

STUDY

Requested by the JURI committee

Cross-border claims to looted art



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Abstract

This study addresses cross-border restitution claims to looted art, considering Nazi-looted art and colonial takings, but also more recent cultural losses resulting from illicit trafficking. Although these categories differ considerably, commonalities exist. The study highlights blind spots in the legal and policy frameworks and formulates recommendations on how these could be bridged.

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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AAMD	Association of Art Museum Directors
CAfA	Court of Arbitration for Art
CECOJI	Centre d'Etudes sur la COopération Juridique Internationale
CESCR	Committee on Economic, Social and Cultural Rights
CIVS	Commission pour l'indemnisation des victimes de spoliations intervenues du fait de législations antisémites en vigueur pendant l'Occupation
CNRS	Centre national de la recherche scientifique
CoE	Council of Europe
CULT	Culture and Education
EC	European Commission
EEC	European Economic Community
EU	European Union
EP	European Parliament
EPPO	European Public Prosecutor's Office
EVCA Civ	England and Wales Court of Appeal (Civil Division)
HRC	Human Rights Council
HEAR	Holocaust Era Art Recovery Act
ICOM	International Council of Museums
ICPRCP	Intergovernmental Committee for Promoting the Return of Cultural Property
MENA	Middle East and North Africa
NAI	Netherlands Arbitration Institute
OJ	Official Journal

SHERLOC	Sharing Electronic Resources and Laws on Crime
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNIDROIT	International Institute for the Unification of Private Law
UNSC	United Nations Security Council
US	United States
TFEU	Treaty on the Functioning of the European Union
WIPO	World Intellectual Property Organization

EXECUTIVE SUMMARY

Cultural objects have a protected status in international law and their pillage and destruction is prohibited. Today, the importance of protection of cultural heritage has been acknowledged as a matter of peace and security; criminal justice; fundamental human rights; and the sustainable development of societies. Nevertheless, around the world and throughout history cultural objects have been, and are still being, looted. This causes great harm to those individuals, groups and communities who were deprived of their heritage. Moreover, especially if the looting took place in the course of persecution or other human rights violations, over time such objects may turn into symbols of a (lost) cultural identity or of a (lost) family history. Restitution of looted cultural objects, therefore, is not merely a matter of ownership and (domestic) private law but a matter of global policy and fundamental rights.

This study addresses the main obstacles related to cross-border restitution of looted art, considering historical losses such as colonial takings and Nazi-looted art, but also more recent cultural losses resulting from illicit trafficking.

Different models

Different models for such claims exist. The traditional public international law and private law mechanisms to resolve claims have serious shortcomings, mostly because dispute resolution takes place at the national level; ownership laws differ widely; and international treaties aimed at harmonization only have effect in as far they were adopted and implemented. The 'ethical model', based on non-binding 'soft law' instruments, also has important drawbacks, most notably the absence of neutral mechanisms for dispute resolution and, consequently, vague notions of what exactly *is* 'unlawful looting'. Over the last few years, two trends can be witnessed in cultural heritage law: 'humanization' and 'criminalization' – both of which have implications for the field of restitution. In that sense, two more models exist, namely a human rights' model, where restitution is seen as a reparation for a violation of human rights; and a criminal law model, where restitution is facilitated following seizure after a violation of an import or trade ban of looted artefacts.

Common problems

The various categories of claims addressed in this study differ considerably but commonalities exist. Two common problems are: (i) a lack of clear standards and procedures to address and resolve title issues, and (ii) the fact that cultural objects can be traded and possessed without documentation demonstrating their lawful provenance (ownership history), making it difficult to distinguish between artefacts that were unlawfully looted or lawfully obtained. These factors cause for a reality where looted artefacts may be owned lawfully, which complicates restitution.

Recommendations

Against this background, the following recommendations are made:

1. Introduce mandatory due diligence standards for the trade

Making transactions dependent on minimum standards of documentation on their provenance will encourage provenance research and discourage future transactions that involve cultural objects with a tainted provenance. An example of such mandatory due diligence standards can be found in the German Cultural Property Protection Act of 31 July 2016. A logical way to regulate this would be to include such mandatory due diligence standards for the trade – in combination with a registration

obligation as proposed under (2) – in a revised version of Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State.

2. Develop a central registration system

Registration of cultural objects is not only essential for their traceability and to prevent looting, but also for restitution efforts. Setting up a registration system has many aspects and could be done in various ways: the entry into force of the licensing system in EU Import Regulation 2019/880 appears to be the logical moment to set up a comprehensive registration system. In the same spirit, museums should be supported to have (digital) inventories of their collections, and a certification system should be considered for art market professionals.

3. Set up a knowledge-centre for provenance research

The measures above will result in the increased attention to provenance research, and this implicates that expertise is needed to assess what is a 'good' provenance. In this context, the establishment of a permanent knowledge centre - or at the minimum a permanent academic network - for provenance research is recommended.

4. Set up a central ADR mechanism

In light of the institutional vacuum in European jurisdictions for (many) restitution claims that concern past looting, the establishment of a European (ADR) claims procedure should be considered. This is a public task and would also meet the obligation that states have taken upon themselves – by signing instruments like the Washington Principles and the UNDRIP – to develop neutral and accessible procedures to ensure that promises about justice are upheld.

5. Set up an EU Agency for cultural objects

A pragmatic and integrated approach to address the above-mentioned tasks would be to do so by the establishment of an EU agency, or embed this task in an existing agency in a related field (e.g., EUIPO). Logically, the licensing system envisaged in the EU Import Regulation 2019/880 needs to be accompanied by the establishment of a clearance system to address the problems that will surface regarding cultural objects without a clear provenance. Such an organisation should provide for neutral and transparent procedures to assess title and provenance issues, but beyond that could set up/coordinate a knowledge centre for issues relating to provenance research; a central registration system; a transparency register for *unprovenanced* cultural objects; a certification system for art market professionals.

The main message here is that the present institutional vacuum in terms of access to justice, coordination and compliance needs to be addressed at the EU level.

6. Further measures

- To prevent the looting and smuggling of cultural objects in the future, criminalizing their trafficking and setting minimum penalties is crucial. Given the cross-border nature of this crime, the EU should take a coordinating role and EU Member States should consider acceding to the 2017 Nicosia Convention.
- To avoid stagnation of the art market and cultural objects from going 'underground', consider setting up a transparency register for unprovenanced cultural objects ('orphan objects') and regulate the notion of 'safe havens' for artefacts that can (temporarily) not be returned.

- Support the funding of (digital) inventories and provenance research by museums.
- Promote adherence by Member States to the obligations concerning Indigenous cultural property in UNDRIP, and, more generally, promote the participation of source communities in decisions concerning their cultural objects.
- Raise awareness and support education programmes on cultural heritage protection and regulations: if rules are not known they will not be followed or enforced.
- Support the adoption of the *lex originis* – whereby title issues are governed by the law of the country of origin or discovery rather than the law of the country where the object is located – as a special conflict of law rule for cross-border claims to cultural objects, and set up an accessible database of national laws (or support an update of the existing UNESCO database).
- Keep this topic on the agenda and periodically monitor developments.

In sum, public guidance at the EU level is urgently needed for a successful transition from a market with many grey areas to a transparent and licit art market. Measures in that regard would not only serve the interests of former owners but of *all* stakeholders, and help safeguard the cultural heritage of all people.

1. BACKGROUND

1.1. Introduction

Cultural objects have a protected status in international law and pillage and destruction is prohibited. Today, the protection of cultural heritage has been acknowledged as a matter of peace and security; criminal justice; fundamental human rights; the sustainable development of societies.¹ More generally, cultural heritage – the 'cultural capital' inherited from the past, which people consider as an expression of their evolving values, beliefs, knowledge and traditions' –, is essential for societal well-being.²

Nevertheless, around the world and throughout history cultural objects have been, and are still being, looted.³ This causes great harm to those individuals, groups and communities who were deprived of their heritage. Moreover, since cultural objects are meant to be preserved and passed on to new generations, over time such objects may turn into symbols of a cultural identity or (lost) family history, especially if the looting took place in the course of persecution or other human rights violations. Restitution of looted cultural objects, in other words, is not merely a matter of lost possessions and private law but of fundamental rights. The commitment by 150 states in the 2022 MONDIACULT declaration to fight the illicit trafficking but also to 'expand efforts to promote the return and restitution of cultural property', highlights that, today, restitution also is a matter of urgent global policy.⁴

This study (an in-depth analysis) is meant as an update for the European Parliament JURI Committee in its active dealings with this topic. It addresses legal difficulties related to cross-border restitution of looted art, considering historical cultural losses such as colonial takings and Nazi-looted art, but also more recent cultural losses resulting from illicit trafficking. As a background to this study, what follows first is a paragraph on the scope of this study – also introducing the various categories of claims –, some words on terminology, and a listing of earlier studies and resolutions on the topic (1.2). An overview of the full study is given in 1.3.

1.2. Background to the study

1.2.1. Scope and categories

The scope of this study is broad. The terms of reference seek answers to questions surrounding historical losses such as colonial takings and Nazi-looted art, as well as to questions concerning present-day looting. These different categories often are perceived as self-contained categories, and indeed there are important differences between them.

The background to the category of Nazi-looted art is the wide-scale looting by the Nazi's during the Second World War, most notably from Jewish owners in the course of genocide. In the late 1990s the apparent injustice for deprived families, who lost their family heirlooms that were found on museum walls, but whose claims are often categorised as stale under the application of regular law, came back

¹ E.g., the [Conclusions \(EU\) No 9837/21 of the Council of the European Union on EU approach to cultural heritage in conflicts and crises](#), 21 June 2021.

² See [ESPON \(2022\) HERIWELL](#) – Cultural Heritage as a Source of Societal Well-being in European Regions, Final Report (June), p. 11.

³ For more on the term 'looting', see hereafter 1.2.1 (a).

⁴ UNESCO World Conference on Cultural Policies and Sustainable Development – [MONDIACULT 2022 \(28-30 September 2022, Mexico City\), Final Declaration](#), under (10) v., adding that this would be 'in consultation with the populations concerned and with their free, prior and informed consent.'

on the political agenda. In 1998 in Washington D.C. over 40 states adopted the so-called Washington Conference Principles on Nazi-Confiscated Art, which introduced the now internationally recognised standard for claims thereto, i.e., that former owners or their heirs are entitled to a 'just and fair solution', depending on the specific circumstances of each case.⁵ Such claims mostly concern Western-European artefacts in public and private collections.

Restitution claims that concern colonial takings are another category of 'historical claims' that should be addressed in this study, and find their origin in European imperialism. Given the long period of this era, this potentially concerns a very broad category. Although already in 1973 the UN General Assembly had adopted a Resolution 'on restitution of works of art to countries victim of expropriation', only recently have Western holding states started to address this issue.⁶ In 2017, French President Macron broke the silence on the lingering issue of return in a now-famous speech in which he stated that 'it is no longer acceptable that most of Africa's cultural heritage is in Europe'.⁷ This turned out to be the starting signal for heated debates on the topic, and for other Western holding states to also develop policies to enable the return of colonial takings. For the moment, restitution claims in this category mainly focus on ethnological collections in major museums.

The third category concerns present-day looting of cultural objects and the related topic of illicit trafficking. This often relates to so-called 'conflict antiquities' (cultural objects looted during war and foreign occupation). In light of the fact that 'where there is a war, there is looting', as experts note, it may be clear that this category is also broad. Especially 'portable antiquities', such as archaeological finds and elements of monuments, are prone to looting, as witnessed in conflicts in the Near and Middle East (Iraq, Libya or Syria), but also Yemen, and earlier in Northern Cyprus or Cambodia, for example.⁸ This also means that looted cultural objects from Ukraine – home to vast archaeological sites – will probably surface on the EU-market in the near future, or circulate already.⁹ In light of recent seizures of looted Ukrainian antiquities in the US, this is highly likely.¹⁰

Regulation in this field traditionally was a matter of humanitarian law and focused on prevention in source countries and on criminalization of those directly responsible for the looting. However, the demand-side of the chain has come under scrutiny and is recognized as an important instigator of looting ('where there is a demand there is an offer'). Such newer regulations focus on the illicit trafficking more generally – without distinction between objects looted from war-zones or from other areas, as this can often not be determined. In line with these regulations, this study will not make that strict distinction either.¹¹

⁵ Principle VIII of Washington Conference Principles on Nazi-Confiscated Art released in connection with the Washington Conference on Holocaust – Era Assets, 3 December 1998, Washington, DC.

⁶ UN General Assembly Resolution 3187 UN Doc A/RES/3187 (XXVIII), adopted 18 December 1973.

⁷ Macron, E., President of the French Republic, [Speech at the University of Ouagadougou](#), Burkina Faso, 28 November 2017.

⁸ E.g., ['The Looting of Cultural Heritage in Occupied Cyprus \(Department of Antiquities, Republic of the Republic of Cyprus\)'](#).

⁹ For more on looting in Ukraine, see Campfens, E., Jakubowski, A., Hausler, K. et al., ['Protecting cultural heritage from armed conflicts in Ukraine and beyond – Research for CULT Committee'](#), European Parliament, Directorate-General for Internal Policies of the Union, PE 733.120, 2023, e.g., pp. 19 and 95.

¹⁰ See ['Secretary Mayorkas Delivers Remarks at Ukrainian Cultural Artifacts Repatriation Ceremony'](#), 21 September 2023.

¹¹ E.g., the new EU import regulation lets go of this distinction. [Regulation \(EU\) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and import of cultural goods](#), OJ L 151, 7.6.2019. See hereafter, 2.2.3.

1.2.2. Common problems

Despite the differences, all these categories concern involuntarily lost ('looted') cultural objects (also: cultural goods or cultural property).¹² These categories also have two major problems in common, the first problem being that the legal framework for restitution is highly fragmented which means that standards are not always clear. A second problem is caused by the fact that the ownership history of cultural objects (their provenance), and thus the unlawfulness of the initial loss, often does not 'stick' to objects. For long, artefacts have been able to circulate on the market without documentation about their provenance, and this is still commonplace. Moreover, very often they are not even (well) registered and this makes identification after a loss difficult.¹³ For an understanding of the infrastructure of the art world and blind spots in the system, it is important to highlight this reality already here. These will be recurring topics that inform the recommendations in Chapter 5.

1.2.3. Terminology

Looting

As will surface in the following chapters, there are important differences between the normative (i.e., legal, and ethical) regimes for these different types of claims, although distinctions are not as clear-cut as they may seem. The term 'looting', for example, is traditionally used to describe the unlawful appropriation of a cultural object in a setting of armed conflict or foreign occupation (also: pillage).¹⁴ Today, it is also widely used also for the unlawful excavation or export of cultural objects, irrespective of a situation of war or foreign occupation (i.e., illicit trafficking), as touched upon above. Apart from such *unlawful* takings however, the term 'looting' has also come to include losses that today are considered *unjust*, not per se unlawful. For example, the term 'Nazi looting' is used for confiscations at the hands of German authorities of their own citizens, which under then-contemporary German law was lawful, and this similarly is used for involuntary (but not per se unlawful) losses under colonial rule. Such expropriations in the course of genocide or racial discrimination may be qualified as grave violations of international law that call for reparations.¹⁵ Beyond such expropriations also involuntary (forced) sales (without 'free, prior and informed consent' of the owners in a situation of power imbalance) today are often categorized as 'looted art'.

Such developments are an indication of the evolving law. Whilst international law first regulated restitution after looting in the specific situation of a formal war under the laws of warfare, with the adoption of the 1970 UNESCO Convention the term 'looting' became mainstream for any unauthorised export of cultural objects, and today has come to include losses that were the consequence of persecution or racist (colonial) policies.

¹² See the general definition of 'cultural property' given in Art. 1 of the 1970 UNESCO Convention and in Art. 2 of the 1995 UNIDROIT Convention ('cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art') referring to the criterion of the value of cultural property. An 'artefact' can be seen as a sub-category of cultural objects/cultural goods/cultural property.

¹³ Information on the provenance is often unknown, but that good registration is also often lacking is highlighted by a recent scandal of a series of unnoticed thefts of *undocumented* artefacts from the British Museum. See, Batty, D., '[Artefacts stolen from British Museum 'may be untraceable' due to poor records](#)', *The Guardian*, 25 August 2023.

¹⁴ *Dictionnaire comparé du droit du patrimoine culturel* defines 'looting' as the appropriation of goods by force or by constraint in the event of a national or international armed conflict, see Cornu, M., Fromageau, J., Wallaert C. (eds), *Dictionnaire comparé du droit du patrimoine culturel*, Paris: CNRS Éditions, 2012.

¹⁵ Vrdoljak, A. F., 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity', *The European Journal of International Law*, 2011, 22(1), pp. 17–47.

In the present context the term 'looting' will be used as a general term for instances of involuntary loss, in line with its use in the terms of reference of this study and the Resolution of 17 January 2019 of the European Parliament on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars.¹⁶

Restitution

In a similar vein, the term 'restitution', traditionally used for the return of full ownership after an unlawful act, today is also used as a generic term for claims that fall short of a claim of full ownership. For example, resolutions concerning claims to Nazi-looted art often take the form of a sharing in the sales proceeds between the present owner and the heirs of the former owner, and the rule here is indeed to search for an equitable solution ('fair and just, according to the specific circumstances of the case', in the words of the 1998 Washington Principles). As indicated above, such claims are also not restricted to *unlawful* takings, but include appropriations that today are seen as *unjust*. This all indicates that the norms are changing in this field.

In this sense, the development of a human rights' model for restitution claims, that focuses on present-day interests instead of on the unlawfulness of the taking in the past, is promising for a further evolution of the legal framework (discussed in Chapter 4). For now, however, the law remains unsettled in this field and standards on what qualifies as 'unlawful looting' for which an equitable solution or restitution is warranted is far from clear, whilst pragmatic solutions need to be found to address the evident injustices in this field. It is for that reason that this study will focus on such pragmatic solutions in the recommendations, not per se on legal measures.

1.2.4. Resolutions and studies

This study does not stand by itself: it is a follow-up of two Resolutions on the topic by the European Parliament and two earlier studies. In fact, already in 2003 the European Parliament adopted a resolution on the topic, and in 2016 and 2017 the JURI Committee of the European Parliament commissioned two studies: a study by Prof. Renold on 'Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations' (hereafter the '2016 EP Study')¹⁷; and a study by Prof. Weller on 'Cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars with special regard to aspects of private law, private international law and civil procedure' (hereafter the '2017 EP Study').¹⁸ In the meantime, the European Commission also carried out several studies in the field of the illicit trade in cultural goods. Furthermore, and most importantly, in 2019 the European Parliament adopted its resolution, already mentioned above, on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars (the '2019 EP Resolution').

¹⁶ [Resolution \(EP\) of 17 January 2019 on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars \(2017/2023\(INI\)\)](#), OJ C 411, 27.11.2020.

¹⁷ Renold, M.-A.; '[Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations](#)', European Parliament, Directorate for Citizens' Rights and Constitutional Affairs, Committee on Legal Affairs and the Internal Market, PE 556.947, 2016.

