], ultimately leaving the task to assess what 'fair and equitable' means to the judges who are called upon to apply the Convention, on a case-by-

[139] 1995 Unidroit Convention Art 3(1).
[140] For instance, 3 years: French Civil Code Art 2276.
[141] Italian Civil Code Art 1153.
[142] Frigo, *La circolazione dei beni culturali* (n 34) 27.
[143] 1995 Unidroit Convention Art 3(3).
[144] *Ibid* Art 3(4).
[145] Art 3(5).
[146] Art 4(1).
[147] Directive 2014/60/EU Art 10.
[148] M. Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' in The Hague Academy of International Law (ed), 375 *Collected Courses of the Hague Academy of International Law* (Brill, 2016) 292.

case basis[149]. Under another aspect, Article 4 represents a major breakthrough in that it adopts the objective requisite of 'due diligence' instead of the subjective 'good faith', hence incorporating the *caveat emptor* doctrine according to which the purchaser bears the onus of investigating the title of the object he is intentioned to buy[150]. Paragraph 4 then defines due diligence through a non-exhaustive list of circumstances to be taken into account (*i.e.* the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, etc.)[151], resulting in a sensibly stricter definition of a good faith purchaser than that inferable by the 1970 UNESCO Convention[152]. Finally, it must be pointed out that Article 4 abandons the presumption of good faith envisaged by most national laws on the circulation of movables by reversing the burden of proof. In other words, it is up to the possessor to prove that he did not know nor ought to reasonably have known that the object was stolen and that he exercised due diligence when acquiring the object[153].

The return of illicitly exported objects is a more complicated issue in so far as it pertains to the matter of recognition and application of foreign States' public law[154]. The Convention precisely aims to introduce an obligation to do so under the circumstances laid down in Articles 5 and 7. Indeed, whether an object has been illegally exported pursuant to Article 5 is a matter for the requesting State's legislation to decide. Also deemed as illicitly exported are cultural objects which have been temporarily exported from the territory of a State for purposes such as exhibition, research, or restoration under a permit compliant with that State's export regulations, and not returned in accordance with the terms of such permit[155]. However, by analogy with the regime set out for restitution, claims for the return of illicitly exported objects must be filed within a period of three years from the time when the requesting State knew the location of the cultural property and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under such a permit[156]. The return is further

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[149] L.V. Prott, *Biens culturels volés ou illicitement exportés: commentaire relative à la Convention d'Unidroit* (UNESCO, 2000) 75.
[150] Stamatoudi, *Cultural Property Law and Restitution* (n 85) 86.
[151] 1995 Unidroit Convention Art 4(4).
[152] M.-A. Renold, 'Stolen Art: The Ubiquitous Question of Good Faith' in The International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes* (n 25) 259.
[153] 1995 Unidroit Convention Art 4(1).
[154] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 293.
[155] 1995 Unidroit Convention Art 5(2).
[156] *Ibid* Art 5(5).

subject to the verification of the requisites established by Article 5(3) with regards to the cultural importance of the object[157] and the requesting State has the burden to furnish all factual and legal information as may be necessary to assess the existence of such requirements[158].

Like Article 4, Article 6 establishes that the *bona fide* possessor of an illicitly exported cultural object who has to return it is entitled to payment of a fair and reasonable compensation, in this case by the requesting State[159], provided that the standard of due diligence as defined by Article 6(2) is met. Notably, among the circumstances which shall be taken into account in assessing the possessor's due diligence is the absence of an export certificate required under the requesting State's law[160]. Moreover, unlike for stolen property, pursuant to Paragraph 3 the possessor who is required to return an illicitly exported object, in agreement with the requesting State, has two alternative options to compensation. First, he may retain ownership of the object. Second, he may transfer ownership (both against payment or gratuitously) to a person of his choice residing in the requesting State, provided that the latter furnishes the necessary guarantees[161]. Such guarantees would typically aim to ensure that the object does not return to the original possessor and that, in any case, it is not exported again[162], but the State may also seek that the designated person ensure the security and conservation of the object[163]. In any event, these alternatives have clearly been introduced to the advantage of any requesting State which might be unable to pay the compensation, by allowing it to ensure that the object at question be returned to its territory though renouncing to acquire its ownership[164].

3.3 European Union Law

Turning to a regional context, the European Union legislation in the field of movable cultural property offers a particularly interesting framework, laying down both limitations on the circulation of such property and a procedure for its recovery. Indeed, the Treaty Establishing the European Community (EC Treaty), originally in its Article 36, later 30,

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[157] Art 5(3).
[158] Art 5(4).
[159] Art 6(1).
[160] Art 6(2).
[161] Art 6(3).
[162] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 294.
[163] Prott, *Biens culturels volés ou illicitement exportés* (n 149) 113.
[164] *Ibid.*

already envisaged a 'national treasures' waiver to the prohibition of quantitative restrictions on imports among Member States, as does today Article 36 of the Treaty on the Functioning of the European Union (TFEU)[165]. In other words, even the founding Treaties acknowledge the peculiar nature of cultural objects[166] and, in view of it, admit a derogation from one of the fundamental freedoms laid down therein, namely the free movement of goods.

The provision of Article 36, however, poses a serious problem of interpretation insofar as its wording is not uniform across the various authentic texts. Indeed, while the expression 'national treasures' is found in the English, French, Greek and Danish versions (*trésors nationaux, ethnikón thesaurón, nationale skatte*), the Italian, Spanish, Portuguese and Dutch texts make reference to the artistic, historical or archaeological heritage (*patrimonio nazionale, patrimonio nacional, património nacional, nationaal bezit*). The German version uses yet another expression (*Kulturguts*). The issue here is that the different texts seem to allow Member States different levels of discretion as to the categories of objects that they can subject to protective legislation. The best solution is, thus, to make reference to Article 33(4) of the Vienna Convention of the Law of Treaties[167], according to which, except where the treaty provides that a particular text shall prevail, 'when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'. The European Court of Justice has, indeed, upheld such principle of interpretation by stating that, in case of divergence, various language versions of a provision of EU law must be interpreted uniformly through reference to the purpose and general scheme of the rules of which such provision forms part[168]. Accordingly, because Article 36 is comprised in the Title of the Treaty dealing with the free movement of goods, laying down a number of exceptions to the general prohibition of quantitative restrictions set out by Articles 34 and 35, the more restrictive interpretation shall be preferred over the broader one[169].

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[165] Consolidated Version of the Treaty on the Functioning of the European Union (2008) OJ C115/01 (TFEU) Art 36.

[166] B. Sitter-Liver, 'Against the Right of the Stronger: Ethical Considerations Concerning Cultural Property' (1995) 3 European Review 221 225.

[167] VCLT Art 33(4).

[168] Case 29/69 *Stander* (1969) ECR 419 3; Case C-219/95 *Ferriere Nord v Commission* (1997) ECR I-4411 15; Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* (2001) ECR I-08615 47.

[169] M. Frigo, 'The Implementation of Directive 2014/60/EU and the Problems of the Compliance of Italian Legislation with International and EU Law' (2016) Santander Art and Culture Review 2 71 75; J. Goyder, 'European Community Free Movement of Cultural Goods and European Community Law: Treaties and EC

The issue of limitations to the circulation of cultural property eventually had to be dealt with more in detail, and the provision of Article 36 be specified, face the establishment of the European single market[170]. Consequently, in 1992 Council Regulation 3991/92 on the Export of Cultural Goods[171] was adopted. The Regulation has been amended several times and eventually replaced by Regulation 116/2009 and aims to achieve uniform export controls at the external borders of the Union through subjecting the export of cultural objects to the presentation of an export certificate[172]. It must be noted, however, that the ambit of 'cultural goods' under the Regulation does not correspond exactly to the notion of 'national treasures' under Article 36 of the TFEU. Indeed, though mentioning the Member States' power to designate their national treasures, Article 1 of the Regulation defines cultural goods by reference to an Annex containing a list of categories as well as both age and monetary thresholds[173]. It is therefore possible, on the one hand, that some objects that are protected by national laws pursuant to Article 36 do not fall under the scope of protection of the Regulation, and on the other, that some objects that are cultural goods within the meaning of Article 1 are not classified by the concerned Member State among its national treasures. Indeed, the first case is expressly considered by Article 2(4), which provides that such objects be subject to the controls established by the national laws of the Member State of export[174]. The second scenario can, instead, be inferred by Article 2(2), third indent, whereby the export license may be refused only when the cultural goods in question are also covered by the Member State's legislation concerning the protection of its national treasures[175]. Hence, by contrast, cultural goods that are not identified as national treasures cannot be denied the export license. Furthermore, it should be noted that, due to pressure exercised by the UK[176], an exception was introduced in Article 2(2) by which such license is not required for archaeological objects which, though being more than 100 years

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Matters' (1992) 1 International Journal of Cultural Property 219; European Commission, 'Study on Preventing and Fighting Illicit Trafficking in Cultural Goods in the European Union' (n 6) 42; Commission of the European Communities, 'Communication from the Commission to the Council on the Protection of National Treasures Possessing Artistic, Historic or Archaeological Value: Needs Arising From the Abolition of Frontiers in 1992' (22 November 1989) Com (89) 594 3.

[170] Not by coincidence, the chronological ambit of both Regulation (EEC) 3991/92 and Directive 93/7/EC (objects removed on or after 1 January 1993) coincides with the abolition of the internal frontiers and the establishment of the European internal market.

[171] Council Regulation (EEC) 3991/92 on the Export of Cultural Goods (1992) OJ L 395/1, repealed and replaced by Council Regulation (EC) 116/2009 on the Export of Cultural Goods (2008) OJ L 39, 10 February 2009.

[172] Council Regulation (EC) 116/2009 Art 2(1).

[173] *Ibid* Art 1.

[174] Art 2(4).

[175] Art 2(2).

[176] Stamatoudi, *Cultural Property Law and Restitution* (n 85) 137.

old and, thus, falling within the Regulation's Annex, are of limited archaeological or scientific interest, and provided that they are not the direct product of excavations, finds or archaeological sites within a Member State and that their presence on the market is lawful[177].

The Regulation is intrinsically linked to, and its entry into force was indeed subject to that of[178], Council Directive 93/7 on the Return of Cultural Objects Illegally Exported from the Territory of a Member State[179]. The Directive established a mechanism for the return of cultural objects that had been unlawfully removed from the territory of a Member State, provided that the object at question: (a) had been classified by the national laws or administrative procedures of the state of origin, either before or after the transfer, among national treasures pursuant to Article 36; (b) fell under the Annex, which comprised the same list of categories and chronological as well as financial thresholds as the Regulation, or (c) otherwise formed an integral part of public collections listed in the inventories of museums, archives, libraries' conservation collections, or ecclesiastical institutions[180]; and (d) had been illicitly removed from the territory of a Member State after 31 December 1992[181]. Further, the Directive specified that an object shall be deemed illicitly removed from the territory of a Member State when its removal was in breach of either the State's national rules concerning the protection of its cultural heritage or of the above Regulation, or when it had not been returned at the end of a period of lawful temporary removal or after the breach of any other conditions governing such temporary removal[182].

The return provided for by the Directive was, like in the 1970 UNESCO Convention, a State return, meaning that the proceedings laid down therein could only be brought by Member States and not by individuals nor institutions, though admitting parallel civil and criminal proceedings against the possessor or holder pursuant to the national laws of the concerned Member States[183]. Return proceedings based on the Directive, moreover, could not be initiated more than one year after the requesting Member State became aware of the location of the object at question and the identity of its possessor or holder, nor in any

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[177] Council Regulation (EC) 116/09 Art 2(2).
[178] *Ibid* Art 11; M.P. Chiti, *Beni culturali e Comunità Europea* (Giuffré, 1994) 149; J. Goyder, 'European Community Free Movement of Cultural Goods and European Community Law Part V: A Summary of Current Legislative Initiatives and a Note on the Progress of the European Convention on Protection of the Archaeological Heritage (Revised)' (1994) 3 International Journal of Cultural Property 125.
[179] Council Directive (EEC) 93/7 on the Return of Cultural Objects Illegally Exported from the Territory of a Member State (1993) OJ L 74/74.
[180] *Ibid* Art 1(1).
[181] Art 13.
[182] Art 1(2).
[183] Art 15.

event after 30 years from the time of the unlawful removal (with the exception of objects that are part of public collections or ecclesiastical goods, which were subject to a time limit of 75 years except in Member States where proceedings were not subject to a time limit or in the case of bilateral agreements between Member States laying down a longer period)[184]. Also, the Directive provided that a fair compensation should be paid by the requesting Member State, upon return of the object, to the possessor who exercised due care and attention in acquiring such object[185]. Finally, it is meaningful that the Directive was neutral in regard to the matter of ownership after return[186]. Indeed, the purpose of the recovery system set out by EU law was solely to secure the return of cultural property to the territory of the state of origin, while leaving it to the Member States' national laws to regulate subsequent issues of ownership (*v. supra*, § 1.2).

Though being 'a step in the right direction', the Directive presented a number of shortcomings due to which it was rarely applied in practice[187]. Criticism was raised even by the European Commission in four reports to the Council, the European Parliament and the Economic and Social Committee published between 1993 and 2013[188], following which a working group of representatives of the central authorities within the Committee on the Export and Return of Cultural Goods was entrusted with the identification of the problems and the suggestion of possible solutions. The group identified the main reasons for the limited effectiveness of the Directive as being the strict eligibility criteria for objects to fall under its scope of protection; the short time periods established for bringing proceedings (especially the one year time-limit from the time when the central authority of the Member State became aware of the location of the object or the identity of the possessor); and the uncertainty of the provision regarding compensation, both with regard to the determination

[184] Art 7(1).
[185] Art 9.
[186] Art 12.
[187] Stamatoudi, *Cultural Property Law and Restitution* (n 85) 156; Magri, *La circolazione dei beni culturali nel diritto europeo* (n 16) 139.
[188] European Commission, 'Fourth Report from the EC to the EP, the Council and the European Economic and Social Committee on the application of Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State' (2013); European Commission, 'Third Report' (2009); European Commission, 'Second Report' (2005); European Commission, 'Report from the EC to the Council, the EP and the Economic and Social Committee of 25 May 2000 on the implementation of Council Regulation (EEC) no. 3911/92 on the export of cultural goods and Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State' (2000), cited in G. Magri, 'Directive 2014/60/EU and Good Faith Acquisition of Cultural Goods in Italy' in S. Pinton, L. Zagato (eds) *Cultural Heritage: Scenarios 2015-2017* (Edizioni Ca' Foscari, 2017) 233. *See* Magri, *La circolazione dei beni culturali nel diritto europeo* (n 16) 115.

of the amount and to the allocation of the burden of proof with concern to the due care exercised by the possessor at the time of acquisition of the object[189].

Based on such observations, the Commission proposed a recast of Council Directive 93/7/EEC, which was taken up by the European Parliament and the Council and led to the adoption on 15 May 2014 of Directive 2014/60/EU[190], in force since 19 December 2015. The main innovations of the recast Directive are, first, the extension of the range of objects which may be recovered based on the proceedings provided by the Directive through the elimination of the Annex. Article 1, indeed, provides that such proceedings apply to all objects classified or defined by a Member State as being among its national treasures pursuant to Article 36 TFEU[191], irrespective of any categories or age and/or financial requisites[192]. Second, Directive 2014/60/EU extends the time-limit for bringing proceedings from one to three years after the central authority of the requesting State became aware of the location of the object and the identity of the possessor[193]. Third, while the amount of the compensation to be paid remains unclear, the Directive clarifies that the possessor has to demonstrate that he exercised due care and attention in acquiring the object at question and enumerates a number of circumstances which shall be taken into account in this respect[194]. Also, the new Directive improves co-operation between national central authorities through the possibility of using the Internal Market Information System (IMI)[195] with respect to the return of cultural objects in order to simplify the search for specific objects that have been unlawfully removed and the identification of their possessor[196].

Overall, Directive 2014/60/EU may be considered a positive improvement in the fight against the illicit trafficking of cultural property[197]. Not only does it enhance the effectiveness of the recovery system set up by Directive 93/7/EEC, but also achieves greater coordination with the 1995 Unidroit Convention, as the three year-limitation period for initiating return

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[189] Article 9 of Directive 93/7/EEC provides that 'the competent court in the requested State shall award the possessor such compensation as it deems *fair* according to the circumstances of the case, provided that it is *satisfied* that the possessor exercised due care and attention in acquiring the object' (emphasis added).
[190] M. Górka, 'Directive 2014/60/EU: A New Legal Framework for Ensuring the Return of Cultural Objects within the European Union' (2016) Santander Art and Culture Law Review 2 27.
[191] Directive 2014/60/EU of the EP and the Council Arts 1, 2(1).
[192] *Ibid* Preamble (9).
[193] Art 8.
[194] Art 10.
[195] *See* Regulation (EU) 1024/2012 of the EP and of the Council of 25 October 2012 on Administrative Cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (IMI Regulation) OJ L 316, 14 November 2012.
[196] C. Roodt, *Private International Law, Art and Cultural Heritage* (Edward Elgar Publishing, 2015) 196.
[197] Frigo, 'The implementation of Directive 2014/60/EU and the Problems of the Compliance of Italian Legislation with International and EU Law' (n 169) 82.

proceedings is now the same in both legal instrument[198]. The same holds true for the allocation of the burden of proof with regard to the due care exercised by the possessor[199]. Further, the list of elements introduced by the recast Directive to assess the possessor's due diligence substantially coincides with Article 6(2) of the Unidroit Convention[200]. Such improved coordination is particularly welcome considering that Article 13 of the latter convention only settles possible conflicts between internal rules of regional organizations or bodies and conventional provisions the scopes of which coincide[201]. Indeed, this is not exactly the case with the Directive (though the elimination of the Annex has brought the two even closer).

4. Shortcomings of a rule-oriented system

Overall, the international regime set up to regulate the circulation of cultural property has been only partially effective when it comes to disputes regarding its restitution or return. On the one hand, public international law instruments, in addition to being unable to tackle relevant private international issues, present a number of other shortcomings. First, they are not retroactive[202], with the consequence that they do not cover, for instance, the multitude of colonially-prompted claims. Second, they are not self-executing nor directly applicable. On the other hand, attempts to harmonize private international law are being hampered by the reluctancies of the main market states to ratify the Unidroit Convention. Among the 46 States who have ratified it are not, for instance, the United States, the United Kingdom, nor the Netherlands[203].

More generally, however, it is the peculiar nature of the art world that hinders the efficacy of any strictly rule-oriented approach to its regulation. As we will see in the next Chapter, such an approach, corresponding to adversarial processes of judicial or quasi-judicial methods of dispute settlement, inevitably leads to unsatisfactory outcomes in a field where contrasting interests to a specific cultural object are often all, in a way, legitimate.

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[198] Directive 2014/60/EU Art 8 and 1995 Unidroit Convention Art 5(5).
[199] *Ibid* Arts 10 and 6(1).
[200] Arts 10 and 6(2).
[201] Article 13(3) of the 1995 Unidroit Convention provides that 'in relations with each other, Contracting States which are Members of organizations of economic integration or regional bodies may declare that they will apply the internal rules of these organizations or bodies and will not therefore apply, as between these States, the provisions of this Convention the scope of application of which *coincides* with that of those rules' (emphasis added).
[202] Pursuant to the general rule of the non-retroactivity of treaties: VCLT Art 28.
[203] Status Map of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995), https://www.unidroit.org/status-cp?id=1769 accessed 21 June 2019.

The focus should therefore be put on provisions setting out processes for consultations and cooperation among parties, like those of the 1970 UNESCO Convention calling for the diplomatic settlement of disputes over its implementation[204] and promoting further cooperation among States Parties[205]. As we will see, indeed, an interest-oriented, cooperative approach would allow to reach more efficient, mutually beneficial settlements.

[204] 1970 UNESCO Convention Arts 7, 17(5).
[205] *Ibid* Arts 9, 15.

II. THE JUDICIAL AND QUASI-JUDICIAL SETTLEMENT OF DISPUTES

1. The (limited) practice of international tribunals

Considering that there are a number of international courts and tribunals potentially competent to adjudge disputes for the recovery of cultural property based on the above legal instruments, the paucity of international case-law in this field is dismaying[206]. The underlying reason for this state of things is that the referral of cultural heritage-related disputes to international judicial bodies presents some serious shortcomings, which are epitomized by the famous judicial saga of Prince Hans-Adam II of Liechtenstein, concerning the latter's claim for ownership of the painting *Szene um einen römischen Kalkofen* (or *Der große Kalkofen*) by the seventeenth-century Dutch master Pieter Van Laer.

1.1 An example: the case of Prince Hans-Adam II of Liechtenstein

The background to this case is the reparations owed by Germany on account of violations of both *ius ad bellum* and *ius in bello* in the context of World War II[207], as a consequence of the general duty of States to provide reparation for damages caused by their internationally wrongful acts. Unlike after World War I, however, no peace treaty was concluded with Germany to specify the latter's obligations. This notwithstanding, as early as in 1945 various Allied States started to seize German property present on their territory, as at the Potsdam Conference the main source of reparations had been identified precisely in German external assets, *i.e.* property of German nationals abroad. The practice of States after World War II therefore confirmed the legitimacy of exceptions to the general

[206] For instance, only in one case has the International Court of Justice ordered restitution of cultural objects: *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) (1962) ICJ Rep 1962 6 35. However, Cambodia's request for restitution was merely 'implicit in, and consequential on' the claim regarding the sovereignty over the temple of Preah Vihear, with the consequence that the Court could 'only give a finding of principle in favor of Cambodia, without relating it to any particular objects': *ibid* 34.

[207] B. Delmartino, 'The End of the Road for the Prince? Sixty Years after the Czechoslovak Confiscation of Liechtenstein Property' (2006) 19 Leiden Journal of International Law 441.

international protection of private property[208], subject to three conditions[209]: first, that confiscation serve the purpose of reparation, and as a consequence involve solely property belonging to nationals of the responsible enemy State; second, that confiscated goods fall within the jurisdiction of the taking State, that is to say that they must be present on its territory; third, that takings be agreed with the responsible enemy State, which will normally happen through peace treaties or subsequent international agreements.

These takings were eventually legitimated by the 1946 Paris Agreement on Reparation from Germany[210], signed by Czechoslovakia in that same year. The Paris Agreement therefore provided for a legal basis for the takings of German external assets located in the Czechoslovakian territory which had been put in place since the previous year, following the issuance of the so-called Beneš Decrees. Thus, while the legitimacy of the Beneš Decrees could not be contested after the conclusion of the Paris Agreement, it was their application to property belonging to neutral Countries' nationals which attracted strong criticism. Specifically, pursuant to Decree No. 12, which concerned agricultural property including buildings, installations and movable property pertaining thereto, a Van Laer painting belonging to Liechtenstein's head of State, Prince Franz Josef II, which had been until then in one of the family's castles on the territory of Czechoslovakia, was confiscated.

