



**Department of Law**

**Complementary and Alternative Mechanisms  
beyond Restitution:  
An Interest-oriented Approach to  
Resolving International Cultural Heritage Disputes**

**Robert Peters**

Thesis submitted for assessment with a view to obtaining the degree of  
Doctor of Laws of the European University Institute

Florence, October 2011



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## *Summary*

Disputes over the restitution and return of cultural materials have steadily increased in recent years. While several restitution claims pertaining to Nazi-confiscated art have been resolved, other cases relating to the appropriation of cultural materials during war, foreign or colonial occupation, theft, or as a consequence of illicit trafficking have proliferated.

Despite these challenges and recent developments in international law, international treaty law and current State practice in resolving restitution disputes primarily focus on arguments associated with State interests and property rights, and thus do little to accommodate the interests of the various stakeholders involved in restitution disputes. Moreover, because of major legal obstacles claimants face in restitution cases (namely the non-retroactivity of international treaty law, the protection of the *bona fide* purchaser and provisions on the lapse of time), a purely legal approach is not a viable option in many restitution disputes. Therefore, this dissertation introduces an approach that aims at taking into account the interests of the various stakeholders in the resolution of these disputes. In a second step, complementary and alternative mechanisms in the resolution of restitution disputes are examined in order to accommodate these different interests. The utilization of this interest-oriented approach will allow restitution disputes to be resolved in a more sustainable and cooperative manner; moreover, ethical and historical considerations can also be more adequately addressed than in a purely legal approach. It will be demonstrated that within the scope of the ‘common interest’ in the protection of cultural heritage, other issues can be identified as being of common concern, including: physical and cultural preservation, access, integrity, and cooperation. Since these aspects form part of the ‘common interest’, they are valid not only for the protection of cultural heritage in war and peace, but must also be taken into account in the resolution of restitution disputes. Consequently, these common interests form new general principles in international cultural heritage law.



## *Acknowledgments*

The journey of this dissertation started in the summer of 2005 when I came across a newspaper article on a criminal trial in Rome: the former curator of the Getty Museum, Marion True, was accused of having received stolen art and conspiring to deal in looted artifacts. Since then, the interconnection between art and law has captured me.

Starting in October 2006, four years of study and research at the European University Institute in Florence followed and enriched my life in various ways, both academically and personally. In the first place, I would like to express my utmost gratitude and heartfelt thanks to Professor Francesco Francioni for his supervision, advice and constant guidance from the very early stage of my doctoral research. It was also thanks to him that I was able to spend six months working at UNESCO Headquarters in Paris under the guidance of Abdulqawi A. Yusuf, who offered me a number of extraordinary experiences at UNESCO.

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During the exciting journey of this thesis the charges against Marion True were dropped in October 2010, but several objects from the Getty returned to Italy. In contemplation of the beauty of these objects put on display in Rome in December 2007 and again in 2009, I happily recalled the starting point for this thesis that has now been completed.

October 2011

*Robert Peters*



To my grandma Luzie



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## List of Abbreviations

AAL	Art Antiquity and Law
AAM	American Association of Museum
AJIL	American Journal of International Law
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
CETS	Council of Europe Treaty Series
CPTA	Cultural Property Transfer Act (Switzerland)
CPIA	Convention on Cultural Property Implementation Act (United States)
EC	European Communities
EECC	Eritrea-Ethiopia Claims Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
EJLS	European Journal of Legal Studies
EU	European Union
FAO	United Nations Food and Agriculture Organization
FAZ	Frankfurter Allgemeine Zeitung
GAC	German Advisory Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICOM	International Council of Museums
ICPRCP	Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation

ICTY	International Criminal Tribunal for the former Yugoslavia
IJCP	International Journal of Cultural Property
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
INTERPOL	International Criminal Police Organization
KUR	Kunst und Recht
LNTS	League of Nations Treaty Series
MERCOSUR	South American Economic Organization
MoU	Memorandum of Understanding
NAGPRA	Native American Grave Protection and Repatriation Act of 1990
NGO	Non-governmental Organization
NSPA	National Stolen Property Act (United States),
SAP	Spoliation Advisory Panel (United Kingdom)
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environmental and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCRC	United Nations Convention on the Rights of the Child
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNIDROIT	International Institute for the Unification of Private Law
UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UNTOC	United Nations Convention against Transnational Organized Crime
UNTS	United Nations Treaty Series
US	United States of America
USSR	Union of Soviet Socialist Republics
WHC	World Heritage Committee (UNESCO)
WKSA	Wounded Knee Survivors' Association

“We wish to state that, from our own knowledge,  
no historical grievance will rankle so long or be the cause of so much justified bitterness  
as the removal for any reason of a part of the heritage of any nation  
even if that heritage may be interpreted as a prize of war.”

Wiesbaden Manifesto, Germany, drawn up by U.S. Capt. Walter I. Farmer,  
7 November 1945



## **CHAPTER I: Introduction and Question of Research**

While the debate surrounding the restitution and return of cultural materials is by no means a new one, it has become an increasingly controversial aspect of international law, and thus remains more unresolved than ever. In addition to well-known but yet unresolved cases, such as the case of the Parthenon Marbles in the British Museum claimed for return by Greece since 1984, the geo-political changes in the early 1990s have resulted in new restitution claims emerging from the opening of several archives in Central and Eastern Europe. Claims for the restitution and return of cultural objects removed as a consequence of war, foreign or colonial occupation, or vast human rights violations have increasingly challenged international law. Whereas several restitution claims pertaining to Nazi-looted art have been resolved in recent years, other cases relating to looted cultural objects – during the Armenian massacres for example – have surfaced only recently.<sup>1</sup> Moreover, other issues – such as the steady demand of the international art and antiquities market, the general role of public museums and private collectors, as well as the continuing illicit trafficking in archeological artifacts – have become a growing part of the wider restitution debate.

As a consequence, restitution claims have steadily increased in number, and claims continue to be a perennial preoccupation and a growing burden on States, public and private museums, and private collectors alike. Generally speaking, private and public collections strongly oppose to restitution claims, since they fear that the return of single objects would create momentum and legal precedent for further restitution claims, eventually dismantling entire collections. Thus, this anxiety still outweighs the commitment to cooperate and to engage in restitution disputes.<sup>2</sup> It is this anxiety that too often leads to a strong sense of

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<sup>1</sup> With regard to restitution claims relating to the Armenian massacres (of 1915 to 1918 and 1920 to 1923), see: Charlotte Burns, *Armenian restitution claims grow – Getty case may be tip of the iceberg*, in: *The Art Newspaper*, No. 223, April 2011, p. 5.

<sup>2</sup> See, for example, the concerns expressed in the *Declaration on the Importance and Value of Universal Museums* (December 2002), signed by major European and North-American Museums (the British Museum; the Metropolitan Museum of Art; the Louvre; the State Hermitage Museum St. Petersburg; State Museums Berlin; the Prado Museum, Madrid, et al), stating: “We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era. The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones”; reprinted in ICOM News No. 1 (2004), available at: [http://icom.museum/fileadmin/user\\_upload/pdf/ICOM\\_News/2004-1/ENG/p4\\_2004-1.pdf](http://icom.museum/fileadmin/user_upload/pdf/ICOM_News/2004-1/ENG/p4_2004-1.pdf) (accessed 23 September 2011).

entitlement and an unwillingness to compromise in restitution disputes, which in turn undermine the spirit of exchange, cooperation, and possible mutual gain that could be realized in this field. Traditionally, national import and export restrictions have been considered to be the main tool in preventing the illicit trafficking in cultural artifacts, as supported by international conventions, such as the 1970 UNESCO Convention<sup>3</sup> and the 1995 UNIDROIT Convention.<sup>4</sup> However, especially in culture-rich areas such as the Middle East, the Mediterranean, and Latin America, illicit trafficking in cultural materials continues at a steady pace. Similar to national export regulations, claims for restitution and return have mainly been based on the assumption that what has been found within a State's national borders implicitly belongs to its national heritage. Despite the fact that modern State borders were primarily drawn up during the nineteenth century and often do not correspond to the boundaries of the ancient civilizations that produced the cultural artifacts in question, this territorial assumption gives rise to notions such as 'national cultural heritage' and 'national cultural patrimony'. It is these notions that, in turn, evoke other notions, including ideas regarding the 'repatriation' of cultural materials.

Although international law is still mainly driven by the interests of States, other stakeholders – including indigenous peoples, ethnic and religious groups, scientific communities, public and private museums, as well as individuals – have increasingly submitted claims for the return of cultural objects. Broader concepts such as 'the common heritage of humankind' and 'common concern' have evolved in international law, thus shifting legal perspectives along the way, and perhaps more importantly, defining even the international community as a stakeholder in its own right in international law. Despite the intensity of interests and the highly emotional character of the debate on restitution and return, scholarly analysis has mainly focused on the horizontal, inter-governmental dimension, paying little attention to the plurality of legal, cultural and economic interests on the one hand, and to the exploration of alternatives to current restitution mechanisms, on the other. It is time to reconsider the current concepts and practices pertaining to restitution and to develop an

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<sup>3</sup> UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (Paris, adopted 14 November 1970, entering into force 24 April 1972), 823 UNTS 231, full text available at: [http://www.unesco.org/culture/laws/1970/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml) (accessed 23 September 2011).