¹⁸ Weller, M., 'Study on the European added value of legislative action on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars with special regard to aspects of private law, private international law and civil procedure', Annex 1 to Salm, Ch., '[Cross-border Restitution Claims of Looted Works of Art and Cultural Goods: European Added Value Assessment. Accompanying the European Parliament's Legislative Initiative Report](#)' (Rapporteur: Pavel Svoboda), European Parliamentary Research Service, European Added Value Unit, PE 610.988, 2017.

These resolutions and studies will surface throughout this study, mainly in Chapter 5 where the recommendations will be set out in light of the actions foreseen in the 2022 EU Action Plan against Trafficking in Cultural Goods and the 2019 EP Resolution.¹⁹

1.3. Overview of the study

The purpose and scope of this study does not allow for a full analysis of the particularities of the separate categories or a thorough analysis of the relevant legal and policy frameworks. Instead, it will focus on common problem. In that regard, and as input for the recommendations in the last Chapter (5), Chapters 2-4 will render a bird's eye overview of the rapidly evolving normative framework for restitution claims and its blind spots and discuss different models to address such claims.

Chapter 2 will start with an overview of the conventional model based on international treaties and domestic private law, after which Chapter 3 addresses the 'ethical model' that finds its basis in non-binding soft-law and is particularly relevant for claims to Nazi-looted art and colonial takings. Chapter 4 will then discuss relevant developments in this field and introduce two more models for restitution, namely a human rights' model – important for historical cases of looting; and the criminal law model – that is indirectly, but in important points relevant to for restitution claims and is a factor underlining the increased importance of provenance research. Chapter 5 will conclude with a summary of findings and a set of recommendations. For this study a number of experts (listed in Annex 1) were consulted on the question what is needed in the field of restitution today, which provided valuable insights for the recommendations.

¹⁹ [Communication COM\(2022\) 800 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Action Plan against Trafficking in Cultural Goods](#), 13 December 2022., p. 4.

2. THE LEGAL FRAMEWORK

KEY FINDINGS

- Cultural objects are protected in international law, looting and destruction is prohibited and cultural objects should be returned after looting, both in times of conflict and in times of peace.
- Nevertheless, treaties that codify this norm only apply (directly) to claims after implementation of restitution obligations at the national level.
- The fragmentation of the legal framework is an incentive to illicit trafficking.
- Private laws differ widely per jurisdiction, notably between the US and European jurisdictions – with the effect that European claims find their way into US courts.
- The *lex originis* is, increasingly, the preferred conflict of law rule for restitution claims.
- The tradeability of looted objects will be limited by making transactions dependent on minimum standards of documentation of a lawful provenance through the introduction of mandatory due diligence standards.

2.1. Introduction

Cultural objects have a multifaceted nature. On the one hand, they can be seen as possessions: the commodification of cultural objects may be as old as time itself, and this is expanding as a result of globalisation and the possibilities of (anonymous) sales over internet. On the other hand, cultural objects can be approached as heritage: their intangible value is what sets them apart from other goods. That intangible value is by no means a static notion: an artefact may be valued because of its (art) historical value, but at the same time it may be of spiritual, cultural, or historical importance to a community or nation, or symbolic as family heirloom. This wide variety of interests means that many fields of law may interact and overlap: fragmentation lies at the core of what causes restitution claims to be so complex. In broad terms, private law norms address cultural objects as possessions, and public law norms address the intangible heritage interests at stake. This chapter will analyse the legal framework for cross-border claims to cultural objects based on that distinction.

2.2. International law: protected heritage

Cultural objects have a protected status in international law because of their intangible heritage value to people – as symbols of their identity. It is precisely this identity that is often targeted in looting and plundering practices. The Arch of Titus in Rome, depicting the spoils taken after the sacking of the Temple in Jerusalem on the cover of the study, is a textbook example of this scenario. Identity was also at stake in Nazi-looting practices and, similarly, in the colonial context. European powers, for example, justified their presence in Africa by referring to their religious duty to bring to the 'natives' the 'blessings of civilization.'²⁰

²⁰ Art. 6 of General Act of the Berlin Conference on West Africa, 26 February 1885.

That being so, it is remarkable how old the notion is that harming other people's cultural objects is uncivilised. Early examples of Hindu, Muslim, precolonial African, and Japanese rules protecting sites and objects of spiritual and cultural significance illustrate its global nature.²¹ In the European setting, this rule gained legal importance through the writings of the founders of international law, such as Hugo Grotius and Emer de Vattel.²² Although this prohibition certainly did not always prevail, it found its way into the first legal instruments on the laws of war the 1899 and 1907 Regulations concerning the Laws and Customs of War on Land, where Article 56 read:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.²³

After the Second World War the obligation to return cultural objects in violation of this prohibition to pillage in times of war was generally acknowledged as having (binding) customary status.²⁴ That rule was also at the basis of the interstate Allied (external) restitution program, arranging for the return of artefacts taken by the Nazi's from occupied territories to the countries from where these were taken.

2.2.1. 1954 Convention and Protocols

The 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict – the first international convention dedicated to the protection of cultural heritage – obliges states to respect cultural property, and 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', and to 'refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party'.²⁵ The obligation to return cultural objects taken in violation of these provisions is provided for in a separate Protocol of the same year.²⁶ After the Balkan conflicts, where cultural heritage was deliberately targeted, in 1999 a Second Protocol was adopted that extends protection to armed conflicts *not* of an international character and, in addition, establishes obligations to adopt measures to suppress the 'illicit export or other removal or transfer of ownership of cultural property from occupied territory'.²⁷ States parties, in other words, are obliged to act when cultural objects from conflict zones circulate on their markets.

²¹ Referred to by Bugnion, F., ['The Origins and Development of the Legal Protection of Cultural Property in the Event of Armed Conflict, 50th Anniversary of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict'](#), International Committee of the Red Cross, Geneva, 2004.

²² Usually, Grotius is quoted confirming the rights to spoils; however, this is his 'moderation' in Chapter XII of Book III of R. Tuck (ed.) *The Rights of War and Peace*, from the edition by J. Barbeyrac, Indianapolis: Liberty Fund, 2005, vol. 3, pp. 1466–1467.

²³ 1907 Hague Convention was the first multilateral treaty. An earlier version with almost the exact wording was adopted in 1899 Convention (II) with Respect to the Laws and Customs of War on Land, and its annex: Regulations concerning the Laws and Customs of War on Land, adopted 29 July 1899.

²⁴ Generally, scholars argue that there was an emerging customary rule in the nineteenth century. For an overview Campfens, E., *Cross-border title claims to cultural objects: property or heritage?*, The Hague: Eleven International Publishing, 2021, pp. 149-151.

²⁵ Art. 4 of 1954 UNESCO Convention.

²⁶ First Protocol to the 1954 UNESCO Convention, adopted 14 May 1954, entered into force 7 August 1956. In July 2021, 110 states ratified the 1954 Protocol.

²⁷ Art. 22 of the Second Protocol to the 1954 Convention, adopted 26 March 1999, entered into force 9 March 2004. In July 2021, 84 states ratified the 1999 Protocol.

In the context of this study – and in light of the difficulties of identifying objects as being unlawfully exported (looted) – it is noteworthy that under this system **States are expected to prepare inventories of museum collections.**²⁸ If artefacts are not documented, it is impossible to identify, trace, and return them: this is true beyond just museum collections and gives a basic insight that underlies many of the practical problems in the application of legal rules.

2.2.2. 1970 UNESCO Convention

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention) extends the protection of cultural heritage beyond a situation of armed conflict.²⁹ This was the answer by the international community to the one-way flow of cultural objects from culturally rich but economically weak 'source countries' to Western 'market countries', and the product of long negotiations. Although the provisions on restitution are known for their ambiguous wording, adoption of the 1970 UNESCO Convention nevertheless is key to the development of standards on restitution.³⁰ In that sense, its entry into force – in 1972 – is often considered as *the* watershed moment: since then export without the authorisation of the source country is unlawful, although earlier looting (i.e., takings against the country of origin's legislation) would not be covered by clear legal standards – and therefore 'lawful'. That last point of view is obviously not supported by countries that were victim of looting practices before that time, and thus is challenged by recent practice (which is discussed more in 2.3.4 and 4.2).³¹

The 1970 UNESCO Convention provides for the general rule that export of cultural property from the territory of a Member State, designated 'as being of importance for archaeology, prehistory, history, literature, art or science', without its authorization is illicit, and states should cooperate for their return and, in that sense, adopt preventive measures. Today, 143 states have ratified or acceded to the Convention, including all EU Member States except Ireland and Malta, and its main principle is referred to in many later instruments. For museums, for example, the ICOM Code of Ethics for Museums (under 7.2) presents the 1970 UNESCO Convention as a minimum standard for museum practice.³²

The 1970 UNESCO Convention is non-self-executing and non-retroactive: it only applies after both states are party to the Convention and only to the extent that the principles are translated into national law.³³ This results in a system in which the legal status of looted cultural objects depends not only on the protected status in the source country, but also on the *moment* of loss, the *ratification* by both states, and on the *implementation* of the return principles in the domestic law of the destination (or transfer) country. In the absence of uniform standards, states have also taken different approaches. Some countries adopted a model of reciprocity whereby export prohibitions are only accepted if the

²⁸ Art. 3 of 1954 UNESCO Convention, and Art. 5 of the Second Protocol.

²⁹ 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted 14 November 1970, entered into force 24 April 1972.

³⁰ For a comprehensive commentary, see Vrdoljak, A. F., Jakubowski, A., and Chechi, A., *The 1970 UNESCO and 1995 UNIDROIT Conventions on Stolen or Illegally Transferred Cultural Property. A Commentary*, Oxford: Oxford University Press (forthcoming 21 December 2023).

³¹ Art. 15 of the 1970 UNESCO Convention implicitly acknowledges this by providing that in spite of its non-retroactivity '(n)othing in this Convention shall prevent State Parties thereto from concluding special agreements ... regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned'.

³² As the 'ICOM Code of Professional Ethics', the Code was adopted by the 15th General Assembly of the International Council of Museums on 4 November 1986, and was renamed and revised in 2004. See [ICOM Code of Ethics for Museums](#), Paris, 2017.

³³ Art. 21 of 1970 UNESCO Convention.

other country does the same; others a model where additional bilateral agreements are needed (e.g., US, Switzerland, Egypt); and yet other countries have a system that prohibits the import or trade of cultural objects that lack an export licence (e.g., the 2018 Palestinian law). An interesting model, that provides for a comprehensive system, is the 2008 Lebanese Law stipulating that on import of antiquities a custom declaration is mandatory, which is also needed for re-exportation or a sale.³⁴

Insofar as concerns preventive measures as requested in Article 13 of the 1970 UNESCO Convention such as import prohibitions, market states until very recently mostly adopted a *laissez-faire* policy: implementation of the 1970 UNESCO Convention mostly focused on the designation and protection of each country's own cultural heritage.³⁵

2.2.3. EU Law

EU Import Regulation 2019/880

In the EU, this changed with the introduction of Regulation 2019/880, which introduces a general import prohibition:

[T]he introduction of cultural goods ... which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited.³⁶

The preamble highlights the reasons for such (general) prohibition, namely that:

Pillaging of archaeological sites has always happened, but has now reached an industrial scale and, together with trade in illegally excavated cultural goods, is a serious crime that causes significant suffering to those directly or indirectly affected. ... As long as it is possible to engage in lucrative trade in illegally excavated cultural goods and to profit therefrom without any notable risk, such excavations and pillaging will continue. Due to the economic and artistic value of cultural goods they are in high demand on the international market. The absence of strong international legal measures and the ineffective enforcement of any measures that do exist, lead to the transfer of such goods to the shadow economy. The Union should accordingly prohibit the introduction into the customs territory of the Union of cultural goods unlawfully exported from third countries, with particular emphasis on cultural goods from third countries affected by armed conflict.³⁷

In terms of enforcement the Regulation does not entail systematic controls. It does, however, foresee a licensing system, to be effective as of June 2025, that relies on documentation of the importer on the provenance (ownership history) of cultural objects. This can be an export license from the country of origin or discovery, but in certain cases proof that the object was outside of its country of origin *before* 1972 – the year the 1970 UNESCO Convention entered into force – may be sufficient, which effectively confirms the '1970-rule' (see further 4.2). The reason for this, according to the preamble, is that:

³⁴ Art. 17 and 18 Lebanon Law N. 37 regarding Cultural Property, 2008. An import of listed cultural objects 'from a State with which Lebanon has diplomatic relations ... without the express agreement of the State in question ... are seized and returned to their original owner ...' Fraoua, R., ['Legislative and institutional measures to combat trafficking in cultural property in Arab States: background paper for participants in the Second Meeting of States Parties to the 1970 Convention UNESCO Headquarters'](#), Paris, 2012.

³⁵ The US and Switzerland restrict import if additional bilateral agreements are concluded. Canada imposed import restrictions (since 1985); Germany (since 2016), and the EU as a whole since the EU Import Regulation 2019/880.

³⁶ [Regulation \(EU\) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and import of cultural goods](#), OJ L 151, 7.6.2019, pp. 1–14.

³⁷ *Ibid.*, preamble (3).

The legality of export of cultural goods should be primarily examined based on the laws and regulations of the country where those cultural goods were created or discovered. However, in order not to impede legitimate trade unreasonably, a person who seeks to import cultural goods into the customs territory of the Union should, in certain cases, be exceptionally allowed to demonstrate instead the licit export from a different third country where the cultural goods were located before their dispatch to the Union. That exception should apply in cases where the country in which the cultural goods were created or discovered cannot be reliably determined or when the export of the cultural goods in question took place before the 1970 UNESCO Convention entered into force, namely 24 April 1972. In order to prevent circumvention of this Regulation by simply sending illicitly exported cultural goods to another third country prior to importing them into the Union, the exceptions should be applicable where the cultural goods have been located in a third country for a period of more than five years for purposes other than temporary use, transit, re-export or transshipment.³⁸

Intra-EU restitution: Directive 2014/60

The 1970 UNESCO Convention is also the basis of the EU's system for the return of cultural objects that, after 1993, were unlawfully removed from the territory of another Member State (Directive 2014/60).³⁹ Given the introduction of the single market, it was meant to address the fact that 'national treasures' (as these are rather restrictively defined) that are exempt from free trade on the basis of Article 36 of the Treaty on the Functioning of the European Union (TFEU), could nevertheless easily leave the country.⁴⁰

A recent denial by the Dutch Supreme Court of a claim by Sweden based on the 2014 Directive, to an antique manuscript, stolen from the Swedish Royal Library and found in the hands of a Dutch dealer, illustrates the obstacles for restitution even within the EU.⁴¹ In spite of regulations at the international or EU level that aim to prevent ownership of and/or title to looted cultural objects from passing on to new possessors, private law in the other jurisdiction often stands in the way to restitution. In this particular case, the claim was dismissed because of a lapse of the (short) limitation periods. However justifiable such outcomes may be in individual cases and in the light of the applicable domestic law, this confirms the idea that theft or looting of cultural objects pays off.

2.3. A private law approach: Lost possessions

While cultural objects may be protected as 'heritage', they can also be traded and owned and, as such, are subject to property law regimes. Traditionally, this a matter of national sovereignty.⁴² Ownership can be defined as 'the greatest possible interest in a thing which a mature system of law recognises'.⁴³ Apart from this common feature, major differences exist, most notably between common law (US and

³⁸ Ibid., preamble (8).

³⁹ [Directive 2014/60 of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation \(EU\) No 1024/2012 \(Recast\)](#), OJ L 1159, 28.5.2014, pp. 1–10, replacing [Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State](#), OJ L 74, 27.3.1993, pp. 74–79.

⁴⁰ Art. 36 of the TFEU exempts from free trade 'national treasures possessing artistic, historic or archaeological value'.

⁴¹ HR 10 februari 2023, ECLI:NL:HR:2023:200. On the basis of Art. 3:310a (old) Dutch Civil Code, based on Council Directive 93/7/EEC.

⁴² Within the EU Art. 345 of the TFEU regulates that: 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. See Treaty on the Functioning of the European Union (Consolidated version), OJ C 326, 26.10.2012, p. 194.

⁴³ Dromgoole, S., *Underwater Cultural Heritage and International Law* (Cambridge Studies in International and Comparative Law), Cambridge: Cambridge University Press, 2013, p. 96.

UK) and civil law jurisdictions (most European countries), with many variations on the theme of whether, how, and when title over a (stolen) good can be transferred to a new possessor.⁴⁴ Where misappropriated *cultural* property is concerned, the situation becomes even more fragmented, as stolen artefacts tend to surface only years or decades later, by which time they may have crossed many borders. At that point, private international law should guide judges to a just outcome. Two problems occur at this level. First, ownership disputes regarding movable goods are normally regulated by the law of the country where the object is located at the time of a transaction (*lex rei sitae*). This enables (invites) the ‘laundering’ of looted objects through (civil law) jurisdictions that allow for a transfer of the ownership title of stolen goods after a *bona fide* acquisition, or merely by the passage of time. A second stumbling block is that foreign public law will not generally be applied in another jurisdiction, while export laws or laws that render cultural objects inalienable in their original setting often form the basis of the unlawfulness of a taking.

2.3.1. The problem illustrated

A case concerning a Chinese Buddha statue containing the human remains of a mummified monk may serve as an illustration. In 1995 the statue, dating back to the eleventh century and revered as ‘Master Zhang Gong’ by the Chinese community from which it came, was stolen from a temple. It was acquired in Hong Kong by a Dutch collector who, in 2014, loaned the statue to a museum, where – after publication of a news article – it was recognised by Chinese villagers as their sacred Master Zhang Gong. They instigated a restitution claim before the Amsterdam District Court.⁴⁵ The collector, however, argued that he was the lawful owner under Dutch law, claiming that he purchased it in good faith and that at the time it was not common practice to ask for provenance details. Indeed, the Netherlands only acceded to the 1970 UNESCO Convention in 2009. For disputes concerning artefacts that were misappropriated before that time – i.e., nearly all of today’s cases – the rule applies that a new possessor gains valid title after a good faith acquisition, or even merely by the passage of time (adverse possession). Whilst the regulation of ownership differs widely per country, this is the situation in a civil law jurisdiction like the Netherlands.⁴⁶ The court denied the claim in its December 2018 ruling by stating that the ownership status of the Chinese community was unclear.

This case resembles French litigation brought on behalf of the Hopi Native Americans to stop the auction of their sacred Katsina – masks representing incarnated spirits of ancestors that, according to Hopi law, cannot be privately owned or traded.⁴⁷ The Katsina were lost longer ago, in the 1930s and 1940s, but the litigation ended in a similar way: the French court observed that the claim that the Katsina were (inalienable) patrimony of the Hopi has no legal basis in French property law.⁴⁸ Again, such

⁴⁴ For further analysis, see Campfens, E., ‘Restitution of looted art: what about access to justice?’, *Santander Art and Culture Law Review*, 2/2018 (4), pp. 185–220.