Hence, in 1951 Prince Franz Josef II challenged the measure before the Bratislava Administrative Court, which, however, upheld the decision of Czechoslovakian administrative authorities to apply Presidential Decree No. 12 to Liechtenstein's property. In the Court's reasoning, Article 1 §1 *lit* (a) of said decree provided for the confiscation of agricultural properties belonging to 'all persons of German or Hungarian nationality', irrespective of their citizenship. Indeed, as noted by the European Court of Human Rights in its decision on the case, 'the notions of "German nationality", or of "German origin" (*deutsche Volkszugehörigkeit*), likewise used at that time, comprised as relevant elements a person's citizenship and nationality, the latter depending on the mother tongue', and '[a]t the relevant time, the Czechoslovakian authorities indisputably regarded the applicant's

[208] I. Brownlie, J. Crawford, *Brownlie's Principles of Public International Law* (8th ed Oxford University Press, 2012) 511; C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945) 1737 cited in H.P. De Vries, 'The International Responsibility of the United States for Vested German Assets' (1957) 51 AJIL 18 27.

[209] B. Delmartino, 'Reparation for the Violation of Property Rights during War' (DPhil thesis, Katholieke Universiteit Leuven 2006) 305.

[210] Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold (adopted 14 January 1946, entered into force 24 January 1946) 61(3) Stat 3191 (Paris Agreement).

father as of German origin in that broader sense'[211]. As no other remedies were available under Czechoslovakian law, nor being the European Convention on Human Rights[212] in force yet, this being the only international instrument providing for individual standing on the subject at the relevant time, the only way forward was a State claim brought by Liechtenstein against Czechoslovakia. However, this solution was not viable either, as in the absence of any special agreement, compromissory clause or reciprocal optional clauses there appeared to be no basis for the jurisdiction of the International Court of Justice on such a dispute[213].

The case remained therefore dormant for forty years, until in 1991 the painting was loaned from the Brno Office for Historical Monuments to the Wallraf-Richartz Museum in Cologne. Prince Hans-Adam II, who had succeeded his father Prince Franz Josef II as the head of state of Liechtenstein, seized the opportunity and instituted proceedings for the recovery of the painting before the Cologne Regional Court (*Landgericht*). The Regional Court, however, declined its jurisdiction pursuant to the 1954 Convention on the Settlement of Matters Arising out of the War and the Occupation (the Settlement Convention)[214]. Indeed, Chapter 6, Article 3 of the Settlement Convention, which was concluded as an integral part of the Bonn-Paris agreements of 1952 and 1954 ending the occupation of Western Germany, provided that:

> 1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets..., seized for the purpose of reparation or restitution, or as a result of the state of war.
> ...
> 3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1 ... of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments.

As a matter of fact, the Regional Court found that the confiscation of the Prince's father's property constituted a measure within Paragraph 1. In particular, it rejected the Prince's argument that the provision of Article 3 did not apply as it only concerned measures carried out with respect to the property of German nationals, which his father

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[211] *Prince Hans Adam II of Liechtenstein v. Germany* (2001) ECHR Rep VIII 18.
[212] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR).
[213] J.R. Crook, 'The 2001 Judicial Activity of the International Court of Justice' (2002) 96 AJIL 397 407.
[214] Convention on the Settlement of Matters Arising out of the War and the Occupation (adopted 26 May 1952) as amended by the Protocol on the Termination of the Occupation Regime of the Federal Republic of Germany (adopted 23 October 1954, entered into force 5 May 1955) 332 UNTS 219.

had never been. The Court made reference to the Federal Court of Justice's well-established case-law that a teleological interpretation of such provision required that the view of the confiscating State was decisive in this regard. Indeed, the aim and purpose of Article 3 was to sanction, without further evaluation, confiscation measures performed abroad on German property, which could only be achieved by excluding such measures from judicial review in Germany. Subsequently, the decision of the Regional Court was upheld by the Regional Court of Appeal (*Oberlandsgericht*), the Federal Court of Justice (*Bundesgerichtshof*) and the Federal Constitutional Court (*Bundesverfassungsgericht*) and the painting was therefore returned to the Czech Republic.

1.1.1. The case before the European Court of Human Rights

In 1998 Prince Hans-Adam II decided to bring the case before the European Court of Human Rights, claiming that he had had no effective access to justice and that both the German courts' decisions and the return of the Van Laer painting to the Czech Republic violated his right to property[215]. He therefore relied on Article 6 section 1 of the Convention and Article 1 of the First Protocol, both alone and in combination with Article 14, concerning the right of non-discrimination.

As to the first claim, the Court stressed that the right of access to justice is not absolute, but rather may be subject to restrictions under three conditions. Accordingly, the restriction must pursue a legitimate aim, must be proportionate, and shall not impair the essence of the right at question. In the case at hand, the Court found that all three conditions were satisfied. Indeed, the waiver to German courts' jurisdiction from which the limitation to the Prince's right of access to justice followed served the legitimate purpose of regaining full sovereignty, which the Allied powers had made dependent on Germany's acceptance of the Settlement Convention. Such limitation was also proportionate nor impaired the essence of the right at stake, because the Prince's interest in bringing a claim for the recovery of a painting was not sufficient to outweigh Germany's vital public interest in regaining sovereignty[216].

Turning to the Prince's second claim, the Court specified that, because the confiscation of the property at question preceded the entry into force of the European Convention on Human Rights in 1953 and of the First Protocol in 1954, it was not

[215] 'Prince Hans-Adam II of Liechtenstein v. Germany' (2001) 12 Human Rights Case Digest 549.
[216] *Prince Hans Adam II of Liechtenstein v. Germany* (n 211) 69.

competent *ratione temporis* to evaluate the legitimacy of such events nor of the continuing effects produced by them up to date. Hence, the assessment regarding Article 1 of the First Protocol would only concern the return of the painting from Germany to the Czech Republic. However, the Court excluded German responsibility in this regard, considering that after the expropriation neither Prince Hans-Adam II nor his father had been able to exercise any owner's rights in respect of the painting and that, thus, the former could not be deemed to retain a title to property or a 'legitimate expectation' within the Court's relevant case-law[217].

Finally, in the light of these findings, the Court rejected the claim concerning Article 14 by reference to its consistent case-law that such provision has no independent existence and only has effect in relation to the enjoyment of the rights and freedoms safeguarded by the substantive provisions of the Convention and of its Protocols[218].

1.1.2. The case before the International Court of Justice

Having all available individual claims proved unsuccessful, the claim was brought to an intergovernmental level. However, having diplomatic negotiations failed as well, in 2001 the Principality of Liechtenstein applied for proceedings against Germany before the International Court of Justice. The Principality's Government alleged, first, that by its conduct in respect of Liechtenstein property Germany had failed to respect Liechtenstein's rights over such property; second, that Germany's failure to pay compensation for the loss suffered by Liechtenstein and its citizens constituted a breach of international law[219].

Germany raised six preliminary objections to the jurisdiction of the Court. First, it questioned the existence of a dispute. The Court dismissed this objection by reference to its well-established case-law that 'a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties'[220] and that its existence must be evaluated by the Court based on whether 'the claim of one party is positively opposed

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[217] *Ibid* 85.
[218] 91.
[219] *Certain Property (Liechtenstein v. Germany)* (Application of Liechtenstein) General List No 123 (2001) 25.
[220] *Certain Property (Liechtenstein v. Germany)* (Preliminary Objections) (2005) ICJ Rep 6 24, where the Court referred to *Mavrommatis Palestine Concession* (Judgment No 2) (1924) PCIJ Series A No 2 11; *Northern Cameroons* (Preliminary Objections) (1963) ICJ Rep 27; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) (1988) ICJ Rep 27 35; *East Timor (Portugal v. Australia)* (Judgment) (1995) ICJ Rep 99 22.

by the other'[221]. Hence, Germany's denial of the complaints of fact and law formulated by Liechtenstein against it entailed the existence of a legal dispute between the two[222], the subject matter of which was whether, by applying the Settlement Convention to Liechtenstein property that had been confiscated in Czechoslovakia under Beneš Decree No. 12, Germany was in breach of its international obligations owed to Liechtenstein and, if so, what Germany's international responsibility was[223].

Conversely, the Court upheld Germany's second preliminary objection, concerning the Court's lack of jurisdiction *ratione temporis*. Indeed, Liechtenstein had based the jurisdiction of the Court on the European Convention for the Peaceful Settlement of Disputes[224], which at Article 27(a) excludes from its scope of application 'disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute'[225]. As between Germany and Liechtenstein, the Convention entered into force on 18 February 1980, when the latter ratified it. Hence, the Court's jurisdiction depended on what factor was considered relevant to situate the dispute in time. On the one hand, Liechtenstein claimed that the dispute had not been triggered by the Settlement Convention nor by the Beneš Decrees because, prior to the 1990's, the Convention had never been applied to neutral assets and, thus, had not given rise to any disputes between Liechtenstein and Germany. Consequently, the generating factor was, instead, German courts' decisions from 1995 onwards[226]. On the other hand, Germany contended that the point in time to which reference should be made was not the date when the dispute had arisen, but rather when the facts or situations to which the dispute related had occurred[227]. Because the judicial decisions in the 1990s had not departed from previous German case-law on the subject, the case had its real source in facts and situations existing prior to 1980.

First, the Court stressed that the text of Article 27(a) did not differ in substance from the temporal jurisdictional limitations dealt with in its precedents on the matter and in those of its predecessor, the Permanent Court of International Justice, which were

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[221] *South West Africa* (Preliminary Objections) (1962) ICJ Rep 328, quoted *ibid.*
[222] *Ibid* 25.
[223] 26.
[224] European Convention for the Peaceful Settlement of Disputes (adopted 4 April 1957, entered into force 30 April 1958) ETS 23.
[225] *Ibid* Art 27(a).
[226] *Certain Property* (Preliminary Objections) (n 220) 38.
[227] *Ibid* 30.

therefore relevant in the case at hand[228]. Accordingly, the Court found that '[t]he facts or situations to which regard must be had ... are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the Electricity Company of Sofia and Bulgaria, only 'those which must be considered as being the source of the dispute', those which are its 'real cause'"[229]. In the view of the Court, such real cause could have been identified in the 1990's decisions only in two cases, namely if such decisions had departed from a previous common position that the Settlement Convention did not apply to Liechtenstein property, or if German domestic courts, in applying the Convention to such property for the first time, had applied it to a 'new situation' emerged after 1980. However, the International Court of Justice excluded the existence of either conditions.

As to the first, it pointed out that 'the issue whether or not the Settlement Convention applied to Liechtenstein property had not previously arisen before German courts, nor had it been dealt with prior thereto in intergovernmental talks between Germany and Liechtenstein' and, in addition, that 'German courts have consistently held that the Settlement Convention deprived them of jurisdiction to address the legality of any confiscation of property treated as German property by the confiscating State'[230]. Turning to the second, the Court emphasized that 'German courts did not face any "new situation" when dealing for the first time with a case concerning the confiscation of Liechtenstein property as a result of the Second World War', considering that 'his case, like previous ones on the confiscation of German external assets, was inextricably linked to the Settlement Convention'[231]. The Court therefore concluded that, though the dispute had arisen as a result of the German courts' decisions, these events had their source in the confiscation of property of some Liechtenstein nationals, including Prince Franz Josef II of Liechtenstein, and in the regime set up by the Settlement Convention[232]. Therefore, in light of the provision of Article 27(a) of the European Convention for the Peaceful Settlement of Disputes, the Court declined its jurisdiction *ratione temporis* and refused to rule on the merits of Liechtenstein's claims.

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[228] *Ibid* 43. In previous paragraphs, the Court had recalled *Phosphates in Morocco* (Judgment) (1938) PCIJ Series A/B No 74 22; *Electricity Company of Sofia and Bulgaria* (Judgment) (1939) PCIJ Series A/B No 77 82; *Right of Passage over Indian Territory* (Merits) (1960) ICJ Rep 35.
[229] *Right of Passage* (Merits) (n 228), quoted *ibid* 44.
[230] *Ibid* 50.
[231] *Ibid* 51.
[232] *Ibid* 52.

1.2 An appraisal: the limits of international adjudication in this field

The case at hand clearly illustrates two crucial shortcomings of international adjudication in the area of movable cultural property. The first and foremost derives from the principle of consent, which is the very fundamental principle of international adjudication and entails that 'no state can, without its consent, be compelled to submit its disputes ... to arbitration, or any other kind of pacific settlement'[233]. For instance, were the International Court of Justice to have jurisdiction over a claim by Liechtenstein against Czechoslovakia, it seems from a *prima facie* look into the merits of such a claim that the latter would be found in breach of the rule of international law that each State may determine who its nationals are, and that no State may decide on the nationality of a foreign citizen[234]. However, the Prince's claim was frustrated by the lack of any ground for the jurisdiction of the Court over such a dispute.

While it should be noted that almost all the many judicial institutions of more recent creation have been invested with some degree of compulsory jurisdiction[235], meaning that their jurisdiction may be invoked unilaterally against parties to their constitutive instruments[236] (so much so that some authors have talked about a 'shift of paradigm' from consensual to compulsory)[237], it cannot be overlooked that, due to the very nature of international law, States still retain both *ex ante* and *ex post* control over international tribunals. Indeed, States contribute to their design, control the implementation of their decisions by domestic courts and retain the possibility to withdraw previously accorded consent to their jurisdiction[238]. Moreover, it must be pointed out that such new courts have been clustered in a relatively limited number of areas of international relations, mostly appertaining to the protection of human rights and to economic integration or co-operation[239].

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[233] *Status of Eastern Carelia* (Advisory Opinion) (1923) Series B No 5 19.
[234] B. Renauld, 'Le Code de la nationalite belge. Presentation synthetique et developpements recents' in J.-Y. Carlier and S. Sarolea (eds.), *Droit des étrangers et nationalité* (2005) 9 13, cited in Delmartino, 'The End of the Road for the Prince?' (n 207) 445.
[235] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford Scholarship Online, 2003) 5.
[236] Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 EJIL 73 75.
[237] C.P.R. Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2007) 39 New York University Journal of International Law and Politics 791.
[238] A. Chechi, 'Some Reflections on International Adjudication of Cultural Heritage-Related Cases' (n 24) 7.
[239] Shany, 'No Longer a Weak Department of Power?' (n 236) 83.

This leads us to the second of the above-mentioned flaws of international adjudication. Indeed, specialized and/or regional courts operating in specific legal frameworks appear to focus primarily on the promotion of the goals of their overarching regimes and on the maintenance of the equilibrium among States parties and between States parties and the institutions of such regimes[240]. In the case at hand, it appears that the European Court of Human Rights was more concerned with the political implications of a successful outcome of the claim rather than the legitimacy of the restrictions to the Prince's rights. As a matter of fact, it has been noted that while waiving individual rights for the sake of a peace treaty is an arguably lawful purpose, the legitimacy of the confiscation of a neutral citizen's property without compensation is at the least an unsettling issue[241]. However, had the Court found Germany to be in breach especially of the Prince's right of access to court, the waiver posed by Article 3(3) of Part VI of the Settlement Convention would have substantially been removed, thus opening the path for a large number of claims for damages by confiscation to be brought in German courts against not only Czechoslovakia, but also other Central European countries, and ultimately putting in jeopardy the peaceful relationship between Germany and its Eastern neighbors[242].

As a matter of fact, though leading to the opposite outcome, the same tendency was apparent in the Strasbourg Court's decision in *Beyeler v. Italy*[243]. The case concerned Italy's exercise of its right of pre-emption with regard to Van Gogh's painting *The Gardener* (also known as *Portrait of a Young Paesant*). An intermediary had bought the painting on behalf of Beyeler in 1977 upon notification to the Italian Ministry of Cultural Heritage, as required by Italian law. In 1983, Beyeler notified its intention to sell the painting to the Peggy Guggenheim Foundation in Venice to the Ministry, and after five years of silence Beyeler proceeded to the sale. Later that year, however, the Italian State exercised its right of pre-emption, but at the 1977 price, which was sensibly lower than that paid by the Guggenheim Foundation in 1988. Eventually, the controversy made it to the Grand Chamber which, while admitting that 'the control by the State of the market in works of art is a legitimate aim for the purposes of protecting a country's cultural and

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[240] A. Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 167.
[241] M. Winn, 'Peace Treaty Claim Waivers: The Case of Prince Hans-Adam II of Liechtenstein and the Scene at a Roman Well' (2006) 38 George Washington International Law Review 807 819.
[242] A. Gattini, 'A Trojan Horse for Sudeten Claims? On Some Implications of the *Prince of Liechtenstein v. Germany*' (2002) 13 EJIL 513 526.
[243] *Beyeler v. Italy* (GC) ECHR 2000-I 57; *see* M.-A. Renold, 'A Landmark Decision in Art Law by the European Court of Human Rights: Beyeler v. Italy' (2000) 5 Art Antiquity & Law 73.

artistic heritage'[244], upheld the applicant's claim that by its delay in the exercise of the right of pre-emption Italy had failed to strike a fair balance between such public interest and the property rights of individuals, thus violating Article 1 of the First Protocol. The Court's reasoning stems, indeed, from the circumstance that the European Convention on Human Rights does not take an interest in collective structures, but rather in the individual sphere, preserving it from excessive intrusions from the public powers. Consequently, the protection of cultural goods falling outside the Convention's express goals, it rather constitutes one such interference, the legitimacy of which thus depends on whether a fair balance is stroke between the underlying public interest and the rights and freedoms of individuals[245].

A similar pattern may be found in the jurisprudence of the European Court of Justice. In 1968 the Court was called upon by the Commission to assess whether the duty imposed by the 1939 Italian law on cultural property upon exportation of cultural goods[246] was legitimate under the exception provided by Article 36 TCE[247]. In their decision, the Luxembourg judges considered that, constituting an exception to the general rule of the freedom of movement of goods, the Treaty provision should be interpreted restrictively as to apply solely to measures 'in the nature of prohibitions, total or partial, on import, export or transit', which are 'by nature clearly distinguished from customs duties and assimilated charges'[248]. Hence, the Court declared the Italian norm in breach of the relevant Treaty provisions. Notably, it stressed that artworks fall within the definition of 'goods' as 'products having a monetary value which, as such, may be the object of commercial transaction'[249] and are therefore subject to the Treaty rules on the free circulation of goods[250].

In conclusion, if it is undeniable that recourse to international tribunals is not only desirable but essential in those cases where States are unable to reach a diplomatic solution to a dispute, as States' international obligations otherwise risk remaining dead

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[244] *Ibid* 112.
[245] F. Michl, 'The Protection of Cultural Goods and the Right to Property under the ECHR' in E. Lagrande, S. Oeter, R. Uerpmann-Wittzack (eds), *Cultural Heritage and International Law* (Springer, 2018) 110.
[246] Legge 1° giugno 1939 n. 1089 Art 37.
[247] Case 7/68 *Commission v Italy* (1968) ECR 423; *see* N. Catalano, 'Sentenza 10 dicembre 1968 (in causa 7/68); Pres. Lecourt P., Rel. P. Pescatore, Avv. Gen. Gand (concl. Conf.); Commissione C.e.e. (Rappr. Toledano) c. Repubblica italiana (Avv. Dello Stato Peronaci)' (1969) 92(4) Il Foro Italiano 89.
[248] *Ibid* 430.
[249] Chechi, 'Some Reflections on International Adjudication of Cultural Heritage-Related Cases' (n 24) 4.
[250] J. Goyder, 'European Community Free Movement of Cultural Goods and European Community Law' (n 169) 220.

letter[251], such bodies seem to be mostly ill-equipped to deal with disputes concerning the international circulation and recovery of cultural property.

2. Shortcomings of litigation before national Courts

The bulk of cultural property-related cases is still nowadays dealt with by domestic courts. This is true, indeed, for the majority of any transnational cases, due to a number of factors. For instance, national tribunals come to play a decisive role when one considers that individuals and other non-State entities lack standing before most international bodies[252]. Further, domestic procedures present the advantage of ending with a final decision which may be enforced through the ordinary mechanisms[253] and which is capable of setting a legal precedent useful to clarify and codify enforceable rights and duties[254]. In general, national courts can be said to play a primary role in the adjudication of international claims between private parties and, thus, in the enforcement of the international rule of law[255].

On the other hand, bringing a claim for the recovery of cultural property under international law before domestic judges presents a number of obstacles resulting in considerable unpredictability as to the outcome of such a dispute. Such obstacles concern both the effectiveness of instruments of public international law before domestic courts and the issues of private international law emerging in trans-national disputes.

2.1 The role of domestic courts in international law

As Professor Conforti stressed, the concrete implementation of international law still relies on the domestic judges' willingness to employ the instruments offered by domestic law so as to ensure the prevalence of international interests over national ones[256]. As a matter of fact, domestic courts do not limit themselves to exercise an international

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[251] T.A. Mensah, 'Using Judicial Bodies for the Implementation and Enforcement of International Environmental Law' in I. Buffard et al (eds), *International Law between Universalism and Fragmentation* (Martinus Nijhoff Publishers, 2008) 810.
[252] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 139.
[253] *Ibid.*
[254] D. Shapiro, 'Litigation and Art-Related Disputes', in Q. Byrne-Sutton, F. Geisinger-Mariéthoz (eds), *Resolution Methods for Art-Related Disputes: Proceedings of a Symposium Organized on 17 October 1997* (Schulthess, 1999) 18.
[255] A. Nollkaemper, 'Jurisdiction' in A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011) 25.
[256] B. Conforti, *Diritto internazionale* (11th ed, Editoriale scientifica, 2018) 7.

judicial function when called upon to settle disputes under international law[257], thus enforcing such law and contributing to its interpretation and further development[258]. Also, it has been argued that in the absence of any arbiter of legality other than States themselves, domestic courts are the 'natural judges' of international law, in the sense of being the immediate judges, those who will interpret and apply international law when no central instituted judge exists[259].