<sup>4</sup> UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* (Rome, adopted 24 June 1995, entering into force 1 July 1998, 34 ILM 1322, full text available at: <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm> (accessed 23 September 2011).

alternative approach that goes beyond traditional concepts in international cultural heritage law.

Therefore, this thesis proposes an approach that takes into account the plurality of interests of the various stakeholders involved in restitution disputes, while also attempting to strike a balance between these interests, in order to identify complementary and alternative outcomes to current restitution practices. Due to the variety of stakeholders involved, the interests in the resolution of restitution disputes might be competitive or sometimes even mutually exclusive. It is, however, the objective of this thesis to argue that, by taking into account the various interests involved in restitution matters, common ground can be found. In turn, current restitution practices often do not secure a balanced outcome that reflects the interests of all parties involved, since they mainly focus on the location of the object in question, legal title, and property rights. Consequently, current restitution disputes often result in a zero-sum solution – the item in question is returned (or retained) without any mutual gain for the parties involved. However, as this thesis will illustrate, restitution disputes do not have to end this way. Overcoming the shortcomings of currently employed restitution mechanisms requires an analysis of alternative means that encompass the positions of the various interests involved in restitution disputes. As will be discussed in this thesis, a broad variety of feasible options that aim at mutual gain in dispute resolution are available. These include: voluntary returns; temporary and permanent loan agreements; return without transfer of ownership; the exchange of objects; the fabrication of replicas; as well as joint custody and shared management agreements.

As is apparent from the objective of this thesis, an analysis of this topic cannot be limited to legal analysis, but must also include an analysis of the ethical and historical aspects inherent in the restitution debate. The legal analysis will demonstrate that several multi-lateral conventions and bilateral agreements have been established in order to provide legal grounds for dealing with the appropriation of cultural materials and the subsequent question of restitution and return. However, most of the historical events that have given rise to many current restitution claims occurred before the promulgation of such measures. Consequently, enforceable legal action is often not an option – resulting in an unsatisfying outcome both legally and ethically. It is this concurrence of circumstances that has led to a situation in which ethical and historical considerations merge, and this requires the law to consider what can be summarized as ‘the remedying historical injustice’. This is particularly applicable in

cases in which the removal of a cultural object might have been considered as ‘legal’ or at least as ‘common practice’ at the time of its appropriation, but now fails to comply with present human rights standards, such as those that are now classified as internationally wrongful acts, including war of aggression and genocide.<sup>5</sup> Therefore, it is essential to associate legal aspects with ethical and historical considerations in the attempt to resolve international cultural heritage disputes. The application of measures that take ethical and historical considerations into account within the context of restitution might even facilitate creative outcomes that are more appropriate to the interests of the parties involved and produce results that are more result-oriented in practical terms than the mere application of legal instruments. This is because legal instruments – should they be applicable – might provide for the reinstatement of ownership, without consideration of the particular circumstances that led to the removal of the property.

It is neither exceptionally remarkable nor legally questionable that when, for example, an antique vase stolen from the National Museum of Iraq in Baghdad in the aftermath of the 2003 Iraq War later turns up in the hands of a Swiss antiques dealer, it should be returned to the museum and to the people of Iraq; other cases, however, are not so straightforward. In this hypothetical but unfortunately quite realistic case, the return of the antique vase to Iraq is clearly indicated, since: firstly, the theft of the vase was a breach of national law; secondly, the theft occurred in the context of war and occupation and thus was a breach of customary international law; and thirdly, the vase was classified as State property under Iraqi antiquities law and thus could neither be legally traded nor be legally exported without an official export license. In contrast to this straight-forward case, the international community has generally had difficulty agreeing on a common approach to restitution in historic cases, in which the appropriation took place decades or centuries ago; in such cases, no legal instruments are applicable and the circumstances of the removal may be obscure or unable to be definitively clarified. In such cases, it is frequently difficult to find a single means of facilitating an appropriate solution to restitution disputes, even when all legal circumstances, given the evidence, have been properly taken into account. There are certainly many cases in which material and ‘moral’ restitution should be made without reservation; however, there are just as many, in which the claim for restitution and return is much more questionable on both legal and ethical grounds. It is therefore the attempt of this thesis to identify complementary and

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<sup>5</sup> Cf. Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge Press, 2006), p. 299.

alternative mechanisms using an interest-oriented approach, in order to facilitate the resolution of restitution disputes. Although this thesis focuses primarily on cases in which legal remedies are not available or the circumstances of the removal are obscure, its application is not limited to such cases, since the use of complementary and alternative mechanisms may add value even in cases in which legal remedies are applicable. In the abovementioned example of the Iraqi vase, the parties involved may mutually agree that the return be postponed until safety measures have improved at the National Museum of Bagdad or additional scientific research on the object is conducted for the benefit of both the Iraqi museum and the returning State.<sup>6</sup> These parties might even consider a touring exhibition of the vase in order to raise awareness of the problem of stolen Iraqi cultural materials and to raise funds for the Bagdad museum. As this dissertation will demonstrate, there is a vast variety of creative problem-solving options in restitution disputes.

Moreover, as the number of restitution claims has risen, international awareness of the importance of protecting cultural heritage has also substantially increased over the last decades. This increasing awareness can be seen, for example, in the by now universal character of the 1972 UNESCO World Heritage Convention<sup>7</sup> protecting sites of cultural and natural significance. Moreover, the immediate reaction and the public outcry in response to destruction and looting (as, for example, in the incident of the destruction of the Buddhas of Bamiyan in Afghanistan in 2001, the looting of the National Museum and the National Library in Bagdad in 2003,<sup>8</sup> and the looting of the National Museum in Cairo in 2011)<sup>9</sup> underline the general responsiveness of the international community with regard to the protection of cultural heritage. It was only a few days after the looting in the National Museum in Cairo that the international archaeological community published a declaration of

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<sup>6</sup> For a detailed discussion on this matter with the example of the ‘Afghanistan Museum-in-Exile’ in Bubendorf, Switzerland (1999-2007), see Chapter Five, Section 3.7.

<sup>7</sup> UNESCO *World Heritage Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972; available at: [http://www.unesco.org/whc/world\\_he.htm](http://www.unesco.org/whc/world_he.htm); the convention has currently 187 State Parties out of the total of 193 States (23 September 2011), see ratification status at: <http://whc.unesco.org/en/statesparties/> (accessed 23 September 2011).

<sup>8</sup> For more on looting in Iraq, see “*Lost from the Baghdad museum: truth*”, by David Aaronovitch, in: *The Guardian*, 10 June 2003, available at: <http://www.guardian.co.uk/artanddesign/2003/jun/10/art.highereducation> (accessed 27 August 2011). For up-to-date information about which items are missing: [www.interpol.com/Public/WorkOfArt/Poster/Poster33a.pdf](http://www.interpol.com/Public/WorkOfArt/Poster/Poster33a.pdf) (accessed 23 September 2011); See with further details and legal analysis: Francesco Francioni and Federico Lenzerini, “The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq,” in *Art and Cultural Heritage*, ed. Barbara Hoffmann (2006), pp.28.

<sup>9</sup> For more on the looting of the National Museum in Cairo, see “*Egypt crisis: Looters destroy mummies in Cairo museum*”, by Harriet Alexander, in: *The Telegraph*, 30 January 2011, available at: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8291526/Egypt-crisis-Looters-destroy-mummies-in-Cairo-museum.html> (accessed 23 September 2011).

concern.<sup>10</sup> Although international law will never be able to wholly prevent such incidents from occurring, the growing recognition of the importance of protecting cultural heritage is not without repercussion in international law. This serves to promote protection, preservation, access, and cooperation in terms of the development of legal standards and principles. It is therefore only logical, as this thesis argues, to introduce these elements into matters of restitution and return.

In short, the research question of this work can be summarized as follows: claims for the restitution and return of cultural materials are often characterized by a sense of entitlement that often results in unwillingness to compromise on both the part of the requesting party and the current possessor. Although international law is still mainly driven by States and their national interests, other stakeholders have recently become more active in this field, with the result that the debate on restitution and return has gradually shifted away from traditional patterns of international law. Consequently, this thesis argues in favor of an alternative approach to current restitution practices on the basis of two premises: firstly, the assumption that the international community has a legal responsibility to protect cultural heritage as it constitutes the ‘common heritage of humankind’; and secondly, the imperative to balance the interests of the various stakeholders involved in restitution disputes. Going beyond current restitution mechanisms raises the questions of who can legitimately control and claim which cultural material, and what rights of access, use, and disposition may be granted or retained. Certain cases of restitution and return are quite straightforward; in many others, however, alternative solutions and result-oriented considerations could lead to win-win situations rather than zero-sum outcomes.

While an argument in favor of both restitution and retention could certainly be made, the settlement of the dispute might be considered differently if the interests of the various parties involved are all taken into account. As a legal principle, ‘restitution’ aims at “reversing the effects of a former breach of the law,”<sup>11</sup> but too often it fails to provide feasible solutions in international cultural heritage disputes. This is primarily due to five specific shortcomings:

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<sup>10</sup> „*The International Archaeological Community is following with great concern the events unfolding in Egypt*“, issued by the Society for American Archaeology, 4 February 2011, available at: <http://www.saa.org/Portals/0/SAA/GovernmentAffairs/EGYPT.STATEMENT.pdf> (accessed 23 September 2011).