⁴⁵ Village Communities of Yangchun and Dongpu v Van Overveem, Design & Consultancy BV, Design Consultancy Oscar van Overveem B.V. (Judgment of 12 December 2018) Amsterdam District Court, Case No. C/13/609408, ECLI:NL:RBAMS:2018:8919.

⁴⁶ For a similar outcome see Autocephalous Greek Orthodox Church in Cyprus v Lans (Judgment of 7 March 2002) The Hague Court of Appeal, Case No. 99/693, ECLI:NL:GHSGR:2002:6. It concerns a denial of a claim to icons looted in the 1970s from occupied Cyprus, due to prescription. Discussed in Campfens, E., ‘Bridging the gap between ethics and law: the Dutch framework for Nazi-looted art’, *Art Antiquity and Law*, 2020, 25(1), pp. 1–25.

⁴⁷ Association Survival International France v S.A.R.L. Néret-Minet Tessier Sarrou (2013) Tribunal de Grande Instance de Paris, No. RG 13/52,880 BF/No. 1.

⁴⁸ In France individual property is the known format as defined by Art. 544 of the French Civil Code. See also Kuprecht, K., *Indigenous peoples’ cultural property claims: repatriation and beyond*, Cham: Springer, 2014, pp. 111–112; Nicolazzi, L. et

an approach, i.e. from the perspective of national private law, is clearly at odds with the principles and *rationale* of heritage protection at the international level, and with the rights of Indigenous peoples to use and control their (lost) cultural objects.

To widen the scope: the field of Nazi-looted art is also typified by a striking imbalance between international (soft law) regulations that prescribe 'fair and just solutions' for disputes over family heirlooms lost as a result of racial persecution on the one hand, and the possibilities to regain ownership under national private law on the other – the US legal system being the exception.⁴⁹ A case concerning Camille Pissarro's depiction of a Paris street scene (*Rue Saint-Honoré, après-midi*) at the centre of litigation in the US for almost 20 years, highlights the differences between the US common law system – based on the adage that a thief cannot transfer title (the 'nemo dat' rule) – and the European civil law system – allowing a new possessor to gain title (under adverse possession).⁵⁰ Since 1993, the Pissarro is part of the Thyssen-Bornemisza Museum in Madrid. However, it once belonged to Jewish art collector Lilly Cassirer Neubauer, who was forced to sell it before her escape from Germany in 1939. Whereas the first years of litigation revolved around the question of whether a US court had jurisdiction (affirmatively decided in accordance with earlier US case law regarding typically 'European' cases), in the following years the question was which law should apply (Spanish or US law). Interestingly, in an *obiter dictum* in one of the rulings the judge voiced his frustration by pointing out that Spain had accepted the 1998 Washington Principles on Nazi-confiscated art, and had thus committed to settle the case in a 'just' way.⁵¹ Alternative dispute resolution apparently did not resolve the matter, and after the US Supreme Court reversed and remanded the case in April 2022, litigation remains ongoing.⁵²

2.3.2. 1995 UNIDROIT Convention

The issue of the fragmentation of private law was addressed in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention).⁵³ It aims to harmonise the private law of States Parties and ensure the return of stolen or unlawfully exported cultural objects as foreseen in the 1970 UNESCO Convention. It introduces a model where ownership title over cultural objects *cannot* (easily) pass if these were stolen or unlawfully transferred. It differentiates between rules for the restitution of stolen objects – which include the category of unlawfully excavated cultural objects (not covered by the 1970 UNESCO Convention) – in Article 3, and rules for the return of unlawfully exported cultural objects if these are of 'significant cultural importance to that state' (Article 5). Furthermore, it provides for harmonization of limitation periods for claims: these should be filed within three years from the moment the object was located, with an option to set a maximum limitation period for claims of 75 years.⁵⁴ Another concession to civil law countries is that under the 1995

al., '[Case Hopi masks – Hopi tribe v. Néret-Minet and estimations & ventes aux enchères](#)', Platform ArThémis, Art-Law Centre, University of Geneva, 2015.

⁴⁹ Campfens, E., 'Nazi-looted art: a note in favour of clear standards and neutral procedures', *Art Antiquity and Law*, 2018, 22(2017-4), pp. 315–347.

⁵⁰ Claude Cassirer, grandson of Lilly Cassirer, filed the lawsuit in 2005 in California.

⁵¹ *Cassirer v Thyssen-Bornemisza Collection Foundation* (2015) United States District Court for the Central District of California, 153 F. Supp 3d 1148; Washington Conference Principles on Nazi-Confiscated Art released in connection with the Washington Conference on Holocaust – Era Assets, 3 December 1998, Washington, DC.

⁵² *Cassirer v. Thyssen-Bornemisza Collection Foundation* (2022) 596 U.S. 20-1566.

⁵³ 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, signed 24 June 1995, entered into force 7 July 1998.

⁵⁴ Art. 3, points (5) and (8) of 1995 UNIDROIT Convention.

UNIDROIT Convention new possessors are entitled to 'fair and reasonable' compensation if they can prove that they were duly diligent (in good faith) upon acquisition.

2.3.3. Good faith/due diligence

The good (or bad) faith of a new possessor is an important, but also highly subjective, notion in this field: it depends on standards in the trade in a specific time and place. The 1995 UNIDROIT Convention elaborates on this principle:

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances. (Article 4(4)).

This due diligence standard thus requires active provenance research by the prospective acquirer. In spite of the lukewarm reception of the 1995 UNIDROIT Convention, this standard has been repeated in many later legal and ethical instruments and thus gained importance in its own right. Accordingly, buyers, dealers, auction houses and museums are expected to assure themselves before acquisition of an items' provenance. The increasing importance of provenance research and due diligence standards will be further discussed in section (4.4).

The adoption by states of the 1995 UNIDROIT Convention would support a smooth and licit art trade *in the future*. However, today's restitution claims deal with past losses, and many 'market countries' did not accede to the 1995 UNIDROIT Convention (precisely because it deals with ownership), and have only recently become party to the 1970 UNESCO Convention.⁵⁵ This means that the fragmented situation continues. As an aside: one should also bear in mind that even if treaties would apply retroactively, limitation periods of 30 (as in the Directive 2014/60), 50, or even 75 years would not cover claims to Nazi-looted art or colonial booty. This underscores that a private law approach will simply not suffice.

2.3.4. Primacy of the *lex originis*?

Lawful ownership under domestic private law where an object surfaces or was sold as *the* criterion for contested cultural artefacts, as usually would be the case under application of the *lex rei sitae*, is increasingly being challenged. The contours of such practice surface in rulings where courts have ruled on claims by giving preference to the law of the state of origin of the cultural object.⁵⁶ A noteworthy example is the follow-up of the case regarding the sacred Buddha statue discussed above: after litigation in The Netherlands had ended, the claim was pursued in China. This time, the claim was upheld.⁵⁷ In making reference to the object and purpose of the 1970 UNESCO and 1995 UNIDROIT Conventions (neither of which applied directly), the court held that in cultural property disputes the

⁵⁵ On 25 September 2023, 54 states are party to the 1995 UNIDROIT Convention, excluding the US, China, the UK, Switzerland, Germany, France and the Netherlands.

⁵⁶ See *United States v. Frederick Schultz*, 178 F.Supp.2d 445 (S.D.N.Y. 2002); *Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd.* [2007] EWCA Civ. 1374; *République arabe d'Égypte C/ Wormser Didier*, Tribunal judiciaire de Paris, 18 octobre 2022, n°15070000313.

⁵⁷ *The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem*, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V. (Judgment of 4 December 2020) Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626.

law of the country where an artefact was stolen should govern the issue of ownership, not the law of the country where the object surfaces or was last traded – the usual conflict-of-law rule for cross-border title disputes over movable goods.⁵⁸ This meant that Chinese law should apply and, accordingly, ownership could not have passed as the statue was considered as inalienable property of the Chinese village communities.

This preference for the laws of the country of origin to determine which law applies to the question of ownership indeed reflects the generally preferred international standard that was, as early as 1991, promoted by the Institut de Droit international.⁵⁹ The relatively new Belgium Code of Private International Law (of 2004) indeed provides for such as a special conflict of law rule applicable to cultural objects.⁶⁰

The EU Import Regulation 2019/880 is also modelled on this principle, as well as the 2023 UNESCO Model Provisions on the Prevention and Fight against Illicit Trafficking of Cultural Property – drawn up as guidance for states in their implementation of the 1970 UNESCO Convention.⁶¹ These 2023 UNESCO provisions propose that 'When ruling on claims for restitution or on requests for return of cultural property, the judicial or administrative authority of the State addressed should apply the law of the State of origin on the control of the movement and ownership of cultural property'.

A special conflict of law rule for cross-border title claims to cultural objects, under which the law of the country of origin or the law of the country where the loss occurred (the *lex originis*) governs the matter of ownership, thus has surfaced as a private law tool to prevent the laundering of looted cultural objects.

Both earlier studies of the JURI Committee proposed to harmonize the legislation of EU Member States in this sense – the 2017 EP study proposes that the EU consider enacting a harmonised choice of law rule (as the *lex originis*), and clarifying that there is no obstacle to the application by EU courts of foreign cultural property law of non-EU states (source states); for example in a recital to the harmonised choice of law rule.⁶² This would indeed create more clarity on the ambiguous question of what should count as an 'unlawful' provenance.

This study proposes that considering the far-reaching implications for the legal status of collections in jurisdictions that protect new possessors (and where ownership title passed), this prioritization of the *lex originis* should be accompanied by the **setting up of a transparent and neutral ADR procedure to assess issues relating to lawfully owned but tainted (due to their *unlawful* provenance) cultural objects**. Moreover, this also **calls for the setting up of an accessible database of national laws and guidance as to their practical implications - or the existing (outdated) UNESCO**

⁵⁸ Zhengxin, H., ['The Chinese villages win a lawsuit in China to repatriate a Mummified Buddha Statue hold by a Dutch Collector – What Role has Private International Law Played?'](#), Conflict of Laws.net: Views and News in Private International Law, 12 December 2020.

⁵⁹ Arts. 2, 3 and 4 of the 1991 IDI Basel Resolution on The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage; cf. Regulation (EU) 2019/880, Recital at (8).

⁶⁰ Art. 90 of the 2004 Belgium Code of Private International Law (introducing the *lex furti* for cultural objects). For a discussion see Jakubowski, A., 'Return of Illicitly trafficked cultural objects pursuant to private international law: current developments', in A. F. Vrdoljak, F. Francioni, *The illicit traffic of cultural objects in the Mediterranean*, EUI Working Paper AEL 2009/09, pp. 137–148.

⁶¹ Provision 14 (Commentary 8) of the [Draft Model Provisions on the Prevention and Fight Against the Illicit Trafficking of Cultural Property](#), UNESCO C70/23/7.MSP/8, adopted in May 2023.

⁶² See 2017 EP Study.

database should be updated.⁶³ Actors in the art world cannot be expected to adhere to rules that are unclear or to laws they cannot know.

2.4. Conclusions

An analysis of the legal framework for cross-border restitution claims reveals that similar obstacles arise in various categories: a disconnect between norms occurs on different levels. Whilst international standards voice the rule that title over unlawfully looted cultural objects should *not* pass, domestic private law are often is not (yet) in line with these standards.

The most prominent blind spot is that only losses which occurred *after* the adoption and implementation of the given Convention are affected by the Convention's rules – whilst most claims usually concern past losses, and in addition market states only recently started to adopt the 1970 UNESCO Convention (and mostly did not accede to the 1995 UNIDROIT Convention). This means that many claims are *not covered* by these norms. Through trade and acquisition, ownership title can be (and often has been) passed on to new possessors, and objects are 'laundered': the illegality of the looting simply does not 'stick' to the objects. Often, the provenance of a specific object is also either omitted by or unknown to new possessors inasmuch as trade in unprovenanced cultural objects has been the rule rather than the exception for a long time and is still common practice. Given that reality, solutions need to be found.

One solution would be to promote the law of the country of origing or last discovery (the *lex originis*). Nevertheless, to retroactively declare the lawfully acquired ownership title of a new possessor invalid is problematic – mostly for civil law countries where the ownership over stolen goods may pass –, as that would implicate expropriation.⁶⁴ It is unlikely that states would ever change their laws in that way, hence the preference for the extra-legal 'ethical' model for claims to Nazi-looted art in Europe, discussed hereafter.

A solution to this would be to limit their tradability in the future by making transactions dependent on minimum standards of documentation on their lawful provenance, by introducing mandatory due diligence standards. In combination with a prohibition of the placing on the market of unlawfully looted or lost cultural objects – as is done in the German Cultural Property Protection Act of 31 July 2016 – certain objects will also then practically become *res extra commercium*.⁶⁵ **This should be accompanied with the setting up of transparent and neutral ADR procedures for 'tainted artefacts' that may be looted, and an open access database of national legislation pertaining to protection of cultural objects.** This is largely in line with the 2019 EP Resolution and proposals in earlier studies on this topic.⁶⁶

⁶³ See <<https://en.unesco.org/cultnatlaws>>.

⁶⁴ Art. 17 of Universal Declaration of Human Rights (UDHR); Art. 1 of the First Protocol to the 1952 European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 20 March 1952: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

⁶⁵ German Cultural Property Protection Act of 31 July 2016 (German Federal Law Gazette [BGBl.] Part I p. 1914). See Chapter 4 ([in English translation](#))

⁶⁶ Cf. 2011 COM Study and 2017 EP Study.

3. THE ETHICAL MODEL

KEY FINDINGS

- A vast body of soft law supports the rights of former owners to their looted cultural objects, also when ownership title passed to a new possessor under domestic private law.
- This results in grey categories of tainted cultural objects that presently can only be resolved through extra-legal (alternative) procedures: i.e. the ethical model.
- Abidance by the rules in this model depends on both the willingness of parties as well as political pressure, while norms which remain vague give rise to legal insecurity and, at times, injustice.
- To meet the obligation under instruments like the Washington Principles and the UNDRIP, neutral and accessible ADR procedures should be available.
- Considering the cross-border nature of such procedures, the establishment of an EU Agency – with ADR services and tasks in field of provenance research – should be considered.

3.1. Introduction

As mentioned earlier, different models exist for claims to lost cultural objects. Apart from the interstate model based on the private law model, there is an 'ethical model' based on non-binding soft law instruments. One could say that this model bridges the gap between private law and morality – since under positive law restitution claims are often inadmissible. The present chapter will discuss this ethical model and the two categories of historical claims for which this model is mostly used, namely Nazi-looted art and colonial takings. Because the resolution of claims in such an extra-legal model depends on voluntary procedures (alternative dispute resolution (ADR) mechanisms), procedural aspects deserve particular attention.

In its 2019 Resolution on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars, the EP proposes the use of ADR to resolve claims that result from instances of past looting such as Nazi-looted art.⁶⁷ In that regard, the second part of this chapter pays attention to the role and limits of various forms of ADR to resolve claims.

3.2. Soft law

Since the turn of the century, the adoption of various soft-law instruments underscores that norms are changing regarding the possession of looted art, even if artefacts are lawfully owned under private law rules. From a law-making perspective, the term 'soft law' is simply a convenient description for a variety of non-legally binding yet authoritative instruments.⁶⁸ Soft law instruments in this field vary widely. Some merely condemn looting practices and the illicit trade, whilst others formulate specific rights of

⁶⁷ [Resolution \(EP\) of 17 January 2019 on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars \(2017/2023\(INI\)\)](#), OJ C 411, 27.11.2020, para. 15 and further.

⁶⁸ Boyle, A., 'Soft Law in International Law-making', in M. Evans (ed.), *International Law*, 4th edition, Oxford: Oxford University Press, 2014, p. 118 et seq.

former owners regarding their lost cultural objects. On the one hand, these non-binding instruments may be merely aspirational, such as the standards in the International Council of Museums (ICOM) ethical code that museums should neither display nor acquire unprovenanced material or material that may have been looted in the past – a standard that is certainly not met today.⁶⁹ On the other hand, some instruments set standards that in terms of adherence may actually be more effective than binding international conventions.⁷⁰

Ethical codes, professional guidelines, and declarations in this field tend to have a similar pattern, namely that they advocate:

- Equitable solutions for title disputes, in the light of the interests of former owners; and
- ADR mechanisms to resolve claims.

3.3. Nazi-looted art

The background to the category of claims to Nazi-looted art is the wide-scale looting by the Nazis, both in occupied territories and within Germany. Public collections and private, most notably Jewish, collections were systematically seized or acquired under duress. In neighbouring 'Aryan' countries art was also acquired on the market through regular (but according to Allied laws prohibited) sales.

The post-War restitution framework aimed to reverse all these different types of looting.⁷¹ It relied on a process of 'external restitution' of artefacts to the countries from where they had last been removed – irrespective of the grounds for removal – and a process of 'internal restitution' to dispossessed owners at the local (national) level. To organise the process of internal restitution, states enacted special regulations that suspended regular private law rules. Typically, such laws declared void (*ab initio*) confiscations based on discriminatory Nazi regulations, whilst other transactions were voidable if the loss was a result of persecution by the Nazis. Due to the lapse of the short limitation periods, these post-War restitution laws hardly play any role in today's practice.

At times however they do, as in the French litigation about a Pissarro painting that had been confiscated from a Jewish collector and eventually was found in the hands of an American collector who had acquired it in the 1990s, unaware of its provenance.⁷² Since the original confiscation was void, under application of French law legal title had remained with the pre-War owner and, thus, the claim for restitution was awarded. This outcome, however, was allegedly challenged before the European Court of Human Rights by the American collectors for a violation of *their* right to property, not having received any compensation.⁷³ (As an aside: this case may highlight the weakness of the zero-sum outcome in the traditional ownership approach: it posits that there is only one absolute right holder

⁶⁹ See under points (2.3) and (4.5) of ICOM Code of Ethics.

⁷⁰ E.g., provenance research is still primarily focused on the identification of Nazi-looted art – not addressed by any formal treaty, whereas the identification of illegally excavated antiquities – addressed in the 1970 UNESCO Convention – lags behind.

⁷¹ Based on the 'Inter-Allied Declaration against Acts of Dispossession committed in the Territories under Enemy Occupation or Control', *The Department of State Bulletin*, vol. 8, 5 January 1943.

⁷² *Bauer et al v B and R Toll* (2017) Tribunal de Grande Instance de Paris, No RG 17/58735 No 1/FF; confirmed *Cour de Cassation*, No. B 18-25.695.

⁷³ Under Art. 1 of the First Protocol to the 1952 European Convention for the Protection of Human Rights and Fundamental Freedoms. See Noce, V., '[American collector to sue France over restitution of \\$1.7m Pissarro painting](#)', *The Art Newspaper*, 2 July 2020.

(the lawful owner) whilst in fact over time more parties may have gained legitimate interests in the same object).

3.3.1. The Washington Principles

In reaction to the clear injustice to deprived families whose paintings re-appeared on museum walls, in 1998 over 40 states adopted the non-binding Washington Conference Principles on Nazi-Confiscated Art. They introduced the standard for claims that former owners or their heirs are entitled to a 'just and fair solution', recognising this may vary according to the 'facts and circumstances surrounding a specific case'.⁷⁴ Along with later instruments that generally repeated the initial Principles, they furthermore stress the importance of ADR for resolving claims as the ethical model for claims.