Indeed, our field of interest is of no exception. The leading case in this regard is the decision of the Tribunal of Venice over the case *Mazzoni c. Finanze dello Stato* of 8 January 1927[260]. Such dispute concerned the admissibility of a replevin action aimed at recovering some private property removed during the Austrian occupation of North-Eastern Italy and restituted to the Italian Government in 1922, which the Ministerial office refused to return to the Mazzoni heirs. The Tribunal was therefore called upon to interpret and apply the peace treaty concluded by Italy and Austria, as well as the 1907 Hague Regulations and any other rule of international law concerning the restitution of private property taken during the war. First, the Court established that the restitution had taken place for the purposes of restitution *ad individuo* pursuant to Article 184 of the Treaty of St. Germain[261], rather than for the purposes of reparations[262]. Hence, taking into account the provision of Article 189 excluding that credit be reckoned to Austria in respect of its reparation obligations for property returned pursuant to Article 184[263], the title had not passed to the Italian Government but rather belonged to the original owners. Further, the Court stressed that such title had not extinguished pursuant to the right of spoils. Indeed, being private property protected under the 1907 Hague Regulations as well as customary international law, the seizure of such property could not be deemed as lawful booty, but rather was to be classified as plunder and pillage. Moreover, the Tribunal rejected the doctrine upheld during the war by Germany according to which the property of individuals absent from occupied

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[257] Which they are more and more often: W. Sandholtz, 'How Domestic Courts Use International Law' (2015) 38 Fordham International Law Journal 595.
[258] A. Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 133 137.
[259] *Ibid* 151.
[260] *Mazzoni c. Finanze dello Stato* (1927) 52(I) Il Foro Italiano 959, with case note by M. Udina, 'Udienza 8 gennaio 1927: Pres. Saccone, Est. Colagrosso; Mazzoni (Avv. Zoratti, Casellati) c. Finanze dello Stato'; translated and digested in A.D. McNair, H. Lauterpacht (eds), *Annual Digest of Public International Law Cases. Years 1927 and 1928* (Longmans, Green & Co., 1931).
[261] Treaty of St Germain-en-Laye (n 49) Art 184.
[262] Udina, 'Udienza 8 gennaio 1927' (n 260) 975.
[263] Treaty of St Germain Art 180.

territories was to be considered *res nullius* or booty. Hence, the Court ordered that the applicants, who held title to the assets restituted by Austria, were reintegrated in the full enjoyment of their property rights over such assets.

In a nutshell, the Tribunal of Venice identified the passive subject of Austria's international obligations as being the victims of spoliation themselves[264]. As a matter of fact, the Treaty of St. Germain had not specified to whom restitution was to be performed, and it might well have been the Allied powers. Conversely, the Court determined that the purpose of the Treaty provision on restitution was to restore the legitimate holders of title over looted assets to the full enjoyment of their private property, hence, this should have been the result even if restitution was made to the Governments of the Allied powers. Then, the same had to hold true for cultural property returned pursuant to Article 191 of the Treaty of St. Germain, as the specific provisions concerning 'records, documents, objects of antiquity and of art, and all scientific and bibliographical material'[265] taken from the occupied territories were deemed to merely confirm the general rule of Article 184[266].

This decision well exemplifies how domestic courts are capable not only of enforcing international law, but also of clarifying the content of such law, thus setting an authoritative, though not binding, legal precedent. As a matter of fact, the case *Mazzoni c. Finanze dello Stato* has been regularly cited in subsequent decisions even by Courts from foreign jurisdictions (especially in the United States) dealing with the restitution of wartime-looted cultural property[267].

2.2 The applicability of public international law in national legal systems

The first problem faced when seeking restitution of cultural property under the legal instruments analyzed in Chapter I is their applicability before domestic courts[268]. Indeed, because States are free to decide how to transpose international law into their legal systems[269], whether such law is applicable by national judges is a question the answer to

[264] Udina, 'Udienza 8 gennaio 1927' (n 260) 970.
[265] Treaty of St. Germain Art 191.
[266] Udina, 'Udienza 8 gennaio 1927' (n 260) 965 n 14.
[267] *See e.g. Menzel v List* (1966) 267 NYS 2nd 804 (Sup Ct); J. R. Stevenson, 'Menzel v. List. 49 Misc. 2nd 300' (1966) 60 AJIL 851 854.
[268] A. Nollkaemper, 'Applicable Law' in A. Nollkaemper, *National Courts and the International Rule of Law* (n 255) 68.
[269] J.H. Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86 AJIL 310.

which is still fully contingent upon municipal law[270]. As a consequence, domestic courts may be obliged to dismiss claims grounded on the above instruments due to their non-self-executing nature, deriving either from a lack of domestic validity or from their incomplete content[271]. Especially in the latter case, it has been pointed out that international conventions are of no substantial use unless they are accompanied by the measures necessary to ensure their applicability to legal relations among and with individuals[272].

For instance, in the case *Autocephalous Greek Church of Cyprus in Cyprus v. Willem O. A. Lans*[273], the absence of such measures resulted in the reject of the action in replevin brought before a Dutch court under the First Protocol to the 1954 Hague Convention. The controversy concerned four icons removed during the Turkish military occupation of Northern Cyprus and found in the dwellings of Mr. Lans, a private collector who had bought them *bona fide* in the Netherlands from an art dealer in the 1970's. In its decision of 1999 the District Court of Rotterdam stressed that the provisions of the Protocol, being only directed at the High Contracting Parties, did not have any direct effect with respect to the relations between private subjects, upon whom they did not therefore place any obligations. In other words, the Court denied the self-executing nature of the Protocol, also considering significant in this connection that Article III, Paragraph 11 required States Parties to the Protocol to adopt 'all necessary measures to ensure its effective application' within six months from its entry into force[274], which the Netherlands had failed to do.

The same problem regarding the direct applicability of Treaty provisions has emerged with respect to the 1970 UNESCO Convention in a number of cases before domestic courts from various States Parties. One example is the case *Ministero dei beni culturali francese c. Ministero dei beni culturali e ambientali e De Contessini*[275]

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[270] Nollkaemper, 'Applicable Law' (n 268) 73.
[271] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 118.
[272] M. Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 237.
[273] *Autocephalous Greek Church of Cyprus and Republic of Cyprus v Willem O.A. Lans* (1999) Case no 44053, Roll no Ha Za 95-2403 (Rotterdam District Court); S. Matyk, 'The Restitution of Cultural Objects and the Question of Giving Direct Effect to the Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (2000) 9 International Journal of Cultural Property 341.
[274] First Protocol §11.
[275] *Ministero francese dei beni culturali c Ministero dei beni culturali e ambientali e De Contessini* (1995) I Foro italiano 907 (Corte Cass); *see* M. Frigo, 'Trasferimento illecito di beni culturali e legge applicabile' (1988) 2 Diritto del commercio internazionale 611; A. Lo Monaco, 'Sulla restituzione dei beni culturali rubati all'estero secondo la Convenzione dell'UNESCO' (1988) LXXI Rivista di diritto internazionale 842; L.

concerning the admissibility of a replevin action brought by France in respect of two Amiens tapestries from the XVII century, classified as national historical monuments, which had been stolen in 1975 from the Riom Palace of Justice and forfeited in 1977 from De Contessini's antiques store in Milan. First, the Court of Cassation determined that the applicable substantive law was Italian law and that the limits on export placed by French law were therefore irrelevant (*v. infra*, § 2.3.2.2). Second, the Court held that the acknowledgment and application of such limits was not required by Italy's international obligations either, as Article 7(b)(ii) of the 1970 UNESCO Convention, by which States Parties undertake, at the request of the State Party of origin, 'to take appropriate steps to recover and return' any stolen cultural property imported after the entry into force of this Convention as between the Parties concerned[276], was deemed inapplicable. As a matter of fact, like in the case before the Dutch Court the Roman judges stated that such provision was only directed at States, as the Italian legislature had not adopted any domestic norms providing that the *bona fide* purchaser had an obligation to return the good at question[277].

The problem of Treaty law's lack of direct applicability is further aggrieved by the neutrality of international law as to the modes of its implementation[278]. For instance, a case may be recalled where the Paris Court of Appeal rejected an action in replevin brought by the Republic of Nigeria under Article 13 of the 1970 UNESCO Convention and aimed at recovering some Nok sculptures which had allegedly been illicitly exported by a French art dealer[279]. Once again, the provisions of the Convention were deemed to only impose obligations upon States, while not entailing any direct obligations for private citizens. Notably, in its decision the Court suggested that, because France had not relied on automatic incorporation for the implementation of the Convention, but rather on a recent reform of its relevant legislation, the Republic of Nigeria ought to have based its claim before the Court of Appeal on such relevant provisions of the French Civil Code. Indeed, when it attempted to do so before the Court of Cassation, it was already too late

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Cannada-Bartoli, 'Sul trasferimento di beni fuori commercio nel diritto internazionale privato' (1989) LXXII Rivista di diritto internazionale 618.

[276] 1970 UNESCO Convention Art 7(b)(ii).

[277] Frigo, 'Trasferimento illecito di beni culturali e legge applicabile' (n 275) 618.

[278] *See* Nollkaemper, 'Applicable Law' (n 268).

[279] *République fédéral du Nigéria c Alin de Montbrison* (5 April 2004) RG No 2002/09897 (Cour d'Appel de Paris).

according to French procedural rules[280]. It is therefore apparent that, due to the discretion accorded to states in implementing their international obligations, requesting states will need the legal advice of experts in the domestic system of requested states in order to effectively file their claim[281].

2.3 Issues of private international law

Even when applicable, however, it has been noted that instruments of public international law have no bearing on fundamental issues of private law which may, indeed, determine the outcome of a claim[282]. It is therefore relevant to analyze the most crucial ones.

2.3.1 The identification of the competent jurisdiction

The first problem faced by those seeking judicial remedy through domestic litigation is access to court. Indeed, though the decision to go to court is for the litigants, applicants are not free to decide which court is competent *ratione materia*[283]. Notably, the identification of the competent jurisdiction, though not entailing the automatic application of the substantive law of the forum state, has two fundamental implications.

First, though indirectly, it does have a decisive influence on the determination of the applicable *substantive* law. Indeed, such determination is contingent on the application of the conflict of laws rules of the forum state, combined with the rules of international law applicable within that legal system[284]. Second, the court seized will be bound to apply the *procedural* law of the forum state[285], which may have a significant impact on the decision by regulating, for instance, the characterization of the case[286] or the judge's powers in relation to the collection of evidence or the issuance of provisional measures[287].

In consideration of this, legal certainty as to the predictability of the seizable court is of great importance. However, due to their neutrality the criteria traditionally employed

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[280] *République fédéral du Nigéria c Alin de Montbrison* (20 September 2006) No 04-15599 (Cour de Cassation) in 3005(IV) JCP 1917.
[281] P.J. O'Keefe, *Commentary on the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export or Transfer of Ownership of Cultural Property* (n 83) 152.
[282] Frigo, 'Trasferimento illecito di beni culturali e legge applicabile' (n 275) 618.
[283] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 140.
[284] *Ibid.*
[285] I. Fellrath Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes* (Ardsley Transnational Publishers, 2004) 52.
[286] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 87.
[287] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 375.

to establish jurisdiction are insufficient to meet such objective and may, indeed, represent an obstacle to the positive outcome of restitution or return claims[288]. As a matter of fact, the general rule at the international level, as expressed by the so-called Brussels system[289], that the issue of jurisdiction be settled by reference to the defendant's domicile[290], can only prove effective when the so-appointed forum state coincides with the current place of location of the stolen or illicitly exported good. Indeed, this is the only scenario where specific restitution of such good would be easily attainable, this being the sole truly satisfactory remedy in disputes of this kind[291]. However, the practice of the international art trade shows how only seldom is it so. Indeed, especially in the context of illicit traffic, cultural objects are most often transferred across national borders precisely in the view of reducing the potential effectiveness of an action being brought before the competent court[292].

For the above reasons, both at the international and at the national[293] level a tendency has emerged to envisage a special and more favorable rule of jurisdiction applicable to this kind of disputes, establishing the competence of the courts of the place where the good at question is situated.

The first expression of such trend, being both the 1970 UNESCO Convention and the First Protocol to the 1954 Hague Convention silent on this like on other issues of private international law, is found in the 1995 Unidroit Convention. Indeed, Article 8 § 1 establishes an additional title of jurisdiction with respect to claims for restitution under Chapter II and requests for return under Chapter III of the Convention, which may thereby be brought 'before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States'[294], including those of the defendant's domicile state under the general 'Brussels system'-

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[288] *Ibid.*
[289] Made up of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (adopted 27 September 1968, entered into force 1 February 1973) 1262 UNTS 153 (Brussels Convention) and of Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2000) OJ L 12 1 (Brussels I), recast by Council Regulation (EU) No 1215/2012 (2012) OJ L 351 1 (Brussels I bis). The same rules are reproduced by the Convention on Jurisdiction and the Recognition and the Enforcement of Judgments in Civil and Commercial Matters (adopted 30 October 2007, entered into force 1 October 2010) OJ L 339 3 (Lugano Convention).
[290] Brussels Convention Art 2; Lugano Convention Art 2; Regulation Brussels I bis Art 4(1).
[291] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 296.
[292] *Ibid* 376.
[293] *See e.g.* Swiss *Loi Fédéral sur le Droit International Privé* (LDIP) (2005) Art 98(a).
[294] 1995 Unidroit Convention Art 8(1).

rule[295]. In other words, Article 8 creates an *ad hoc* title of jurisdiction, alternative to the ordinary ones, clearly aimed at facilitating the recovery of stolen or illicitly exported goods in cases where such goods are located in a State other than that of the defendant's domicile[296]. Indeed, by allowing the claimant (or the requiring state) to seek remedy before the courts of the state of location, this provision eliminates the problem concerning the exequatur of foreign judgments, which otherwise arises[297]. Moreover, it allows to bring such a claim or request even when the possessor of the stolen or illicitly exported good, which is located in a State Party, is domiciled in a Country which is not bound by the Convention[298].

The same tendency is apparent in the European context, both under the special regime established for the circulation of cultural property (Directive 93/7, recast by Directive 2014/60) and under the general rules on jurisdiction (Regulation Brussels I *bis*). As to the former, Article 5 of Directive 93/7[299] (reproduced by Article 7 of the recast Directive)[300] merely provides for the jurisdiction of 'the competent court in the requested Member State' over proceedings brought under the Directive. However, it is sufficient to compare this provision with the definition of 'requested member State' under Article 1 § 3[301] (Article 2 § 3 of the recast)[302] as 'the Member State in whose territory a cultural object unlawfully removed from the territory of another Member State is located' to infer the implied establishment of an *in rem* jurisdiction.

Turning to the latter, the recast Regulation Brussels I *bis* has introduced a new express provision, having the status of a rule of special jurisdiction, precisely to facilitate the recovery of cultural objects as defined in Directive 93/7[303]. Indeed, paragraph 4 of Article 7 provides a basis for jurisdiction of the court of the place where the object is located at the time the court is seized, provided that the claim is a civil claim for the recovery of the object (and not for damages) based on the ownership of that object and

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[295] Brussels Convention Art 2; Regulation Brussels I bis Art 4.
[296] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 295.
[297] Law Reform Commission of Ireland, 'Report on the Unidroit Convention on Stolen or Illegally Exported Cultural Objects' (1997) LRC 55-1997 54.
[298] L.V. Prott, *Biens culturels volés ou illicitement exportés* (n 149) 119.
[299] Directive 93/7 Art 5.
[300] Directive 2014/60 (Recast) Art 7.
[301] Directive 93/7 Art 1(3).
[302] Directive 2014/60 (Recast) Art 2(3).
[303] P. Rogerson, 'Jurisdiction for the Retrieval of Cultural Objects' in A. Dickinson, E. Lein, *The Brussels I Regulation Recast* (Oxford University Press 2015) 174.

brought by the person who claims the right to recover it[304]. The rationale of this reform is explained as follows by Recitals 16 and 17 of the Recast Regulation:

> [16] In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. [...]
>
> [17] The owner of a cultural object as defined in Article 1(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State should be able under this Regulation to initiate proceedings as regards a civil claim for the recovery, based on ownership, of such a cultural object in the courts for the place where the cultural object is situated at the time the court is seized. Such proceedings should be without prejudice to proceedings initiated under Directive 93/7/EEC.

Especially the latter clarification is particularly welcome, considering that Article 7(4) of the recast Regulation regulates private proceedings based on ownership, while the action encompassed by Directive 93/7 may only be exercised by Member States. Indeed, being the rights established by the Directive specific to Member States and not addressed at private individuals, they fall outside the scope of civil and commercial matters within the meaning of the Regulation[305].

In conclusion, it seems that the establishment of a special rule providing for an *in rem* jurisdiction with respect to claims for the recovery of cultural property may be useful both to enhance the foreseeability of the competent court and, hence, of the conflict of laws and procedural rules which will be applied, and to improve the chances of securing the enforcement of judicial decision and, ultimately, of achieving the restitution or return of cultural property.

2.3.2 The applicable material law: the Goldberg *case*

The practice of disputes for the recovery of cultural property, however, has shown that the key issue for the outcome of this kind of controversies is the determination of the applicable substantive law[306].The *Goldberg* case[307] is a good example of this. The controversy related to four sixth Century mosaics which were forcibly removed from the

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[304] Regulation Brussels I bis Art 7(4).
[305] Rogerson, 'Jurisdiction for the Retrieval of Cultural Objects' (n 303) 175.
[306] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 214.
[307] *Autocephalous Greek Orthodox Church of Cyrpus v Goldberg & Feldman Fine Arts* (1989) 717 F Supp 1374 (S D Ind), aff'd (1990) 917 F 2nd 278 (7th Cir).

Cypriot Church of the *Panagia Kanakaria* in Lythrankomi during the Turkish military occupation of Northern Cyprus. The mosaics were hidden until 1988, when they were purchased by Peg Goldberg, an art dealer from Indiana, United States, in the freeport area of the Geneva airport. Eventually, because of Goldberg's extensive search for a buyer, the Republic of Cyprus came to know that the mosaics were in her possession and offered reimbursement for the purchase price in exchange for their restitution. At Goldberg's refusal, Cyprus' Government, along with the Church of Cyprus, brought suit against her in the U.S. District Court for the Southern District of Indiana seeking the return of the mosaics[308].

Three different jurisdictions were relevant to the case: Cyprus (the country of origin of the mosaics), Switzerland (the country where the last transaction had taken place) and Indiana (the country of domicile of the defendant and where the artworks were located when the court was seized)[309]. The criterion used to determine the applicable substantive law would therefore be decisive, considering the differences among the three. For instance, under Cypriot law antiquities and things dedicated to worship were inalienable and could not be acquired by a private person whether through sale, prescription or otherwise. Thus, were this law to be applied, having proved ownership of the mosaics[310] the Church of Cyprus would have retained such title, irrespective of any facts or transactions invoked by the defendant. Swiss law, on the other hand, protected good faith purchasers and barred restitution claims filed more than five years after the date of theft. Finally, under Indiana law a thief could neither acquire nor, consequently, transfer good title over stolen property and, though restitution actions were barred after six years from the date of theft, one could invoke the 'discovery rule' or, in alternative, the 'fraudulent concealment' doctrine, thus preventing statutes of limitations from running until the plaintiff learnt of the stolen property's location provided, respectively, that he had exercised due diligence in the search to locate and recover such property or that the defendant had fraudulently concealed it from him[311].

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[308] L. Suede, '*Autocephalous Greek Orthodox Church of Cyrpus v Goldberg & Feldman Fine Arts*, 717 F Supp 1374 (S D Ind 1989)' (1990) 31 Harvard International Law Journal 377; D.L. Crowell, '*Autocephalous Greek Orthodox Church of Cyrpus v Goldberg & Feldman Fine Arts, Inc.*: Choice of Law in the Protection of Cultural Property' (1992) 27 Texas International Law Journal 173.

[309] S.C. Symeonides, 'A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property' (2005) 38 Vanderbilt Journal of Transnational Law 1177 1181.

[310] *Goldberg* 717 F Supp 1374 (n 307) 1397.

[311] Suede, '*Autocephalous Greek Orthodox Church of Cyrpus v Goldberg & Feldman Fine Arts*' (n 308) 380.

The identification of the applicable choice-of-law rule depended on the characterization of the dispute, *i.e.* the allocation of the case to its relevant legal class (property, tort, contract, etc.), under the law of the forum state[312]. Accordingly, the District Court first classified the suit as a replevin action. Second, the Court determined that the applicable Indiana choice-of-law rule in such cases required that every aspect of the legal action be governed by the law of the jurisdiction which had the 'most significant contacts' to it[313]. It therefore affirmed that Indiana was such jurisdiction. Consequently, through the application of the above-mentioned discovery rule and fraudulent concealment doctrine as concerned statutes of limitations, and of the *nemo dat* rule in respect of title, the District Court admitted the replevin action and awarded the mosaics to the plaintiff.

In conclusion, as is apparent from the *Goldberg* case, the determination of the applicable substantive law is crucial for at least three sets of problems: the issue of statutes of limitations; the regulation of title and the protection of the good faith purchaser; and the enforcement of limits to the circulation of certain categories of goods imposed by foreign public law.

2.3.2.1 Statutes of limitations and prescription

All legal systems subject the commencement of legal proceedings to certain time limits which may be either of a procedural nature, if their expiration merely bars claims against the person who has been in undisturbed possession for the prescribed period, or of a substantive one, if they have the result of extinguishing the original title. The usual justification for the existence of limitation periods is to protect the possessor from stale claims and to encourage persons with good causes of actions to expedite proceedings, by pursuing them with reasonable diligence[314]. Further, the security of the marketplace requires that the legal situation corresponds to the greatest possible extent with the ostensible situation. However, the practice of the illicit art trade, as demonstrated by the *Goldberg* case, is that stolen objects will often be hidden by thieves precisely for the purpose of letting

[312] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 87.
[313] Crowell, '*Autocephalous Greek Orthodox Church of Cyrpus v Goldberg & Feldman Fine Arts, Inc.*' (n 308) 177.
[314] R. Redmond-Cooper, 'Limitation of Actions in Art and Antiquity Claims' (1999) 4 Art Antiquity and Law 323; *ibid*, 'Limitation of Actions in Art and Antiquity Claims: Part II' (2000) 5 Art Antiquity and Law 185 192.

time limitations run and bar potential replevin actions. The central question will therefore be the determination of the moment in time from which the period is held to run.

Most jurisdictions in the United States, like that of Indiana[315], adopt the 'discovery' or 'due diligence' rule, by which the limitations period starts running from the date the claimant owner could have been expected to discover, through the exercise of reasonable due diligence, the location of the stolen property or the identity of the possessor. This rule, however, has been criticized for imposing an excessively burdensome duty on the original owners of stolen art, especially in highly sensitive cases like those concerning objects stolen during the Holocaust[316]. For instance, acknowledging the unique policy concerns involved by these specific actions, California enacted a special statute extending the statute of limitations to recover Nazi-looted art from any museum or gallery within the state until December 31, 2010[317].

As a matter of fact, California was already one of two United States jurisdictions envisaging a rule more favorable to the dispossessed owner. Indeed, the courts of California would generally apply the 'actual discovery' rule pursuant to which the action does not accrue until the owner actually discovers the whereabouts of the object or the identity of the possessor[318]. Even more convenient is the rule fashioned by the courts of the state of New York in the leading case *Menzel v. List*[319]. There, the Court first applied the 'demand and refusal' rule, whereby the cause of action only accrues when the possessor refuses the alleged owner's demand for the object's return[320].