<sup>11</sup> Wojciech W. Kowalski, "Claims for Works of Art and Their Legal Nature," in *Resolution of Cultural Property Disputes*, ed. The International Bureau of the Permanent Court of Arbitration (The Hague: Peace Palace Papers, 2004), p. 33.

(1) legal instruments are often not available due to the fundamental principle of non-retroactivity in international treaty law;<sup>12</sup> (2) if legal instruments are available, national provisions often favor the *bona fide* purchaser; (3) statutes of limitation often prevent legal action because stolen or illicitly exported objects frequently reappear years or decades after the initial theft and illicit removal; (4) legal instruments too often fail to ‘remedy historical injustices’ since they do not adequately take ethical and historical considerations into account; and – most importantly within the scope of this thesis – (5) current restitution practices fail to take a broader perspective that encompasses the various interests involved in restitution disputes. Unequal bargaining powers among States as well as between States and other (private) stakeholders only add to the problem of balancing relevant interests. In light of these shortcomings, this thesis aims at providing sufficient reasoning for the introduction of an interest-oriented approach to resolving international cultural heritage disputes through mechanisms that promote mutual gain and cooperation.

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<sup>12</sup> See Article 28 of the *Vienna Convention on the Law of Treaties*, (adopted 23 May 1969; entering into force 27 January 1980), 1155 UNTS 331.



## **CHAPTER II: Setting the Frame – Rationales, Categorizations, and Terminology**

### ***Overview of the Chapter:***

This chapter starts by exploring the main dilemmas in current restitution disputes and looks at the history of plunder, appropriation, and the illicit trafficking in cultural materials. The chapter continues by analyzing the terminology commonly associated with restitution disputes, namely ‘reparation’; ‘restitution and return’; ‘repatriation’; and ‘retention’. The analysis of these terms will demonstrate the inconsistent use of terminology in this area of law, not only in international treaty law, but also in UN and UNESCO recommendations, as well as in multi- and bilateral agreements pertaining to restitution and return.

Having established the terminological framework, the chapter continues by analyzing the different legal categories of restitution claims. A clear understanding of the different legal categories of claims is essential, since – apart from the terminological inconsistency in the field – the widespread tendency to commingle different categories of restitution claims is a major obstacle in adequately assessing restitution disputes. Five major categories of claims will be identified: (1) claims related to the removal of cultural objects during armed conflicts (war time regime); (2) claims related to illicit trafficking (peace time regime); (3) claims made for the return of cultural objects to their ‘countries of origin’; (4) claims made on the grounds of former ownership, mainly in relationship to Nazi-confiscated art; and (5) claims made for the return of cultural materials to a certain people, group or community. Subsequently, the chapter will introduce the interest-oriented approach to restitution and return developed in this thesis.

### **1. Current Dilemmas in International Cultural Heritage Disputes**

A dilemma – or double proposition – is defined as a problem offering at least two solutions, of which none is practically acceptable or desirable. International cultural heritage disputes often resemble such dilemmas, since often neither return nor retention yields an outcome that meets the interests of both the requesting party and the current possessor.

In recent years, claims for the restitution and return of cultural materials have increasingly become matters not only of legal and moral concern, but also of financial concern. While the cultural rights of indigenous peoples and ethnic minority groups are still often largely ignored or simply neglected, auctioneers and lawyers hunt for potential clients. Whereas those interested in cultural rights base restitution claims on ‘cultural identity’ rationales, those with financial motives may submit a claim for the return of a valuable artifact with the ultimate aim of reselling this object at the highest market price on the international art and antiquity market. This trend is facilitated to a great extent by the fact that public and private museums as well as individual collectors still expend little effort and demonstrate little interest in researching the provenance of the objects in their collections. While museums and collectors are interested in the genuineness of the object, they are frequently much less interested in the history of its ownership. This persistent refusal to undertake such research seems to result from a general attitude that could be described as ‘we keep what has not yet been claimed’.<sup>13</sup> Nevertheless, there is another trend that takes the opposite approach asking not whether, but rather when museums will return large portions of their collections to the so-called ‘countries of origin’.<sup>14</sup> Both attitudes, however, do little to resolve the rising number of restitution claims; instead they serve to increase the controversy and the legal uncertainty associated with restitution matters.

There have been several restitution disputes that have sparked public and legal debate alike. These include many prominent examples, such as the *Goudstikker* case,<sup>15</sup> which, after a long-standing debate, resulted in the restitution of 202 paintings to Jewish heirs by the Dutch government in 2006; the *Altmann* case,<sup>16</sup> which concluded in the New York auction of six paintings by Gustav Klimt in 2006;<sup>17</sup> or the unfolding dispute over two Qing bronzes most likely looted from the Imperial Palace in China and now associated with the Paris auction of

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<sup>13</sup> Cf. “Les musées ne restituent que s’ils y sont obligés”, interview with Hector Feliciano (author of *Le Musée disparu*), *Le Monde*, 2 February 2009.

<sup>14</sup> Opening statement of Philippe de Montebello, Director of the Metropolitan Museum of Art (MET), NY (1977-2008) in a speech given in NY, November 2007.

<sup>15</sup> The restitution has been carried out on the recommendation of the ‘Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War’ (Restitutions Committee), Cf. Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (New York: Oxford University Press, 2007), pp. 227. For details see: [http://www.restitutiecommissie.nl/en/rc\\_1.15/samenvatting\\_rc\\_1.15.html](http://www.restitutiecommissie.nl/en/rc_1.15/samenvatting_rc_1.15.html) (accessed 23 September 2011).

<sup>16</sup> *Altmann vs. Republic of Austria*, 142 F.Supp.2d 1187 (C.D.Cal. 1999), *aff’d*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 US 677 (2004).

<sup>17</sup> In 2006, the portrait of Adele Bloch-Bauer I (known as the ‘Golden Adele’) by Gustav Klimt (1907) was purchased by auction for the Neue Galerie in New York by Ronald Lauder for a US \$135 million, the highest reported price ever paid for a painting: see, BBC News, 19 June 2006, available at: <http://news.bbc.co.uk/2/hi/entertainment/5093650.stm> (accessed 23 September 2011).

the Yves Saint Laurent's private collection in 2009.<sup>18</sup> These and many other cases demonstrate that restitution disputes involve not only questions regarding legal title and property rights, but also sensitive ethical and historical considerations.

Legal aspects are strongly tempered by ethical and historical considerations, since the remedy of restitution, if conducted properly, is not merely a physical act, but rather one that addresses the effects of policies and practices that led to the removal of that piece of cultural heritage in the first place.<sup>19</sup> The attempt to redress or to 'remedy historical injustice' is therefore a crucial aspect in restitution matters. This difficult undertaking, however, cannot be accomplished solely through the application of legal instruments. Since legal provisions must be consistent and coherent within their legal parameters, they tend to be rigid in their application and, as a result, lack the flexibility frequently required in restitution matters. Without a consistent and coherent framework, however, the law would be difficult to enforce. Notwithstanding the general difficulty associated with the enforcement of norms of international law, many restitution claims face an additional obstacle, namely their inability to rely on applicable legal regulations. This is a result of the fact that frequently current legal provisions do not apply retroactively or do not apply if the State in which the claimed cultural object is currently located has not yet ratified the relevant legal instruments. Consequently, enforceable legal action is not an option in many restitution cases. Even in cases in which legal provisions are accessible and could be applied with the consequence of setting legal precedent, the disputing parties frequently avoid making use of legal action, preferring non-legal settlements that deliberately exclude legal obligations.<sup>20</sup>

The reluctance to employ legal instruments is evident not only among the parties negotiating restitution matters, but also, and perhaps even more significantly, within the legal terminology found in multi- and bilateral treaties and other agreements drawn up to facilitate restitution and return. This chapter will demonstrate that both international treaties and bilateral agreements often lack legal terminology and specific legal regulations, because this would involve the creation of legal certainties, which States would rather avoid. These include: questions of compensation; the implied acknowledgement of the illegal nature of the

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<sup>18</sup> See: Steven Erlanger, *Saint Laurent Art Sale Brings in \$ 264 Million*, in: The New York Times, 23 February 2009; available at: <http://www.nytimes.com/2009/02/24/arts/design/24auction.html> (accessed 23 September 2011).

<sup>19</sup> Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, p. 299.

<sup>20</sup> More detail on this issue is provided in Chapter Three, Section 2.10.

removal; and general conflicts between national and third party rights.<sup>21</sup> However, this general tendency towards terminological vagueness and avoidance of legal means for restitution and return provide a greater margin of flexibility in negotiations pertaining to restitution and return. While this might be considered advantageous for parties with strong bargaining power in restitution disputes, other parties may find that they have even less influence on the negotiations, and the final outcome under such regime is less advantageous than it would have been with tight legal regulations.<sup>22</sup>

In addition to the problematic use of legal terminology in international treaties and bilateral agreements, the traditional and still dominant approaches in international cultural heritage law mainly reflect adversarial models of legal interaction. These models – based on an oppositional understanding of cultural heritage matters – might be described as ‘either-or’ terminology.<sup>23</sup> The concepts that underlie this choice of terminology rely heavily on traditional assumptions under international law, such as the predominance of the State and the overall importance of property rights. A dichotomous understanding of the parties involved in restitution matters – such as ‘restitution and return’ versus ‘retention’; ‘art-exporting’ versus ‘art-importing countries’, or ‘source-countries’ versus ‘art-market countries’ – dominates the debate on restitution disputes. Other common dichotomies include ‘common heritage’ versus ‘national patrimony’ or its siblings, ‘cultural internationalism’ versus ‘cultural nationalism’; ‘underwater salvage’ versus ‘protection of the underwater heritage’; and so on. To a certain extent, classifications of this kind are to be expected and provide essential analytical constructs in the development of these concepts. They should, however, remain temporary constructs, which eventually yield – as they indeed have already begun to do – to multi-faceted frameworks and an empirically valid regime of authority.<sup>24</sup> The approach taken by this thesis attempts to overcome these adversarial constructs in order to facilitate outcomes that do not end in dilemmas, but rather identify and balance the interests of the stakeholders involved in restitution matters, while ensuring preservation, access and cooperation in cultural heritage.