Whilst it is clear that the 'just and fair' rule calls for redress for dispossessed families that lost their artefacts as a result of Nazi-looting, what it means *exactly* is less clear, even – or probably even more so today – after 25 years. Some believe a 'fair and just solution' means the full restoration of property rights – a straightforward and absolute right on the part of dispossessed owners to restitution of their lost property. Others believe the interests of other parties should also be weighed to reach a 'fair and just' solution.⁷⁵ Likewise, views on what exactly is 'Nazi-looted art' differ. While it is well-understood that the confiscation of artefacts on basis of racial (Nazi) laws, theft, and forced sales fall under the notion, some argue that sales in neutral countries by Jewish refugees – having an indirect causal relation with the Nazi regime – should also be considered as forced sales.⁷⁶

Clearly the norm is widening and is also applied to wartime losses at the hands of others than the Nazis.⁷⁷ The question is: In what direction is it evolving and who is to clarify these rules? The standards applied by European governmental panels differ considerably – even when cases concern artefacts from the same collection that were lost in the exact same manner, the outcomes are inconsistent.⁷⁸ An explanation for such differences by a comprehensible argumentation is also often lacking. This is problematic from the perspective of justice, which implies that similar cases are treated similarly, and disparities are made clear and comprehensible.

3.3.2. Evolving law?

In terms of access to justice, the US system serves as the exception. The US legal system, as illustrated in the previous chapter, is more open to claims by former owners. This discrepancy has led to an increasing number of typically 'European' cases (that concern artefacts in European museums) being

⁷⁴ Principle VIII of Washington Conference Principles on Nazi-Confiscated Art released in connection with the Washington Conference on Holocaust – Era Assets, 3 December 1998, Washington, DC.

⁷⁵ See, for example, the commotion over a Dutch decision that held that the interest of the museum outweighed the interests of former owners. See Hickley, C., '[Dutch policy on Nazi-Loot restitutions under fire](#)', *The Art Newspaper*, 21 December 2018.

⁷⁶ Examples in Campfens E., 'Nazi-looted art: a note in favour of clear standards and neutral procedures', *Art Antiquity and Law*, 2018, 22(2017-4), pp. 315–347.

⁷⁷ Reports of the Spoliation Advisory Panel regarding the *Beneventan Missal* (23 March 2005 and 15 September 2010). Dutch Restitutions Committee, '[Recommendation Regarding Krasicki](#)', RC 1.152, 2017.

⁷⁸ This mostly surfaces in the categories of 'early' sales or so-called *Fluchtgut*, see, e.g., Weller, M., 'In search of "just and fair" solutions: towards the future of the "Washington Principles of Nazi-confiscated art" and Woodhead, C., 'Action towards consistent "just and fair" solutions', both in *Guide to the work of the Restitutions Committees: five ways of resolving claims*, Paris: CIVS, 2019, pp. 9–17, 65–75.

litigated before US courts.⁷⁹ However, in comparison to the European panels, US courts appear to use a narrower notion of what loss qualifies as ‘Nazi loot’. Accordingly, claims to artefacts lost as a result of sales that were not under direct threat (i.e., without a direct causal relation) are denied by US courts, whilst similar claims are honoured by European panels.⁸⁰

Apart from such differences, the rule that dispossessed owners of Nazi-looted art are entitled to equitable solutions regarding their lost family heirlooms increasingly surfaces in (binding) domestic legislation. Such laws single out Nazi-looted art as a special category (for which regular law does not equally apply).⁸¹ This approach is generally also supported by legal scholars.⁸² However, caution is needed as it does *not* extend to an obligation of restitution in full ownership and is often presented as merely ‘moral’ in nature. In that vein, in the 2017 EP study Weller concludes that, usually, no legal claims exist, and that this cannot be remedied by (retroactive) legislation as this would violate other fundamental rights.⁸³ In line with the present study, he therefore proposed stricter (mandatory) due diligence standards and the setting up by the EU of a ‘specific alternative dispute resolution institution for dealing with contested cultural property.’

In summary, the legal model for dispute resolution in the field of Nazi-looted art has been mostly superseded by the ethical model, at least in Europe. Market forces and politics tend to set the tone in that model. **In the interests of former owners and all stakeholders, standards need to be clarified. In that regard neutral claims procedures to develop norms and provide access to justice for parties concerned should be made available.**

3.4. Colonial takings

The category of colonial takings has similarities to Nazi-looted art: neither category is covered by international treaties. For Nazi-looted art, however, the rule that cultural objects removed from the territory of an occupied state should be returned was widely acknowledged at the interstate level. Moreover, on the sub-state level, private claims were covered by special restitution laws in the post-War period, and today by the ethical model. This contrasts with the framework for cultural losses in a colonial setting, although this situation is changing rapidly. Such changes are reminiscent of developments in the field of Nazi-looted art around the turn of the century.

It is noteworthy, however, that already in 1979, at UNESCO’s request ICOM presented a study stating that:

[t]he reassembly of dispersed heritage through restitution or return of objects which are of major importance for the cultural identity and history of countries having been deprived

⁷⁹ For an overview, see Campfens, E., *Cross-border title claims to cultural objects: property or heritage?*, The Hague: Eleven International Publishing, 2021.

⁸⁰ Litigation in the US often revolves around jurisdiction, immunity, prescription, and the equitable defence of laches (requiring a dispossessed owner to be duly diligent in searching for their artefacts).

⁸¹ The US Holocaust Expropriated Art Recovery (HEAR) Act (2016) and other US laws exempting Nazi-looted art from other movable goods in order to allow access to justice for claimants. Other examples are the UK Holocaust (Return of Cultural Objects) Act (2009) – allowing for the de-accessioning of Nazi-looted art from public museums; and the German Cultural Property Protection Act (2016), that provides for enhanced due diligence standards to ascertain artefacts were not lost due to Nazi persecution.

⁸² Van Woudenberg takes the view that cases involving Holocaust confiscated art involve a ‘serious breach of an obligation arising under a peremptory norm of general international law’. See Woudenberg, N. van, ‘Developments Concerning Immunity from Seizure for Cultural State Property on Loan’, in A.M. Carstens, E. Varner (eds), *Intersections in international cultural heritage law*, Oxford: Oxford University Press, 2020, p. 363.

⁸³ 2017 EP Study, p. 23.

thereof, is now considered to be an ethical principle recognised and affirmed by the major international organizations.⁸⁴

The study even predicted that this principle would 'soon become an element of *jus cogens* of international relations.'⁸⁵ What followed were a series of UN General Assembly and UNESCO declarations that underline the importance of return of a country's lost cultural patrimony, also under referral to the right to self-determination of newly independent states.⁸⁶ Nevertheless, former colonial 'holding' states generally did not follow up on these calls.

As said, over the last years this status quo is being challenged, and today EU Member States have developed guidelines, policies and even legislation to enable the return of colonial takings, often focussing on the restoration of relations with their own former colonies.⁸⁷ It is noteworthy that restitution of colonial takings is generally perceived as an interstate (political) affair, as opposed to the approach in the field to Nazi-looted art claims and the human rights' model (discussed hereafter), which have communities and individuals at their core.

3.4.1. Standards

Of particular importance to the category of colonial takings is the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).⁸⁸ It contains a right of redress with respect to cultural objects taken without the 'free, prior and informed consent' of Indigenous peoples.⁸⁹ Depending on the cultural importance of the cultural object at stake, redress may vary from a right to 'access and control' to a straightforward right to, for example, the repatriation of objects containing human remains.⁹⁰ To fulfil this aim, states are expected to provide assistance – 'effective mechanisms in conjunction with Indigenous peoples' – in addressing claims. In this regard, the 2020 Report of the Expert Mechanism on the Rights of Indigenous Peoples concludes that:

- 'States should enact or reform legislation on repatriation in accordance with [UNDRIP, EC] with the full and meaningful participation of Indigenous peoples and the safeguard of free, prior and informed consent'; and that
- 'Museums, universities and other collecting institutions must become partners in ensuring that Articles 11, 12 and 31 of the Declaration are respected and upheld. Museums must develop relationships of collaboration and trust, and seek out and respect Indigenous peoples' knowledge, protocols, traditional laws and customs regarding items in their collections.'⁹¹

⁸⁴ Ad hoc Committee appt. by the Executive Council of ICOM. See Ganslmayr, H., Landais, H., Lewis, G. et al., 'Study on the principles, conditions and means for the restitution or return of cultural property in view of reconstituting dispersed heritages', *Museum International*, 1979, 31(1), p. 62.

⁸⁵ *Ibid.*, p. 66.

⁸⁶ For an overview of the resolutions of the General Assembly of the UN, see the preamble of [UN General Assembly Resolution A/RES/76/16 on the return or restitution of cultural property to the countries of origin](#), adopted 6 December 2021.

⁸⁷ For an overview of developments, see [Santander Art and Culture Law Review](#), 2022, 8(2).

⁸⁸ UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted 13 September 2007.

⁸⁹ Art. 11(2) of UNDRIP defines this as 'redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.'

⁹⁰ Art. 12 deals with rights to objects of special importance – namely, a right to 'use and control' where it concerns lost ceremonial objects, while for human remains a straightforward right to repatriation applies.

⁹¹ Arts. 97 and 92 of UN Human Rights Council Report A/HRC/45/35 of the Expert Mechanism on the Rights of Indigenous Peoples, 21 July 2020. See also Tümsmeyer, V.M., *Repatriation of sacred Indigenous cultural heritage and the law: Lessons from*

Seen in this light, recent initiatives to address claims to colonial takings can be seen as the fulfilment of such international obligations. Because in many (civil law) jurisdictions new possessors gained valid legal ownership/title over objects lost longer ago – as has been highlighted already several times –, states should provide assistance in finding solutions through the setting up of transparent ADR mechanisms in consultation with Indigenous peoples.⁹²

Lastly, in terms of standards for museum practice, the 1986 International Code of Ethics adopted by ICOM needs mentioning – which also operates on the sub-state level.⁹³ Most museums are members of ICOM and are expected to adhere to the principles adopted in this Code of Ethics. Similar to the approach outlined above, these guidelines state that with regard to restitution issues, museums should collaborate with source communities. The Code furthermore encourages readiness to enter into dialogue, preferably on a non-governmental level. The relevant provisions read as follows:

- Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level.
- When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international law and international conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return.

3.5. Alternative dispute resolution

In the context of restitution, ADR mechanisms are often promoted to resolve claims. Their specific nature and the complex moral and legal issues that are involved are often cited as reasons. The main reason for resorting to ADR is that positive legal standards will not provide the redress promised in soft-law instruments.⁹⁴ Consequently, international organisations such as UNESCO and ICOM promote the use of alternative procedures in cultural property disputes.⁹⁵ In its 2019 Resolution, also the European Parliament promotes ADR to resolve historical cases: a confirmation of the extra-legal 'ethical model' for restitution claims.⁹⁶ What follows is a brief discussion of specific ADR formats.

the United States and Canada, Maastricht University, 2020 [doctoral thesis], proposing the repatriation of Indigenous sacred cultural heritage is an obligation following from Art. 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR).

⁹² For further discussion, see Campfens, E., 'The Bangwa Queen: Artifact or Heritage?', *International Journal of Cultural Property*, 2019, 26(1), pp. 75–110.

⁹³ The ICOM Code of Professional Ethics was adopted by the General Assembly of the International Council of Museums on 4 November 1986, retitled 'ICOM Code of Ethics for Museums' in 2001, and revised in 2004. See [ICOM Code of Ethics for Museums](#), Paris, 2017, ICOM Code 6.2 (Return of Cultural Property), and ICOM Code 6.3 (Restitution of Cultural Property).

⁹⁴ As was illustrated by the examples in the first section. See also Woodhead, C., 'Nazi era spoliation: establishing procedural and substantive principles', *Art Antiquity and Law*, 2013, 18(2), pp. 167–192. In the UK, for example, the Spoliation Panel is not an alternative method – it is the sole way to resolve Nazi-era claims on their merits.

⁹⁵ 'Competing claims ... if they cannot be settled by negotiations between the States or their relevant institutions ... should be regulated by out of court resolution mechanisms, such as mediation ... or good offices, or by arbitration'. Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, UNESCO, 1970, May 2015, para. 18–20.

⁹⁶ [Resolution \(EP\) of 17 January 2019 on cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars \(2017/2023\(INII\)\)](#), OJ C 411, 27.11.2020, para. 15 and further.

3.5.1. Arbitration

Arbitration is specifically mentioned in the 1995 UNIDROIT Convention, which provides that: 'The parties may agree to submit the dispute to any court or other competent authority or to arbitration'.⁹⁷ Whereas arbitration may offer advantages, due to the formal nature of this procedure (similar to regular litigation with a choice of law) its value probably mainly lies in the field of contractual claims over authenticity and attribution, due to the confidentiality that it grants.⁹⁸ So far, arbitration plays hardly any role in restitution claims. The *Altmann* arbitration, which was instituted after the initial stage of litigation as discussed above, is amongst the few such cases. In the words of Chechi: 'In effect, while negotiation is very common and mediation is becoming increasingly popular, it appears that recourse to arbitration is the exception rather than the rule'.⁹⁹

3.5.2. Mediation and negotiated settlements

Mediation, an informal procedure in which a mediator helps the parties to settle a dispute by identifying their interests but without imposing a decision, is a method that has gained considerable popularity in cultural property disputes. In 2011 ICOM established its mediation programme for the museum sector in cooperation with the World Intellectual Property Organization (WIPO). It was established after positive experiences in the case regarding a *Makonde Mask* stolen from a museum in Tanzania and acquired in 1985 by a Swiss museum, a case that fell outside of any 'hard law' rules obliging restitution, as Switzerland acceded to the UNESCO Convention only much later.¹⁰⁰ The programme/procedure is administered by ICOM-WIPO in Geneva, although it appears not to be operative at present.

3.5.3. The intergovernmental UNESCO Committee (ICPRCP)

In 1978 the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) of UNESCO was established to assist Member States with return requests that concern cultural property 'which has a fundamental significance from the point of view of the spiritual values and cultural heritage of the people of a Member State or Associate Member of UNESCO and which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation'.¹⁰¹

The low number of cases resolved by the Committee may be an indication that the state-centred approach of the ICPRCP creates a political setting that is not *per se* suitable as a setting for ADR – in spite of the fact that in 2010 the possibility for mediation and conciliation was added to its mandate.¹⁰² Since restitution of colonial takings – the topic the ICPRCP was meant to address since 1978 – has lately risen on the political agenda, the role of the ICPRCP in this regard may increase. For now, it mostly

⁹⁷ Art. 8(2) of 1995 UNIDROIT Convention.

⁹⁸ Chechi, A., *The Settlement of International Cultural Heritage Disputes*, Oxford: Oxford University Press, 2014, p. 177.

⁹⁹ Ibid.

¹⁰⁰ Slimani, S., and Theurich, S., 'The New ICOM-WIPO Art and Cultural Heritage Mediation Program', in A.L. Bandle, A. Chechi and M.A. Renold (eds), *Resolving Disputes in Cultural Property*, Zurich: Schulthess Verlag, 2012, pp. 51–64.

¹⁰¹ Art. 3(2) of 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, CLT/CH/INS-2005/21, adopted by 20 C/Resolution 4/7.6/5 of the 20th session of the General Conference of UNESCO, Paris 24 October–28 November 1978, amended October 2005.

¹⁰² [Strategy to facilitate the restitution of stolen or illicitly exported cultural property](#), adopted by 33 C/Resolution 46 of the 33rd Session of the UNESCO General Conference, Paris, 3–21 October 2005. In 2010 the Committee adopted [Rules of Procedure for Mediation and Conciliation](#) (UNESCO CLT-2010/CONF.203/COM.16/7). Further discussed in Chechi, A., *The Settlement of International Cultural Heritage Disputes*, Oxford: Oxford University Press, 2014.

functions as a forum for best practice examples and for governments to state claims: the Greek claim to the Parthenon Marbles held in London, for example, has featured on the agenda of every meeting since 1984.¹⁰³ Interestingly it is within the setting of the ICPRCP that currently the UNESCO International Code of Ethics for Dealers in Cultural Property is being revised (which is discussed more in 4.4).

3.5.4. Government advisory panels for Nazi-looted art

Whereas Nazi-looted art cases are generally settled through confidential settlements, several European States have set up special advisory bodies, as mentioned above. Around the year 2000 five of such committees were established: the Spoliation Advisory Panel in the UK; the CIVS¹⁰⁴ in France; the Dutch Restitutions Committee in the Netherlands; the *Beratende Kommission* in Germany; and the *Beirat* in Austria.¹⁰⁵ These are government-appointed panels to enable the assessment of Nazi-looted art claims on their merits. The Dutch, Austrian and French Panels have been particularly active in terms of numbers of cases they dealt with.

In establishing these panels, the focus was on the specific national situation of each country. For example, in France and the Netherlands so-called ‘heirless art’ collections – that consist of artefacts that all have a certain ‘war history’ and are in the custody of these governments since the post-War period – call for specific obligations and solutions, while in Germany museums may have objects acquired directly from their persecuted owners.¹⁰⁶ Their working methods, organisational structure, and recommendations consequently differ a great deal.

Nevertheless, cases may also be similar. Art collections that were confiscated or forcibly sold by persecuted owners often were dispersed over many countries, hence claims in different countries may concern artefacts from the same collection lost in the exact same way. The different standards applied, and different outcomes reached in such similar cases thus give rise to confusion over what constitutes ‘unlawful looting’ in this field.¹⁰⁷

Another aspect is that such ad-hoc committees may be prone to politicization. In this sense, both the Dutch Restitutions Committee and the German *Beratende Kommission* were under constant criticism in recent years.¹⁰⁸ Interventions in individual cases pending before these panels also highlight the political dimension of these procedures.¹⁰⁹ Given that private laws in most jurisdictions do not support claims, these procedures are however the *only* way to settle title claims in such cases.

¹⁰³ Decisions of the 23d session of the ICPRCP, 18-20 May 2022, [ICPRCP/22/23.COM/Decisions](#), p. 5.

¹⁰⁴ Commission pour l’indemnisation des victimes de spoliations intervenues du fait de législations antisémites en vigueur pendant l’Occupation.

¹⁰⁵ For an overview of the committees, see Marck, A., Muller, E., ‘National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, the Netherlands and Germany – a Brief Overview’, in E. Campfens (ed.), *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes*, The Hague: Eleven International Publishing, 2015, pp. 41–89.

¹⁰⁶ Further elaborated on in Campfens, E., ‘Nazi-looted art: a note in favour of clear standards and neutral procedures’, *Art Antiquity and Law*, 2018, 22(2017-4), pp. 315–347.

¹⁰⁷ In January 2019, a network was created linking the committees. Commission for the Compensation of Victims of Spoliation, ‘[Establishment of a Network of European Restitution Committees](#)’, 28 January 2019.