While statutes of limitation laws in the United States generally favor plaintiffs seeking the recovery of cultural property[321], civil law countries tend to value more the protection of the good faith purchaser and the security of commercial transactions. Indeed, most of such countries' civil codes provide that the title of the original owner extinguish in favor of the

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[315] *Goldberg* 917 F 2nd 278 (n 307) 287.
[316] S. Cuba, 'Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art' (1999) 17 Cardozo Arts & Entertainment Law Journal 447 456.
[317] California Code of Civil Procedure § 354(3) (2006).
[318] *See e.g. Naftzger v. American Numismatic Society* (1996) 42 Cal App 4th 421.
[319] *Menzel v List* (n 267) 809.
[320] *See e.g. Solomon R. Guggenheim Foundation v Lubell* (1990) 153 AD 2nd 143, 550 NYS 2nd 618, aff'd (1991) 77 NYS 2nd 311, 569 NE 2nd 426, 567 NYS 2nd 623.
[321] L.M. Kaye, Recovery of Art Looted During the Holocaust' in J.A.R. Nafziger, A.M. Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce* (Martinus Nijhoff Publishers, 2009) 389.

good faith purchaser after a short period of time[322] (or even immediately, as in Italy[323]), which, in addition, generally starts running from the time of theft.

Noticeably, the uniform limitation periods provided by the 1995 Unidroit Convention[324] (*v. supra* § 3.2) would have the effect of eliminating such competing rules, hence easing the task of settling disputes for which the issue of statutes of limitation is critical[325]. However, precisely such provisions have been identified as the main barrier to ratification of the Convention by those states who are not willing to let go of their cherished traditions in this matter[326].

2.3.2.2 The protection of the good faith purchaser

While in the *Goldberg* case the District Court affirmed that the same result would be achieved even were Swiss law to be applied, as the suspicious circumstances of the sale did not allow to consider Goldberg a good faith purchaser[327], differences among the laws regulating title in countries involved in the art trade[328] may have (and, indeed, have frequently had) a critical effect on the outcome of a case[329]. In particular, it has often proven decisive whether the controversy is governed by the law of a civil or a common law system. Indeed, while civil law jurisdictions (like Switzerland) tend to favor the security of commercial transactions by adopting the principle *la possession vaut titre*, thus granting protection to the good faith purchaser (whose good faith is, indeed, presumed), common law systems (like the State of Indiana) follow the *nemo dat* rule according to which the title of the original owner over a stolen good cannot be extinguished by subsequent acquisition by a third person, whether in good or bad faith[330].

The main problem with this state of things is that thieves are well aware of the differences between civil and common law countries and seek to exploit them to secure the profitability of their activity, by moving stolen objects through national borders and selling them in

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[322] With the exception of Germany: BGB § 197 (2001).
[323] Italian Civil Code Art 1153.
[324] 1995 Unidroit Convention Arts 3 and 5(6).
[325] *See e.g. City of Gotha v Sotheby's and Cobert Finance S.A.* (1994) 1 WLR 114.
[326] P.J. O'Keefe, 'Using Unidroit to Avoid Cultural Heritage Disputes: Limitation Periods' in Nafziger, Nicgorski (eds), *Cultural Heritage Issues* (n 321).
[327] *Goldberg* 717 F Supp 1374 (n 307) 1400.
[328] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 169.
[329] Crowell, '*Autocephalous Greek Orthodox Church of Cyrpus v Goldberg & Feldman Fine Arts, Inc.*' (n 308) 175.
[330] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 90.

countries where the title is laundered through the norms protecting good faith purchasers[331]. Indeed, the vast majority of legal systems, both of civil and common law, have opted for the extension of the *lex rei sitae* rule to movable goods, by analogy with the regime of immovables[332], thus applying the law of the jurisdiction where the good at question was situated at the time of the last transaction. The operation of the *lex rei sitae* rule in claims for the recovery of cultural property is therefore easily exploitable by expert thieves and smugglers, thus leading to disparate, often unpredictable results. This is apparent by a comparison among similar cases which have had opposite outcomes due to the different laws regulating the actions.

For instance, in the well-known *Winkworth* case[333], the application of the Italian substantive law entailed the reject of the plaintiff's claim. The controversy concerned some Japanese miniatures which were stolen from Winkworth's collection in Great Britain and transferred to Italy, where they were sold to a good faith purchaser. When the latter eventually returned the artworks to England to sell them at auction, Winkworth filed suit before the English competent court against the vendor and the auctioneer. The Court, however, determined that pursuant to the *lex rei sitae* rule Italian law, being the law of the place where the stolen goods were located at the time of the last transaction, was applicable. Consequently, pursuant to the relevant provisions of the Italian civil code[334] Winkworth's title had extinguished in favor of the good faith purchaser[335]. Similarly, in the case *The Islamic Republic of Iran v. Berend*[336] the application of the French law provisions on the *bona fide* acquisition of movables[337] led to the same result. Conversely, the plaintiff's action was admitted in the case *Kunstsammlungen zu Weimar c. Elicofon*[338], concerning a claim for the restitution of two paintings by Albrecht Dürer which had been stolen from the Weimar Museum during the Second World War and transferred from Germany to the United States, where they were bought by an American collector in 1946. In this case, the New York court seized of the controversy admitted the action in replevin brought by the Weimar Museum based on the application of the law of the State of New York, such being

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[331] *Ibid.*
[332] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 163.
[333] *Winkworth v Christie, Manson & Woods Ltd* (1980) 1 All ER 1121.
[334] Italian Civil Code Art 1153.
[335] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 90.
[336] *The Islamic Republic of Iran v Berend* (2007) EWHC 132 (QB).
[337] French Civil Code Art 2279.
[338] *Kunstsammlungen zu Weimar c. Elicofon* (1982) 678 F 2nd 1150 (2nd Cir).

the place where the good was located at the time of the last transaction (*lex rei sitae*). Noticeably, had German law been applied, as the law of the place where the theft had taken place (*lex loci delictus*), the German rules on the acquisition of property through good faith possession would have prevented the claim from being admitted[339].

2.3.2.3 The enforcement of foreign public law

The final aspect making the choice of the applicable law crucial to the outcome of claims for the recovery of cultural objects is the enforceability of foreign domestic norms for the protection of cultural heritage limiting the trade in cultural property[340]. For instance, in the above-mentioned case *Ministero dei beni culturali francese c. Ministero dei beni culturali e ambientali e De Contessini*[341] (*v. supra* § 2.2), the negative outcome of the action brought by France was largely due to the Court's determination that, being the controversy regulated by Italian law, the limits posed by French law on the circulation of cultural property were irrelevant[342]. As a matter of fact, it has been argued that even in the cornerstone case *Duc de Frias c. Baron Pichon*[343] before the Tribunal of the Seine, the reject of the plaintiff's action in replevin based on an inalienability clause in a contract stipulated under Spanish law depended on the Court's determination that the sole applicable law, pursuant to the *lex rei sitae* rule, was that of France[344].

Noticeably, even when the norms imposing limits on the trade in the cultural goods at question are applicable pursuant to the conflict of laws rules of the (different) forum state, domestic courts are reluctant to enforce such limits. Indeed, a distinction must be drawn between those laws providing that ownership of certain categories of cultural property is vested *ipso jure* in the State itself, on the one hand, and those prohibiting or restricting the export of cultural objects, on the other[345]. Such distinction is crucial because only the former enjoy extraterritorial effect. Indeed, Professor Merryman has stressed that while 'it is a well-established principle of private international law that nations will judicially enforce foreign private law rights, including rights of ownership', domestic courts 'have no obligation to

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[339] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 215.
[340] J. Gordley, 'The Enforcement of Foreign Law' in F. Francioni, J. Gordley (eds) *Enforcing International Cultural Heritage Law* (Oxford University Press, 2013).
[341] *Ministero dei beni culturali francese c. Ministero dei beni culturali e ambientali e De Contessini* (n 275).
[342] Cannada-Bartoli, 'Sul trasferimento di beni fuori commercio nel diritto internazionale privato' (n 275) 619.
[343] *Duc de Frias c. Baron Pichon* (1885) Clunet 593 (1886) (Tribunal civil de la Seine).
[344] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 196.
[345] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 66.

enforce foreign public laws, of which export controls are obvious examples'[346], unless so provided by a treaty or a statute[347].

For instance, in its decision over the case *Repubblica dell'Ecuador c. Danusso*[348] the Tribunal of Turin admitted the claim for the return of some objects of archaeological interest which had been bought in the Andean state from local excavators and subsequently exported to Italy as a consequence of the application of the patrimony laws of Ecuador, which vested the State with the ownership of undeclared archaeological finds and, hence, did not allow Danusso to acquire title over such goods[349]. The English Court of Appeal was even more explicit in the case *Iran v. Barakat*[350], where it admitted Iran's claim for the return of certain cultural objects based on the circumstance that by invoking its national laws vesting it with the ownership of such objects, Iran had asserted a patrimonial claim, not a claim to enforce a public law or to assert sovereign rights, and that British courts ought therefore to recognize and enforce Iran's title[351].

On the other hand, the reluctance of domestic courts to apply extraterritorially foreign export regulations is well-exemplified by the English Court of Appeal's decision in the famous case *Attorney General of New Zealand v. Ortiz*[352], reversing the admissibility decision by the trial court. The latter had, indeed, applied New Zealand's law by considering the controversy to revolve around the issue of title. Conversely, in its decision, subsequently upheld by the House of Lords, the Court of Appeal ruled that such law was inapplicable as it was 'an act done in the exercise of sovereign authority which will not be enforced outside its own territory'. Hence, considering that English courts could not judge on a suit brought by a sovereign to enforce its penal, revenue or other public laws, the latter including legislation prohibiting the export of works of art, the claim of the Government of New Zealand was rejected[353].

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[346] J.H. Merryman, 'Cultural Property, International Trade and Human Rights' (2001) 19 Cardozo Arts & Entertainment Law Journal 51 58.

[347] *See e.g.* Agreement between the Government of the United States of America and the Government of Canada Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnological Materials in (1999) 8 International Journal of Cultural Property 245.

[348] *Repubblica dell'Ecuador c Danusso* (1982) Rivista di diritto internazionale e procedurale 625 (Tribunale di Torino).

[349] D. Favero, 'Lex rei sitae e traffico illecito di reperti archeologici' (2012) IV Archeomafie 38 43.

[350] *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* (2007) EWCA Civ 1374.

[351] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 93.

[352] *Attorney General of New Zealand v. Ortiz* (1982) 3 QB 432, rev'd (1983) All ER 432, add'd (1983) 2 All ER 93.

[353] *Ibid* All ER 432 (*obiter dictum* by Lord Denning) 434.

2.4 An assessment of domestic litigation

Due to the above issues, litigating claims for the restitution or return of cultural property before national courts leads to a high level of uncertainty as to their outcome. Moreover, it must be taken into account that domestic judges may have little or no knowledge of the art world. This means not only that they may fail to recognize the cultural value of objects, thus equating them to chattels[354], but also that they may be utterly unaware of the dynamics of the illicit art trade. For instance, in a case brought by Italy against the Netherland's National Museum of Antiquities for the return of a bronze cuirass, the court of The Hague deemed the evidence produced by the Carabinieri too meagre, thus neglecting both the fact that the Swiss dealer who had sold the cuirass to the museum had been involved in the laundering of other objects, and that museum staff could not be unaware of the role of Switzerland in the illicit traffic of cultural goods[355].

In addition, there are some practical pitfalls which make it less desirable to resort to domestic courts[356]. First, unless the judges of the state of location have been seized, having a favorable sentence recognized and enforced in a foreign jurisdiction may not be easy. Second, resort to litigation entails economic expenses so high (*v. e.g. infra*, § 3.1) that it is a viable solution only for disputes concerning objects worth millions of dollars. Third, it lacks the confidentiality that is highly valued by actors in the art world.

Finally, and mostly importantly, domestic litigation is inflexible, meaning that it cannot take into account interests other than the law, like ethical, social, scientific and public policy concerns[357]. These interests are closely linked to the smooth settlement of a case without attracting negative publicity or harming relations among the parties, through mutually agreed upon arrangements that need not be those envisaged by the law. By contrast, domestic litigation follows a strictly adversarial approach providing for zero-sum solutions, whereby the gain of one party is offset by the loss of another. This represents a major

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[354] *See e.g. Robinson v. the Western Australia Museum* (1977-8) 138 Commonwealth Law Reports 283 295, cited in L.V. Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage' in The Hague Academy of International Law (ed), 217 *Collected Courses of the Hague Academy of International Law* (Brill, 1989) 237, where former Chief Justice of Australia stated that seventeenth-century shipwrecks of the Dutch East India Company off the coast of Western Australia were of no significance to the history of Australia.

[355] J. Van Beurden, 'A Disputed Cuirass: Italy v. Netherland's Museum of Antiquities in Leiden' (2006) 18 Culture Without Context 8 https://traffickingculture.org/publications/culture-without-context-2006-issue-18-cambridge-mcdonald-institute-for-archaeological-research/ accessed 21 June 2019.

[356] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 142.

[357] I. Stamatoudi, 'Alternative Dispute Resolution and Insights on Cases of Greek Cultural Property: The J.P. Getty Case, the Leon Levy and Shelby White Case, and the Parthenon Marbles Case' (2016) 23 International Journal of Cultural Property 433 436.

shortcoming in art-related disputes, whose parties are anxious to preserve good relations among them and often purport interests that, though contrasting, are all worthy of consideration.

3. Arbitration as an alternative to litigation

In light of the foregoing discussion, it comes as no surprise that recourse to international commercial arbitration as an alternative to domestic litigation has been promoted by prominent scholars[358] as well as international organizations[359]. As a matter of fact, arbitration is expressly envisaged as an alternative procedure to litigation in the Unidroit Convention[360] and in the European Union secondary legislation[361]. This notwithstanding, the international practice shows that only rarely are disputes of our concern referred to arbitration proceedings[362]. Indeed, though arbitration might have numerous benefits when compared to domestic litigation[363], it shares the latter's judicial nature[364] and, thus, retainis the above-discussed inflexibility, which represents a major shortcoming in this field.

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[358] J.H. Merryman has opined that 'many problems of international trade might be more easily solved by arbitration tribunals than by state courts because arbitrators are extranational and can avoid cultural nationalism and because they are likely to have more expertise than judges of state courts', quoted by K. Siehr, 'Resolution of Disputes in International Art Trade, Third Annual Conference of the Venice Court of National and International Arbitration: Venice, Italy (September 29-20, 2000)' (2001) 10 International Journal of Cultural Property 122 123. *See also* Q. Byrne-Sutton, 'Resolution Methods for Art-Related Disputes: Art-Law Centre, Geneva (17 October 1997)' (1998) 7 International Journal of Cultural Property 249.

[359] For instance, the Parliamentary Assembly of the Council of Europe has welcomed the arbitration clause in the Unidroit Convention recommending 'that the Committee of Ministers: ... (iv) contribute to ensuring that, in addition to the known international courts of arbitration, the states establish an arbitration commission at the Unidroit Institute that can be called upon by the States Parties to assist in the event of disagreements concerning the interpretation of the text of the Convention', 'Unidroit Convention on Stolen or Illicitly Exported Cultural Property' (1998) Recommendation 1372. *See* also ILA, 'Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material', Report of the Seventy-second Conference (2006) available at http://www.ila-hq.org/index.php/publications/order-reports accessed 21 June 2019; J.A.R. Nafziger, 'The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material' (2007) 8 Chicago Journal of International Law 187.

[360] 1995 Unidroit Convention Art 8(2).

[361] Directive 93/7 Art 4(6) reproduced by Directive 2014/60 (Recast) Art 5(6).

[362] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 365. Giovannini stresses that even the most important auction houses only seldom include compromissory clauses in their contracts: T. Giovannini, 'La pratique de l'arbitrage en matière de biens culturels' in M.-A. Renold, A. Chechi, A.L. Bandle (eds), *Resolving Disputes in Cultural Property* (Schulthess, 2012).

[363] E. Sidorsky, 'The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration' (1996) 5 International Journal of Cultural Property 19 32.

[364] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 362.

3.1 A comparison: the Altmann *case*

The landmark *Altmann* case[365] provides an optimal starting point to assess the advantages and pitfalls of arbitration in comparison to domestic litigation. The case concerned six paintings by Gustav Klimt which were owned by the Vienna-based Jewish magnate Ferdinand Bloch-Bauer, including two portraits of Bloch-Bauer's wife, Adele. The couple was the toast of Vienna's society, and when Adele prematurely died in 1925, she left a will requesting Ferdinand to donate the paintings, upon his death, to the Austrian National Gallery, in the Belvedere Castle. However, when in March 1938 Nazi Germany annexed Austria, Bloch-Bauer was forced to flee the country, leaving behind all his belongings, including his art collection. The paintings were soon confiscated and ultimately came into the possession of the Austrian Gallery. Ferdinand died in Zurich in 1946, bequeathing his entire estate to one nephew and two nieces, among whom was Maria Altmann. Like her uncle, Altmann had fled Austria in 1938, but had settled in California.

In 1946, the Republic of Austria passed a law annulling all transactions motivated by the discriminatory Nazi ideology. However, it was soon apparent that this was no more than an official policy, in spite of which Jews wanting to leave the country were required to donate valuable artworks in favor of public museums and institutions as a condition to receiving export permits for other valuable assets, a practice which the Austrian Government itself later declared to be illegal[366]. Hence, when in 1948 an attorney requested in behalf of Maria Altmann and her co-heirs permission to export the remainder of Ferdinand's collection, he was required to execute a document recognizing Ferdinand's intent to honor his wife's will regarding the disposition of the Klimt paintings.

The case remained dormant until the case *Portrait of Wally*[367], concerning a work by Egon Schiele confiscated in Vienna by a Nazi official, erupted in 1998. Indeed, in response to allegations emerging at the trial that the Austrian Gallery possessed looted art, the Austrian Government disclosed its archives to permit research into the provenance of the museum's collection, in addition to enacting a law allowing individuals to reclaim artworks

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[365] *Maria Altmann v Republic of Austria* (1999) 142 F Supp 2nd 1187 (CD Cal), aff'd (2002) 317 F 3rd 954 (9th Cir), as amended, (2003) 327 F 3rd 1246 (9th Cir), (2004) 541 US 677; *see* C.H. Brower II, 'Republic of Austria v. Altmann, 124 S.Ct. 2240' (2005) 99 AJIL 236.

[366] *Ibid*, 236 n 10.

[367] *United States v Portrait of Wally* (2000) 105 F Supp 2nd 288 (SDNY); (2002) US Dist LEXIS 6445; (2009) 663 F Supp 2nd 232 (SDNY); J.M. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003, New York University Press) 232.

that public museums had coercively obtained in exchange for export permits[368]. As a result, an Austrian journalist uncovered documents proving that Ferdinand Bloch-Bauer had never freely donated the Klimts and that reliance on Adele's will was not a legitimate basis to establish title in favor of the museum[369]. However, when Maria Altmann sought to reclaim the paintings pursuant to the Restitution Act, a panel of government officials and art historians denied her request on the grounds that the Austrian Gallery had, indeed, derived title from Adele's will.

To challenge the panel's decision, Altmann first filed suit in Austrian courts, being the paintings located in the Viennese museum. However, a major impediment to that suit was Austrian law requiring the payment of court filing fees in proportion to the sum in dispute. In Mrs. Altmann's case, this would have resulted in a six-figure filing fee, considering that the Klimts were (then) valued around $135 million. Altmann first obtained a partial reduction of the required fees, but Austria filed an appeal against the court's decision. Moreover, Austria failed to reply to Altmann's request to waive the statute of limitations based on the 1998 Restitution Act. Due to these procedural hurdles, Altmann eventually withdrew the claim to bring a new action in the United States District Court for the Central District of California, based on Mrs. Altmann's residency[370].

Altmann grounded the subject matter jurisdiction of the Court upon the 'expropriation' exception provided by the Foreign Sovereign Immunity Act (FSIA)[371] of 1976. Thereby, a foreign State would not be immune from the jurisdiction of American courts in all cases involving 'rights in property taken in violation of international law' provided that the property 'is present' in the United States and has a commercial connection to the United States or the agency or instrumentality that owns the property is engaged in 'commercial activity carried out' therein[372]. The Republic of Austria and the Austrian Gallery, on the other hand, moved for dismissal for lack of subject matter jurisdiction on the grounds that the FSIA did not apply to claims relating to actions performed before its adoption and, in

[368] Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections (1998) 1 Federal Law Gazette 18111998 (Restitution Act).
[369] *See* H. Czernin, *Die Fälschung: Der Fall Bloch-Bauer und das Werk Gustav Klimts* (2006, Czernin Verlag).
[370] D.S. Burris, E.R. Schoenberg, 'Reflections on Litigating Holocaust Stolen Art Cases' (2005) 38 Vanderbilt Journal of Transntional Law 1041 1045.
[371] Foreign Sovereign Immunity Act (1976) 28 USC §1602.
[372] *Ibid* §1605(a)(3); Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 125.

any event, before the State Department's endorsement of the restrictive immunity doctrine in 1952[373]. The District Court denied the defendants' motion for dismissal.

The defendants appealed the ruling. In 2002 the Ninth Circuit Court of Appeals ordered a mediation attempt which, however, failed. Hence, the Ninth Court affirmed the lower court's decision, ruling that the FSIA 'expropriation' exception applied because, first, the taking of the paintings constituted a violation of international law, as it did not serve any public purpose, was discriminatory, and was not compensated, and second, the property was owned by an agent of the Austrian Government (the Austrian National Gallery) which was engaged in commercial activity related to the property in the United States. Indeed, because the Austrian Gallery advertised its exhibitions and sold books in the United States, the Court held that it was irrelevant that the property was not there located.

Subsequently, the Republic of Austria petitioned for a writ of certiorari to the U.S. Supreme Court, which let the above portions of the decision stand without review and concluded that the FSIA applied to all actions, irrespective of when the underlying conduct took place, hence, that Mrs. Altmann's claims could proceed[374]. Therefore, after almost four years of litigation, Mrs. Altmann's case was remanded to the District Court.

Back before the Los Angeles court, the parties continued to skirmish on procedural grounds until May 2005, when they agreed to refer the dispute to a binding arbitration proceeding in Austria. The panel of arbitrators was called to rule on the ownership situation of the Klimt paintings and on the applicability of the 1998 Restitution Act. It was agreed that the arbitrators would apply Austrian substantive and procedural law and would base the decision solely on the facts which were presented to it by the parties. The parties further agreed to accept the award as final. In January 2006, the Austrian arbitration panel unanimously ruled in favor of Mrs. Altmann[375].

The paintings were quickly returned from the Austrian Gallery to Mrs. Altmann, who loaned them to the Los Angeles County Museum of Art for a temporary exhibition.

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[373] Letter from J.B. Tate, Acting Legal Adviser, Department of State, to P.B. Perlman, Acting Attorney General (Tate Letter) (1952) 26 Dept of State Bull 984.