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<sup>21</sup> Ana Filipa Vrdoljak, "Reparations for Cultural Loss," in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, ed. Federico Lenzerini (Oxford: 2007), p. 214.

<sup>22</sup> The question of unequal bargaining powers will be discussed in detail in Chapter Four, Section 1.3.

<sup>23</sup> James A. R. Nafziger, "Cultural Heritage Law: The International Regime," in *Le Patrimoine Culturel De L'humanité - the Cultural Heritage of Mankind*, ed. James A. R. Nafziger and Tullio Scovazzi (Hague Academy of International Law, 2008), p. 163.

<sup>24</sup> Ibid.

## 2. A Historical Analysis – Rationales for Returning Cultural Objects

Throughout history, cultural materials have not only been the subject of trade, commerce and exchange, but also subject to destruction, theft and plunder.<sup>25</sup> Although the looting of cultural material was already condemned in the Classical Age, ancient societies often condoned the practice of plunder in war.<sup>26</sup> Over the centuries, armed conflicts and belligerent occupation often coincided with the removal of cultural artifacts — which were frequently displayed in triumphal processions to the capital by the conquering force. Interestingly, the cultural artifacts of the vanquished have consistently been valued by the victors, regardless the contempt for and humiliation of the people who created the artifacts. In fact, these characteristics associated with plunder, spoil, and the removal of cultural objects have been replicated by cultures on every continent and throughout the millennia.<sup>27</sup> Independent of the material value of an object, the motive for removal has often been the symbolic significance of a cultural artifact; thus, there are certain objects that have been subject to repeated removals over times. Examples of such recurring removals include the Horses of Saint Mark (Greece-Rome-Constantinople-Venice-Paris-Venice-Rome-Venice), and the Quadriga of the Brandenburg Gate (Berlin-Paris-Berlin). These symbolic removals, however, have not been confined to ancient or colonial empires. Policies of assimilation and centralization have also been deployed by modern states as a means to exert their control over disparate peoples and nations within their borders through the promotion of a single, and therefore dominating, national identity.<sup>28</sup>

Given that plunder and destruction have repeatedly occurred since ancient times, and looting has commonly been assumed to be the privilege of the victorious party subsequent to periods of conflict, the concept of restitution and return of cultural materials is by no means a modern one.<sup>29</sup> As early as 1648, the Treaty of Westphalia<sup>30</sup> made provisions for the return of objects looted during the Thirty Years War; in compliance with this treaty, Sweden returned

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<sup>25</sup> Kurt Siehr, "International Art Trade and the Law," *Académie de droit international, Recueil des cours* 243, no. VI (1993): p. 241.

<sup>26</sup> Lyndel V. Prott and Patrick J. O'Keefe, *Law and the Cultural Heritage*, vol. III: Movement (Butterworths, 1989), p. 803.

<sup>27</sup> Ana Filipa Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," *paper presented at the Expert Meeting and Extraordinary Session of the UNESCO Intergovernmental Committee (ICPRCP) in Celebration of its 30th Anniversary, Seoul, November 25-28, 2008*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1336359](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336359). (2008): p. 7.

<sup>28</sup> Ibid.

<sup>29</sup> Siehr, "International Art Trade and the Law," p. 109.

<sup>30</sup> See Article CXIV of the Treaty of Westphalia, signed at Münster, Germany in 1648.

133 Bohemian archival records taken in 1648 at the end of the eighteenth century. Remarkably, this matter has yet to be completely resolved: the Gigas Code, the oldest known medieval manuscript – created in 1229 and looted by Swedish soldiers from Prague in 1648 – was returned to Prague on loan from the Swedish National Library from September 2007 to January 2008 – more than 350 years after it had originally been taken.<sup>31</sup>

At the beginning of the nineteenth century, the prohibition on the confiscation and removal of cultural materials in times of war was established as a principle in international law. This principle condemned not only the destruction but also the removal of cultural objects, which was considered comparable with their destruction. Thus, particular peace treaty provisions on the return of cultural material looted during wartime redefined what was meant by *jus in bello*.<sup>32</sup> Along this vein, the 1815 Congress Treaty of Vienna<sup>33</sup> imposed a restitution obligation on France, denying France the right to plunder works of art as had been done by Napoleon throughout Europe. The first codification that includes provisions on the protection of cultural property in armed conflict was the 1863 *Lieber Code*,<sup>34</sup> drafted by the German-American jurist Francis (Franz) Lieber, who fought in the Prussian Army during the Napoleonic Wars, and was signed by President Lincoln for the use of the Union Forces in the American Civil War.<sup>35</sup> Only a few years later, this code formed the basis of a project to create an international convention on the laws of war, which was presented to the Brussels Conference in 1874 and later stimulated the adoption of the provisions of the 1899<sup>36</sup> and 1907<sup>37</sup> Hague Conventions Respecting the Laws and Customs of War on Land; these provisions generally prohibit pillage, destruction and seizure of enemy property unless necessitated by the demands of war.<sup>38</sup> Despite these provisions, widespread damage and destruction of cultural property took place during the First World War (hereinafter WWI). Similar to the earlier Hague Conventions (and as a cultural analog to the Red Cross for

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<sup>31</sup> Lyndel V. Prott, "The History and Development of Processes for the Recovery of Cultural Heritage," *Art, Antiquity and Law* XIII(2008): p. 175.

<sup>32</sup> Cf. Nafziger, "Cultural Heritage Law: The International Regime," p. 187.

<sup>33</sup> The Final Act of the Congress of Vienna, embodying all the separate treaties, signed 9 June 1815.

<sup>34</sup> Lieber Code, Articles 34-36 and 44 (c): Instructions for the Government of Armies of the United States in the Field, General Order No. 100, 24 April 1863; *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, (Washington, D.C. Government Printing Office, 1899), Series III, Volume 3, pp 148-164, or full text version available at: <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (accessed 23 September 2011).

<sup>35</sup> Cf. Prott and O'Keefe, *Law and the Cultural Heritage*, p. 804.

<sup>36</sup> Convention with Respect to the Laws and Customs of War on Land (The Hague, 29 July 1899), reprinted in *AJIL*, vol. 1 (1907), p. 129.

<sup>37</sup> Convention Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), reprinted in *AJIL*, vol. 2 (1908), p. 90.

<sup>38</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 187.

medical neutrality), several States, including Chile, Guatemala, Mexico and the United States, ratified the Roerich Pact in 1935.<sup>39</sup> This treaty states that historic monuments and museums are to be considered neutral in armed conflicts and must be protected by the belligerent parties. Together with the Hague Conventions of 1899 and 1907, the 1935 Roerich Pact formed the basis for the drafting of the 1954 Hague Convention on the protection of cultural heritage in case of armed conflict.<sup>40</sup>

Where looting could not be prevented, post-war treaties were drawn up regulating the return of specific cultural objects. Earlier treaties, such as the 1815 Congress Treaty of Vienna<sup>41</sup> or the 1919 Peace Treaties of Versailles<sup>42</sup> had included predetermined lists of specific items deemed to be surrendered by the defeated party; in contrast, the 1919 Saint-Germain-en-Laye Treaty<sup>43</sup> and the 1921 Treaty of Riga<sup>44</sup> between Poland and Soviet Russia, for example, articulated general reparation provisions: firstly, by recognizing a formal obligation to return cultural objects; and secondly, by delineating principles and processes for the resolution of claims.<sup>45</sup> These treaties reflect some of the earlier inter-State practices pertaining to the restitution and return of cultural materials after WWI.<sup>46</sup>

As a result of the Second World War (hereinafter WWII), the incidents of destruction, war plunder and looting were vastly multiplied. These incidents include the plunder and looting of cultural objects through specialized units, such as the *Einsatzstab Rosenberg*, which assembled the collection of cultural objects to be placed in the Führermuseum in Linz close to Hitler's birthplace, and coordinated Holocaust-related appropriation and looting of Jewish property in Germany and in occupied territories all-over Europe.<sup>47</sup> The ensuing Nuremberg

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<sup>39</sup> *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments* among the States of the Pan-American Union (Treaty of Washington), (signed 15 April 1935, entering into force 26 August 1935) 49 Stat. 3267, 167 LNTS 289.

<sup>40</sup> In detail on the 1954 Hague Convention, see Chapter Three, Section 2.1.

<sup>41</sup> Final Act of the Congress of Vienna, embodying all separate treaties (signed on 9 June 1815).

<sup>42</sup> Treaty of Peace between the Allied and Associated Powers and Germany, Versailles (signed on 28 June 1919, entering into force 10 January 1920), (1919) 225 Parry's CTS 189.