¹⁰⁸ Heavily criticised was the recommendation regarding a Kandinsky where the outcome relied on the value of the painting for the museum (RC 3.141). Subsequently, in 2020, a new policy was introduced that basically denounces the weighing of interests. See Committee for the Evaluation of the Restitution Policy for Cultural Heritage Objects from Second World War, Raad voor Cultuur, ‘[Striving for Justice](#)’, The Hague: Raad voor Cultuur, 2020.

¹⁰⁹ E.g. Raadscommissie Kunst Diversiteit en Democratisering, ‘[Raadsbrief met reactie op rapport Kohnstamm](#)’ (Letter of the Mayor and Aldermen to the Amsterdam Municipal Council), 19 February 2021. As to political interference in individual cases in Germany, see Häntzschel, J., ‘[Ärger ums “Zitronenscheibchen”](#)’, *Süddeutsche Zeitung*, 26 February 2021.

3.5.5. Court of Arbitration for Art

Another special ADR initiative in this field is the Court of Arbitration for Art (CAfA), offering arbitration and mediation services. It is the result of a cooperation between the Authentication in Art foundation (AiA) and the Netherlands Arbitration Institute (NAI), and was launched in 2018 as a specialised 'tribunal' in the field of art-related disputes such as authenticity, contract or title disputes.¹¹⁰ Its main feature is that it relies on (neutral) experts for factual evidence.¹¹¹ This reliance on neutral expertise appears to be a valuable element in cases involving provenance issues, where the uncertainty about the factual circumstances and weighing of (missing) evidence is often the major challenge.¹¹²

3.6. Conclusion

Common themes in the soft-law instruments that have emerged in this field are a call for equitable solutions to title disputes, and for ADR to settle claims. Problematic in this model is the lack of transparent and neutral procedures to implement and clarify soft law norms, and for parties to turn to if they do not agree on an outcome.

ADR procedures are advocated as being more efficient, less adversarial, and more flexible to culturally sensitive arguments. In reality however, these procedures are often the *only* way to assess claims, as certain artefacts cannot be sold or sent on international loans if their title is not 'cleared', and although market forces have come to fill in some gaps in the law, this does not guarantee justice. This institutional vacuum in terms of access to justice in Europe needs to be addressed. A lack of clarity at both the substantive and the procedural levels – e.g., what is the norm and who will interpret and apply it? – will otherwise aggravate legal uncertainty.

In its 2019 Resolution, the European Parliament acknowledged the fragmented situation and advocated for an ethical approach and voluntary ADR procedures to address claims of works of art looted in armed conflicts and war in the past. **In other words, also in this respect the establishment of a European (ADR) claims procedure could be considered.** This would also meet the obligation that states have taken upon themselves – by signing instruments like the Washington Principles and the UNDRIP – to develop neutral and accessible procedures to ensure that promises about justice are upheld. In the light of the cross-border nature of provenance research and the apparent need for coordination of standards also in terms of (neutral) provenance research, this could be part of a broader organisation to deal with the problem of looted art at the EU level.

¹¹⁰ See [CAfA – Court of Arbitration for Art](#).

¹¹¹ [CAfA Arbitration Rules, NAI Arbitration Rules and AiA/NAI Adjunct Arbitration Rules Combined](#), in force as of 1 January 2019, Rotterdam: Netherlands Arbitration Institute.

¹¹² *Ibid.* Explanatory Notes (2.2).

4. TRENDS: HUMANIZATION AND CRIMINALIZATION

KEY FINDINGS

- In a human rights' model, cultural objects are valued on account of their social function and intangible values.
- Restitution may be a remedy to an ongoing violation of the right to access to (one's own) culture. Participation of source communities in the governance of 'their' heritage is another element to consider.
- In a criminal law model, restitution is facilitated by return after seizure of looted artefacts following a violation of an import or trade ban.
- The entry into force of the licensing system arranged for with EU Import Regulation 2019/880 (2025) is the logical moment to set up a comprehensive registration and compliance system (a coordinating authority). This, in turn, requires coordination of specific expertise (a 'knowledge centre') to determine a lawful provenance.
- What exactly is a 'lawful provenance' is still unclear. In this respect the '1970-rule' is challenged by the *lex originis*, but also by other rules (e.g., for Nazi-looted art the provenance between 1933–1945 should be covered). This calls for guidance by a public authority.

4.1. Introduction

The previous chapters addressed the interstate, private law, and ethical models for cross-border restitution claims to involuntarily lost cultural objects. What seems clear is that the traditional public international law and private law mechanisms to resolve claims have serious shortcomings. This is because dispute resolution takes place at the national level; ownership laws differ widely; and international treaties aimed at harmonization only have effect in as far they were adopted and implemented in a given jurisdiction. The ethical model also has important drawbacks, most notably the absence of neutral mechanisms for dispute resolution to which the parties can turn to for clarification of norms, or if they cannot agree, for example, on what exactly is 'unlawful looting'.

Over the last few years, two trends can be witnessed in the field of cultural heritage law: 'humanization' and 'criminalization' – both of which have implications for the field of restitution. In that sense, one can speak of two more models for the restitution of looted cultural objects, namely:

- A human rights' approach, where restitution is seen as a reparation for a violation of human rights (4.2); and
- A criminal law approach, where restitution is facilitated following a violation of an import or trade ban by a new possessor (4.3).

These developments are briefly discussed in this Chapter, as well as the increasing role of the concept of due diligence, and provenance research in that regard (4.4).

4.2. Humanization

In international law, the obligation to return looted cultural objects developed through the laws of war: restitution was the preferred form of reparation after the removal of cultural objects during armed conflict or foreign occupation. Since the adoption of the 1970 UNESCO Convention, this obligation also extends to cultural objects looted in peacetime. The recipient of the rights to restitution in these 'traditional' approaches are national states. Increasingly, however, international law vests rights on cultural objects with individuals and groups, such as minorities and Indigenous peoples. Another model is therefore restitution as a remedy for human rights violations.

For example, according to the UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, victims of human rights violations are entitled to reparations for the harm suffered. This can be effectuated by, *inter alia*, the restitution of lost possessions.¹¹³ Under contemporary international law, individuals and communities such as minorities also enjoy a right to culture. This follows from a number of human rights instruments, most notably Article 15(1)(a) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).¹¹⁴ According to the 2009 General Comment on the right to culture of the supervisory treaty body of this Covenant, this has come to include 'access to cultural goods'. This means that states have an obligation to adopt 'specific measures aimed at achieving respect for the right of everyone ... to have access to their own cultural ... heritage and to that of others'.¹¹⁵ In other words, access to cultural objects may be seen as an essential dimension of human rights. In that sense, claims to lost cultural objects are not merely a matter of stolen property, but also a matter of lost heritage which concerns identity values for specific people.

4.2.1. Paradigm shift

The 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention) exemplifies this 'humanization' by defining cultural heritage as 'a group of resources inherited from the past which people identify, *independently of ownership*, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions'.¹¹⁶ Although the Faro Convention does not aim to create any binding rights, it creates a paradigm shift.

The interrelationship of cultural heritage law and human rights law is also illustrated by the active involvement of the UN Human Rights Council in heritage protection and the illicit trafficking of cultural objects. This heightened involvement coincided with the conflicts in the Middle East, where the detrimental effects for communities of destruction of their heritage and wide-scale looting became vividly clear. In its 2007 Resolution, dedicated to the protection of cultural heritage, the Human Rights

¹¹³ Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the United Nations General Assembly Res. 60/147 of 16 December 2005. As remedies for victims are named: (a) access to justice, (b) reparation for harm suffered, and (c) access to information concerning violations and reparation mechanisms.

¹¹⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Art. 15, para. 1(a): the right of everyone to take part in cultural life. See also Art. 27 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res. 217 A (III) (UDHR).

¹¹⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), [General comment no. 21. Right of everyone to take part in cultural life \(art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights\)](#), 21 December 2009, E/C.12/GC/21, para 49(d); see also paras 15(b) and 50.

¹¹⁶ Art. 6 of Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Faro, 27 October 2005 (Council of Europe Treaty Series, No. 199). Emphasis added.

Council confirmed for example that ‘cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights’.¹¹⁷ Moreover, the Council in its 2016 Resolution addresses the illicit trafficking and the need for measures to ensure the return of looted cultural objects. In this respect it calls for ‘enhanced international cooperation in preventing and combating the organized looting, smuggling and theft of and illicit trafficking in cultural objects and in restoring stolen, looted or trafficked cultural property’.¹¹⁸ In other words, the message here is that people who are left *without* their cultural objects after looting practices suffer a deprivation of their human rights.

4.2.2. A human rights’ approach to restitution

Looting may constitute violations of various human rights: these may be cultural rights, but also the right to property or the right to a family life for example. In that respect international human rights law gives a good basis for a further development of the legal framework in this field.

A clear example of a human rights’ law approach to restitution is the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) – which, as indicated in the previous chapter, was first introduced as a non-binding instrument. Today, the relevant provisions are considered to be part of the implementation of the (binding) right to culture in Article 15(1a) of the International Covenant on Economic, Social and Cultural Rights, insofar as it concerns Indigenous peoples’ cultural rights.¹¹⁹ That this comes with legal obligations is highlighted by the general acknowledgement that the provisions on cultural rights of Indigenous peoples in UNDRIP reflect evolving customary international law.¹²⁰

A roadmap for the operationalisation of this model is given in a Colombian ruling concerning the so-called ‘Quimbaya Treasure’.¹²¹ In that ruling, the Court ordered the Colombian government to pursue, on behalf of the Quimbaya people, the restitution by Spain of a golden treasure lost at the close of the nineteenth century. The court relied on the argument that under today’s standards of international law, Indigenous communities are entitled to their lost cultural objects. Two recent European decisions taking the provisions on cultural rights in UNDRIP as their legal basis bolsters this interpretation: one by the Swedish government in May 2022 ordering the return to the Yaqui in Mexico of cultural objects that were taken during scientific fieldwork in the 1930s; the second concerns Kogi masks that were returned to the Kogi people in Colombia in June 2023.¹²² The latter, a German case, is interesting because it was not based on the unlawfulness of the loss – they were sold in what appears have been a regular transaction – but the spiritual value of the masks to the Kogi that was essential to establishing a right to restitution.

¹¹⁷ Preamble to UN Human Rights Council Resolution A/HRC/RES/6/11 on Protection of cultural heritage as an important component of the promotion and protection of cultural rights, adopted 28 September 2007.

¹¹⁸ Point (4) of UN Human Rights Council Resolution A/HRC/RES/33/20 on Cultural rights and the protection of cultural heritage, adopted 30 September 2016.

¹¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), [General comment no. 21. Right of everyone to take part in cultural life \(art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights\)](#), 21 December 2009, E/C.12/GC/21.

¹²⁰ Alves, A. Do Vale, [‘The customary international status of Indigenous peoples’ rights’](#), 22 March 2022.

¹²¹ The ‘Quimbaya Treasure,’ Judgment SU-649/17. At <http://www.corteconstitucional.gov.co>. See also Mejía-Lemos, D., ‘The “Quimbaya Treasure,” Judgment SU-649/17’, *American Journal of International Law*, 2019, 113(1), pp. 122–130.

¹²² Swedish Decision of 5 May 2022. See [‘The National Museums of World Culture to return objects to Mexico’](#), 5 May 2022; German return, See [‘Restitution of Kogi Masks from the Ethnologisches Museum’](#), Berlin, 19 June 2023.

These cases illustrate the development of a right of access and control, often implying restitution, with regard to cultural objects that people identify with on account of their intangible 'heritage' value. To *remain separated* from certain cultural objects can thus constitute a continuing human rights violation. This is different from the focus on events in the past – i.e. the unlawfulness of the acquisition – in the traditional approach. Another element is that communities – not national states – are at the centre. This does not negate the role governments have in procedures as custodians of the interests of their citizens, but does point out the importance of participation of heritage communities in the governance and decisions over their cultural heritage. This is an important observation, because this means participation of source communities in both provenance research and the care of their collections. A positive side-effect of such collaborative model is that this may result in mutual respect and (permanent) cultural cooperation.

4.2.3. Access to justice

This model also indicates that national courts, despite the obstacles under private law, eventually *can* have a role in the development of the law in this field. Access to justice is of special importance to dispossessed families or communities that – for whatever reason – are not actively supported by their governments. National courts may weigh the different interests at stake, and adjudicate individual claims, either by reliance on applicable human rights norms, or – depending on the specific jurisdiction – by a 'heritage sensitive' interpretation of open norms that exist in all jurisdictions.

4.3. Criminalization

Another aspect of changes in cultural heritage law is the trend towards criminalization: restitution within this field of law may be the consequence of violation of a prohibition, for example to import unlawfully exported cultural property. This model is mainly of importance for more recently looted cultural objects.

Traditionally, criminal law in this field focused on the act of looting or destruction, and not to the demand side of the chain: at least that was the case in countries that implemented the obligations of the 1970 UNESCO Convention solely in a private law manner. Recently however, this has changed and the 2023 Draft Model Provisions on the Prevention and Fight Against the Illicit Trafficking of Cultural Property, for example, also propose to criminalise the illicit import, placing on the market, and non-conformity of art market professionals of the duty to register transactions: these 'shall be criminal offences'.¹²³ This trend may be most noticeable in the US, where in high profile cases art dealers have been arrested and artefacts are seized from major museums; interestingly, in September 2023 the criminal law model of restitution after seizure was also applied to (allegedly) Nazi-looted art.¹²⁴ Indirectly, but on crucial points, criminalization thus affects cross-border restitution claims.

4.3.1. Sanction measures Syria and Iraq

The trend to also target the possessor of looted art was instigated in reaction to the wide-scale looting during the conflicts in Iraq and Syria. They brought about an awareness of the scale of the illicit trade; as well as the involvement of organised crime and terrorist groups; and clearly showed the detrimental

¹²³ The 2023 [Draft Model Provisions on the Prevention and Fight Against the Illicit Trafficking of Cultural Property](#), in Provision 19.

¹²⁴ A number of drawings by Egon Schiele, lost under duress by the Jewish owner in the Nazi-era, were seized and returned under as stolen property. See '[Schiele Artworks Returned to Heirs of Owner Killed by Nazis](#)', *The New York Times*, 20 September 2023.

effects on source communities, who were left without their cultural heritage after the looting practices.¹²⁵ These events prompted the involvement of the UN Security Council and the adoption of directly binding sanction measures. These are not criminal law measures under national law but organisational sanction measures, but they are mentioned here as they introduced a ban on the trade in and possession of cultural objects from Syrian and Iraqi territories.¹²⁶ The EU also acted at that moment, by adopting measures to ban the import, export and dealing in Iraqi¹²⁷ and Syrian¹²⁸ cultural objects.

Beyond measures aimed at the protection of cultural heritage from within the EU (for example, which was the reason behind the adoption of the 1993 Directive on the return of 'national treasures' from the territory of EU Member States¹²⁹ (see 2.3); and of a system for export licenses¹³⁰), these measures were the first directed at the identification and restitution of cultural heritage from *non*-EU States. They are, however, limited to objects removed from Iraq *after* 6 August 1990, and from Syria *after* 9 May 2011. Without a reversal of the burden of proof it is notably difficult for law enforcement and customs to prove objects disappeared after a certain moment, in a situation where antiquities circulate widely without documentation on their provenance and without identification (a 'passport').

The EU Import Regulation 2019/880, introduced above and further discussed hereafter (4.3.3.), indeed brings about this reversal of the burden of proof – however, this is limited to import from non-EU countries.

4.3.2. Nicosia Convention

In 2017, the Council of Europe Convention on Offences relating to Cultural Property was adopted (the Nicosia Convention).¹³¹ It is the first international convention taking a criminal law approach to the protection of cultural property. Adopted within the framework of the CoE's action to fight terrorism and organised crime, it supersedes the former European Convention on Offences relating to Cultural Property (1985), which never entered into force. The Nicosia Convention establishes several criminal offences, including: theft; unlawful excavation, importation and exportation; as well as illegal acquisition and placing on the market. It also lists a number of measures to 'facilitate co-operation for the purpose of also protecting and preserving cultural property in times of instability or conflict.'¹³² This is meant to include for example the establishment of 'safe havens' for foreign movable cultural property endangered by conflicts, a concept that may offer possibilities to further develop solutions

¹²⁵ See also the International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences, adopted by the UN General Assembly Resolution A/RES/69/169 of 18 December 2014.

¹²⁶ UN Security Council Resolution S/RES/2199 of 12 February 2015 requires States to prevent the trade in Iraqi and Syrian cultural property. See also S/RES/661 of 6 August 1990 and S/RES/1483 of 22 May 2003.

¹²⁷ [Regulation \(EU\) No 1210/2003 of the Council of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation \(EC\) No 2465/96](#), OJ L 169, 8.7.2003, pp. 6–23.

¹²⁸ [Regulation \(EU\) No 1332/2013 of the Council of 13 December 2013 amending Regulation \(EU\) No 36/2012 concerning restrictive measures in view of the situation in Syria](#), OJ L 335, 14.12.2013, pp. 3–7.

¹²⁹ [Directive 2014/60 of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation \(EU\) No 1024/2012 \(Recast\)](#), OJ L 1159, 28.5.2014, pp. 1–10, replacing [Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State](#), OJ L 74, 27.3.1993, pp. 74–79.

¹³⁰ [Council Regulation \(EC\) No 116/2009 of 18 December 2008 on the export of cultural goods \(Codified version\)](#), OJ L 39, 10.2.2009, pp. 1–7, replacing the older Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, pp. 1–5.

¹³¹ [European Convention on Offences relating to Cultural Property](#), Delphi, 23 June 1985 (European Treaty Series, No. 119).

¹³² Art. 21(c) of Nicosia Convention.

for tainted *unprovenanced* cultural objects that will surface, due to heightened due diligence standards and efforts to establish the legal history of objects that cannot readily be said to be 'unlawful' or 'lawful'.¹³³ Although, to date only six states are party to the Nicosia Convention, five of them (Cyprus, Greece, Hungary, Italy and Latvia) are EU Member States and more states appear to be considering ratification.

4.3.3. EU Import Regulation

Regulation (EU) 2019/880 on the Introduction and Import of Cultural Goods (EU Import Regulation 2019/880) aims to prohibit the import of cultural goods that were illicitly exported from third countries into the Union customs territory ('removed from the territory of the country in breach of the laws and regulations of the country where they were created or discovered').¹³⁴ The 'licit' provenance of the cultural object may be documented by export licenses, or under certain conditions (namely if it has been in a third country for a minimum of five years) by documentation that the artefact had left the country of origin already before 24 April 1972. Once the licensing system is in place, the EU Import Regulation 2019/880 could be a major step in the fight against illicit trade because, as noted above, this causes a de-facto shift in the burden of proof for importers.

Whilst the entire import controls regime, such as the electronic system that will carry out the storage and the exchange of information between the authorities of the Member States, should be operational from 28 June 2025 at the latest, the general prohibition has applied since 28 December 2020.