[374] Brower, 'Republic of Austria v. Altmann' (n 365) 237; M.J. Chorazak, 'Clarity and Confusion: Did *Republic of Austria v. Altmann* Revive State Department Suggestions on Foreign Immunity?' (2005) 55 Duke Law Journal 373; M.D. Murray, 'Stolen Art and Sovereign Immunity: The Case of *Altmann v. Austria*' (2004) 27 Columbia Journal of Law & the Arts 301.

[375] *Maria V Altmann and others v the Republic of Austria* (arbitral award) 15 January 2006, available at https://sherloc.unodc.org/cld/case-law-doc/traffickingculturalpropertycrimetype/aut/2006/maria_altmann_vs._republic_of_austria.html?lng=en&tmpl=sherloc accessed 21 June 2019; *see* R. Bernstein, 'Austrian Panel Backs Return of Klimt Works', The New York Times, 17 Jan 2006, available at https://www.nytimes.com/2006/01/17/arts/austrian-panel-backs-return-of-klimt-works.html accessed 21 June 2019.

Altmann then offered the paintings for sale to the Austrian Government who, however, was forced to cut off negotiations due to the insufficiency of sponsors[376]. Finally, Altmann sold the portrait *Adele Bloch-Bauer I* (also known as *Woman in Gold*, as the Nazis renamed it to conceal its real provenance), arguably the greatest work by Klimt, to Ronald Lauder of the Neue Galerie in New York for one of the highest prices ever paid[377]. The remaining restituted paintings[378] were sold by Christie's at auction in November 2006 for an incredible total amount of approximately $190 million[379].

3.2 Benefits and limits of arbitration

The *Altmann* case displays yet another problem which may arise when national courts are seized of a claim for the restitution of cultural property, namely the issue of jurisdictional immunities of states[380]. Moreover, it epitomizes some of the general advantages of arbitral proceedings, which are undoubtedly applicable to the field of cultural property.

First, arbitration may cut costs and speed proceedings. Indeed, the arbitral award was delivered months after the decision to arbitrate the dispute, while litigation had been ongoing for seven years without reaching an end. Second, arbitration grants parties to a dispute the power to shape the process as they wish by selecting the applicable substantive and procedural law and appointing one or more arbitrators. The latter aspect further offers the potential for enhanced expertise, through the selection of arbitrators with a particular knowledge of the sector. Third, arbitration allows for the 'delocalization' of disputes[381], which is particularly desirable in a context where the public interest is very strong and may influence judges belonging to that state's jurisdiction. Fourth, arbitral decisions are generally final and circulate easily through the mechanisms established by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[382].

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[376] *See* P. Arendt, 'Austria Loses Fight to Keep Klimt's £170m Gilded Masterpieces', The Guardian, 21 Mar 2006, available at https://www.theguardian.com/world/2006/mar/21/austria.disputedart accessed 21 June 2019.

[377] *See* C. Vogel, 'Lauder Pays $135 Million, a Record, for a Klimt Portrait', The New York Times, 19 Jun 2006 available at https://www.nytimes.com/2006/06/19/arts/design/19klim.html accessed 21 June 2019.

[378] Namely, *Adele Bloch-Bauer II*, *Birch Forest*, *Houses at Unteracht on the Attersee* and *Apple Tree I*. A sixth painting, *Amalie Zuckerland*, was deemed by the arbitral tribunal not to have been confiscated by the Nazis.

[379] *See* C. Vogel, '$491 Million Sale Shatters Art Auction Record', The New York Times, 9 Nov 2006, available at https://www.nytimes.com/2006/11/09/arts/design/09christies.html accessed 21 June 2019.

[380] A. Chechi, 'State Immunity, Property Rights, and Cultural Objects on Loan' (2015) 22 International Journal of Cultural Property 279.

[381] N. Palmer, 'Arbitration and the Applicable Law' in The International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Dispute* (n 25) 292.

[382] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

Moreover, the fact that arbitration requires consent by both parties will generally ensure the prompt enforcement of the arbitral award, as was the case after the decision in the *Altmann* case.

On the other hand, the consent requisite entails that arbitration is particularly suitable for the settlement of disputes based on a contract[383], where consent may be expressed beforehand through the negotiation of a compromissory clause to be inserted in the contract itself. Indeed, the parties will more easily agree to make recourse to an arbitral proceeding when the disagreement is merely potential. Conversely, restitution or return claims do not involve a contractual relationship between the parties, but rather a claim over title. Hence, in these cases arbitration requires an *ad hoc* agreement, at a time when relations among the parties might be less than amicable[384].

More problems arise when one of the parties to the dispute is a State. For instance, Frigo has pointed out that a State alleging the public property of an object based on its ownership laws is unlikely to agree to submit to arbitration a claim brought by or against an individual, if there is a chance to seize the domestic courts of its own jurisdiction[385]. Further, another problem displayed by the *Altmann* case in reaching the parties' consent to arbitration when one party is a State, is the defense of sovereign immunity. Indeed, because an agreement to arbitrate is typically deemed as a waiver to the defense of jurisdictional immunity[386] states are less likely to consent to do so. As a matter of fact, the Austrian Government presumably rejected the initial proposal of Maria Altmann to submit the claim to arbitration precisely in the hope of having such defense admitted and, indeed, accepted to do so only after the Supreme Court's ruling.

More importantly, the above-mentioned judicial nature of arbitration entails two consequences which represent two fundamental shortcomings in the settlement of this specific kind of disputes. First, as Palmer emphasizes, arbitral decisions are based on strict

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[383] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 366.
[384] N. Palmer, 'Litigation: The Best Remedy?' in The International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes* (n 25) 279.
[385] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 366.
[386] S.J. Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Grotius, 1990) 146; *see* Permanent Court of Arbitration, 'Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State' (1993) available at https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/ accessed 21 June 2019 Art 1(2).

legal doctrine, drawn from the law of a determined legal system, which considering the art world's wealth of conventions, codes and soft law in general, is at the least unhelpful[387].

Second, like litigation, arbitration provides zero-sum solutions. As mentioned above, this represents a major pitfall in cultural property-related cases. Indeed, in the *Altmann* case like in other cases involving, for instance, innocent third-party buyers, the interests at stake, however contrasting, are all, in a way, legitimate[388]. In the case at hand, the Austrian Government purported the public interest in maintaining the paintings in the collection of the Belvedere Gallery, where they had been cherished for decades by the Austrian people who had come to regard them as part of their national cultural heritage. On Austria's side was also the global interest to allow public access to these extraordinary works of art. On the other hand, Altmann's ultimate aim was to make up for the human rights abuses and violations suffered by her family on part of Nazi Austria. The arbitral award, however, only accommodated the latter interest and the Klimts were ultimately lost for both Austria and, except for *Adele Bloch-Bauer I* which is permanently exhibited in New York, the public.

It is therefore evident that in cases concerning the restitution or return of cultural property more flexible methods of dispute settlement are needed, allowing to adopt creative legal solutions in order to overcome or at least mitigate the effects of such clashes of interests[389].

[387] Palmer, 'Litigation: The Best Remedy?' (n 180) 279.
[388] E. Jayme, 'Globalization in Art Law: Clash of Interest and International Tendencies' (2005) 38 Vanderbilt Journal of Transnational Law 927.
[389] *Ibid* 942.

III. CREATIVITY AND FLEXIBILITY: SHIFTING THE FOCUS TOWARDS COLLABORATIVE SOLUTIONS

1. Creativity: an interest-based approach

The inadequacy of judicial and quasi-judicial methods of dispute settlement in the area of cultural property is only fully appreciated when bearing in mind the peculiarities of the art world[390]. First, the objects involved are works of art, which constitute a separate class of goods due to the 'cultural and immaterial value' they hold in addition to the economical one[391]. This is, indeed, the underlying reason for the national and international regulation of the trade in art[392]. Second, the actors in the art market are highly specialized and limited in number, thus valuing greatly confidentiality, and often purpose conflicting, yet legitimate interests and objectives[393]. An overview of these interests is key to assess what kind of settlements would be more efficient in this field.

1.1 The interests at stake in the art world

An essential starting point for such an analysis is Professor Merryman's classic categorization of the possible attitudes towards art as between the two poles of cultural internationalism (or cosmopolitanism) and cultural nationalism[394]. Accordingly, the former relies on the idea of cultural objects as part of the common heritage of humankind[395], as first expressed in the Preamble to the 1954 Hague Convention:

> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage *of all mankind*, since each people makes its contribution to the culture of the world;
> Considering that the preservation of the cultural heritage is of great importance *for all peoples* of the world and that it is important that this heritage should receive international protection [...][396].

[390] Q. Byrne-Sutton, 'Resolution Methods for Art-Related Disputes (n 358) 249.
[391] Q. Byrne-Sutton, 'Arbitration and Mediation in Art-Related Disputes' (1998) 14 Arbitration International 447; C. Roodt, 'Restitution of Art and Cultural Objects and Its Limits' (2013) The Comparative and International Law Journal of South Africa 286.
[392] P.M. Bator, 'An Essay on the International Trade in Art' (n 80).
[393] E. Jayme, 'Globalization in Art Law' (n 388).
[394] J.H. Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 80 AJIL 831; D. Gillman, *The Idea of Cultural Heritage* (Cambridge University Press, 2010) 27.
[395] F. Francioni, 'Public and Private in the International Protection of Global Cultural Goods' (2012) EJIL 719.
[396] 1954 Hague Convention Preamble(2) and (3) (emphasis added).

As a consequence, cultural property is not linked to a state nor to a specific territory, but rather belongs to all mankind. That is to say, by way of example, that Greco-Roman artefacts belong not only to Italy, but also to all Western civilization, and display in American museums is as appropriate as in Italy[397]. Cultural internationalism therefore promotes the widest possible circulation of art as a tool for preservation, knowledge and public access[398], thus favoring the free trade in art and the enactment of anti-seizure statutes aiming to protect the exhibited objects from third party claims[399]. By contrast, it argues against the use of artworks as political tools to build national identities[400] and deems claims for their restitution or return justified solely when an applicable legal standard has been violated[401].

To the opposite, cultural nationalism regards cultural objects as part of the cultural heritage of nations, as emphasized in the preamble of and throughout the 1970 UNESCO Convention[402]. Hence, on the one hand, this theory urges the adoption of retentive laws[403], whereby the export of cultural objects may be limited or banned, and such objects may be classified as *res extra commercium*. On the other hand, it advocates the return of cultural property removed in times of war, colonial occupation, or as a result of theft or illicit trafficking to its nations of origin[404] on the grounds of cultural, spiritual and emotional ties which make it important for the latter's national identity[405].

The concerns of the various stakeholders in the art world may easily be reconducted under this classification. First, the interests of the international community may be

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[397] K.J. Hurst, 'The Empty(ing) Museum: Why a 2001 Agreement between the United States and Italy is Ineffective in Balancing the Interests of the Source Nation with the Benefits of Museum Display' (2006) 11 Art Antiquity and Law 55 60.

[398] J.H. Merryman, 'Thinking About the Sevso Treasure' in M.A. Adler, S. Benton Bruning (eds), *The Futures of Our Pasts: Ethical Implications of Collecting Antiquities in the Twenty-first Century* (School for Advanced Research Press, 2012).

[399] C. Murphey, 'Immunity of Loaned Art from Seizure in the United States and the Necessity of Legislative Reform to Ensure the Continuation of International Lending' (2016) 35 Review of Litigation 105; A. Chechi, 'State Immunity, Property Rights and Cultural Objects on Loan' (n 382) 279; N. Palmer, 'Itinerant Art and the Architecture of Immunity from Legal Process: Questions of Policy and Drafting' (2011) 16 Art Antiquity & Law 1.

[400] J. Cuno, *Who Owns Antiquity? Museums and the Battle Over Our Ancient Heritage* (Princeton University Press, 2008) 11.

[401] I. Stamatoudi, *Cultural Property Law and Restitution* (n 85) 21.

[402] For instance, Preamble(3) reads: '[c]onsidering that cultural property constitutes one of the basic elements of civilization and national culture [...]', while under Article 2 '[t]he States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property [...]'.

[403] Merryman, 'Two Ways of Thinking about Cultural Property' (n 5) 844.

[404] For a critical view, *see* J.H. Merryman, 'Thinking about the Elgin Marbles' (1985) 83 Michigan Law Review 1880.

[405] A. Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 36.

identified with those of cultural internationalism[406]. Indeed, the global civil society, who after the advent of globalization has come to purpose interests that are separate and independent from those of states and nations[407], in the field of art law mainly advocates for two claims, namely public access to works of art and the free circulation of artworks for international exhibitions. Second come the interests of states and nations. However, the difference between so-called 'source' and 'market' nations[408], here, entails that such interests are heterogenous and often divergent. Indeed, while the former generally champion cultural nationalism, market states, with their wealth of universal museums and flourishing art market, support a form of cultural cosmopolitanism whereby works of art belong wherever they have a chance to be best preserved and exhibited[409]. These are, of course, the same arguments upheld by museums[410], as well as auction houses, art dealers and private collectors[411], and largely coincide with the interests of the market itself[412].

Having identified the different interests at stake in art law, what needs to be underlined is that, however contrasting, all these interests are, in a way, legitimate[413]. Hence, an adversarial-like approach, leading to a zero-sum settlement where one interest is accommodated at the expense of the other, is not the optimal solution in art-related disputes. A more flexible process, allowing to take into account factors other than strict law and to reach a mutually acceptable, re-pacifying settlement, is preferable in so far as it has the potential lead to a reconciliation of clashing interests, with a view to avoid disputes rather than settling them.

1.2 Proposed substantial solutions

Different positions, indeed, are not necessarily irreconcilable. To the opposite, the variety of interests at stake in art-related disputes results in great potential for what in U.S. mediation terminology is often referred to as 'logrolling' or 'expanding the pie'[414]. This

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[406] *Ibid* 36; Jayme, 'Globalization in Art Law' (n 388) 929.
[407] F. Cafaggi, D.D. Caron, 'Global Public Goods amidst a Plurality of Legal Orders: A Symposium' (2012) 23 European Journal of International Law 643.
[408] Merryman, 'Two Ways of Thinking about Cultural Property' (n 394).
[409] Hurst, 'The Empty(ing) Museum' (n 399).
[410] ICOM, 'Declaration on the Importance and Value of Universal Museums' (2002) in 'Universal Museums' (2004) 57 ICOM News http://archives.icom.museum/universal.html accessed 21 June 2019.
[411] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 44.
[412] Jayme, 'Globalization in Art Law' (n 388) 940.
[413] *Ibid* 941.
[414] A.S. Rau, quoted by Byrne-Sutton, 'Resolution Methods for Art-Related Disputes' (n 358) 251 and J.A.R. Nafziger, 'A Blueprint for Avoiding and Resolving Cultural Heritage Disputes' (2004) 9 Art Antiquity & Law 3 4.

process consists of identifying the parties' different concerns – tangible and intangible, short-term and long-term – and cooperating in the view to trade one off against the other for mutual gain[415].

Professor Rau has exemplified the advantages of collaboration through the now classic parable of the two sisters quarrelling over a single orange[416]. The adversarial approach characterizing judicial and quasi-judicial methods of dispute settlement would lead to award the orange to the sister with the greater 'rights' to the fruit. However, it may be the case that the latter sister would throw away the peel, as she only wants to eat the pulp; while the other sister wanted precisely the peel for cooking and would have thrown away the rest. A method encouraging the sisters to express their respective interests in the orange would have therefore allowed to reach a mutually productive, more-than-zero-sum solution, awarding the peel to one sister and the pulp to the other.

Alternative solutions to the outright restitution or return of cultural property should therefore be considered when dealing with this kind of requests. An endorsement of such explorative attitude may be already identified in Article 6 §3 of the 1995 Unidroit Convention, providing a practical possibility of 'expanding the pie' by allowing the good faith purchaser of an illegally exported cultural object to remain the owner of the requested object, on condition that the latter is returned to the territory of the requesting State[417] (*v. supra* ch. I §3.2). Also, this course was expressly promoted by the Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material adopted in 2006 by the International Law Association (ILA Principles)[418] with the aim to 'facilitate non-confrontational agreements'[419]. As a matter of fact, the ILA has expressed the need for 'a collaborative approach to requests for transfer of cultural material, in order to establish a more productive relationship between and among parties'[420] and has called upon museums and other institutions to promote the exploration of 'alternatives to outright transfer such as loans, production of copies and shared management and control'[421].

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[415] *Ibid.*
[416] A.S. Rau, 'Mediation in Art-Related Disputes' in Byrne-Sutton, Geisinger-Mariéthoz (eds), *Methods for Art-Related Disputes* (n 254) cited by Nafziger, 'A Blueprint for Avoiding and Resolving Cultural Heritage Disputes' (n 414) 4.
[417] 1995 Unidroit Convention Art 6(3).
[418] Committee on Cultural Heritage Law, 'Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material' in International Law Association Report of the Seventy-second Conference (Toronto 2006) (International Law Association 2006).
[419] *Ibid* Preamble(10).
[420] Preamble(5).
[421] § 3(i).

Increasing international practice regarding such alternative arrangements suggests, indeed, that the ILA Principles may represent evidence of emerging international minimum standards concerning requests for the transfer of cultural property[422]. As a matter of fact, the variety of substantial solutions developed in recent cases has led part of the academia to talk about a 'renewal' in the way of handling restitution claims[423]. Such solutions include complex arrangements, either based on restitution or radically alternative to it, as well as joint solutions, and often entail the uncoupling of ownership from possession.

Based on such practice, Professors Cornu and Renold have suggested a first categorization of possible substantial settlements[424]:

- Restitution (simple or for consideration). An example of the former would be the *Altmann* arbitral award, whereby the Klimts were restituted to Mrs. Altmann without any further conditions. The latter would be, instead, the case of the Aksum Obelisk, which was handed back by Italy to Ethiopia based on a bilateral agreement whereby the former also bore all the transport, reconstruction and restoration costs (*v. infra* §2.2.1).
- Conditional restitution. An example was the 2007 shipping of the human remains of thirteen Aborigines from the British Natural History Museum back to their original community, on condition that they would not be buried but preserved for future scientific use subject to the specific consent of the community itself[425].
- Restitution accompanied by cultural cooperation measures. This solution is particularly fitting in cases where there are public or private entities involved, which thereby agree to bind themselves to not merely transfer the object, but rather engage in more general cultural and scientific cooperation and capacity-building (*v. infra* §2.2.2).
- Formal recognition of the importance to cultural identity. This was, indeed, one of the conditions agreed by the Swiss Cantons of Zurich and Saint-Gall through

[422] R.K. Paterson, 'Resolving Material Cultural Disputes: Human Rights, Property Rights, and Crimes Against Humanity' in Nafziger, Nicgorski (eds), *Cultural Heritage Issues* (n 321) 382.
[423] M. Cornu, M.-A. Renold, 'Le renoveau des restitutions de biens culturels: les modes alternatifs de règlement des litiges' (2009) Journal du Droit International (Clunet) 493, published in English language as 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution' (2010) 17 International Journal of Cultural Property 1.
[424] *Ibid* 18.
[425] M. Bailey, 'Natural History Museum Returns Aboriginal Remains' 8 The Art Newspaper 181 (1 Jun 2007) 1.

the mediation of the Swiss Confederation (*v. infra* §2.1.1). However, acknowledgment of cultural significance may be more than just symbolic, for instance when institutions retaining the disputed objects agree that they may be used for ritual purposes by the community of origin[426].

- Loans (long-term or temporary). Long-term loans are an increasingly popular option and may go in two ways: either from the requested to the requesting party, when restitution is not agreed upon (*e.g.* the above-mentioned Swiss mediation), or from the requesting to the requested party, as a condition to the transfer of title over the object from the latter to the former (*e.g.* the 2002 agreement between France and Nigeria on the Nok and Sokoto figurines: *v. infra* §2.2.1). Conversely, temporary loans are usually arranged when restitution, though desirable, is not feasible due to technical reasons, such as domestic legislation impeding deaccessioning from national museums.
- Donations. Like restitution, this solution entails the transfer of ownership of the requested object. However, a different psychological element is required, as it presupposes that the donor be recognized as the rightful owner[427]. While in some cases this might be an advantage, as it avoids questions of responsibility and, thus, negative impacts on the parties' reputation, it makes donation unsuitable for situations where the requesting party refuses to acknowledge the other party's title to property. Nonetheless, there have been a number of cases where, eventually, this was the final settlement. For instance, after agreeing through negotiations to the loan of the Roman frescos of Cazenoves to France, the Museum of Art and History of Geneva unilaterally decided to turn it into a donation[428]. In another case, separate donations from a private collector and the *Antikenmuseum* of Basel allowed for the eyes of a statue of Amenhotep III to find their way back to Egypt and be reunited to the rest of the statue, which in the meantime had been reconstructed by archaeologists[429].

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[426] *See* Ian Tattersall's submission to the symposium 'From Anatomic Collections to Objects of Worship: Conservation and Exhibition of Human Remains in Museums' organized by the Quai Branly Museum on February 22-23, 2008: M. Frigo, 'The International Symposium "From Anatomic Collections to Objects of Worship: Conservation and Exhibition of Human Remains in Museums", Paris (France), February 22-23, 2008' (2008) 15 International Journal of Cultural Property 437.

[427] M. Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 416.

[428] R. Contel, 'Échange, prêt et cooperation culturelle: solutions en matière de restitution de biens culturels' in M.A. Renold, A. Chechi, A.L. Bandle (eds), *Resolving Disputes in Cultural Property* (n 362) 185.

[429] Cornu, Renold, 'New Developments in the Restitution of Cultural Property' (n 423) 21.

- Special ownership regimes. The variety of solutions here is impressive. For instance, ownership of Degas' painting 'Landscape with Smokestacks', looted by the Nazis and subsequently purchased by a U.S. collector, was split between the descendants of the family from which it had been looted and the Art Institute of Chicago, whose Trustee had purchased it from a New York collector[430]. The museum was further given the option to purchase the first half of the painting by paying half of its value (*v. infra* §2.2.1). A trustee has been, instead, set up for Afghan cultural assets which were held in the Afghanistan Museum in Exile in Bubendorf, Switzerland, with the aim to safeguard them and returning them to Afghanistan upon cessation of hostilities.
- The production of replicas. This may be desirable when, for instance, practical difficulties make it impossible to transfer the object. This was precisely the case for the cosmographical globe which constituted the object of yet another condition of the Saint-Gall-Zurich Cantons agreement.
- Withdrawal of the claim in exchange for financial compensation. Contrary to what one may think, this situation is fairly common, especially when the claimant realizes that he his case would be a difficult one before a court. This was, for instance, the content of the settlement agreement ending nearly 12 year of litigation over Egon Schiele's *Portrait of Wally*[431] (*v. infra* §2.2.1). A more recent example was the out-of-court settlement reached by Julius Schoeps, on one side, and the Museum of Modern Art and the Solomon R. Guggenheim Foundation, on the other, in the controversy over Picasso's *Boy Leading a Horse* and *Le Moulin de la Galette*[432] (*v.infra* §2.2.1).