<sup>43</sup> Treaty of Peace between the Allied and Associated Powers and Austria, St-Germain-en Laye (signed on 10 September 1919, entering into force 8 November 1921), (1919) 225 Parry's CTS 482.

<sup>44</sup> Treaty of Peace between Poland and the Soviet Republics of Russia and Ukraine, Riga (signed on 18 March 1921), LNTS vol. 6, No. 149, pp. 51-169, available at: <http://treaties.un.org/doc/publication/unts/lon/volume%206/v6.pdf> (accessed 23 September 2011).

<sup>45</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 7.

<sup>46</sup> Cf. Lyndel V. Prott, "The Unesco Icprcp - Origin, Development, Accomplishments and Challenges," *Seoul, Conference Paper of the Expert Meeting and Extraordinary Session of the ICPRC in Celebration of its 30th Anniversary* (2008): pp. 6. published only as conference material.

<sup>47</sup> Siehr, "International Art Trade and the Law," p. 110.

Trials (1945-1949), which served to prosecute the most prominent Nazi war criminals, firmly established the fact that the confiscation, destruction, and damage of cultural material must be considered a war crime subject to prosecution and punishment; this, as a result, provided the first true instance of international enforcement of cultural property law.<sup>48</sup> In particular, Alfred Rosenberg, Director of the notorious *Einsatzstab*, was found guilty of war crimes based on his responsibility for the plunder of cultural objects throughout Europe.

The Allies, having estimated the scale of cultural property looted by Nazi-Germany already before the war had ended, set up a non-binding statement regarding Nazi-looted property, known as the *Declaration of London* of 1943.<sup>49</sup> Its validity was later stressed in numerous other documents, including the *Final Act of the Bretton Woods Conference*<sup>50</sup> of 1944 and, in particular, in the *Final Act of the Paris Conference on Reparations*<sup>51</sup> of 1945. In these documents, the Allies and other like-minded States recognized that, under international law, no state possesses more than a ‘custodial interest’ in Holocaust-looted art, and that each State has the obligation to identify, locate, and return spoiled art to its proper owner. The declaration allowed the Allies, which had yet to win the war in 1945, to publicize the extent of Nazi plunder, to deny the legality of the confiscations, and to reserve the right to nullify all transactions carried out by the Nazi regime, even in neutral States, such as Sweden and Switzerland.<sup>52</sup> This declaration was an especially important precedent, because it emphasized the fact that these transactions, even those “apparently legal in form, even when they purport to be voluntarily effected” might be declared invalid.<sup>53</sup> Immediately after WWII measures were taken to implement the Declaration of London in a number of countries, as for example in Sweden, Switzerland, the Netherlands, Belgium, Luxembourg, and France.<sup>54</sup> In Germany,

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<sup>48</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 160.

<sup>49</sup> Declaration of the Allied Nations against Acts of Dispossession Committed in Territory under Enemy Occupation or Control (hereinafter ‘Declaration of London’), 5 January 1943, (8, Department of State Bulletin 21), full text also available at: <http://www.lootedartcommission.com/inter-allied-declaration> (accessed 23 September 2011).

<sup>50</sup> United Nations Monetary and Financial Conference Final Act, Resolution VI: Enemy Materials and Looted Property, New Hampshire, 1-22 July 1944, See: [http://www.lootedartcommission.com/lootedart\\_brettonwoods.htm](http://www.lootedartcommission.com/lootedart_brettonwoods.htm) (accessed 23 September 2011).

<sup>51</sup> Act of the Paris Conference on Reparations (Paris, 21 December 1954), see:

<http://www.archives.gov/research/holocaust/finding-aid/civilian/rg-43.html> (accessed 23 September 2011).

<sup>52</sup> Cf. Prott, "The History and Development of Processes for the Recovery of Cultural Heritage," pp. 178.

<sup>53</sup> See Declaration of London, para. 3 (above n.49).

<sup>54</sup> For example in France: Decree No. 47-2105 of 29 October 1947, *Journal officiel de la République Française* 1947, 10831. The Decree declared null and void all legal transaction on French territory with former Nazi-Germany and its public authorities. Most national legislations of this kind ordered the restitution of goods dispossessed in a manner contrary to international law by violence, confiscation, requisition or similar methods used by the occupying power. At the same time, this legislation granted a good faith possessor the right to compensation.

the Allied (United States, United Kingdom, France and the Soviet Union) issued laws on restitution for their respective zones of occupations that overrode provisions of the German Civil Code which would have prohibited restitution by protecting the good faith possessor.<sup>55</sup> The 1943 Declaration of London also inspired the wordings of subsequent agreements, such as those issued by the newly independent States in Africa, which began laying claim to their cultural materials in the beginning of the 1960s.<sup>56</sup>

Although the Soviet Union, as one of the Allies, signed the 1943 Declaration of London condemning the wrongful displacement of cultural heritage by the Nazi, looting by Soviet troops took place on a grand scale in Germany between 1945 and 1947. The Trophy Committee of the Red Army removed many artifacts directly out of museums or security depositories, as well as salt mines and caves, where items had been stored for protection from Allied bombing. In addition, many Central and Eastern European museums, particularly in Hungary and Poland, lost cultural materials not only due to destruction and looting under Nazi occupation, but also by the Soviet army at the end of WWII.<sup>57</sup> The Soviet Union, however, declared the appropriation of the confiscated works of art by its troops and their subsequent retention as “compensatory reparation”<sup>58</sup> for the damages incurred on Soviet Russian territory in WWII by Nazi-Germany and its allies. These objects have also been described with the ambiguous term ‘trophy art’.<sup>59</sup> Whereas some of these artifacts have been returned after “having been located for temporary preservation in the Soviet Union”<sup>60</sup> and as “symbols of friendship” to the Communist regimes in Central and Eastern Europe in the late 1950s,<sup>61</sup> others were only returned in the early 1990s subsequent to the collapse of the Soviet Union. Moreover, many items still remain in Russian museums and archives, most of them undocumented and many subject to environmental conditions that may contribute to their

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<sup>55</sup> Protz, "The History and Development of Processes for the Recovery of Cultural Heritage," pp. 178.

<sup>56</sup> Protz and O'Keefe, *Law and the Cultural Heritage*, p. 803.

<sup>57</sup> István Fodor, "The Restitution of Works of Art in Hungary," in *The Spoils of War*, ed. Elizabeth Simpson (1997), p. 92.

<sup>58</sup> Such ‘compensatory reparation’ included not only works of art, libraries and archives but to great parts industrial equipment.

<sup>59</sup> Cf. John Henry Merryman, Albert E. Elsen, and Stephen K. Urice, *Law, Ethics and the Visual Arts*, 5 ed. (2007), p. 63. A note to German terminology: “*Beutekunst*” -“booty”, defined as war-related removal of art by the victors of war vs. “*Raubkunst*” – “robbery”, defined as Nazi-looted art.

<sup>60</sup> The return upon only “temporary preservation in the U.S.S.R.” indicates that the Soviets did not claim title to the objects removed, Cf. Mark Boguslavsky, "Legal Aspects of the Russian Position in Regard to the Return of Cultural Property," in *The Spoils of War*, ed. Elizabeth Simpson (New York: 1997), p. 189.

<sup>61</sup> Unilateral action of the Soviet Union restoring artifacts to the German Democratic Republic, taken from the Dresdner Gemäldegalerie in 1945; see: Siehr, "International Art Trade and the Law," p. 119.

deterioration.<sup>62</sup> In many cases, it is not known whether an object was lost or destroyed during WWII or if it has survived in Russian storage.<sup>63</sup> It has been estimated that some two million books and more than one million pieces of German artwork (of which some two hundred thousand that could be significant for museum collections) are still kept in Russia.<sup>64</sup> In 1998, the Russian parliament (Duma) passed a law entitled: ‘Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of the Second World War and Located on the Territory of the Russian Federation’.<sup>65</sup> This law asserts Russian State ownership of cultural property removed during and at the end of WWII,<sup>66</sup> even though Germany and the Soviet Union agreed on a provision regarding the preservation and the return of cultural materials in the 1990 bilateral ‘Treaty on Good-Neighborliness Partnership and Cooperation’ (Article 16).<sup>67</sup> This preservation and return provision was also confirmed by the 1992 Cultural Agreement between Germany and Russia.<sup>68</sup>

The end of the Cold War allowed for the opening of archives in Central and Eastern Europe, which in turn has led to the identification of many looted cultural objects. As a result, many new incidences of Nazi-looted art have been revealed. In light of the unprecedented scale of unsolved cases pertaining looted and displaced cultural objects, forty-four states participated in the 1998 Washington Conference on Holocaust-Era Materials, which

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<sup>62</sup> In 2005, Anatoly I. Vilkov, Deputy Chief of the Russian federal agency preserving cultural heritage, claimed that Russia held 249,000 works of art, more than 260,000 archives files, and 1.25 million books taken from Germany, see: Steven Lee Myers, “In Moscow, a Proud Display of Spoils”, *New York Times*, 17 May 2005.

<sup>63</sup> The revelation, for example, that the Trojan gold, also known as King Priam’s Treasure, had survived WWII gave rise to a set of claims for the objects from Turkey (where the Treasure was excavated by Schliemann in the 1873), Germany (where the Treasure was held in the Museum für Vor-und Frühgeschichte Berlin until 1945), and Russia (where it is now). Until the treasure turned up at the Pushkin Museum in Moscow in 1993 and was exhibited there in 1996, the Soviet Union denied any knowledge of the fate of Priam’s Treasure. The matter remains unsettled.