Member States should ensure that the regulation is properly implemented, and adopt and apply effective, proportionate, and dissuasive penalties for infringements.¹³⁵ At present, however, divergencies between Member States in their systems to criminalize such offences appear to be an obstacle for law enforcement in these cross-border investigations. **This calls, in other words, for harmonization at the EU level and in that regard the signing of the Nicosia Convention by EU Member States**, as suggested in the 2022 EU Action Plan.¹³⁶ Furthermore, in this regard also harmonization of questions pertaining to the burden of proof in relation to Anti Money Laundering regulations is important.¹³⁷

The 2022 EU Action Plan also suggests broadening the scope of international investigations, with support from Europol, Frontex, Eurojust and EPPO (the European Public Prosecutor's Office), and the reinforcement of cooperation of national law enforcement authorities through the informal CULTNET network. Furthermore, the 2022 EU Action Plan appears to foresee an integrated approach by extension to the system of export licenses under Council Regulation (EC) 116/2009.¹³⁸

¹³³ See para. 126 of [Explanatory Report to the Council of Europe Convention on Offences relating to Cultural Property](#), Nicosia, 19 May 2017 (Council of Europe Treaty Series, No. 221).

¹³⁴ For which the law of the country of origin and the year 1972 (the entry into force of the 1970 UNESCO Convention) are decisive. [Regulation \(EU\) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and import of cultural goods](#), OJ L 151, 7.6.2019, pp. 1–14.

¹³⁵ *Ibid.*, Art. 11.

¹³⁶ [Communication COM \(2022\) 800 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Action Plan against Trafficking in Cultural Goods](#), 13 December 2022, p. 13.

¹³⁷ See, e.g., the CoE: ['Burden of proof should be reversed to allow confiscations in serious offences: Warsaw Convention report'](#).

¹³⁸ *Ibid.*, p. 4.

The entry into force of the licensing system as foreseen in EU Import Regulation 2019/880 by June 2025, thus appears the logical moment to **introduce a comprehensive registration system to enhance the traceability of cultural objects within the EU. This also calls for a compliance system (a coordinating authority) that, in its turn, requires a 'knowledge centre' where experts can help determine a lawful provenance (i.e., assess the authenticity of the documentation and evaluate whether it may concern looted objects).**

4.4. Due diligence and provenance research

As discussed in Chapter 2, due diligence standards were introduced in the 1995 UNIDROIT Convention and since then have been adopted in many other instruments.¹³⁹ Within the (private law) system of the 1995 UNIDROIT Convention, this standard merely defines the good or bad faith of a new possessor and his or her rights to compensation for the value of the object upon return if it turns out to be stolen or looted: only a new possessor who 'neither knew or ought reasonably to have known' of the unlawful provenance of an artefact may claim compensation.¹⁴⁰ The Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State has adopted the due diligence standard in that sense. The importance of this standard is that it creates an obligation to actively research the provenance of an artefact before acquisition, which obviously is key for the identification of tainted or looted cultural objects.

Such an obligation to actively research the provenance of artefacts before acquisition features in the ICOM Code of Ethics for Museums since the 1980s:

Every effort must be made before acquisition to ensure that ... has not been illegally obtained in, or exported from its country of origin ... Due diligence in this regard should establish the full history of the item since discovery or production.¹⁴¹

Although the 1999 UNESCO International Code of Ethics for Dealers in Cultural Property is often referred to – and supported in the 2022 EU Action Plan – it is rather unspecific on this point.¹⁴² It voices a commitment that professionals 'will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported', but it does *not* impose an obligation to actively research the provenance of cultural objects (i.e., not even as an ethical standard).¹⁴³ Since 2020 the UNESCO Code is

¹³⁹ Art. 4 (4) of 1995 UNIDROIT Convention: 'In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.'

¹⁴⁰ Art. 4 (1) of 1995 UNIDROIT Convention. See, e.g., Art. 10 of [Directive 2014/60 of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation \(EU\) No 1024/2012 \(Recast\)](#), OJ L 1159, 28.5, 2014, pp. 1–10. Several states integrated this standard in their implementation legislation of the 1970 UNESCO Convention, such as Switzerland (in Art. 16 of the 2003 Cultural Property Transfer Act) and the Netherlands (in Art. 87a Civil Code).

¹⁴¹ ICOM Code of Ethics (2.3).

¹⁴² See the 2022 EU Action Plan, p. 8. (above, 4.3.3).

¹⁴³ [The 1999 UNESCO International Code of Ethics for Dealers in Cultural Property](#), CLT/CH/INS.06/25 REV, adopted 16 November 1999.

under revision and a draft new version indeed includes such obligation to actively research provenance.¹⁴⁴

Furthermore, the 2023 UNESCO Model Provisions on the Prevention and Fight against Illicit Trafficking of Cultural Property – which are non-binding but authoritative as future standards – also provide for an obligation on museums and art market professionals to actively ensure the legal provenance of cultural objects before any transfer, and in that regard to:

check whether the cultural property in question is registered in publicly accessible databases such as the INTERPOL Database on Stolen Works of Art as well as relevant national databases and refer to the ICOM Red Lists of Cultural Objects at Risk. ...

adequate documentation on provenance' must be interpreted by reference to relevant information that can be reasonably obtained which, in the case of orphan works or exceptional collecting of primary evidence ... includes background information that establishes the quality of orphan works or legitimizes exceptional collecting of primary evidence.¹⁴⁵

In the meantime, due diligence standards also entered into the national legislations of countries that did not accede to the 1995 UNIDROIT Convention – as a measure to determine the good faith of buyers – but *also* as a minimum standard in immunity for seizure regulations (e.g., in the 2008 UK law).¹⁴⁶ In order to receive a guarantee that artefacts on an international loan in the UK will be immune from seizure, the provenance of the artefacts must be researched and documented.

4.4.1. Mandatory due diligence standards

An important boost to *mandatory* due diligence standards as part of import or trade prohibitions was the adoption of the 2017 UN Security Council Resolution 2347, solely dedicated to cultural heritage protection. It requests states to take steps to prevent and counter illicit trafficking, 'including by prohibiting cross-border trade in such illicit items where states have a reasonable suspicion that the items originate from a context of armed conflict, ... *and which lack clearly documented and certified provenance*, to allow for their eventual safe return'.¹⁴⁷ It also urges states to adopt measures to engage 'museums, relevant business associations and antiquities market participants on standards of provenance documentation, differentiated due diligence and all measures to prevent the trade of stolen or illegally traded cultural property'.¹⁴⁸ In 2021 the UN General Assembly reinforced this by urging states to 'take appropriate measures to ensure that:

all actors involved in the trade of cultural property ..., are required to provide verifiable documentation of provenance as well as export certificates, as applicable, related to any cultural property imported, exported or offered for sale, including through the Internet.¹⁴⁹

¹⁴⁴ For the revision and proposed draft new version, [see Annex 5 to the provisional Agenda item 12 of the 23d Session of the ICPRIP](#) (May 2022). Draft art. 3: 'take all the necessary measures to detect stolen, illegally alienated, clandestinely excavated or illegally exported cultural property and refer, among others, to accessible registers of stolen cultural objects and any other relevant information and documentation which it can reasonably obtain. Traders acting or not as agents should notably ensure that a cultural property has been licitly obtained, exported and imported, as documented by a legally issued export certificate. Particular attention should be given to the screening of online offers.'

¹⁴⁵ Provision 18 of the [Draft Model Provisions on the Prevention and Fight Against the Illicit Trafficking of Cultural Property](#), C70/23/7.MSP/8, adopted in May 2023.

¹⁴⁶ See, e.g., Provision 3 of the 2008 UK [Regulations on the Protection of Cultural Objects on Loan](#).

¹⁴⁷ Para. 8 of UN Security Council Resolution S/RES/2347 of 24 March 2017. Emphasis added.

¹⁴⁸ *Ibid.*, para. 17, point (g).

¹⁴⁹ [UN General Assembly Resolution A/RES/76/16 on the return or restitution of cultural property to the countries of origin](#), adopted 6 December 2021, at 21.

The Nicosia Convention, as seen above, replicates and codifies such mandatory due diligence standards: State parties should take measures to ensure that the acquisition or ‘placing on the market’ of stolen or unlawfully transferred cultural property is a criminal offence, not only if the person knowingly acquires such objects but ‘also in the case of a person who should have known of the cultural property’s unlawful provenance if he or she had exercised due care’.¹⁵⁰

In a similar vein, the EU Import Regulation 2019/880 also relies on documentation to support the lawful provenance and requires:

documents and information providing evidence that the cultural goods in question have been exported from the country where they were created or discovered in accordance with the laws and regulations of that country or providing evidence of the absence of such laws and regulations at the time they were taken out of its territory¹⁵¹

Nevertheless, this obligation is limited to the import from third countries onto EU territory, whereas for transactions *within* the EU no such mandatory due diligence standards are in place. **If the aim is to tackle the ongoing trade in unprovenanced (and possibly looted) cultural objects, this gap needs to be addressed.**

4.4.2. Lawful provenance?

Due diligence standards thus appear to be in transformation from a criterion for eligibility for compensation upon restitution in a private law approach, into a hard legal obligation. Especially in countries where the trade in *unprovenanced* antiquities was common practice, the effect of such measures will be felt.

An important point worthy of attention here is what exactly is meant by a ‘lawful’ or ‘unlawful’ provenance? This is obviously a key question in restitution issues. The answer, however, depends on the perspective one takes, as was highlighted throughout this study: lawful according to what law? National ownership laws vary widely, while international rules are neither retroactive nor clearly defined.

In this regard, the ‘1970 watershed rule’ has surfaced as a ‘proxy to legality’.¹⁵² It is used as a touchstone by auction houses, the art trade, and museums, and it means that artefacts should have a documented provenance as of the entry into force of the 1970 UNESCO Convention (24 April 1972), either as being outside the country of origin before that date or otherwise with an export licence.¹⁵³ This rule has been confirmed in both soft and hard law instruments.¹⁵⁴ The EU Import Regulation 2019/880, as noted before, also deploys the 1970-norm by allowing in cultural objects *without* an export licence as long as the object was outside its source country before 24 April 1972 (and for a minimum of 5 years in another

¹⁵⁰ Arts. 7 and 8 of the Nicosia Convention.

¹⁵¹ Art. 4 (4) of [Regulation \(EU\) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and import of cultural goods](#), OJ L 151, 7.6.2019.

¹⁵² To cite Gerstenblith, P., ‘Enforcement by domestic courts, criminal law and forfeiture in the recovery of cultural objects’, in F. Francioni, J. Gordley (eds), *Enforcing international cultural heritage law*, Oxford: Oxford University Press, 2013, p. 153. See also Négri, V., [‘Legal study on the protection of cultural heritage through the resolutions of the Security Council of the United Nations’](#), Paris: UNESCO, 2015, p. 10.

¹⁵³ The 1970 UNESCO Convention entered into force on 24 April 1972; this time lock is also used as simply ‘before or after 1970’.

¹⁵⁴ E.g., the 2013 Guidelines on the Acquisition of Archaeological Material and Ancient Art of the US Association of Art Museum Directors (AAMD), under ‘E’, prescribe that ‘Member museums normally should not acquire a Work unless provenance research substantiates that the Work was outside its country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970’.

country).¹⁵⁵ The 1970-rule (which in fact is 1972, the moment of entry into force of the 1970 UNESCO Convention) operates, in other words, as a time lock for a new international order of controlled trade.

Despite its apparent attraction (legal security), such a time lock has a downside. Source countries may not be able to prove that a specific object was still on their territory: cultural objects are certainly not always documented in an inventor: freshly (illicitly) excavated archaeological objects *by definition* are not documented for example. A recent scandal of a series of unnoticed thefts of undocumented artefacts from the British Museum, however, illustrates that this is a more general problem.¹⁵⁶ At the same time, provenance research has not always been an issue and many artefacts lack information on their ownership history as touched upon several times already: this does not necessarily mean that an object was unlawfully taken or looted. Leaving such nuances aside, one noticeable effect of this 1970-rule is that artefacts offered on the market remarkably often are presented with a provenance in terms of a 'private (Western) collection' followed by a date before 1970.¹⁵⁷

In the meantime, the 1970-rule is challenged by the *lex originis*: under application of that rule the laws of the country of origin define the 'lawfulness' of a provenance – and this may obviously be earlier than 1972. Moreover, the lawfulness of a provenance also depends on the question whether it was exported from an occupied territory and was covered by the rules of the 1954 UNESCO Convention and Protocol; or, yet another option, it may depend on its whereabouts in the Nazi-period (1933-1945) or whether it concerns cultural objects that were lost -by Indigenous communities.

In short: what is a 'lawful provenance' is not clear, and guidance would seem needed. Since norms in this field change constantly and a clear rule may not surface soon, the focus should best be on procedural justice and ways to settle title issues in a transparent and neutral manner. A pragmatic solution is to **establish a (neutral and transparent) ADR procedures/clearance system** where cases can be investigated and assessed on a case-to-case basis.

In the meantime, solutions must also be found for artefacts that will surface - due to increased research - without a (full) provenance (also sometimes called 'orphan objects').¹⁵⁸ An ADR system, therefore, should be complemented with a **transparency register or other system, and regulation of the notion of a 'safe haven', for cultural objects with an unclear (but not *per se* unlawful) provenance.**

4.4.3. Tools for provenance research

Another question is how to fulfil the minimum standard of due diligence: what steps can be taken and what tools are available? A 2019 study on 'Due diligence' by the Subsidiary Committee to the 1970 UNESCO Convention in this regard lists:

¹⁵⁵ An exception applies for objects of which the country of origin cannot be established or were outside its source country before 24 April 1972, provided they were five years in another country. See Art. 4 (4) of the [Regulation \(EU\) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and import of cultural goods](#).

¹⁵⁶ See, Batty, D., ['Artefacts stolen from British Museum 'may be untraceable' due to poor records'](#), The Guardian, 25 August 2023.

¹⁵⁷ Cf. e.g., Lixinski, L., *International Heritage Law for Communities: Exclusion and Re-Imagination*, Oxford: Oxford University Press, 2019, p. 132: 'The black market in antiquities exploits this loophole through creating mechanisms to prove that the objects left the territories of the states in question before the Convention's entry into force, thus laundering the cultural artefacts'. See also Campbell, P.B., 'The illicit antiquities trade as a transnational criminal network: characterizing and anticipating trafficking of cultural heritage', *International Journal of Cultural Property*, 2013, 20(2), pp. 113–153.

¹⁵⁸ In this regard under auspices of UNIDROIT an 'exploratory expert group' on 'orphan objects' has been installed to address the subject. See Summary report, S70B/Orphan objects/EEG/Doc. 3, UNIDROIT, March 2023.

- the UNESCO Database of National Cultural Heritage Laws (Natlaws) as a tool to examine national laws, specifically regarding export provisions;
- direct searchable and non-direct searchable object-based databases – either commercial (Art Loss Register) or institutional entities (national registers of stolen cultural objects); INTERPOL’s Database of Stolen Works of Art;
- the ICOM Red Lists, which lists objects that are at risk; and, finally,
- the World Customs Organization’s ARCHEO, which serves as an electronic information exchange platform, and United Nations Office on Drugs and Crime’s SHERLOC, a platform with resources and laws on the crime of trafficking in cultural property.¹⁵⁹

In practice, however, such tools, however useful, often appear not readily and easily accessible (ARCHEO and SHERLOC), outdated (UNESCO's database), incomplete (e.g., INTERPOL only contains reported thefts) or only give an idea of the *types* of objects that may be looted (the ICOM Code Red Lists).¹⁶⁰ These are helpful tools but often insufficient to establish a lawful or unlawful provenance of a specific object and this means that for research into artefacts without a clear provenance actors in the art world often depend on a risk analysis by a commercial organisation (the Art Loss Register).

In such a situation without clear standards or accessible tools to establish what is a lawful provenance, one can hardly expect actors in the art worlds to abide by strict standards. This institutional blind spot needs to be addressed: **guidance by a public authority would seem needed.**

4.5. Conclusions

This last chapter has addressed new models and tools in the rapidly evolving legal framework for restitution claims.

The first part discussed the 'human rights' model' for restitution, where restitution is seen as a remedy for human rights' violations, either for grave human rights' violation in the past, or for an *ongoing* violation of the right to access to culture. The distinguishing feature of this model is that it is based on today's identity values of the object, less so on the unlawfulness of a loss in the past. Such an approach may foster cooperative solutions – and obliges museums to engage with source communities on the governance of their cultural heritage.

The second part addressed the trend toward the criminalization of cultural heritage law, specifically with respect to issues concerning illicit trafficking. In a criminal law model, restitution may be facilitated after seizure of the looted artefact. **Implementation and harmonization of cultural offences and crimes, however, is important for this system to work well, and a reason for EU Member States to accede to the 2017 Nicosia Convention and for the EU to take on a coordinating role.**

The introduction of import restrictions linked to mandatory due diligence standards in regulations such as the EU Import Regulation 2019/880 underscore the increasing importance of provenance research. Buyers, dealers, auction houses and museums must assure themselves of the lawful provenance before a transaction (who were the previous owners and was it lawfully acquired?). The question of what is '(un)lawful', however, is anything but clear. In this respect the '1970-rule', long used as a practical tool

¹⁵⁹ [Study on Due Diligence, discussed 22 and 23 May 2019 by the Subsidiary Committee of the Meeting of States parties to the 1970 UNESCO Convention \(C70/19/7.SC/8a\)](#), pp. 3-4.

¹⁶⁰ See fn. 63 and acc. text on the UNESCO database.

to distinguish a 'good' from a 'bad' provenance, is challenged not only by the *lex originis*, but also by other standards. Another problem that needs to be addressed is a lack of tools to help establish a 'good' provenance. No publicly managed and accessible database for stolen artefacts exists (or could exist since cultural objects cannot always be documented), whereas databases that do exist often focus on particular categories, mostly on the period 1933–1945. This calls for guidance by a public authority.

The entry into force of the licensing system in EU Regulation 2019/880 appears to be the logical moment to set up a **comprehensive registration system to enhance the traceability of cultural objects within the EU**. That would also call for a **compliance system (a coordinating authority), and the setting up of a 'knowledge centre' where experts can help determine the lawful provenance**. Simultaneously, clarification of standards that yet are unsettled would only seem possible by building up jurisprudence, for example at a **centralized ADR (appeal)/clearance system**.

5. CONCLUSION AND RECOMMENDATIONS

This study addressed the main obstacles related to cross-border restitution claims to looted art, considering recent cultural losses resulting from illicit trafficking, but also Nazi-looted art and colonial takings. These categories differ but commonalities exist.

What follows in this last chapter is a summary of the findings, and a list of recommendations. These take account of the 2019 EP Resolution and the actions announced in the 2022 EC Action Plan.