The list could, indeed, go on as much as law operators' creativity allows. As a matter of fact, this open-endedness, allowing the disputants to pursue whatever result they consider to best accommodate their respective interests, is precisely the advantage being sought by parties when agreeing to explore alternative possibilities to outright restitution or return of the disputed object.

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[430] N. Palmer, 'Repatriation and Deaccessioning of Cultural Property: Reflections on the Resolution of Art Disputes' (2001) 54 Current Legal Problems 477 494.

[431] Herrick Feinstein LLP, 'Estate of Lea Bondi Jaray – "Portrait of Wally" Restitution' (2010) http://www.herrick.com/sitecontent.cfm?pageID=21&itemID=584 accessed 21 June 2019.

[432] A. Feuer, 'A Lawsuit Will Determine the Fate of 2 Picassos', The New York Times, 18 Dec 2007, available at https://www.nytimes.com/2007/12/18/nyregion/18picasso.html accessed 21 June 2019.

2. Flexibility: procedural solutions to achieve cooperation

On the other side of the coin is, clearly, the necessity to adopt procedural solutions alternative to both litigation, either before international or domestic tribunals, and arbitration[433]. Indeed, the shift towards a less adversarial, more collaborative model, whereby the parties are encouraged to pursue an interest-based settlement, requires the employment of more flexible processes[434] that are not focused solely on legal interpretation, but also allow to consider non-legal issues such as ethical and political concerns, fairness and common sense, as well as professional ethics and codes of conduct. This path is, indeed, the only way forward in order to acknowledge the intrinsic legitimacy of the parties' interests to the disputed object and, subsequently, pursue a creative, mutually satisfactory outcome.

It has therefore been argued that less formal alternative dispute resolution (ADR) methods, falling under the cap of cultural diplomacy[435], may be the most suitable means of dispute settlement, especially when compared to litigation or arbitration, as they provide the necessary flexibility for the 'logrolling' required by art-related disputes[436]. As a matter of fact, an overview of the international practice reveals that, in more recent years, the vast majority of cases over requests for the return or restitution of art have been resolved through recourse to such methods[437]. Out of the many ADR that may be used to prevent disputes in this field, including good offices, inquiry, expert determination, etc., negotiation is still to date the most popular one, but mediation is on the rise.

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[433] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 413.

[434] Nafziger, 'A Blueprint for Avoiding and Resolving Cultural Heritage Disputes' (n 414) 20.

[435] Urbinati emphasizes that though the international doctrine generally uses the expression of diplomatic means of dispute settlement as a synonym of alternative dispute resolution procedures, a distinction may be drawn insofar as the former refers to inter-State proceedings, while the latter may concern other subjects, including museums or private subjects: S. Urbinati, 'Alternative Dispute Resolution Mechanisms in Cultural Property Related Disputes: UNESCO Mediation and Conciliation Procedures' in V. Vadi, H.E.G.S. Schneider (eds) *Art, Cultural Heritage and the Market: Ethical and Legal Issues* (Springer, 2014) 94 n 2.

[436] M. Shehade, K. Fouseki, K.W. Tubb, 'Editorial: Alternative Dispute Resolution in Cultural Property Disputes: Merging Theory and Practice' (2016) 23 International Journal of Cultural Property 343; Cornu, Renolds, 'New Developments in the Restitution of Cultural Property' (n 423); N. Palmer, 'Alternative Procedures – Litigation: The Best Remedy?' in L.V. Prott (ed), *Witnesses to History, A Compendium of Documents and Writings on the Return of Cultural Property* (UNESCO, 2009); S. Theurich, 'Art and Cultural Heritage Dispute Resolution' (2009) 4/2009 WIPO Magazine https://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html accessed 21 June 2019; I. Stamatoudi, 'Mediation and Cultural Diplomacy' (2009) 61 Museum International 116.

[437] A. Chechi, 'New Rules and Procedures for the Prevention of Cultural Heritage Disputes: A Critical Appraisal of Problems and Prospects' in F. Lenzerini, A.F. Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing, 2014) 259.

2.1 Mediation

Mediation is an informal, consensual process in which a neutral third party assists the parties in reaching a settlement of their dispute based on their respective interests[438]. The mediator, who need not be a lawyer[439], cannot impose a solution *ab extra* upon the parties, but rather acts as a mere intermediary towards a mutually satisfactory agreement. In order to do so the mediator can, with the parties' consent and normally in confidence, speak to each party in the absence of the other[440], engaging in a continuing process of consultation. Noticeably, it has been pointed out that this form of 'caucusing'[441] may encourage the parties to express their feelings and, thus, provide the possibility to take them into account in the final settlement, which would be particularly useful in art-related disputes where the parties are often greatly emotionally involved[442].

Mediation is a highly flexible process, in so far as both legal and relevant non-legal issues may be considered[443]. Indeed, the claim submitted to the mediator need not be strictly legal, but rather may extend to any matter as the parties wish. Moreover, other interests apart from law may be taken into account, such as ethics, codes of conduct, national policies, public feelings, and so on and so forth[444]. Further, mediation does not necessitate the application of any procedural law[445], therefore allowing the parties to negotiate however they want to achieve whatever type of agreement they want[446]. The outcome is therefore not constrained to the original issues in dispute nor to the types of orders which a court or arbitrator can make[447], but rather may be tailored to the interests and capacities of the parties[448], envisaging alternatives which are not provided by the law.

In addition, like in arbitration, the parties have the possibility to appoint a mediator who is an expert of art-restitution policies and to access a neutral procedure. Moreover, they can

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[438] WIPO Arbitration and Mediation Center, 'Guide to WIPO Mediation' (2018) WIPO Publication 449 available at https://www.wipo.int/publications/en/details.jsp?id=4383 accessed 21 June 2019.
[439] Indeed, mediators might be 'private individuals, government officials, religious figures, regional or international organizations, *ad hoc* groups, small states [or] large states': J. Bercovitch, 'The Structure and Diversity of Mediation in International Relations', in *Mediation in International Relations: Multiple Approaches to Conflict Resolution* (Jacob Bercovitch & Jeffrey Z Rubin eds, 1992) 8.
[440] Palmer, 'Litigation: The Best Remedy?' (n 384) 280.
[441] D.A. Hoffman, 'Mediation and the Art of Shuttle Diplomacy' (2011) 27 Negotiation Journal 263.
[442] D. Shapiro, A.S. Rau, cited in Byrne-Sutton, 'Resolution Methods for Art-Related Disputes' (n 358) 252.
[443] A.L. Bandle, S. Theurich, 'Alternative Dispute Resolution and Art-Law – A New Research Project of the Geneva Art-Law Centre' (2011) 6 Journal of International Commercial Law and Technology 28 30.
[444] Stamatoudi, *Cultural Property Law and Restitution* (n 85) 198.
[445] *Ibid* 3.
[446] N. Mealy, 'Mediation's Potential Role in International Cultural Property Disputes' (2011) 26 Ohio State Journal on Dispute Resolution 169 193.
[447] Palmer, 'Litigation: The Best Remedy?' (n 384) 280.
[448] A. Mason, 'Mediation and Art Disputes' (1998) 3 Art Antiquity & Law 31 32.

agree to make both the proceedings and the result completely confidential, and thereby preserve their reputation and professional relationships[449]. This is particularly welcome in the art world, where the actors on the playfield are limited in number and anxious to avoid damaging publicity which would derive them from the matter being referred to a judge[450]. Finally, and often most importantly, mediation may save disputants substantial time and monetary costs[451].

Even a summary assessment of the above features of mediation makes it evident that mediation provides great potential for the 'logrolling' process described above. While the terms of the vast majority of mediated agreements are confidential, such potential is well displayed by the exceptionally undisclosed 2006 agreement between the Cantons of Zurich and Saint-Gall.

2.1.1 An example: the mediation agreement between Zurich and Saint-Gall

The controversy between the Swiss Cantons of Zurich and Saint-Gall dated back to the religious wars of 1712[452]. During the second of the so-called Battles of Villmergen between the Catholic and Reformed Swiss Cantons, a substantial number of cultural objects were taken from the Abbey Library of Saint-Gall and transferred to Zurich. Pursuant to the 1718 peace treaty signed in Baden, Zurich had agreed to return the bulk of the displaced objects to the library. However, about 100 manuscripts, books, paintings and astronomical devices remained in the Central Library in Zurich, including the famous Prince-Abbot Bernhard Muller's cosmographical globe, which was later exhibited in the National Museum[453].

The case then sank into oblivion until a letter was sent to the editor of a Saint-Gall journal in 1996, claiming for the Canton's ownership of the objects that had remained in Zurich. Following public pressure, the Canton of Saint-Gall sent a formal request to the

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[449] Mealy, 'Mediation's Potential Role in International Cultural Property Disputes' (n 446) 205; Bandle, Theurich, 'Alternative Dispute Resolution and Art-Law' (n 443) 31.

[450] For instance, Sir Anthony Mason, the International President of ArtResolve, purported that this was the factor that made the parties opt for mediation in the case concerning the Durack papers: Mason, 'Mediation and Art Disputes' (n 448) 31. *See* E. Gosch, 'Library Gets Mary Durack Papers' The Australian, 28 August 2008, available at https://www.theaustralian.com.au/news/nation/library-gets-durack-papers/news-story/8e266073f0db818505980d057ea3309f accessed 21 June 2019; Palmer, 'Repatriation and Deaccessioning of Cultural Property' (n 430) 493.

[451] Mason, 'Mediation and Art Disputes' (n 448) 32.

[452] A.L. Bandle, R. Contel, M.-A. Renold, 'Case Ancient Manuscripts and Globe – Saint-Gall and Zurich' (2012) Platform ArThemis (Art.Law Center, University of Geneva) https://plone.unige.ch/art-adr/cases-affaires/ancient-manuscripts-and-globe-saint-gall-and-zurich/case-note-ancient-manuscripts-and-globe/view accessed 21 June 2019.

[453] Bandle, Teurich, 'Alternative Dispute Resolution and Art-Law' (n 443) 35.

Canton of Zurich for the objects' return, alleging that Zurich had never acquired title over the objects as the applicable federal law of war already prohibited plunder of cultural goods[454]. Moreover, the Canton of Saint-Gall stressed the importance to return objects which had an undeniable and historic bond to their place of origin. Zurich declined the request, claiming that in the eighteenth century a rule of international law prohibiting the removal of works of art by the victor had not developed yet and that, in any event, in view of the Peace Treaty and of restitutions which had already taken place, any further claims were forfeited or otherwise time-barred under international law.

Eight years of unfruitful negotiations followed, until the two Cantons requested the Confederation to act as a mediator, as provided by the 1999 Swiss Constitution[455]. Negotiations were therefore carried out among political representatives of the Cantons and the responsible bodies of all involved libraries under the auspices of a Government-assigned team, and a settlement was finally adopted by all concerned parties at the end of April 2006[456].

Though intranational, this mediated settlement is relevant as it displays the flexibility and potential for creativity offered by mediation. Indeed, the mediation agreement provided that, one the one hand, Saint-Gall accepted Zurich's ownership of the objects that were in the hands of the National Museum and of the Central Library in Zurich, and on the other, that Zurich recognized the relevance of the objects for the cultural identity of Saint-Gall and approved an indefinite loan of 35 manuscripts to the Abbey Library. Moreover, Zurich agreed to produce an exact replica of the Prince-Abbot's cosmographical globe to be donated to Saint-Gall, which took three years and a considerable amount of money to make, as a further demonstration of its willingness to compensate Saint-Gall for its loss.

In conclusion, the two Cantons were able to reach a consensual, re-pacifying settlement aimed to symbolize their willingness to end their quarrel. Instead of insisting on a win-or-lose solution, they agreed to acknowledge the relevance of the disputed objects for the cultural and historical identity of both of them and to share the benefits of the collection[457].

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[454] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 171.
[455] M.-A. Renold, 'Arbitration and Mediation as Alternative Resolution Mechanisms in Disputes Relating to the Restitution of Cultural Property' in J. Anderson (ed) *Crossing Cultures: Conflict, Migration and Convergence* (Melbourne University Press, 2009) 1104.
[456] Mediation Agreement between the Cantons of Zurich and Saint Gaill (27 April 2007) available at https://plone.unige.ch/art-adr/cases-affaires/ancient-manuscripts-and-globe-saint-gall-and-zurich/mediation-agreement-between-the-cantons-of-zurich-and-saint-gall-27-april-2007/view accessed 21 June 2019.
[457] B. Schönenberg, *The Restitution of Cultural Assets* (Stämpfli, 2009) 11.

2.1.2 International and non-governmental fora for mediation

Mediation's potential for cooperative solutions alternative to outright restitution has been acknowledged even by international and non-governmental organizations like the Council of Europe[458] and the International Council of Museums (ICOM)[459], which have subsequently expressed their support to mediation as a suitable method for preventing disputes and maintaining amicable relationships among the parties.

The latter organization has even promoted resort to mediation through the adoption a set of specific rules and procedures to enhance the effectiveness of the resolution of cultural property-related disputes. As a matter of fact, in 2011 ICOM partnered with the World Intellectual Property Organization (WIPO) to launch the ICOM-WIPO Art and Cultural Heritage Mediation Program[460]. Following the experience of the Arbitration and Mediation Center[461], WIPO had already set up an ADR Service for Art and Cultural Heritage, based on the application of its standard ADR rules[462], to bolster the efficiency of dispute resolution in this area[463]. The ICOM-WIPO Mediation Program is available for disputes 'relating to ICOM's areas of activities, including but not limited to return and restitution [...]' and involving 'public or private parties including but not limited to States, museums, indigenous communities, and individuals'[464], including non-ICOM members. The ICOM-WIPO Mediation Rules provide for the establishment of a list of experts in art and related areas[465] who can be appointed by the parties[466] and include safeguards for mediators' impartiality and independence[467]. They set timelines, reduced fees on a non-profit basis[468] and

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[458] Council of Europe, Parliamentary Assembly, 'Looted Jewish Cultural Property' (1999) Res 1205 §16.
[459] ICOM, 'Promoting the Use of Mediation in Resolution of Disputes over the Ownership of Objects in Museum Collections: Statement by the President of ICOM Alissandra Cummins' (2006) available at https://icom.museum/en/activities/standards-guidelines/declarations-statements/ accessed 21 June 2019.
[460] ICOM, 'ICOM and WIPO to Join Forces in Cultural Heritage and Museum Fields', Press Release, 3 May 2011, available at https://icom.museum/en/ressource/icom-and-wipo-to-join-forces-in-cultural-heritage-and-museum-fields/ accessed 21 June 2019.
[461] F. Gurry, 'The Dispute Resolution Services of the World Intellectual Property Organization' (1999) 2 Journal of International Economic Law 385; S. Theurich, 'Designing Tailored Alternative Dispute Resolution in Intellectual Property: The Experience of WIPO' in J. de Werra (ed), *La resolution des litiges de propriété intellectuelle* (Schulthess, 2010).
[462] The rules of mediation, arbitration, expedited arbitration and expert determination are available at WIPO, 'Alternative Dispute Resolution' https://www.wipo.int/amc/en/ accessed 21 June 2019.
[463] WIPO, 'WIPO Alternative Dispute Resolution (ADR) for Art and Cultural Heritage' https://www.wipo.int/amc/en/center/specific-sectors/art/ accessed 21 June 2019; Theurich, 'Art and Cultural Heritage Dispute Resolution' (n 436).
[464] WIPO, 'ICOM-WIPO Mediation Rules' https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/ accessed 21 June 2019.
[465] *Ibid* Art 6.
[466] Art 7.
[467] Art 9.
[468] Arts 25-26.

guarantees of confidentiality[469]. Further, they make express reference to the ICOM Code of Ethics[470] as a tool for guidance for both the mediator and the parties[471]. Finally, the Parties are offered two additional possibilities to resolve their disputes. First, they may request WIPO and ICOM to provide their good offices, free-of-charge and on a confidential basis, in order to reach an agreement to submit their dispute to the mediation procedure[472]. Second, the WIPO Center may provide tailored multi-tier clauses and submission agreements in order to combine mediation with other dispute resolution mechanisms, such as WIPO arbitration, expedited arbitration or expert determination[473].

ICOM and WIPO are not the only international or non-governmental organizations which have provided a forum for the mediated settlement of cultural property-related disputes. Indeed, in 2005 the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or the Restitution in Case of Illicit Appropriation (ICPRCP), which was created in 1978 to facilitate bilateral negotiations for the repatriation of cultural assets from former colonial powers to newly independent states[474], were amended to expand the functions of the Committee and thus strengthen its mandate[475]. Subsequently, Article 4(1) now reads:

> The Committee shall be responsible for: [...] seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin [...]. In this connection, the Committee may also submit proposals with a view to mediation or conciliation to the Member States concerned [...]. For the exercise of the mediation and conciliation functions, the Committee may establish appropriate rules of procedure. The outcome of the mediation and conciliation process is not binding on the Member States concerned, so that if it does not lead to the settlement of a problem, it shall remain before the Committee [...].[476]

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[469] Arts 17-21.

[470] ICOM, 'ICOM Code of Ethics for Museums' (2017) available at https://icom.museum/en/activities/standards-guidelines/code-of-ethics/ accessed 21 June 2019.

[471] 'ICOM-WIPO Mediation Rules' (n 464) Art 13(a).

[472] WIPO, 'Good Offices' https://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/#art23 accessed 21 June 2019.

[473] WIPO, 'Further Procedural Options' *ibid.*

[474] UNESCO Twentieth General Conference (28 November 1978) Res 20 C/4/7.6/5, available at https://unesdoc.unesco.org/ark:/48223/pf0000114032 accessed 21 June 2019.

[475] UNESCO Thirty-third General Conference (21 October 2005) Res 33 C/44, available at https://unesdoc.unesco.org/ark:/48223/pf0000142825?posInSet=1&queryId=68ef4b7c-c300-4042-9cb8-5c36b2ddc86f accessed 21 June 2019; *see* M. Vicien-Milburn, A. García Márquez, A. Fouchard Papaefstratiou, 'UNESCO's Role in the Resolution of Disputes on the Recovery of Cultural Property' (2013) 10(5) Transnational Dispute Management https://www.transnational-dispute-management.com/article.asp?key=2004 accessed 21 June 2019 8.

[476] UNESCO, 'Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation' (2005) Doc CLT/CH/INS-2005/21, available at https://unesdoc.unesco.org/ark:/48223/pf0000145960 accessed 21 June 2019 Art 4(1).

Thereby, the Committee now has the power to make a proposal for mediation or conciliation to States which have submitted a dispute to it. Pursuant to Article 4(1), in 2007 the Secretariat of the Committee presented a set of draft rules of procedure on mediation and conciliation, which were adopted in 2010[477]. The rules of procedure confirm that mediation and conciliation under the auspices of the ICPRCP are voluntary[478] and that they are not binding unless the States parties to a dispute agree so[479]. Further, they specify that the ICPRCP does not act as a mediator or conciliator nor choose mediators or conciliators, as the latter are rather chosen by the parties themselves from a list of independent experts that is maintained by the Committee's Secretariat[480]. As to the subjects vested with *locus standi*, Article 4 establishes that only Member States and Associate Members of UNESCO have standing to submit a request to the mediation or conciliation procedure[481], but they may represent either their own interests, or the interests of public or private institutions located in their territory, or those of their nationals[482]. Moreover, they may address a request to a public or private institution when it is in possession of the concerned asset, provided that the State of nationality of the requested institution is immediately informed of the request and does not object to it[483]. By contrast, the mediation and conciliation functions of the ICPRCP are not available where the holder of the contested object is an individual[484].

While it is still too early to judge their practical utility, what is apparent is that the mechanisms introduced by UNESCO, WIPO and ICOM provide further evidence of the consolidating opinion that, when direct negotiations between the parties are not possible or end in failure, mediation is the most suitable means to resolve disputes over claims for the restitution or return of cultural property[485].

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[477] UNESCO, 'Rules of Procedure for Mediation and Conciliation in Accordance with Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation' (2010) Doc CLT-2010/CONF.203/COM.16/7, available at https://unesdoc.unesco.org/ark:/48223/pf0000192534_eng accessed 21 June 2019.
[478] *Ibid* Art 3.
[479] Art 10(4).
[480] Art 2(6).
[481] Art 4(1).
[482] Art 4(2).
[483] Art 4(3).
[484] Chechi, 'New Rules and Procedures for the Prevention of Cultural Heritage Disputes' (n 437) 253.
[485] *See e.g.* n 436.

2.2 Negotiation

Notwithstanding mediation's increasing popularity, negotiation constitutes *par excellence* the most widely used method of settling (or, rather, preventing) art-related disputes, and this holds true still to date[486]. Indeed, when the relations among the parties allow so, direct negotiations without the intermediation of any neutral third party, not being subject to any prescribed formality, are generally preferred both by States, who wish to retain control over the process so as to restate their sovereignty[487], and individuals (or other entities), especially in cases where, irrespective of the applicability of legal standards, other factors make the possessor uncomfortable in retaining the disputed property.

Negotiation has, indeed, proved a particularly suitable technique for resolving amicably cases that are not covered by relevant international conventions due to material or chronological reasons or that are time-barred due to the expiry of statutes of limitations, but involve ethical and moral concerns[488]. Classic examples are claims relating to Nazi looted material, spoils of war, or assets removed from former colonies. In turn, requested possessors of cultural objects that are stolen or illicitly exported during times of peace, who, instead, do not feel compelled by such concerns, generally agree to negotiate either when extensive evidence of the object's doubtful, if not illicit, provenance becomes available, thus making the outcome of a court claim likely to be unfavorable[489], or when public or private institutions are involved whose utmost concern is to preserve their reputation and avoid negative publicity[490].

A distinction may and should be drawn, however, between traditional negotiated settlements, ending either in a private agreement (which may be enforced as a private law

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[486] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 168.
[487] I. Fellrath Gazzini, *Cultural Property Disputes* (n 285) 62.
[488] Shehade, Fouseki, Tubb, 'Editorial: Alternative Dispute Resolution in Cultural Property Disputes' (n 436) 351.
[489] For instance, incontrovertible evidence of the involvement of criminal networks engaged in trafficking looted cultural property, produced by the *Carabinieri per la Tutela del Patrimonio Culturale*, was arguably the 'game-changer' with regard to claims brought by Italy against museums and leading to their negotiated settlement: L. Rush, L. Benedettini Millington, *The Carabinieri Command for the Protection of Cultural Property: Saving the World's Heritage* (Woodbridge, 2015); P. Watson, C. Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities from Italy's Tomb Raiders to the World's Greatest Museums* (Public Affairs Press, 2007).
[490] The restitution of antiquities by U.S. collector and New York's Metropolitan Museum's trustee Shelby White, for instance, was prompted by the anxiety to avoid adverse publicity, which was likely to derive from a lawsuit, rather than being a spontaneous initiative: I. Stamatoudi, 'Alternative Dispute Resolution and Insights on Cases of Greek Cultural Property (n 357) 433; C. Tsirogiannis, 'False Closure: Known Unknowns in Repatriated Antiquities Cases' (2016) 23 International Journal of Cultural Property 407, instead, reports a case where objects were returned to Italy due to the museum and collector's fear for bad reputation, notwithstanding the lack of strict evidence as to their provenance.

contract or ratified by a judge) or in a treaty (when all parties to the dispute are sovereign States), and more innovative formal solutions akin to those instruments that in international law, particularly in investment law, are increasingly referred to as 'State contracts'.