<sup>64</sup> Waldemar Ritter, "The Soviet Spoils Commission: On the Removal of Works of Art from German Museums and Collections," *International Journal of Cultural Property* 7(1998): p. 447.

<sup>65</sup> Federal Law on Cultural Valuables Displaced to the USSR as a Result of World War II and Located on the Territory of the Russian Federation, Federal Law N 64-FZ of 15 April 1998, adopted by the State Duma on February 5, 1997, English translation available at: <http://docproj.loyola.edu/rlaw/r2.html> (accessed 23 September 2011).

<sup>66</sup> Merryman, Elsen, and Urice, *Law, Ethics and the Visual Arts*, p. 64.

<sup>67</sup> Treaty between the Federal Republic of Germany and the Union of Socialist Republics on Good-Neighborliness Partnership and Cooperation (signed on 9 November 1990), in: 30 I.L.M. 505 (1991). Article 16 of the Treaty reads: “The Federal Republic of Germany and the Union of Soviet Socialist Republics will seek to ensure the preservation of cultural treasures of the other side in their territory. They agree that missing or unlawfully removed art treasures which are located in their territory will be returned to the owners on their legal successors.” See also: Siehr, "International Art Trade and the Law," p. 119.

<sup>68</sup> Cultural Agreement between the German Federal Republic and the Russian Federation (signed 16 December 1992 in Moscow, entering into force 18 May 1993), see: Article 15, BGBl. II, 1256 (1993).

concluded by endorsing the *Washington Conference Principles on Nazi-confiscated Art*.<sup>69</sup> These non-binding principles were designed to assist governments in resolving issues relating to Jewish property confiscated by the Nazis and not subsequently restituted. The principles establish the following guidelines: records and archives should be open and accessible; the pre-war owners of confiscated property or their heirs should be located; and art that has yet to be restituted should be identified, in order that steps “to achieve a just and fair solution” can be undertaken.<sup>70</sup> The principles were reaffirmed by the Holocaust Era Materials Conference in June 2009 that adopted the legally non-binding *Terezin Declaration* of 30 June 2009.<sup>71</sup> In addition to the 1998 Washington Principles, this Declaration deals specifically with issues such as immovable property, Jewish cemeteries and burial sites, judaica (religious cultural materials), archival materials, and general issues of remembrance and research. In several cases, the Washington Principles have expedited the restitution of Nazi-confiscated objects; however, various institutions that hold art with an ambiguous provenance are reluctant to facilitate the identification of artifacts, since clear evidence of ownership is often not available; they therefore tend to keep what they are not expressively obliged to return.<sup>72</sup>

After WWII, several international instruments, such as the 1954 Hague Convention, the 1970 UNESCO Conventions, and the 1995 UNIDROIT Convention were established.<sup>73</sup> Despite these legal provisions, destruction and plunder as well as illicit trade in cultural materials still threaten the world’s cultural heritage. Among the recent examples of this phenomenon are: the devastation of mosques, Orthodox churches, libraries and ancient city centers in Bosnia-Herzegovina and Kosovo in the 1990s and early 2000s and the destruction of the Buddhas of Bamiyan in Afghanistan in 2001.<sup>74</sup> In the wake of the 2003 Iraq War about 13,000 objects were stolen in the looting of the Baghdad museum in the aftermath of the military actions. Some of these cultural artifacts have been recovered; most, however, appear

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<sup>69</sup> Washington Conference Principles On Nazi-Confiscated Art, released in connection with the Washington Conference on Holocaust-Era Materials, Washington, DC, 3 December 1998, reprinted as Annex I to this thesis, available at: [http://www.state.gov/www/regions/eur/981203\\_heac\\_art\\_princ.html](http://www.state.gov/www/regions/eur/981203_heac_art_princ.html) (accessed 23 September 2011).

<sup>70</sup> For detailed analysis of the 1998 Washington Principles, see Chapter Three, Section 3.5.

<sup>71</sup> Holocaust Era Materials Conference, Prague and Terezin, 26-30 June, 2009. Terezin Declaration of 30 June 2009, text available at: <http://www.lootedartcommission.com/NPNMG484641> (accessed 23 September 2011).

<sup>72</sup> Cf. “Les musées ne restituent que s’ils y sont obligés”, interview with Hector Feliciano (author of *Le Musée disparu*), *Le Monde*, 2 February 2009.

<sup>73</sup> For detailed analysis of the relevant legal instruments, see Chapter Three.

<sup>74</sup> Cf. Francioni and Lenzerini, “The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq,” pp. 28.

to have disappeared and might be subject to illicit international trade.<sup>75</sup> Immediately after the looting in Iraq, the UN Security Council passed Resolution 1483/2003<sup>76</sup> adopted under Chapter VII of the UN Charter,<sup>77</sup> which is binding to all member States. The objective of the established trade prohibition is to disrupt the international market for stolen and illicitly exported Iraqi cultural objects and to safeguard the return of Iraqi cultural heritage to Iraq. Additionally, in July 2003, the Council of the European Union adopted Regulation No. 1210/2003 establishing a ban on the import, export, and trade of cultural items exported from Iraq after 2 August 1990.<sup>78</sup> Several items have been returned from foreign States, and others were recovered from Iraqi civilians who were granted amnesty under the ‘no questions asked-policy’ of Iraqi investigators.<sup>79</sup> Although the scale of looting and destruction in Iraq was smaller than originally feared, it was still substantial enough to renew concerns about the adequacy of existing legal and physical protection of cultural materials during armed conflict.<sup>80</sup> War crimes tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), clearly confirm that any act of “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and the sciences, historic monuments and works of art and science”<sup>81</sup> is a violation of the laws and customs of war. Moreover, the ICTY established that the targeting of cultural heritage belonging to a culturally distinct group constitutes a crime against humanity, if the act is committed with discriminatory intent. In this regard, the ICTY acknowledges the essential connection between the intent to persecute a certain group of people and the destruction of the cultural and religious sites that form part of their history, culture, spiritual heritage, and identity.<sup>82</sup>

Furthermore, clandestine excavations and the looting of archaeological sites have drawn major attention to the prevalence of illicit trafficking in cultural material over the last decades. The fight against illicit trafficking faces several problems: (1) the growing

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<sup>75</sup> See <http://www.theartnewspaper.com/iraqmus/index.html> with link for up-to-date information about which items are missing; [www.interpol.com/Public/WorkOfArt/Poster/Poster33a.pdf](http://www.interpol.com/Public/WorkOfArt/Poster/Poster33a.pdf) (accessed 23 September 2011).

<sup>76</sup> UNSC Resolution No. 1483/2003, (22 May 2003), UN Doc S/RES/1483, ILM, 2003, p.1016 ff; See: paragraph 7; full text version: <http://daccess-ods.un.org/TMP/1465505.html> (accessed 23 September 2011).

<sup>77</sup> See full text of UN Charter under <http://www.un.org/aboutun/charter/> (accessed 23 September 2011).

<sup>78</sup> Council Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No. 2465/96, (*Official Journal* 2003, L 169/6).

<sup>79</sup> Cf. Catherine Phuong, "The Protection of Iraqi Cultural Property," *The International and Comparative Law Quarterly* 53, no. 4 (2004): p. 996.

<sup>80</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 160.

<sup>81</sup> See Article 3(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, UNGA Resolution 827/1993 (25 May 1993).

<sup>82</sup> *Prosecutor v. Kordic & Cerkez* (IT-95-14/2-T, 26 February 2001) and *Prosecutor v. Hadžihanović & Kubura* (IT-01-47, 15 March 2006).

international art and antiquity market; (2) the increasing international demand for ‘cultural treasures’; and (3) the process of decolonization, which is linked to a rising awareness of the significance of ‘national cultural heritage’.<sup>83</sup> As a consequence, the newly independent States, created in the 1950s and 1960s, continue to bring restitution claims against the former colonial powers, whose institutions hold cultural material that had been removed from former colonial territories. It is estimated that the British Museum, for example, holds some 90,000 African artifacts that came into its possession as the result of colonial removal,<sup>84</sup> such as the so-called Benin bronzes taken from the territory of what is now Nigeria by the 1897 British Punitive Expedition.<sup>85</sup> Occasionally, former colonial territories may even claim restitution from one another: for example, Malaysia has made a claim for ethnological and historical material from Singapore, both of which were British colonies.<sup>86</sup> Previous standards and practices pertaining to the removing of cultural material often do not comply with current legal and moral standards on the restitution and return of cultural artifacts, since many of these conceptualizations have mainly been articulated only within recent years.<sup>87</sup> Due to the principle of non-retroactivity in international law,<sup>88</sup> current legal provisions are not directly applicable to these historical cases of removal. Nevertheless, these cases must be decided on the basis of some legal and/or moral grounds and, as this thesis argues, in consideration of complementary and alternative mechanisms to the current practices, which do not take the various interests involved in restitution disputes sufficiently into account.

Generally speaking, the importance of returning cultural objects to their ‘country of origin’ may often conflict with sometimes questionable previous authorization given for the removal of cultural material or previous practices, such as the partition (‘partage’) of excavation finds.<sup>89</sup> Although the division of archeological finds between various parties does not correspond with current understandings of archeology (in terms of preserving the context

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<sup>83</sup> Jeanette Greenfield, *The Return of Cultural Treasures*, Third Edition ed. (Cambridge University Press, 2007), p. 222.