5.1. Summary of findings

Conventional model

An analysis of the legal framework for cross-border restitution claims reveals that similar obstacles arise in various categories: fragmentation of the legal framework and a disconnect between norms on different levels. Whilst international standards voice the rule that title over unlawfully looted cultural objects should *not* pass, domestic private law often is not (yet) in line with those standards. The most prominent blind spot is that only losses *after* the adoption and implementation of a convention are affected by the conventional rules – whilst claims concern previous losses. This means that many claims are *not* covered by these norms. Through trade and acquisition, ownership title can be (and often has been) passed on to new possessors, and objects are ‘laundered’: the illegality of the looting simply does not ‘stick’ to the objects. Often, the provenance of a specific object is also omitted or unknown by new possessors: the trade in unprovenanced cultural objects has been the rule rather than the exception for a long time and is still a common practice. With that reality in mind, solutions need to be found. To retroactively declare invalid the lawfully acquired ownership title of a new possessor is problematic – mostly for civil law countries where ownership over stolen goods may pass – as that would implicate expropriation. A solution would be to limit the tradability of looted artefacts by making transactions dependent on minimum standards of documentation on their lawful provenance, in combination with a prohibition of the placing on the market of unlawfully looted cultural objects.

The ethical model

Common themes in soft-law instruments that have emerged in this field are a call for equitable solutions to title disputes, and for ADR to settle claims. Problematic in this model is the lack of transparent and neutral procedures to implement and clarify soft law norms, and for parties to turn to if they do not agree on an outcome. ADR procedures are advocated as being more efficient, less adversarial, and more flexible to culturally sensitive arguments. However, these procedures are often the *only* way to assess claims. On the practical level this means that certain artefacts cannot be sold or sent on international loans as long as their title is not ‘cleared’, and although market forces have come to fill in some gaps in the law, this does not guarantee justice. This institutional vacuum in terms of access to justice in Europe needs to be addressed. A lack of clarity at both the substantive and the procedural levels will otherwise aggravate legal uncertainty.

Humanization

In a ‘human rights’ model’ for claims to looted cultural objects, restitution is seen as a remedy for human rights’ violations. This may be either for a grave human rights’ violation in the past, or for an *ongoing* violation of the right to access to culture. The distinguishing feature of such an approach is a focus on today’s identity values of cultural objects as the main criterion for claims, and less so on the unlawfulness of a loss in the past. This model appears particularly suited to address colonial-era claims:

a clear example is given in the UNDRIP that entitles Indigenous Peoples with rights of access, control, and repatriation of their lost cultural objects, depending on the heritage values involved. A human rights' approach to claims may foster cooperative solutions, yet it also obliges museums to engage with source communities in decisions that regard their cultural heritage.

Criminalization

A last, increasingly important, model for restitution is the criminal law model. Restitution, in this sense, may be the outcome after seizure of looted artefacts that were (for example) imported in violation of a prohibition to import or bring on the market artefacts that lack minimum standards of provenance documentation. Harmonization of criminal sanctions for cultural crimes at the EU level, and the signing of the Nicosia Convention by EU Member States as suggested in the 2022 EU Action Plan, is key to making this model work well. The introduction of import restrictions linked to mandatory due diligence standards, as in the EU Import Regulation 2019/880, underscores the importance of provenance research in this regard.

Standards and tools for a 'lawful provenance'

In the meantime, the key question for restitution of what is exactly an '(un)lawful provenance', is anything but clear. In this respect the '1970-rule', long used as a practical tool to distinguish a 'good' from a 'bad' provenance, is challenged by the *lex originis*, implicating that the law of the country of origin is decisive for what is a lawful provenance. Then again, other standards co-exist, for example if an object has been unlawfully exported from an occupied territory for which the 1954 UNESCO Convention may be decisive, or for Nazi-looted art where clarity on the ownership history in the period 1933–1945 is key. Another, more practical, problem that needs to be addressed is the lack of tools to establish whether an artefact has been stolen or looted in the past.

The overall conclusion in answer to the question posed in this study is that two main common obstacles can be identified.

- (i) In the first place, a lack of clear standards and procedures to address and resolve claims: this obstructs access to justice for dispossessed owners, communities, and states of origin, and in addition it jeopardizes legal security in the art world.
- (ii) A second obstacle is of a practical nature, namely that cultural objects can be traded and possessed without documentation demonstrating their lawful provenance. This makes the distinction between cultural objects with a 'lawful' provenance and those with an 'unlawful' provenance difficult to determine, which in turn is an incentive for the illicit trade. It also causes for the paradox of lawful possession of unlawfully looted (lost) cultural objects: without information of the ownership history, title may be passed on to new possessors.

With this in mind pragmatic solutions must be found.

5.2. Recommendations

The problems identified above call for placing more attention on provenance research and the traceability of cultural objects, and for guidance and procedures to clarify norms and standards. Against that background, the following recommendations are made:

5.2.1. Mandatory due diligence standards for the trade

Making transactions dependent on minimum standards of documentation on their provenance will encourage provenance research and discourage future transactions that involve cultural objects with a tainted provenance. An example of this model is the German Cultural Property Protection Act of 31 July 2016, that relies on 'relevant documents to prove the lawfulness of the export from the country of origin', and provides for detailed due diligence standards for any form of 'placing on the market' of cultural objects.¹⁶¹ A logical way to regulate this would be to include such mandatory due diligence standards for the trade – in combination with a registration obligation as proposed under (2) – in a revised version of Directive 2014/60 on the return of cultural objects unlawfully removed from the territory of a Member State.

This recommendation is in line with the 2019 EP Resolution and proposals in earlier studies on this topic.¹⁶² The 2022 EU Action Plan does not (explicitly) address this issue.

5.2.2. Central registration system

Registration of cultural objects is essential for their traceability and to prevent looting, but also for restitution efforts. Setting up a registration system to enable the identification and traceability of cultural objects has many aspects and could be done in various ways: the entry into force of the licensing system in EU Import Regulation 2019/880 appears to be the logical moment to set up a comprehensive registration system of cultural objects that appear on the EU market. In the same spirit – transparency and traceability – museums should be supported to have (digital) inventories of their collections, and a certification system for art market professionals should be considered.

This is in line with the 2019 EP Resolution that suggests the setting up a common cataloguing system and the establishment of a transaction register. In the 2022 Action Plan in this regard two studies are announced: one on the extension of the electronic registration system for regulating the import – which should be in place in 2025 – to the EU system for export; and another study into the setting up of sales registers.¹⁶³ Furthermore, the 2022 EU Action plan aims at a better recording by museums of their collections through cooperation with ICOM and the training of museum staff.

5.2.3. Knowledge-centre for provenance research

The measures above will result in paying increased attention to provenance research and this means that specialised expertise will be needed. In this context, the establishment of a permanent knowledge centre – or at a minimum a permanent academic network – for provenance research at EU level is recommended. This expertise is needed by law enforcement (and also by other stakeholders) to assess what is a 'good' provenance. This would seem a public task that should take place in a neutral setting.

The 2019 EP Resolution in this regard highlights the need for access to 'high quality and independent provenance research'. The 2022 Action Plan announces no specific measures in this regard, apart from the exploration of 'measures for an EU-wide harmonisation and the interconnection of Member-States' databases of stolen cultural goods'.

¹⁶¹ Chapter 4 German Cultural Property Protection Act of 31 July 2016 ([German Federal Law Gazette](#) [BGBl.] Part I p. 1914).

¹⁶² The 2019 EP Resolution proposes to address the lack of common standards on due diligence and provenance research, by harmonisation of such standards, and to consider adopting a ban for professionals to enter into a transaction if there are doubts as to the provenance of an object. Cf. 2011 COM Study and 2017 EP Study.

¹⁶³ 2022 EU Action Plan, p. 8.

Experts consulted for this study recommend closer (European) cooperation and coordination in the field of provenance research, and highlight that restitution and provenance should be acknowledged as public tasks, since neutrality and impartiality are essential.¹⁶⁴ In this regard the EU should take a role in the standardization (certification) of provenance research (see, e.g., Annex 3-5 for proposals in this regard). Most of the experts also agree that what is mostly needed now is an interdisciplinary knowledge centre (or at a minimum: an academic network), and a coordinating body that can mediate between experts, law enforcement, the judiciary, and other stakeholders. It is not the creation of yet another database, but continuity and consolidation of existing knowledge and the development of sustainable tools are key. In the words of one expert, 'somebody needs to vacuum up all the databases and give them a home'.¹⁶⁵ Building up a knowledge system by linking data and human expertise and the setting up of structural and lasting networks is needed – as opposed to today's informal networks and ad-hoc research projects – in order to build up an institutional memory. The carrying out of this specialised research to support authorities is a public task that should have a place at a public (international) organisation (e.g., at the EU level).¹⁶⁶

5.2.4. Central (EU) ADR mechanism

In light of the institutional vacuum in European jurisdictions for (many) restitution claims that concern past looting, the establishment of a European (ADR) claims procedure should be considered. This would also meet the obligation that states have taken upon themselves – by signing instruments like the Washington Principles and the UNDRIP – to develop neutral and accessible procedures to ensure that promises about justice are upheld. And whilst some EU Member States set up procedures for specific (historical) claims, many restitution claims remain *uncovered* - resulting in typically European cases being adjudicated before US courts. Moreover, the availability of an appeal (ADR) procedure at the EU level could enhance harmonisation of norms.

This is in line with the 2019 EP Resolution to 'establish a specific alternative dispute resolution mechanism to facilitate the resolution of claims to looted cultural objects, 'in light of the importance of transparent and neutral procedures and to develop clear standards'.

5.2.5. EU Agency for cultural objects

A pragmatic and integrated approach to address the above mentioned tasks would be to do so in the setting of an EU agency or embed this task in an existing agency in a related field (e.g., EUIPO that deals with intellectual property and has registration as well as ADR tasks). Logically, the licensing system envisaged in the EU Import Regulation 2019/880 – which should be operative by 2025 – needs to be accompanied by the establishment of a clearance system to address the problems that will surface regarding cultural objects without a clear provenance. Such an organisation should provide for neutral and transparent procedures to assess title and provenance issues, but beyond that could have tasks in terms of the setting up and/or coordination of a knowledge centre for issues relating to provenance research; a coordinating authority for a central registration system; a transparency register for *unprovenanced* cultural objects (as proposed hereunder); and a certification system for art market professionals.¹⁶⁷

¹⁶⁴ Various experts, see list of interviews in Annex 1.

¹⁶⁵ Interview with dr. D. Yates (Annex 1).

¹⁶⁶ See the Annexes 4 and 5 for proposals in this regard.

¹⁶⁷ Cf. Provision 17 of the [Draft Model Provisions on the Prevention and Fight Against the Illicit Trafficking of Cultural Property](#).

This seems in line with the 2019 EP Resolution that calls for a number of coordinating activities, as well as the establishing a specific ADR mechanism. In fact, already in 2003 the European Parliament called on the Commission to undertake a study on 'the value of creating a cross-border coordination administrative authority to deal with disputes on title to cultural goods'.¹⁶⁸ Interestingly, such an Agency (a 'cross-cutting coordination department at European level') was indeed foreseen in 2011 in the study commissioned by the Commission on 'Preventing and Fighting illicit trafficking in cultural goods in the European Union'.¹⁶⁹ It advised that such a coordinating EU body should have 'advisory tasks in field of legislation and implementation', but also 'operational tasks as a European contact point, provide alternative dispute resolution, and manage a new 'European art market observatory' to exchange data and information. Moreover, in the same vein the two studies commissioned by the European Parliament on the topic (of 2016 and 2017) recommend the setting up of an EU Agency/Platform/Advisory body to deal with issues concerning looted art, particularly also to provide for ADR in this field.¹⁷⁰ The 2022 EU Action Plan does not follow up on this.

5.2.6. Further measures

Further recommended measures concern the following:

- To prevent the looting and smuggling of cultural objects in the future, criminalizing their trafficking and setting minimum penalties is crucial. Given the cross-border nature of this crime, the EU should take a coordinating role and EU Member States should consider acceding to the 2017 Nicosia Convention, as advocated in the 2022 EU Action plan.
- To avoid stagnation of the art market and cultural objects from going 'underground', consider setting up a transparency register for unprovenanced cultural objects ('orphan objects'), and regulate the notion of 'safe havens' for artefacts that can (temporarily) not be returned.
- Support the funding of (digital) inventories and provenance research by museums.
- Promote adherence by Member States to the obligations concerning Indigenous cultural property in UNDRIP, and, more generally, promote participation of source communities in decisions concerning their cultural objects, for example in cooperative provenance research projects.
- Raise awareness and support education programmes on cultural heritage protection and regulations: if rules are not known they cannot be followed or enforced.
- Support the adoption of the *lex originis* – whereby title issues are governed by the law of the country of origin or discovery rather than the law of the country where the object is located – as a special conflict of law rule for cross-border claims to cultural objects, and set up an accessible database of national laws (or support an update of the existing UNESCO database of national laws).

¹⁶⁸ [Resolution \(EP\) on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested](#), 2002/2114(INI), 17 December 2003, OJ C 91E, 15.4.2004, pp. 500–502.

¹⁶⁹ Armbrüster, Ch.; Beauvais, P.; Chedouki, J. et al., '[Study on preventing and fighting illicit trafficking in cultural goods in the European Union](#)', European Commission, Directorate-General for Migration and Home Affairs, CECOJI-CNRS, 2011. See pp. 216 and 233.

¹⁷⁰ 2016 Study, p. 44. Recommendation 15 of the 2017 Study.

- Considering the rapid developments in this field, keep this topic on the agenda and periodically monitor developments.

In conclusion, public guidance at the EU level seems urgently needed for a successful transition from a market with many grey areas to a transparent and licit art market. Measures in that regard would not only serve the interests of former owners but *all* stakeholders, and help safeguard the cultural heritage of all people.

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¹⁷¹ Date of access for all online sources was 27 September 2023.

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ANNEX 1

Consultations

Hereunder a list of the consulted experts (excluding those who preferred *not* to be named):

- Anna Kostova-Bourgeix (Policy Officer, DG GROW).
- Dr. Donna Yates (Associate Professor University of Maastricht, the Netherlands).
- Dr. Daniel Soliman (curator Egyptian and Nubian collections, National Museum of Antiquities, Leiden the Netherlands).
- Elie Cavigneaux (Direction des affaires européennes et internationales, France).
- Floris Kunert (researcher, Netherlands Institute for War, Holocaust and Genocide Studies).
- Isobel MacDonald (independent art historian and researcher, UK).
- Julia Rickmeyer (restitution specialist, Sotheby's).
- Kristin Hausler (Director of the Centre for International Law, British Institute of International and Comparative Law).
- Prof. dr. Lynn Rother (professor for Provenance Studies and Director Provenance Lab, University of Lüneburg, Germany).
- Marcel Marée (Assistant Keeper Egypt & Sudan British Museum / Circulating Artefacts, UK).
- Marina Schneider (Principal legal officer and treaty depositary, UNIDROIT).
- Dr. Marius Müller (Independent cultural heritage law expert, Germany).
- Dr. Mirjam Shatanawi (provenance expert Pilotproject Provenance Research on Objects of the Colonial Era (PPOCE)).
- Richard Bronswijk (Head National Expert Team Art and Antiquity Criminality, Dutch Police).
- Dr. Sharon Hecker (Coordinator Expert Witness Pool, Court of Arbitration for Art, art historian and curator, Italy).
- Sophie Delepierre (Head of Heritage Protection Department, ICOM).
- Toon van Mierlo and Dick Oostinga (chair and vice chair Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, the Netherlands).
- Prof. dr. Vladimir Stissi (Professor Classical Archaeology, University of Amsterdam).
- World Customs Organisation, policy officers.

ANNEX 2

UNESCO 2023 draft MODEL PROVISIONS

- Model Provisions on the Prevention and Fight against the Illicit Trafficking of Cultural Property available here: <https://culturalpropertynews.org/wp-content/uploads/2022/11/proposed-Draft-Model-Provisions.pdf>.

ANNEX 3

Expert opinion on standardization of provenance data



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A Comprehensive Guide for Provenance Data Standards is urgently needed

In Need of a Shared Provenance Language:

Provenance research is the foundation for the restitution and decolonization efforts of institutions, communities, and claimants. This type of research is very resource-intensive due to scattered and fragmented archives; its results are often ambiguous and usually reveal more gaps in knowledge than established facts. Since provenance information has been recorded in the 18th-century Parisian art market, it is usually published and updated in list form. These provenance lists are central to the exchange of knowledge about the transfer and whereabouts of artworks between different stakeholders. They serve to (more efficiently) identify potentially looted artworks in museums, private collections, and on the market. Objects whose provenances have no proof of ownership or whereabouts, for example in Europe between 1933 and 1945, are considered particularly suspicious and could be automatically cross-referenced with claimed objects.

Cultural heritage institutions have recognized the **importance of publicly accessible provenance data**. Museums in particular are increasingly making their datasets available via websites, data dumps, and even APIs. However, the majority of provenance data is still recorded as free text and therefore neither intelligently searchable nor linked; this requires so-called structured data. The use of artificial intelligence and context-specific algorithms to handle Natural Language Processing tasks has yielded promising results in structuring provenance data.¹ With **machine-readable data in sight**, it appears that making queries across datasets for specific provenance criteria and using computational methods for large-scale analysis will be possible in the not-too-distant future. This will enable us to identify looted objects and conduct the necessary research at a fraction of the time and cost.

Nonetheless, making existing information digitally available in machine-readable form meets only the first of two challenges to a more efficient and transparent provenance practice. The changes to date have not yet taken into account the

¹ See Rother/Mariani/Koss, Hidden Value, 2023, <https://doi.org/10.1515/ibwg.2023-0005>.



heterogeneity of provenance information in terms of what is recorded and how. These **variations and ambiguities lead to unreliable results** for both humans and machines. What is missing in the present moment, when more and more data is being created and shared, are standards for recording provenance that reconcile the process of documenting complex historical findings with the technological realities of the 21st century. Such standards should not govern how institutions, researchers, or claimants interpret complex sources, conflicting narratives, or legal concepts, but instead should specify how the results of the experts' interpretations are consistently recorded—much like a language that defines rules for understanding but not content.

Recommendations for Provenance Data Standards:

Therefore, the future standards of recording provenance should address three aspects:

1. *A Conceptual Framework*: Experts need to agree on the structure and the semantic logic of provenance records by testing and potentially refining existing ontologies and application profiles (such as CIDOC CRM and Linked Art) on a diverse and large set of provenance records from various disciplines and institutions.
2. *Clear Writing Guidelines*: We must ensure writing consistency across institutions and disciplines, anticipating the needs of both human readers and machines, by building on existing textual standards (such as the AAM Format) while also creating a shared understanding of complex concepts (such as how to record uncertain, contradictory, or incomplete statements).
3. *An Expert-Defined Vocabulary*: We must create an accessible and unambiguous terminology anticipating the requirements of different stakeholders and disciplines (e.g., the current legal definitions of seizure, confiscation, and sequestration versus their use during WWI and WWII) to be incorporated in existing vocabularies (such as the GND or the Getty's AAT).