2.2.1. Traditional negotiated settlements

As mentioned above, examples of traditional negotiated settlements include both agreements among private subjects (persons or entities) and among sovereign States.

2.2.1.1. Private agreements

Under the former category, the vast majority of cases concern claims over Nazi looted art, which often have a nature akin to that of reconciliatory transitional justice rather than being focused on the specific remedy of restitution[491]. The first of these was the famous *Goodman & Gutmann-Searle* agreement[492]. The case concerned the claim of the Goodman family against the U.S. citizen Daniel Searle over the ownership of Degas' 'Landscape with Smokestacks', which had been taken by the Nazis from their father, Friedrich Gutmann, after he was beaten to death in Theresienstadt upon refusal to sign documents transferring the painting to the Reich. As anticipated above, the parties agreed in 1998 to split equally ownership of the artwork between Searle and the heirs of Gutmann, whereby the former gave his half-interest to the Art Institute of Chicago and the latter sold the other half to the same museum at a fair market appraisal, under the condition that the institution attached a label to the display of the painting, chronicling the history of the Gutmann family and the fate of their collection, including the circumstances of the misappropriation of the Degas[493].

Negotiation is not always immediately agreed upon by the parties to a dispute. To the contrary, it is not infrequent that it is resorted to only after litigation has already begun. For instance, the controversy over Egon Schiele's *Portrait of Wally* was settled through a negotiated agreement after as much as 12 years of litigation. The agreement, which was ratified by Judge Preska[494], provided that the descendants of Lea Bondi Jaray, from whom the painting was illegally taken in 1939, released their claim over the Schiele in exchange for payment of its market value ($19 million) from the possessor, the Leopold Museum of

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[491] T. O'Donnell, 'The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?' (2011) 22 EJIL 49 51.
[492] N. Palmer, 'Memory and Morality: Museum Policy and Holocaust Cultural Assets' (2001) 6 Art, Antiquity & Law 259 265.
[493] Palmer, 'Repatriation and Deaccessioning of Cultural Property' (n 430) 495.
[494] *United States v. Portrait of Wally* (n 367); *see* Bazyler, *Holocaust Justice* (*ibid*) 232.

Vienna (*v. supra* §1.2). In addition, the museum undertook to display a tag next to the painting, at the museum and at all exhibitions that it was to authorize anywhere in the world, acknowledging its illicit provenance and the circumstances of its misappropriation[495]. In a similar manner, though more expeditiously, was the case concerning Picasso's *Boy Leading a Horse* and *Le Moulin de la Galette* settled. Julius H. Schoeps, a great-nephew of Paul von Mendelssohn-Bartholdy, a German Jewish banker, claimed that the latter had sold the paintings because of duress due to the Nazi persecution, and that the New York Museum of Modern Art and the Solomon R. Guggenheim Foundation had turned a blind eye on the Picassos' dubious provenance at the moment of their acquisition. On their part, the two museums maintained that there was no sufficient evidence supporting Mendelssohn-Bartholdy's heirs' claim[496]. On the day fixed for trial, however, the parties announced that they had reached an agreement, under which the museums would keep the paintings in exchange for payment of a substantial sum of money[497].

It is worth mentioning that another considerable number of Holocaust-related cases have been settled through negotiation thanks to the intervention of independent panels, set up by various European countries in order to facilitate negotiations over this specific kind of claims[498]. This was, for instance, the case with the Goudstikker collection, which included masterpieces by Goya, Rembrandt, Rubens, and Van Gogh, and had been confiscated after invasion of the Netherlands by the Nazis in 1940. Indeed, after years of unfruitful negotiation, the Dutch Government asked the Dutch Restitution Committee to issue a recommendation regarding the decision to be taken concerning Jacques Goudstikker's request for restitution of the part of the collection being held in national museums, and agreed to comply with the Committee's recommendation that it returned the concerned objects[499].

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[495] Herrick Feinstein LLP, 'Estate of Lea Bondi Jaray – "Portrait of Wally" Restitution' (n 431).
[496] Feuer, 'A Lawsuit Will Determine the Fate of 2 Picassos' (n 432); C. Vogel, 'Two Museums Go to Court Over the Right to Picassos', The New York Times, 8 Dec 2007, available at https://www.nytimes.com/2007/12/08/arts/design/08muse.html accessed 21 June 2019.
[497] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 189.
[498] C. Woodhead, 'Putting into Place Solutions for Nazi Era Dispossessions of Cultural Objects: The UK Experience' (2016) 23 International Journal of Cultural Property 385.
[499] Restitution Committee, 'Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection' (2005) RC 1.15, available at https://www.restitutiecommissie.nl/en/recommendations/recommendation_115.html accessed 21 June 2019.

2.2.1.2. International treaties

Turning to the second category of traditional negotiated settlements, States resort to negotiation to settle both disputes concerning the interpretation or the application of international conventions, and controversies over claims that are not covered by such instruments due to material or chronological reasons, like those over cultural property removed from territories subject to foreign occupation prior to decolonization[500].

As regards the first aspect, negotiation is promoted by relevant international law instruments in this field as the primary means of amicable resolution of inter-States disputes. For instance, Moreover, Article 7 of the UNESCO Convention provides that requests under such convention 'shall be made through diplomatic offices'[501], while Article 17 §5 provides that contracting parties 'engaged in a dispute over its implementation' may request UNESCO to 'extend its good offices to reach a settlement between them'[502], with a provision similar to that of the 1954 Hague Convention[503] and its Second Protocol[504]. Moreover, both the 1970 UNESCO Convention and the 1995 Unidroit Convention expressly envisage the possibility for States Parties to engage in further cooperation through the conclusion of bilateral or multilateral agreements[505]. For instance, the agreement between France and Nigeria over the Nok and Sokoto statuettes was formally based on Article 7 of the 1970 UNESCO Convention[506].

On the other hand, examples of bilateral treaties concerning relations among countries formerly in a colonial relationship include the agreements concluded by Italy with Lybia and Ethiopia respectively[507]. As to the former, Italy and Lybia signed two separate documents. Under the joint declaration of July 1998, Italy agreed to the restitution, pursuant to the 1970 UNESCO Convention, of all assets brought to Italy during and after the Italian colonization of Lybia. In December 2000, an agreement was concluded identifying the *Venus of Cyrene*, a headless marble statue that had been found amidst the ruins of the old Greek and Roman settlement of Cyrene following Italy's invasion in 1911

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[500] A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, 2006) 207.
[501] 1970 UNESCO Convention Art 7.
[502] *Ibid* Art 17(5).
[503] 1954 Hague Convention Art 22.
[504] Second Protocol to the 1954 Hague Convention Arts 35-36.
[505] 1970 UNESCO Convention Arts 9, 15; 1995 Unidroit Convention Art 13.
[506] 'Une convention entre la France et le Nigéria à propos des œuvres Nok et Sokoto du futur musée du quai Branly', discours et communiqués, 13 Feb 2002, http://www2.culture.gouv.fr/culture/actualites/communiq/tasca2002/nok.htm accessed 21 June 2019.
[507] T. Scovazzi, 'La restituzione dell'obelisco di Axum e della Venere di Cirene' (2009) XLV Rivista di diritto internazionale privato 555.

and removed to Rome in 1915, as one of the objects to be returned[508]. The agreement with Ethiopia, instead, finally settled the question of the Aksum Obelisk, which had been removed by Mussolini's army in 1937. Italy had already undertaken to return the 24 meters-tall, 150 tons-stele under the 1947 Peace Treaty between Italy and the Allied Powers[509], a bilateral agreement concluded in Addis Ababa in 1956[510], and a joint statement signed by the two countries in 1997. Finally, a specific memorandum of understanding was signed in Rome in 2004 containing an executive project for the transfer and handover of the stele, whereby Italy agreed to bear all costs of transportation, reinstallation and restoration of the Aksum archaeological site[511].

Another example worth mentioning, though concerning objects (allegedly) looted *after* decolonization, is the above-mentioned agreement between France and Nigeria over ownership of three Nok and Sokoto statuettes which had been acquired by the Louvre in view of the opening in 2004 of the *Musée du Quai Branlay*. Nigeria claimed ownership of the statuettes, as Nigerian law prohibited the export of Nok manufacts, nor could the Louvre be deemed a good faith purchaser under French law, considering that the statuettes were inscribed in the ICOM Red List[512]. Following the reject of Nigeria's claim before French domestic courts due to the lack of a norm implementing the 1970 UNESCO Convention in the French legal order (*v. supra* ch. II), the two countries entered into negotiations, ending with the Nigerian Head of State acknowledging the transaction in favor of France. This settlement encountered much criticism, as it was regarded by many as a legitimization of the vast-scale looting of African archaeological objects[513]. Subsequently, in 2002 the French Government agreed to recognize Nigeria's ownership title over the statuettes, in exchange for a renewable, long-term (25 years) loan to the *Quay Branly* Museum[514]. Moreover, France engaged to return to Nigeria any object whose illicit provenance was to be proved before its courts and to enter into a museum cooperation

[508] T. Scovazzi, '*Diviser c'est détruire*: Ethical Principles and Legal Rules in the Field of Return of Cultural Property' (2011) XCIV Riv dir int 341 360.
[509] Paris Peace Treaty (Italy) (n 52) Art 37.
[510] Agreement between Ethiopia and Italy on the settlement of economic and financial matters issuing from the Treaty of Peace and economic collaboration.
[511] Scovazzi, '*Diviser c'est détruire*' (n 508) 357.
[512] ICOM, 'Red List of African Archaeological Objects' (2000) available at https://icom.museum/en/resources/red-lists/ accessed 21 June 2019.
[513] International Council of African Museums (AFRICOM), Press Release, 21 Apr 2000 quoted in F. Shyllon, 'Negotiations for the Return of Nok Sculptures from France to Nigeria – An Unrighteous Conclusion' (2003) 8 Art, Antiquity & Law 133 143.
[514] ICOM, 'Nigeria's Ownership of Nok and Sokoto Objects Recognized', Press Release, 5 Mar 2002, available at http://archives.icom.museum/release.5march.html accessed 21 June 2019.

agreement concerning training, technical aid, collections' inventories and dating research[515]. Though at a first glance the terms of the final agreement might seem fair, it has been pointed out that Nigeria's submission to French requests, agreeing on an exceptionally long-term loan, is utterly inexplicable, when one considers the undeniable lack of good faith by the Louvre when it acquired the disputed objects[516]. In conclusion, from an interest-based standpoint, the agreement may be deemed to have failed to meet Nigeria's concerns in combating the relentless looting of its archaeological treasures and in preserving some of the finest examples of Nok and Sokoto manufacts in its museums, by according an unbalanced arrangement favoring the instances of the French Government.

Finally, it should be mentioned that the UNESCO has provided a forum for negotiating disputes over the recovery of cultural objects by establishing, in 1978, the ICPRCP[517] (*v. supra* §2.1.2). The Committee's primary function is, indeed, to seek 'ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin'[518], as well as to promote 'multilateral and bilateral cooperation with a view to the restitution and return of cultural property to its countries of origin'[519]. Accordingly, the Committee issues non-binding recommendations, usually suggesting new negotiation terms to the States involved in the dispute so as to encourage further contacts[520].

Noticeably, the Committee's competence is not limited to the scope of application of the 1970 Convention. For instance, given that there is no limitation period to initiate proceedings before it, it may well hear claims falling outside the chronological scope of application of the 1970 UNESCO Convention and 1995 Unidroit Convention[521]. Hence, while the Committee has only resolved four cases so far[522], its success should not be underestimated. Indeed, it has been correctly pointed out that its 'moral pressure' has played a crucial role in persuading Countries and individuals to make some form of return

[515] 'Une convention entre la France et le Nigéria à propos des œuvres Nok et Sokoto du futur musée du quai Branly', (n 506).
[516] F. Shyllon, 'Negotiations for the Return of Nok Sculptures from France to Nigeria' (n 513).
[517] UNESCO Res 20 C/4/7.6/5 (n 474).
[518] Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation (n 476) Art 4(1).
[519] *Ibid* Art 4(2).
[520] UNESCO, 'Rules of Procedure of the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation' (1989) Doc CC.89/CONF.213/COL.3, available at https://unesdoc.unesco.org/ark:/48223/pf0000082384 accessed 21 June 2019 Art 9(1).
[521] Vicien-Milburn, García Márquez, Fouchard Papaefstratiou, 'UNESCO's Role in the Resolution of Disputes on the Recovery of Cultural Property' (n 475) 6.
[522] *Ibid.*

or restitution even in the absence of a legal binding standard, as attested by the tens of thousands of such instances that have taken place since 1978[523].

2.2.2. State contracts

Recently, the tendency has been to expand the scope of negotiated settlements beyond ownership arrangements to involve cultural institutions, either public or private, and engage them in the process of building future relations between the parties through cultural and scientific cooperation. This was, for instance, a part of the above-mentioned France-Nigeria agreement. Also, this was the case with two out of the four cases resolved by the ICPRCP so far, concerning the return by Germany to Turkey of a sphinx and of some 7,000 cuneiform tablets respectively. Thereby, return was conditional upon 'greater museum and archaeology cooperation between the two countries'[524] and the carrying out of joint research on the returned object by experts from the two States[525].

This trend is now developing to involve such institutions not only in the material content of the agreement, but also in its formal structure, through the conclusion of understandings between a State, represented by its ministries or other public entities, on the one hand, and foreign museums or cultural entities, on the other. Even though these instruments are generally called 'agreements', they are distinct from international treaties[526]. Indeed, they rather belong to the category of 'State contracts', that is to say, agreements one party of which is a States, the other being a foreign public or private institution[527].

Though such category has developed in the field of international investment law, specifically in the area of the exploitation of natural resources[528], it has proved a promising

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[523] F. Shyllon, 'The 16th Session of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, 21-23 September 2010' (2011) 18 International Journal of Cultural Property 429 435; *see* UNESCO, 'Successful cases under the aegis of the ICPRCP' http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/return-or-restitution-cases/ accessed 21 June 2019.

[524] UNESCO, Secretariat Report, Intergovernmental Committee, 18th session (22 June 2012) Doc ICPRCP/12/18.COM/3, available at https://unesdoc.unesco.org/ark:/48223/pf0000216533_eng accessed 21 June 2019 3.

[525] UNESCO, Final Report, Intergovernmental Committee, 6th session (16 June 1989) Doc 25 C/91, available at https://unesdoc.unesco.org/ark:/48223/pf0000083117 accessed 21 June 2019 7.

[526] Frigo, 'Circulation des biens culturels, détérmination de la loi applicable et méthodes de réglement des litiges' (n 148) 418; Scovazzi, '*Diviser c'est détruire*' (n 508) 380.

[527] C. Leben, 'La théorie du contrat d'état et l'évolution de droit international des investissements' in The Hague Academy of International Law (ed), 302 *Collected Courses of The Hague Academy of International Law* (Brill, 2003); the first elaboration of 'contracts of international law' as a separate source of law, however, is found already in P. Weil, 'Problémes relatifs aux contrats passes entre un Etat et un particulier' in The Hague Academy of International Law (ed), 128 *Collected Courses of the Hague Academy of International Law* (Brill, 1969).

[528] Leben, *ibid.*

tool even in cases of our concern. Indeed, such technique allows requesting States to overcome the fact that the State of location often does not have the legal tools to compel its private persons or entities to return requested objects, on the one hand, and allows museums to preserve their reputation as cultural institutions committed to fighting against the illicit trafficking in cultural property, on the other[529]. Moreover, it helps both parties strengthen their relationship through agreeing on future cooperation activities.

An early example of employment of this legal instrument in settling restitution or return claims may be found in the 1984 agreement concluded under the aegis of the ICPRCP between the Government of Jordan and the Cincinnati Art Museum in the United States, whereby the two parties agreed to exchange plastic casts of the parts of the sandstone panel of Tyche with the Zodiac held by each of them[530]. Though not envisaging any form of further cooperation among the Ohioan museum and Jordan's cultural institutions, this negotiation introduced a significant element of novelty precisely in that the former museum was directly involved as a party to the agreement.

By contrast, the time was ripe for such a formal *and* material arrangement when, in the early 2000's, Italy engaged in an aggressive campaign to recover various precious antiquities which had allegedly been illicitly excavated in its territory, smuggled through its border, and ended up in prominent American museums[531]. Following the conclusion in 2001 of a bilateral treaty with the United States[532], whereby the Government of the United States undertook to return archaeological material illicitly exported from Italian territory[533], under condition that Italy 'uses its best efforts to encourage further interchange through promoting agreements for long-term loans of objects of archaeological or artistic interest, for as long as necessary, for research and education, agreed upon, on a case by case basis, by American and Italian museums or similar institutions [...]'[534], five such agreements were concluded by Italy with the New York Metropolitan Museum of Art and the Boston Museum of Fine Arts in 2006, the J. Paul Getty Museum of Los Angeles and Princeton University's Art

[529] Scovazzi, '*Diviser c'est détruire*' (n 508) 380.
[530] UNESCO, Final Report, Intergovernmental Committee, 5th session (29 June 1987) Doc 24 C/94, available at https://unesdoc.unesco.org/ark:/48223/pf0000075160 accessed 21 June 2019 7.
[531] Chechi, *The Settlement of International Cultural Heritage Disputes* (n 12) 194.
[532] Memorandum of Understanding Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical, and Imperial Roman periods of Italy (adopted 19 January 2001) ILM 1031, available at https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/italy/us-italy accessed 21 June 2019. The agreement was renewed for a 5-year period in 2006, 2011 and 2016.
[533] *Ibid* Art I(B).
[534] Art II(E)(1).

Museum in 2007, and the Cleveland Museum of Art in 2008. Meaningfully, all these agreements were named 'Long-Term Cultural Cooperation Agreement'. Their terms are all confidential, with the exception of the agreement with the Metropolitan Museum[535]. It is therefore worth to examine the latter's provisions.

2.2.2.1 The Long-Term Cultural Cooperation Agreement between Italy and the Metropolitan Museum

First, in the Preamble, we find an epitome of the contrast between source countries' 'cultural nationalism', on the one hand, and market states' 'cultural cosmopolitanism', on the other. Indeed, the Italian Ministry affirms that:

> '[T]he Italian archaeological heritage [...] is the source of the national collective memory and a resource for historical and scientific research'[536];
>
> 'To preserve the archaeological heritage and guarantee the scientific character of archaeological research and exploration operations, Italian law sets forth procedures for the authorization and the control of excavations and archaeological activities to prevent all illegal excavations or theft of items of the archaeological heritage and to ensure that all archaeological excavations and explorations are undertaken in a scientific manner [...]'[537];
>
> 'The law applies to the permanent and temporary departure from Italian territory of archaeological objects discovered in Italian territory or present in Italian territory and in the possession of private individuals'[538].

By contrast, the Museum:

> '[B]elieves that the artistic achievements of all civilizations should be preserved and represented in art museums, which, uniquely, offer the public the opportunity to encounter works of art directly, in the context of their own and other cultures, and where these works may educate, inspire and be enjoyed by all. The interests of the public are served by art museums around the world working to preserve and interpret our shared cultural heritage'[539].

Furthermore, it:

> '[D]eplores the illicit and unscientific excavation of archaeological materials and ancient art from archaeological sites [...] and the theft of works of art from individuals, museums, or other repositories'[540];

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[535] Agreement between the Italian Ministry for Cultural Heritage and Activities of the Italian Republic and the Commission for Cultural and Environmental Heritage and Public Education of the Sicilian Region and the Metropolitan Museum of Art, New York (21 February 2006), available at https://plone.unige.ch/art-adr/cases-affaires/euphronios-krater-and-other-archaeological-objects-2013-italy-and-metropolitan-museum-of-art/agreement-between-the-italian-ministry-of-culture-and-the-met-21-february-2006/view accessed 21 June 2019.

[536] *Ibid* Preamble(A).

[537] Preamble(B).

[538] Preamble(C).

[539] Preamble(F).

[540] Preamble(G).

> '[I]s committed to the responsible acquisition of archaeological materials and ancient art according to the principle that all collecting be done with the highest criteria of ethical and professional practice'[541].

The first object of the agreement is the return to Italy of some archaeological items, including the Euphronios krater, that were in the Museum's collection and that the Italian Ministry alleged had been illegally excavated in Italian territory and sold clandestinely in and outside the Italian territory[542]. Noticeably, the Museum rejected 'any accusation that it had knowledge of the alleged illegal provenance in Italian territory of the assets claimed by Italy', and asserted that its decision 'to transfer the requested items in the context of this Agreement [...] does not constitute any acknowledgement on the part of the Museum of any type of civil, administrative or criminal liability for the original acquisition or holding of the Requested Items'[543]. On its part, the Italian Government, 'in consequence of this Agreement, waives any legal action on the grounds of said categories of liability in relation to the Requested Items'[544].

The second subject-matter of the agreement is the identification of the forms of cultural cooperation between the parties. Different arrangements were set up corresponding to the various objects which were returned. To sum up, Italy agreed to make four-year loans of mutually agreed upon objects, equivalent to those returned, 'on an agreed, continuing and rotating' basis, so as 'to make possible the continued presence in the galleries of the Museum of cultural assets of equal beauty and historical and artistic significance' to those of the Euphronios krater and of the set of Hellenistic silver items[545]. Moreover, it accorded the loan of 'a first-quality Laconian artifact to the Museum for a period of four years and renewable thereafter'[546] in exchange for a Laconian kylix and three other vases. In addition, the Ministry agreed upon future mutual cooperation for the study and restoration of archaeological items originating from authorized excavations to be conducted on the initiative and at the expense of the Museum, including subsequent short-term loans to the Museum for exhibition, temporary transfers for restoration by the Museum at the latter's expenses, and successive exhibitions to the public in its galleries[547]. In order to make the

[541] Preamble(H).
[542] Art 2; Preamble(E).
[543] Preamble(I).
[544] *Ibid.*
[545] Arts 4(1)(b), 5(3).
[546] Art 3(2).
[547] Art 7.

achievement of such cooperation goals possible, the Agreement's term was fixed at forty years, thereby renewable by agreement between the parties[548].