<sup>84</sup> Cf. James A. R. Nafziger, "The Present State of Research," in *Le Patrimoine Culturel De L'humanité*, ed. Académie de Droit International de la Haye (2007), 244.

<sup>85</sup> Robert K. Paterson, "Resolving Material Culture Disputes: Human Rights, Property Rights, and Crimes against Humanity," in *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, ed. James A. R. Nafziger and Ann M. Nicgorski (2009), p. 376.

<sup>86</sup> See: Restitution of Works of Art to Countries Victims of Expropriation, Report of the Secretary-General, UN Doc. A/10244, at 3-4 (1975).

<sup>87</sup> Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, p. 5.

<sup>88</sup> See Article 28 of the *Vienna Convention on the Law of Treaties*, (adopted 23 May 1969; entering into force 27 January 1980); 1155 UNTS 331.

<sup>89</sup> See, for example, the permission that Thomas Bruce, Seventh Earl of Elgin, British ambassador to the Ottoman Empire (1799- 1803) obtained from the Ottoman authorities in 1801 to remove about half of the surviving sculptures of the Parthenon (more on this case in detail in Chapter Four).

and integrity of excavation finds), dividing finds in such a manner had previously been a common and widespread practice, especially in the eighteenth and nineteenth century. Thus, the great Western museums that hold such archeological finds in particular refer to the common practice of ‘partage’ as being legal at that time. In turn, many ‘countries of origin’ stress the fact that while they were not proper States at that time, they were still deprived of their cultural heritage – regardless the legality or illegality of the removal. Recent developments in international law, however, attempt to take a much broader approach to the issue of restitution and return, by including concepts such as state responsibility and self-determination under the umbrella of the ‘remedying historical injustice’. Facilitating these new approaches, stakeholders other than States – such as indigenous people, museums and the international community as a whole – have increasingly become involved in the resolution of restitution disputes.<sup>90</sup> This requires the exploration of means of resolving international cultural heritage disputes, which are complementary to the currently employed horizontal, inter-governmental settlement patterns that only give little attention to the plurality of the legal, economic and cultural interests involved in restitution disputes.

### **3. Terminological Approaches to Restitution and Return**

The terminology employed in the debate on the restitution and return of cultural materials is frequently inconsistently applied and used interchangeably. The language of international treaties as well as of the academic literature in the field is by no means an exception. This is partly because the subject is interdisciplinary, involving not only lawyers with different legal backgrounds, but also archeologists, anthropologists and art historians. Given that each discipline utilizes its own methodological approaches, the general debate is certainly enriched, but it does not necessarily ease the development of uniform terminology.

As the subject of restitution disputes is also frequently covered by the media around the world, the problem is exacerbated by the use of both legal and non-legal terminology, and is further complicated by difficulties associated with translation.<sup>91</sup> An analysis of the legal

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<sup>90</sup> Cf. Frank Kuitenbrouwer, "The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance," *European Review* 4, no. 13 (2005): p. 604.

<sup>91</sup> As, for example, the confusing and even over time changing translation from the English original of UN documents into the German version of the terms ‘restitution’ and ‘return’: ‘Rückgabe’ (restitution) and ‘Rückführung’ (return); whereas ‘Rückführung’ was later translated by ‘Rückerstattung’, see thereto: Thomas Fitschen, "30 Jahre Rückführung Von Kulturgut - Wie Der Generalversammlung Ihr Gegenstand Abhanden Kam," *Vereinte Nationen*, no. 2 (2004). The problem of proper and consistent translation continues on the European level: the Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully

terminology used in the context of restitution and return will demonstrate the first dilemma associated with the research in this field: namely, the fact that the legal terminology in this field is varied and inconsistent. Moreover, the terms used in this area of the law frequently tend to be deployed in order to blur rather than clarify the legal connotation associated with certain concepts. This terminological inconsistency is consequently perpetuated by various international and national legal traditions. The inconsistent use of terminology, however, leaves the door open to further negotiations, as claims are often made on ethical and historical rather than legal grounds, thereby deliberately avoiding legal terminology.<sup>92</sup>

In particular, the term ‘restitution’ often raises concerns among the parties involved, as it is implicitly connected to other legal questions of compensation and non-retroactivity, and might conflict with national and third party rights.<sup>93</sup> Its legal connotation is the main reason why ‘restitution’ is almost always complemented by or left out in favor of other terms in international treaties, bilateral agreements, and non-binding instruments, as will be shown at a later point in the analysis. These other terms, namely ‘recovery’, ‘retrieval’,<sup>94</sup> ‘repatriation’, the more neutral term ‘return’, or simply ‘transfer’ are frequently employed in lieu of ‘restitution’.<sup>95</sup> Each of these terms has a slightly different shade of meaning: the expression ‘repatriation’ is one such example, as it clearly indicates that the political purpose of the return of cultural objects to the ‘patria’ – the ‘fatherland’ or, generally speaking, the ‘country of origin’.<sup>96</sup> Other terms are clearly used in lieu of restitution, in order to evade legal connotations and their embedded legal obligations.<sup>97</sup> The rather neutral and unencumbered notion of ‘transfer’ has been utilized in several bilateral agreements and the 1970 UNESCO Convention.<sup>98</sup> Whereas the title of the Convention avoids both the notion of ‘restitution’ and ‘return’ by opting for ‘transfer’, the text of the Convention employs the traditional notions of

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removed from the territory of a Member State (Official Journal L 074 of 27 March 1993, 0074-0079) uses in English the term ‘return’, whereas in French it speaks of ‘restitution’, and in German of ‘Rückgabe’.

<sup>92</sup> This will be demonstrated later in Chapter Three, Section 2.10.

<sup>93</sup> Vrdoljak, "Reparations for Cultural Loss," p. 214.

<sup>94</sup> Cf. Prott and O'Keefe, *Law and the Cultural Heritage*, p. 863 ff.

<sup>95</sup> Cf. *Ibid.*, p. 832 ff.

<sup>96</sup> Cf. *Ibid.*, p. 836 f.

<sup>97</sup> The term ‘transfer’ is used, for example, in the Agreements between Italy and several U.S. Museums, including the Getty Museum, Boston Fine Arts Museum or the Metropolitan Museum of Art settling the ‘return’ of illegal exported items to Italy; see for further details Chapter Three, Section 2.10.

<sup>98</sup> The rather neutral and non-legal term of “transfer” has been used in the bilateral U.S.-Italian agreements, see Chapter Three, Section 2.10 and in the 1970 UNESCO Convention, see Chapter Three, Section 2.2. Moreover, also the Swiss law of 2005 implementing the 1970 UNESCO Convention uses the notion ‘transfer’. The Swiss implementing law is entitled: “Cultural Property Transfer Act” (CPTA), full text available at: <http://www.bak.admin.ch/themen/kulturguettertransfer/01104/index.html?lang=en> (accessed 23 September 2011).

‘reparation’ (Article 2) and ‘return’ (Article 7).<sup>99</sup> Frequently, however, the terms ‘return’ and ‘restitution’ are considered to be equivalent, and are often used without distinction when describing this phenomenon.

Nevertheless, examining the terms used in the debate will help to circumscribe the conceptual terrain explored in this thesis. Apart from the general concept of ‘reparation’ and its originally war-related connotation, the trilogy of ‘restitution’, ‘return’, and ‘repatriation’, is commonly used in the debate dealing with displaced cultural materials.<sup>100</sup> Although the terms of ‘restitution’ and ‘return’ within certain contexts are lacking in legal clarity, they are, nevertheless, the terms that are commonly used in legal literature and official documents. The following section of this chapter will examine in detail the terminological development of these terms and will set out the terms that will be used in this thesis.

### 3.1 Reparation

The term ‘reparation’ is sometimes used as a synonym for ‘restitution’, although the concept of ‘reparation’ is much broader and combines various other categories, ‘restitution’ being only one of them. The term reparation was originally used exclusively in connection with what were, in effect, fines exacted against States, usually for damages incurred during wartime.<sup>101</sup> Once hostilities had ceased, the victor would commonly insist that the vanquished party had caused the conflict, and that it, therefore, should be compelled to compensate the victor for war-related expenses and resulting damages. Reparations were thus a relatively unambiguous and tangible form of victor’s justice and were resented accordingly. The indemnities imposed on Germany after WWI are probably the most notorious example of such reparations.<sup>102</sup> While this term has certainly retained this historical connotation, it has in the meantime come to refer to a host of different activities, in which amends are made to non-State groups or individuals. This shift has taken place due to the expansion of human rights in response to the carnage of WWII, particularly the Holocaust.<sup>103</sup> It should be noted, however,

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<sup>99</sup> See Chapter Three, Section 2.2.

<sup>100</sup> See for example: Kowalski, "Claims for Works of Art and Their Legal Nature," p. 31.

<sup>101</sup> John Torpey, *Making Whole What Has Been Smashed - on Reparations Politics* (Harvard University Press, 2006), p. 8.

<sup>102</sup> \_\_\_\_\_, "Politics and the Past," in *Politics and the Past - on Repairing Historical Injustices*, ed. John Torpey (2003), p. 4.