Recommendations for Workshop Series and White Paper:

A multi-tiered, expert consultation process is required to agree on urgently needed guidelines for provenance data standards. Such a process would

- be orchestrated by a steering committee consisting of 2 to 5 leaders in the field of provenance and cultural heritage data;
- consist of a series of 10 to 15 international workshops with a global outlook;
- bring together provenance experts from different disciplines (e.g., anthropology, archaeology, art history, law) and different fields of application (e.g., art market, communities of origin, museums);
- culminate in a comprehensive white paper that provides specific recommendations for recording provenance in the 21st century.

ANNEX 4

Proposal for a registry and expertise hub

Circulating Artefacts (CircArt)

A registry and expertise hub against the supply and sale of illegally sourced cultural goods

Introduction

In March 2018, the Dept of Egypt & Sudan at the British Museum launched a key initiative to help tackle the widespread trade in looted artefacts. This was the birth of 'Circulating Artefacts' (CircArt), a project pioneering a package of elements vital to any prospective infrastructure seeking to curb art market abuses. CircArt was twice awarded generous grants (totalling £1.6m) from the Cultural Protection Fund, a scheme run by the British Council on behalf of Britain's Department for Digital, Culture, Media & Sport (DCMS). Thus far, the CircArt platform was hosted at the British Museum, but it requires adoption by a higher, more suitable institution, where there can be no conflict of interest or risk of unwarranted managerial interference.

CircArt is a holistic toolkit and operation model for the documentation and expert appraisal of cultural goods in circulation on the international art market. Subject specialists manage and feed an ever-growing bank of object data and provenance research. The system is uniquely suited for use as an artefact registry, but CircArt's capabilities go much further. It is designed as a proactive observatory of the trade, equipped and staffed to spot and capture irregularities, and so to raise awareness and foster good practice. CircArt, in fact, is tailored to provide a due diligence support service, whereby users can submit objects not just for registration but for thorough provenance checks. This service, if formally established, holds huge promise of enhanced transparency and accountability on the art market. There will be peer pressure among sellers to demonstrate a higher standard of due diligence. A buyer's or seller's failure to engage with the service could be legally construed as

bad faith and negligence, exposing the individual to legal, financial and reputational risks – especially when an object in their possession is, sooner or later, found to be of illicit origin. Lists could be published of sellers using the service, by way of accreditation, and thus implicitly of those who do not. Any such public record might include statistics on the number of objects submitted by the dealers.

For now, CircArt is lending its expertise predominantly to a wide range of law enforcement agencies.¹ This is leading to successful prosecutions and has thus far enabled the recovery of over 1000 looted artefacts. CircArt also supports investigations by the Association for Research into Crimes against Art (ARCA),² the Antiquities Trafficking and Heritage Anthropology Research (ATHAR) Project,³ and the Archaeology Information Network (ArchaeologyIN).⁴ For detained and seized cultural goods, police need rapid and dependable feedback. Museums and universities lack resource to support police to the required standard. Staff at most such institutions are already overstretched, may lack the necessary niche expertise, are rarely able to deliver trenchant provenance research, and have no knowledge base system at their disposal like CircArt's. Instead, specially trained experts should do such work through full-time jobs linked to a system that CircArt offers.

As a pilot, CircArt has mainly concerned itself with the monitoring of objects from Egypt and Sudan, but it is ready for scope expansion to other source countries. The project was triggered by the director's alarm at the rate of destruction suffered by archaeological sites in MENA countries (Middle East and North Africa). Illicit digging has also sharply increased in Southern Europe, Latin America and Southeast Asia. Artefacts are excavated without authorisation and released onto the open art market on an unprecedented scale, even compared to colonial times.

¹ The platform has initiated, and continues to support, major criminal investigations in the UK (Metropolitan Police, Border Force, Thames Valley Police), the Netherlands (Dutch Police), Belgium (FPS Economy), Germany (Bundeskriminalamt), France (OCBC), Spain (Policía Nacional, Guardia Civil), Switzerland (Federal Office of Culture), and the USA (Immigration & Customs Enforcement, US Customs and Border Protection, New York District Attorney).

² <https://www.artcrimeresearch.org/>

³ <https://atharproject.org/>

⁴ <https://www.archaeologyin.org/>

Looting has been 'democratised' by modern technologies such as mobile phones, the internet, encrypted messaging, and social media platforms. Globalisation enables the rampant growth of criminal networks below the radar of law enforcement. Any looter or trafficker today can interact unhindered with any buyer or intermediary around the world. Within its first 8 months of capturing activities on social media, CircArt found more than 2,000 videos posted by looters *in Egypt alone*, and this certainly represents just the tip of the iceberg. Countless smuggled and laundered artefacts eventually resurface with well-established western dealers and auction houses, and CircArt is able to map full trajectories of objects from start to finish. A clamorous art market lobby insists that their business is 'legitimate', yet most of sellers keep offering tainted artefacts, often with laundered provenance information – and, more often, with none at all. A key problem is that sellers are as yet not obliged to reproduce provenance documentation in their catalogues. They only share such documents with anticipated clients, thus cutting out the researchers.

Since its inception, CircArt has recorded and studied more than 60,000 artefacts. For now, at least 30% of this material was demonstrably looted in recent years, and this figure is bound to keep rising as CircArt's research, data and expertise evolve. It is clear, therefore, that basic ethical rules are being flouted on a catastrophic scale. Sellers and auction houses are expected to make every reasonable effort to determine whether an object may have an illegitimate provenance, yet no due diligence checks will ever be conducted to their full potential unless a mechanism is put in place that promotes accountability, that lays bare any signs of negligence, and that facilitates consultancy by sellers with relevant cultural experts. Such a mechanism, which is precisely what CircArt has prototyped, would allow ethical buyers and sellers to set themselves apart from their less scrupulous competitors. It would reward well-intentioned actors, as has often been voiced to CircArt by dealers supporting its drive for a cleaner trade.

CircArt's principal objectives

It will be useful here to list the key aims that CircArt is designed to deliver:

- *Place the international art market under scrutiny by subject specialists, armed with a tailor-made system for documentation and provenance research.*
 - CircArt, in collaboration with ResearchSpace⁵ and eminent computer scientist Martin Doerr,⁶ has developed a linked-data 'Knowledge Base' system based on the CIDOC-CRM ontology, which is the international standard for capturing and exchanging cultural heritage information.
 - The CircArt tool is structured to help cultural experts document and analyse circulating artefacts as well as the associated actors, places, dates, events, and provenance clues. The system helps provenance researchers record and keep track of connections between these entities, and to discover patterns of investigative interest (e.g., recurrent links between a seller and an archaeological site, implying bulk trafficking).
 - The system integrates data, communications and media in one integrated structure. This includes automated data scraping of dealers' websites and algorithms for itemised processing of textual data and images, so that the experts maintaining the system can allocate more time to annotation and research.
 - Each object reported to CircArt, or proactively documented by the team and the system, receives a unique identifier – a randomly assigned number.
 - The CircArt system has the capability to capture and visualise the trajectories of searched objects over any length of time. These movements are viewable on a navigable 3D map of the world, fitted with a time slider.

⁵ <https://researchspace.org/>

⁶ Research Director at the Institute of Computer Science, Foundation for Research and Technology – Hellas.

- Icons and colour coding serve to indicate our *level of concern* about an object's authenticity and provenance, about an actor's involvement or behaviour, and about a site's exposure to thieves and looters – all backed up, of course, by relevant documentation and argumentation. All steps of argumentation are time- and author-stamped.
- The system also lets its experts mark their *level of confidence* in a piece of information, whether this originates from an external source (e.g., an object's alleged ownership history) or from the experts' own research (e.g., a theory that attribute A points to archaeological site B). The level of confidence is likewise backed up with documentation and argumentation. All steps of argumentation are time- and author-stamped.
- *Take a holistic approach in the capture and analysis of data.*
 - No object is recorded and assessed in isolation. From its first excavation or extraction through subsequent places and actors, an object passes through wider contexts of investigative interest. Countless artefacts relate to others on the market, and many of their connections (e.g., to the same findspot) can only be detected by a dedicated team of subject specialists, often within a small of opportunity.
 - Crucially, CircArt experts not only record and monitor what is happening on the 'official' market (auction houses, online seller platforms, art galleries) but also watch activities on social media.
 - Also recorded are objects that law enforcement agents encounter through seizures, or from exchanges between suspects. Police increasingly bring such objects to CircArt's attention for feedback.
 - CircArt records legal excavations (by archaeologists) as well as illegal ones (by looters). The former often provoke the latter.

Thanks to its holistic approach and contacts, CircArt increasingly traces objects all the way from their archaeological findspots (based on internal evidence), through traffickers in transit countries, to Western dealers and auction houses that advertise the objects with

fake provenances. Naturally, CircArt then reports such artefacts and its findings to the appropriate authorities.

- *Conduct research on the provenance of objects.*
 - CircArt does not just gather information for future data searches. A team of experts proactively researches and analyses the data, and their argumentation is captured within the same system. CircArt is not simply a database, it is a repository of data *and* of its provenance research.
 - The experts involved have an unrivalled understanding of evidence contained in the objects, such as stylistic and inscriptional clues that point to specific archaeological findspots and looting events. These people not only play a key role in promoting the market's accountability in the fight against heritage crime. They are historians, trained to spot and recover illegally sourced objects. Even though they cannot help recover every looted artefact, they are at least saving for future generations a wealth of historical and contextual information that would otherwise be permanently lost.
 - CircArt's internal and external experts are constantly identifying new diagnostic traits and patterns that aid the detection and recovery of illegally sourced artefacts. This research is not delimited by geographical boundaries. Objects anywhere are potentially relevant, not only those that enter Europe. Pieces on the European market cannot be viewed and researched in isolation, because artefacts from looting events spread globally. Trafficking networks do not stop at European borders.
- *Provide a public service where registered users submit objects for registration and exercise due diligence.*
 - Due to the sensitivity of CircArt's data and research, its system is access-restricted; members of the public cannot search it independently. CircArt, however, has been developed to serve as a central point of contact for object registration and for expert advice on questions of provenance and authenticity.

- Rather than remaining based within a museum, CircArt would better sit within an appropriate parent organisation of international scope and visibility, such as the EU or the OSCE. It would, however, benefit from continued engagement with, and from, the museum sector, a synergy to be promoted by the International Council of Museums (ICOM).
- CircArt avails of the right expertise both in-house and through its global professional networks. It constantly interacts with authorities and heritage professionals in source, transit and destination countries. CircArt is thus well placed to promote higher standards of due diligence in the trade by providing a support service for provenance checks. This will make it straightforward for sellers and buyers, at least the well-intentioned ones, to meet a higher benchmark. A readily accessible service leaves no excuse for failure to consult it. Such failure is potentially actionable.
- Through a standardised, largely automated process, registered users can submit to CircArt any object they saw, possess or consider for sale or purchase. An expert then checks if the object is a new addition to the system or if its current appearance is a new 'event', to be added to a pre-existing record. In exchange for a person's submission of an object, they learn from the expert (after internal peer review) whether there are any issues concerning its provenance and authenticity. For such advice, CircArt is already *de facto* a central point of contact for law enforcement and heritage professionals on four continents.
- Submissions of objects for appraisal should possibly come at a fee. This could help safeguard the platform's long-term sustainability, much like the Art Loss Register (ALR) operates.
- CircArt could issue certificates, affirming – if all seems well – that it currently holds no data to suggest that an object was sourced illegally. If, however, evidence to the contrary emerges, then the expert team reserves the right to report its concerns to any appropriate authorities, including those of the source country.

- The expert assessing an object also checks the accompanying paperwork for signs of forgery, and for signs of involvement of any high-concern actors.
- Institutionalised involvement of cultural experts is essential for the successful implementation of **EU Regulation 2019/880**, because its insistence on papers proving that objects left a source country legally is bound to give rise to an even livelier industry in the production of fake documents. Subject specialists will be needed to identify conflicting data contained in the objects themselves, potentially exposing evidence of illicit origin.
- *Share research skills and resources with key parties in local communities.*
 - CircArt has a long track record of providing workshops and educational support to heritage professionals, law enforcement agencies, and the judiciary. It offers these services to key parties in source, transit and destination countries.
 - CircArt offer their own workshops but also support initiatives from Interpol, Europol, the EU, the OSCE, various national police forces, and a number of outreach organisations.
 - CircArt's workshops involve guest speakers from all professional backgrounds, including the trade and law enforcement. This presents participants with all relevant perspectives and aspects of the trade in cultural property. The key themes are:
 1. object documentation and provenance research;
 2. structure, mechanisms and practices of the art market;
 3. relevant laws, treaties and law enforcement agencies;
 4. scope for synergies with other organisations tackling art crime; and
 5. procedures to recover artefacts of demonstrably illicit provenance.
 - To promote the protection and recovery of heritage at risk, CircArt has also developed an e-learning platform. The course takes 100 minutes to complete, and it is accompanied by a resource repository and multiple-choice self-test.

Key differences between CircArt and 'other' databases

How does CircArt differ from other initiatives that help recover illicit artefacts? The following aspects merit particular stress:

- *CircArt records and appraises any object in the trade and in private hands, not only those already known to have been stolen.*
 - The databases of Interpol, the Art Loss Register and Art Recovery International only hold records of stolen objects. There are serious issues with this. Many thefts are not, or not widely, reported. More importantly, the vast majority of illegally sourced artefacts in the trade were not stolen from any known owner but come straight from illicit excavations, so they were never reported by anyone. Thus, countless stolen and looted objects can only be identified by subject specialists well trained in provenance research, judging from evidence contained in the objects themselves. And only they can detect the all-too-common waves of objects from one plundered locality appearing with sellers around the world.
 - CircArt documents objects of known and unknown provenance status, in the knowledge that many uncertainties will eventually be clarified through its ongoing research.
- *In CircArt, the data are fed and analysed by subject specialists, not by police or legal companies who lack the requisite cultural, historical and archaeological expertise.*
 - CircArt strongly advocates that objects on the art market be recorded and assessed by full-time expert staff. They must be academics with a broad grasp of a region's cultural heritage, possess outstanding skills in provenance research, be aware of the legal frameworks within which the trade operates, and understand how to present their expertise to the stakeholders they serve.
 - Experts employed by CircArt have vast professional networks comprising fellow academics around the world, as well as representatives of relevant authorities. Among the contacts are stakeholders in source countries, with whom the experts exchange

- data and advice, and who often need guidance in preparing restitution claims and letters rogatory.
- CircArt's work and objectives draw considerable interest within the museum and academic sectors. If CircArt were to be embedded and sustained within an appropriate international organisation, it would help to bridge the considerable disconnect still existing between that world and law enforcement agencies. To raise wider awareness about heritage crime and how academics can help, CircArt would develop stronger synergies with the International Council of Museums (ICOM).
 - *In CircArt, experts are doing proactive research so as to identify tainted artefacts, problematic actors, and fake provenances, using a semantic knowledge base system with powerful research tools.*
 - The CircArt system is not a mere database where huge volumes of data are 'dumped' to remain essentially unexplored. It is a live research system, where all knowledge accrued is stored and semantically linked. The data are developed with support from a broad package of impressive capabilities for complex data analysis and visualisations.
 - CircArt's research has proven to be of crucial importance for the detection and mapping of trafficking networks. Only cultural experts can extract from artefacts the many hundreds of clues concerning their origins and trajectories, as well as exposing recurrent connections between the objects, people, places and dates.

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ANNEX 5

Expert opinion on certification of standards in field of provenance research

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29 August 2023

Here below are 10 problem areas that I see in the current field of certification of standards for art objects, and 10 benefits of the creation of an EU-based agency for certification of standards and public monitoring.

I. Problem Areas

1. Absence of unified, clear, and comprehensive regulation of due diligence

This situation leaves the process of due diligence up to public and private entities. It is often conducted via disjointed or incomplete standards.

2. Absence of a process of oversight and enforcement

Currently there is no oversight. Recent proposals for self-regulation (i.e., the creation of online due diligence checklists for art transactions) have proven ineffective.

3. Privacy laws

Existing privacy laws allow for withholding of key information, such as names of owners and sellers who might be problematic. Independent researchers as well as potential buyers seeking information, including institutions such as museums, often find it impossible to access this information and are left unable to verify or complete provenance chains or detect red flags for looted or illegally excavated works.

3. Lack of transparency

The current lack of regulations, oversight, and enforcement as well as the guarantee of privacy continue to promote and protect a lack of transparency.

4. Conflicts of interest

Currently, the same figures/institutions who are involved in authenticating and researching an artwork's provenance and authenticity can be invested in the sale or marketing of the work. Such conflict of interest discourages independent research, as well as full, transparent disclosure of potentially problematic information.

5. Problematic accountability

Currently there is no true accountability or responsibility for errors, whether unintentional or intentional.

6. No shared standards for qualifications of experts

Currently there is an absence of codified, shared standards for who should be considered a qualified expert. As the expression of an opinion about an artwork's status is guaranteed by laws of freedom of opinion, expertise can be issued by people who do not have the professional qualifications or experience to do so. There is also no legal protection for qualified experts, who may be discouraged from conducting research. Some qualified experts

are prohibited by their institutions from offering opinions. This leaves important knowledge inaccessible.

7. Absence of requirement for transparent disclosure of steps in the process of due diligence

Currently, experts are not required to “show their homework” or disclose the process by which they arrived at their conclusions. It becomes difficult to retrace their steps or find the error in their assessments.

8. Lack of incentives to conduct transparent due diligence

Without a system of checks and balances in place, there is little incentive to conduct a full and transparent due diligence.

9. Lack of oversight and means of enforcement for transactions involving problematic art

If a transaction turns out to be problematic, there is currently no recourse except legal action, which can be lengthy and costly.

10. Lack of a neutral, supra-national entity for recourse.

Currently there is no neutral recourse in place for national decisions regarding, for example, cultural property.

II. 10 Benefits

Here are 10 benefits of the creation of an EU-based agency for certification of standards and public monitoring. Such an agency would:

1. create a supra-national, public regulation of the process of due diligence, conducted according to consolidated and shared standards.
2. guarantee public access to names of past owners, buyers, and sellers, permitting provenance information to be shared, independently verified, and completed by experts (via, for example, an internationally available online database).
3. guarantee transparency of the process of due diligence through disclosure of potentially problematic provenance information.
4. guarantee transparency of the process of due diligence through disclosure of and controls over the qualifications of experts who are engaged to conduct expertise.
5. guarantee experts’ freedom from conflicts of interest by ensuring that due diligence would not be conducted by those who are market operators or have a vested interest in the work’s sale.
6. guarantee transparency of the process of due diligence through disclosure of documentation used and steps taken to arrive at conclusions about an artwork’s status.
7. create an ethos of public accountability, especially in the case of errors or differences of opinions among experts.
8. create publicly verifiable criteria for assessing the qualifications and selection of experts entrusted to conduct the research on artworks.
9. create publicly verifiable criteria for assessing the quality and veracity of the expertise provided.
10. create a European process for recourse that stands above private and national interests.

This study addresses cross-border restitution claims to looted art, considering Nazi-looted art and colonial takings, but also more recent cultural losses resulting from illicit trafficking. Although these categories differ considerably, commonalities exist. The study highlights blind spots in the legal and policy frameworks and formulates recommendations on how these could be bridged.

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