The success of Italy's initiative is undeniable. Not only did it achieve bringing home the requested items, but also did it demonstrate that the Italian authorities were not willing anymore to turn a blind eye to the acquisition of objects which appeared to have been illegally excavated and export from Italian territory. Indeed, statistics from the Carabinieri Cultural Heritage Protection Division have reported a 90 per cent decline in clandestine excavations since the signing of the 2001 Agreement[549]. On top of that, Italy's campaign for the recovery of its cultural property has given decisive momentum to other ongoing controversies, like the one between Peru and Yale University.

2.2.2.2 The Memorandum of Understanding between Yale University and Universidad Nacional de San Antonio Abad del Cusco

Negotiations between Peru and Yale University concerning the artefacts removed from the site of Machu Picchu between 1912 and 1916[550], which had been formally requested by Peru in 2001[551], were, indeed, being conducted in that period. While the National Geographic Society was favorable to return the collection, Yale had declined Peru's request, claiming that it had fully complied with Peruvian legislation. On the wave of renewed pressure on Yale to release the objects, a preliminary agreement was concluded in 2007 which, however, sank due to the latter's insistence that it had valid title and that the return was the result of a magnanimous act on its part. Some skirmishing followed before U.S. courts, until in November 2010 the Government of the Republic of Peru and the Yale University eventually signed a Memorandum of Understanding, whereby Yale undertook to return all artefacts to Peru upon completion of an inventory[552].

The nature of this agreement appears to be the same as those concluded by Italy. However, cooperation between the two parties was pushed even further through the

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[548] Art 8.

[549] *See* http://savingantiquities.org/a-global-concern/italy/ accessed 21 June 2019.

[550] *See* H. Eakin, 'Inca Show Pits Yale Against Peru', The New York Times, 1 Feb 2006, available at https://www.nytimes.com/2006/02/01/arts/design/01mach.html?pagewanted=all accessed 21 June 2019.

[551] A. Chechi, L. Aufseesser, M.-A. Renold, 'Case Machu Picchu Collection – Peru and Yale University' (2011) Platform ArThemis (Art-Law Centre, University of Geneva) https://plone.unige.ch/art-adr/cases-affaires/machu-picchu-collection-2013-peru-and-yale-university accessed 21 June 2019.

[552] Memorandum of Understanding between Universidad Nacional de San Antonio Abad del Cusco and Yale University Regarding the UNSAAC-Yale University International Center for the Study of Machu Picchu and the Inca Culture (adopted 11 February 2011) available at https://plone.unige.ch/art-adr/cases-affaires/machu-picchu-collection-2013-peru-and-yale-university/memorandum-of-understanding-between-the-government-of-peru-and-yale-university-11-february-2011/view accessed 21 June 2019 Preamble(II).

conclusion of a second Memorandum of Understanding in February 2011 between Yale University and the Universidad Nacional de San Antonio Abad del Cusco (UNSAAC), whereby the two institutions agreed 'to collaborate and jointly develop an international facility and associated programs designed to serve as a base for the display, conservation and study of the Machu Picchu collections as well as for the interchange of students, scholars and scholarship regarding Machu Picchu and Inca culture'[553].

Accordingly, the 'UNSAAC-Yale University International Center for the Study of Inca Culture' was established. This jointly administered Center is made up of a museum exhibition space opened to the public, a storage facility to store archaeological artifacts appropriately, and a laboratory and research area[554], and is charged with making the objects accessible to the public and to international students and scholars, maintaining appropriate conditions for their conservation, and promoting research through academic conferences[555]. The agreement also creates a framework for academic exchange between Yale University and UNSAAC, including fellowships and support for visiting faculty members being exchanged between the two[556]. Finally, the parties agreed that, 'in recognition of Yale's historic role in the scientific investigation of Machu Picchu, the Center would loan a small number of artefacts for display at the Yale Peabody Museum of Natural History, subject to Peruvian laws and for certain time periods'[557].

The contribution of this negotiated settlement is not limited to prove that the use of State contracts in the resolution of claims for the recovery of cultural property inaugurated by Italy is replicable. More importantly, it provides evidence that the trend of involving cultural institutions in the settlement of such disputes is developing even further, towards the conclusion of agreements *among* them. This approach reflects the belief that such institutions 'are by definition the most competent institution to deal with the matter'[558] and is, indeed, currently being explored to settle the controversy over the Benin bronzes.

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[553] *Ibid* §1.
[554] *Ibid.*
[555] §3.
[556] §4.
[557] §5.
[558] G. Fradier, 'Editorial: Return and Restitution of Cultural Property' (1979) XXXI Museum 2 3.

3. Addressing the colonial past through cultural cooperation: a solution for the Benin bronzes

Nigeria is one of many African countries which have seen their cultural property more than halved following the imposition of foreign religions and governments. Much of this treasure was lost to colonial plunder. Indeed, at a time when in Europe a customary rule prohibiting the plunder of cultural property was developing (v. supra ch.1), the practice of colonial relationships was so rich of these episodes, that it is inevitable to infer that such a rule was limited to relations among European countries. One may recall the pillaging of the treasures of Maqdala and Ashanti by the British in 1868 and 1874 respectively, of Ségou and Abomey by the French 1890 and 1892, or the infamous looting of Benin City in 1897. The latter is perhaps the most infamous episode of colonial plunder[559], giving rise to one of the most emotional claims for return in the art history.

Nigeria's claims over its treasures are at a stall point due to the inapplicability of any legal standards, not being in force any conventional instrument yet at the time of the plunder, and the unwillingness or impossibility for countries of location of looted artefacts to force the institutions holding them to make returns. However, a reasonable resolution seems to have been found precisely thanks to multi-lateral negotiations among Nigerian and European cultural institutions.

3.1 Benin bronzes: the looting and the captivity

The Benin Kingdom, largely corresponding to the territory of to-day Edo State, South-West Nigeria, was one of the principal historic kingdoms of Western Africa[560]. In 1897, a British expedition tried to reach Benin City to discuss the removal of obstacles to trade at a time of the year when the king, Oba Ovonramwen, was carrying out an annual religious rite during which the king limits his appearances and is prohibited from contacts with foreign elements, including persons. Though the expedition was accordingly advised, Consul Philip attempted to force his way through, which, the ritual being the most sacred to the Bini, could not be permitted. Therefore, one of the Oba's aides, Chief Olugbushe, acting without the Oba's knowledge, ordered to massacre the expedition, and seven out of nine of its members were brutally killed. When the news reached London, the reaction was swift. Benin City was invaded and the British irrupted in the Royal Palace, where tens

[559] E. Eyo, 'Viewpoints: Nigeria' (1979) XXXI Museum 18 19.
[560] A.A. Adewunmi, 'Possessing Possession: Who Owns Benin Artefacts' (2015) 20 Art Antiquity & Law 229 230.

of thousands of exquisite pieces of art cast in wood, ivory and bronze were displayed. The palace was looted and eventually burnt down, and the king banished.

The artworks were initially brought to London and, from there, dispersed throughout the (Western) world. Many of the objects were, indeed, sold at auction to refund the expenses of the expedition. Among them, the bronzes gained immediate worldwide fame, as their importance was recognized by specialists of the sector. One of them wrote of the bronzes: 'Benvenuto Cellini could not have cast them better and nobody else either, before or since Cellini [...]. These bronzes are technically of the highest quality possible'[561]. The result of the auction was the scattering of the collection in museums and private collections all over the world, making it almost inaccessible to the African public[562].

Nigeria's attempts since the early days of its independence to achieve the return of at least the most important pieces have met with little success. Initially, in order for the National Museum in Lagos, opened in 1957, to display some Benin exhibits the Federal Government bought them and brought them back to Nigeria as they came up for sale[563]. However, by the end of the 1960's, prices for the Benin bronzes had soared so high that the Nigerian Government could not afford to buy other pieces. Therefore, when a National Museum was planned for Benin City in 1968, only few objects were available for exhibition, clearly unsuitable to reflect the position held by Benin in the world art history.

Subsequently, an appeal was made through the ICOM for donations of few pieces from those museums which had large stocks of Benin artefacts[564]. The resolution, which was adopted after it was modified into a more general appeal for restitution or return, was circulated to the embassies and high commissions of countries known to hold such collections in Nigeria. However, no reaction came from any quarters and the Benin Museum remained 'empty'. The Government of Nigeria was therefore forced to compete at auction rooms in Europe to buy some Benin pieces. Still, the country can boast of less than 100 pieces of the famous artefacts, representing today the smallest collection of Benin bronzes after Berlin's *Ethnologisches Museum*, Vienna's *Museum für Volkerkunde*, London's British Museum, Chicago's Field Museum, Oxford's Pitt Rivers Museum (2,500

[561] F. von Luschan (1919), quoted by F. Shyllon, 'Restitution of Antiquities to Sub-Saharan Africa: The booty and the Captivity: A study of Some of the Unsuccessful Efforts to Retrieve Cultural Objects Purloined in the Age of Imperialism in Africa' (2015) 20 Art Antiquity & Law 369 370.
[562] *See ibid*, Appendix for a list of museums and private collections with significant holdings of Benin antiquities. Noticeably, they are all located either in Europe or in the U.S., except for three Nigerian museums and the Canterbury Museum in Christchurch, New Zealand.
[563] Eyo, 'Nigeria' (n 559) 21.
[564] *Ibid.*

and 393 pieces respectively), and, after the donation of the Perls collection, New York's Metropolitan Museum of Art[565]. Other initiatives at the governmental level followed in the 1990's[566], but were equally met with silence. This notwithstanding, Nigeria persisted in its 'quiet diplomacy' strategy, as the Oba himself called it[567].

At first, Nigeria's requests were unfruitful even when the direct cooperation of European cultural institutions was sought. Indeed, in 1977 Nigerian authorities requested the loan of an exquisitely crafted ivory pendant mask, currently at the he British Museum, which had been chosen as the emblem of a pan-African cultural festival to be held in Lagos[568]. The British Museum initially asked for an astounding £2 million insurance, to then argue that the mask was too delicate to move from its carefully controlled environment and eventually refuse the loan. The only choice, then, was to request the still-active guild of Benin craftsmen to produce a replica of the mask.

3.2 The Benin Dialogue Group

This notwithstanding, Nigeria has relentlessly continued to cooperate with Western museums, legitimizing magnificent temporary exhibitions of Benin artefacts. For instance, in 2007 the Oba of Benin was invited to write the Introductory Note to the catalogue of the exhibition 'Benin Kings and Rituals: Court Arts from Nigeria', taking place in Vienna's *Museum für Volkerkunde* and later touring the *Quai Branly* Museum of Paris, the *Ethnologisches Museum* of Berlin, and the Art Institute of Chicago. The Oba, a Cambridge-trained lawyer, attached to the request a heartful request for the return of some of the bronzes, reading:

> It is our prayer that the people and the government of Austria will show humaneness and magnanimity and return to us some of these objects which found their way to your country[569].

Finally, following this event Nigeria's requests were given some credit. The Museum of Ethnology in Vienna and the Nigerian National Commission for Museums and Monuments (NCMM) undertook an open dialogue on the accessibility of the art treasures of the Benin Kingdom to their people of origin and the Nigerian public. Subsequently, in

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[565] Shyllon, 'Restitution of Antiquities to Sub-Saharan Africa' (n 561) 379.
[566] *Ibid* 375; F. Shyllon, 'Unraveling History: Return of African Cultural Objects Repatriated and Looted in Colonial Times' in Nafziger, Nicgorski (eds), *Cultural Heritage Issues* (n 319) 163.
[567] J. Nevadomsky, 'The Great Benin Centenary' (1997) 30(3) African Arts https://www.jstor.org/stable/3337489?seq=1#page_scan_tab_contents accessed 21 June 2019.
[568] *Ibid* 371.
[569] Quoted in B. Plankensteiner (ed), *Benin Kings and Rituals: Court Arts from Nigeria* (Snoeck, 2007) 13.

a meeting in December 2010, they agreed to establish the Benin Dialogue Group as a platform for future cultural co-operation between Nigerian authorities and a consortium of European museums through regular meetings. In recent years, representatives from Austria, Germany, the Netherlands, Sweden and the United Kingdom have joined meetings of the Benin Dialogue Group and agreed to work with Nigerian authorities on the basis of an equal partnership.

The solution on which the Benin Dialogue Group is currently working on concerns the establishment of a permanent display of Benin works of art in Benin City, based on a system of three-years, rotating loans from all participating European museums, including the most iconic pieces[570]. European museums would further provide funds and technical assistance to support appropriate conservation and security conditions for the objects in Benin City, and a legal framework would have to be set up to ensure their immunity from seizure. On its part, Nigeria must guarantee the return of loaned objects after the fixed term. In the meeting following the establishment of these goals, held on 19 October 2018, the Group agreed on a set of practical proposals towards their achievement[571]. A Steering Committee was created, made up of representatives from the European museums and Nigerian authorities, to drive forward the undertakings made at the session. Moreover, European partners agreed, as the planning of the Benin Royal Museum proceeds, to 'provide advice, as requested, in areas including building and exhibition design' and to 'work collaboratively [with Nigerian partners] to develop training, funding, and legal frameworks to facilitate the permanent display of Benin works of art in the new museum'[572].

This seems a promising step towards finally settling the wrangling over the Benin art treasures. Indeed, while the Benin Dialogue Group has specified that the statement 'does not imply that Nigerian partners have waived claims for the eventual return of works of art

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[570] *See* G. Harris, 'Looted Benin Bronzes to be Lent Back to Nigeria' (2017) 294 The Art Newspaper, available at https://www.theartnewspaper.com/news/looted-benin-bronzes-to-be-lent-back-to-nigeria accessed 21 June 2019.

[571] 'Statement from the Benin Dialogue Group, Nationaal Museum van Wereldculturen, The Netherlands, 19 October 2018', available at https://www.volkenkunde.nl/en/about-volkenkunde/press/statement-benin-dialogue-group-0 accessed 21 June 2019; *see* B. Povolny, 'Benin Dialog Group: Building and Filling a New Museum in Benin', Cultural Property News https://culturalpropertynews.org/benin-dialog-group-building-and-filling-a-new-museum-in-benin/ accessed 21 June 2019; K. Brown, 'Europe's Largest Museums Will Loan Looted Benin Bronzes to Nigeria's Planned Royal Museum' Artnet News, 22 Oct 2018, https://news.artnet.com/art-world/benin-dialogue-group-ocotober-2018-1376824 accessed 21 June 2019; K. Monks, 'British Museum to Return Benin Bronzes to Nigeria', CNN, 14 Dec 2018, available at https://edition.cnn.com/2018/11/26/africa/africa-uk-benin-bronze-return-intl/index.html accessed 21 June 2019; A. Herman, 'Britain's Pillaging of the Benin Bronzes Begs for a Reasonable Resolution', The Art Newspaper, 21 Dec 2018 https://www.theartnewspaper.com/comment/law-restitution-and-the-benin-bronzes accessed 21 June 2019.

[572] 'Statement from the Benin Dialogue Group', *ibid.*

removed from the Royal Court of Benin, nor have the European museums excluded the possibility of such returns'[573], this might just not be a realistic alternative. Indeed, in the absence of any rule of international law compelling the return of Benin artefacts, museums which have cared for them and invested great human and economic resources in their conservation are unlikely to agree to their outright restitution. However, multi-lateral negotiations among all the parties concerned, including museums, cultural institutions, and government officials, may have allowed the 'logrolling' discussed above in this chapter. The arrangement being elaborated by the Benin Dialogue Group's seems to be a mutually acceptable and beneficial solution, providing meaningful access to Benin art to scholars, researchers and the general public of West Africa, on the one hand, guarantees of its correct preservation and return after a fixed term, on the other, and building upon future co-operative relations between the parties.

[573] *Ibid.*

CONCLUDING REMARKS

The international regime regulating the circulation of cultural property and the processes for its restitution or return in case of illicit apprehension or removal from the territory of a state has undeniably made some progress in recent decades towards enhanced effectiveness. On the one hand, though the restitution procedure laid out in the First Protocol to the 1954 Hague Convention has been substantially ineffective, on the side of the regulation of export from occupied territories the Hague system has proved a useful tool to assess the illicit provenance of objects, especially after the adoption of the Second Protocol in 1999.

On the other hand, despite its sometimes-confusing terminology and little participation from market states, the Unidroit Convention has represented a substantial advancement towards the harmonization of private international law. Moreover, it may be argued that it has played a role in prompting more states to adopt the 1970 UNESCO Convention, whose States Parties have doubled in number since the adoption of the Unidroit Convention in 1995[574]. Among them are some major art-market states, which had always refused to sign the UNESCO Convention fearing that it would hamper their flourishing art markets: France (ratified on 7 January 1997), United Kingdom (accepted on 1st August 2002), Japan (accepted 9 September 2002), Sweden (ratified 13 January 2003) and the Netherlands (accepted 17 July 2009).

Finally, at the European level it seems that the latest EU Directive 2014/60 is a step in the right direction towards the establishment of a clear procedure for States wishing to request the return of an object that they deem illicitly exported from their territory.

All the above notwithstanding, the application of legal rules to claims for restitution or return of cultural property has left much to be desired. As to potentially competent international tribunals, their practice in this field is very limited. On the one hand, this is due to the principle of consent which still informs the jurisdiction of most international courts, thus hindering the possibility to enter into the merits of many claims. On the other, those judicial bodies that have been established in the context of regional systems of human rights' protection or economic integration are mostly concerned with the promotion and

[574] UNESCO, 'Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Paris, 14 November 1970.' http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E accessed 21 June 2019.

advancement of the goals of their overarching regimes, thus neglecting the specificity of the interests connected to art-related disputes. Moreover, when inter-State disputes are at issue, diplomatic means of dispute settlement are generally preferred in order to maintain amicable relationships between the parties.

Litigating before domestic courts does not provide disputants with a much better option. Indeed, basing a claim before national judges on international treaty law presents a number of problems related to treaties' non-retroactivity and indirect applicability. Moreover, even when these problems are overcome, crucial issues of private international law have to be tackled, namely the identification of the competent jurisdiction and the determination of the applicable law. Especially the latter aspect may have unpredictable consequences, due to the greatly diverse levels of protection accorded by different legal systems to good faith purchasers and the reluctance of domestic judges to recognize and enforce foreign public law.

It has been pointed out that arbitration may allow to overcome these shortcomings, considering that it provides the parties with the possibility to choose the applicable material and procedural law. Other advantages of arbitration over litigation are that it may save the parties substantial time and economic expenses, as well as providing the possibility to appoint arbitrators with a specific expertise of the art sector. Lamentably, however, arbitration shares what is perhaps litigation's major pitfall in art-related disputes, which is ultimately linked to the judicial or quasi-judicial nature of these settlements. Indeed, being both methods of dispute resolution based on strict legal doctrine, they allow solely for black-or-white solutions, whereby the applicant's claim is either upheld and restitution is ordered, or it is fully rejected in favor of the defendant. No space for consultation and collaboration among the parties is allowed.

Such rule-oriented, adversarial-like approach is particularly inadequate in disputes over claims for the restitution or return of cultural property. As a matter of fact, the peculiar nature of cultural objects, linked to the cultural and emotional value that they hold in addition to the (seemingly ever-increasing) economical one, entails that contrasting interests to a specific object may be all, in a way, worthy of some consideration. Further, these claims may be based on substantial moral grounds rather on the violation of legal standards. For instance, Holocaust or colonial-related claims involve concerns that are more akin to those of reconciliatory transitional justice. Hence, a zero-sum settlement, only accommodating one of the concerned interests at the expense of the others, may be a highly frustrating outcome.

This is especially true in cases where the victorious party might consider arrangements other than outright restitution or return. A more efficient solution therefore requires a creative approach, taking into consideration all the interests at stake with a view to reach a mutually satisfactory arrangement. Such substantial creativity, however, requires on the formal side a shift towards less adversarial and more collaborative processes, focused on consultation and co-operation among the parties and allowing to take into consideration concerns other than the law.

For these reasons, judicial or quasi-judicial methods of dispute settlement, bound to the interpretation and application of strict law, are not the most efficient instruments to settle claims for the recovery of cultural property. By contrast, more flexible alternative dispute resolution (ADR) methods may provide for the necessary flexibility, allowing to reach creative solutions tailored to the concerns of the parties involved. Mediation is a particularly fitting instrument in this regard and is, indeed, increasingly popular in controversies for the retrieval of cultural objects. Its suitability for this kind of arrangements has been acknowledged by a number of international and non-governmental organizations, which have indeed promoted its employment through the establishment of specific, sector-oriented rules and procedures.

In any event, when relations among the parties allow so, direct negotiations are still the preferred option. Indeed, traditional negotiated settlements in the form of private agreements or international treaties have allowed even in recent years to settle in a mutually acceptable way many long-standing controversies. Further, more innovative legal techniques in the area of negotiation are being explored.

As a matter of fact, a number of disputes which saw states opposed to cultural institutions have been settled through the conclusion of agreements directly between the two, akin to what in investment law is referred to as 'State contracts'. These agreements, in addition to settling issues of return or restitution, provide a framework for further cultural and scientific co-operation, through loans, collaborative activities and exchange of scholars and researchers. Recently, this trend has evolved to engage cultural institutions in different countries to conclude agreements *among* them.

Especially the latter is a particularly promising method for claims from developing countries, where concerns as to preservation are involved and capacity-building is therefore warmly welcome. For instance, this path is being followed with regard to the well-known claim by Nigeria over the Benin bronzes, stemming from the infamous episode of the 1897 looting of Benin City by the British. In 2007, a consortium of European museums was

created in order to explore mutually acceptable solutions to Nigeria's claim over the precious artefacts. In 2017, the goal was established to create a Benin Royal Museum in Benin City, where a permanent display of Benin art should be achieved thanks to co-operation between European and Nigerian partners.

Not only does this seem to be a more realistic alternative to outright restitution, which museums that have long cared for Benin pieces may not be willing to accord. Also, it is pointless to have museums forcefully separate from their collections, like scholars have recently suggested that President Macron do with French museums' African collections[575], when it is as much in their African counterparts' interest to preserve good relations with them. A mutually satisfactory, re-pacifying solution, allowing to ease tensions between the parties should instead be the guiding light in addressing controversies related to the quest for justice for a painful past.

[575] *See* Nayeri, 'Museums in France Should Return African Treasures, Report Says' (n 1), stressing that 'the French report advises against such [long-term loan measures in favor of permanent restitution'. *See also* S. Vandoorne, L. Said-Moorhouse, 'France Urged to Return Looted Art and Amend Heritage Laws', CNN, 21 Nov 2018, available at https://edition.cnn.com/style/article/france-african-cultural-heritage-intl/index.html accessed 21 June 2019; R. Maclean, 'France Urged to Change Heritage Law and Return Looted Art to Africa', The Guardian, 21 Nov 2018, available at https://www.theguardian.com/world/2018/nov/21/france-urged-to-return-looted-african-art-treasures-macron accessed 21 June 2019.

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