<sup>103</sup> See for example: The Reparations Agreement between Israel and West Germany, in German known as: Luxemburger Abkommen, (signed 10 September 1952, entering into force 27 March 1953). According to the agreement, West Germany was to pay for slave labor, the persecution of Jews during the Holocaust, and to compensate for stolen Jewish property. West Germany paid Israel a sum of 3 billion Deutsche Marks over the next fourteen years, with an additional 450 million Deutsche Marks paid to the World Jewish Congress. The

that the concept of reparation has not only been broadened; in many ways, the concept has undergone a complete reversal in its substantive meaning, at least as it had been understood prior to WWII – namely, from a term referring to the monetary compensation paid by the vanquished to the victor, to a concept of general redress for internationally wrongful acts.<sup>104</sup> Consequently, the term ‘reparation’ has to be seen as referring to all means through which States are obligate to repair the consequences of a breach of international law for which they are responsible (State responsibility<sup>105</sup>).<sup>106</sup> Provisions on reparation can be found in the early 1907 Hague Convention (Article 3),<sup>107</sup> the 1949 Geneva Convention on the Protection of Civilian Persons in time of war (Article 33),<sup>108</sup> and in UN human rights treaties.<sup>109</sup> In fact, reparations have become an essential complement to the spread of human rights at the international level.<sup>110</sup>

Since the term ‘reparation’ gained a human rights dimension,<sup>111</sup> it now encompasses various types of redress. Without going into great detail, the following general types of reparation can be identified: (1) ‘restitution’, including the restoration of freedom, legal rights, social status, citizenship, employment, and goods; (2) ‘restitution-in-kind’, in cases in which the original is lost or destroyed; (3) ‘compensation’, in cases of material damage and loss of income, as well as physical or psychological damage; (4) ‘rehabilitation’, including medical coverage and access to legal and social services; and (5) ‘moral reparations’<sup>112</sup> (‘satisfaction’) and guarantees of non-repetition. If these various forms of redress are taken under

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money was invested in Israel's infrastructure and played an important role in establishing the economy of the newly founded State.

<sup>104</sup> Francesco Francioni, "Reparation for Indigenous People: Is International Law Ready to Ensure Redress for Historical Injustices?," in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, ed. Federico Lenzerini (2007), p. 32.

<sup>105</sup> See: *Articles on Responsibility of States for Internationally Wrongful Acts* completed by the International Law Commission (ILC) in 2001. For the text of the Articles and commentaries see *Official Records of the UN General Assembly*, Fifty-sixth Session, Supplement No. 10, 43, (A/56/10).

<sup>106</sup> Dinah Shelton, *Remedies in International Human Rights Law* (2005), p. 7.

<sup>107</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, adopted 18 October 1907, entering into force 26 January 1910), reprinted in AJIL, vol. 2 (1908), p. 90.

<sup>108</sup> *Convention relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), (adopted 12 August 1949, entering into force 21 October 1950), 75 UNTS 287.

<sup>109</sup> See, for example, Article 14 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, (adopted 10 December 1984, entering into force 26 June 1987), 1465 UNTS 85.

<sup>110</sup> Torpey, "Politics and the Past," p. 5.

<sup>111</sup> Federico Lenzerini, "Reparations for Indigenous Peoples in International and Comparative Law: An Introduction," in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, ed. Federico Lenzerini (2007), pp. 10-11.

<sup>112</sup> Moral reparation might comprise: investigation of the facts; the full and public disclosure of the truth; apologies; public acknowledgement of the facts; acceptance of responsibility; legal or administrative sanctions against the perpetrators of the violations; and commemoration of the victims.

consideration, ‘reparation’ as a general concept often seems more satisfactory than item-by-item restitution. As a result, it is also conceptually more difficult, since it does not deal exclusively with the material aspect of ‘restoration’.<sup>113</sup>

Since the aim of this thesis is to extend the conceptualization of restitution and return beyond current practices in resolving restitution disputes, both the material and the non-material aspects of ‘reparation’ must be included in this analysis. This will be achieved by discussing the concept of ‘remedying historical injustice’ on the basis of ethical and historical considerations.<sup>114</sup> That said, the term ‘reparation’ as such will not be used in this thesis, as it represents the super-ordinate concepts discussed above, of which restitution (and return) is only one aspect – namely, the aspect that deals specifically with the removal of cultural materials and the corresponding question of return.

### 3.2 Restitution and Return

Despite the general terminological inconsistencies, the notions of ‘restitution’ and ‘return’ are widely used in legal literature and in legal documents, such as UN and UNESCO documents. Although one might assume that use of terminology would be more or less consistent within these legal documents, the conventions surrounding the use of terminology have changed several times: this has been done primarily for political reasons, and rarely for the sake of distinct definitions. The terminological changes within the resolutions adopted by the United Nations General Assembly (UNGA) are particularly remarkable. Starting in 1973 as an initiative by the newly independent African States, who under the decolonization process began demanding ‘restitution’ of ‘what belongs to them’,<sup>115</sup> the issue has been broadened over the years to cover illicit trafficking in cultural objects as well. In 1976, the UNGA used the single term ‘restitution’ in Resolution No. 31/40<sup>116</sup> to refer to ‘cultural property lost either as a consequence of foreign or colonial occupation, or through illicit traffic prior to the 1970 UNESCO Convention’.<sup>117</sup> In 1978, UNGA Resolution No. 33/50<sup>118</sup>

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<sup>113</sup> Charles S. Maier, "Overcoming the Past? Narrative and Negotiation, Remembering, and Reparation: Issues at the Interface of History and the Law," in *Politics and the Past - on Repairing Historical Injustices*, ed. John Torpey (2003), p. 297.

<sup>114</sup> See Chapter Three, Section 5.

<sup>115</sup> UNGA Records, XXX, 2410th Plenary Meeting, statement made by the delegation of Zaire.

<sup>116</sup> UNGA Resolution on: *Protection and Restitution of Works of Art as Part of the Preservation and further Development of Cultural Values*, (A/RES/31/40), 31<sup>st</sup> Session, 30 November 1976, available at: <http://www.un.org/documents/ga/res/31/ares31.htm> (accessed 23 September 2011).

<sup>117</sup> For a detailed overview about the history of the UNGA resolutions over the past thirty years, see: Fitschen, "30 Jahre Rückführung Von Kulturgut - Wie Der Generalversammlung Ihr Gegenstand Abhanden Kam," p. 47.

introduces the term ‘return’ and refers to ‘restitution and return’ in its title. One year later, in 1979, UNGA Resolution No. 34/64<sup>119</sup> inverts the terms in favor of the more neutral term ‘return’, substitutes the ‘and’ with an ‘or’ and revised the title as ‘return or restitution of cultural property’.<sup>120</sup>

However, legally speaking, the notions of ‘restitution’ and ‘return’ should not be understood to be interchangeable. Restitution can be defined as an action aimed at reversing the effects of a former breach of the law.<sup>121</sup> Within the context of cultural heritage disputes, this applies both to looting during war, and theft during times of peace. The connecting characteristic of these two seemingly distinct scenarios is the violation of a legal prohibition, namely looting and theft. The aim of restitution is the full restoration of the former state of affairs (*restitutio in integrum*).<sup>122</sup> This might be accomplished either directly (by handing back the object identified as originating from pillage or theft), or – quite debatable – indirectly, through ‘restitution in kind’ (by the furnishing of objects similar to those which were destroyed or cannot be found).<sup>123</sup> Restitution of looted and stolen objects concerns the ownership of that property and has also been described as ‘title dispute’.<sup>124</sup>

In comparison to the notion of ‘restitution’ that refers to pillage and theft, the notion of ‘return’ refers to cultural objects taken during the colonial period, as well as to objects that have been illegally exported from one State to another.<sup>125</sup> The notion ‘return’ began to emerge as an autonomous concept,<sup>126</sup> since the notion ‘restitution’ was increasingly avoided by States because of its clear legal character as a remedy in international law. In 1978, the Director-General of UNESCO introduced ‘*A Plea for the Return of an Irreplaceable Cultural*

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<sup>118</sup> UNGA Resolution on: *Protection, Restitution and Return of Cultural and Artistic Property as Part of the Preservation and further Development of Cultural Values*, (A/RES/30/50), 33<sup>rd</sup> Session, 14 December 1978, available at: <http://www.un.org/documents/ga/res/33/ares33.htm> (accessed 23 September 2011).

<sup>119</sup> UNGA Resolution on: *Return or Restitution of Cultural Property to the Countries of Origin*, (A/RES/34/64), 34<sup>th</sup> Session, 29 November 1979, available at: <http://www.un.org/documents/ga/res/34/ares34.htm> (23 September 2011).

<sup>120</sup> Cf. Fitschen, "30 Jahre Rückführung Von Kulturgut - Wie Der Generalversammlung Ihr Gegenstand Abhanden Kam," p. 47. For a detailed discussion on the UNGA resolutions, see Chapter Three, Section 3.3

<sup>121</sup> Cf. Kowalski, "Claims for Works of Art and Their Legal Nature," p. 33.

<sup>122</sup> Cf. Kifle Jote, *International Legal Protection of Cultural Heritage* (Stockholm 1994), p. 262.

<sup>123</sup> Kowalski, "Claims for Works of Art and Their Legal Nature," p. 50.

<sup>124</sup> Kathryn Last, "The Resolution of Cultural Property Disputes: Some Issues of Definition," in *Resolution of Cultural Property Disputes*, ed. The International Bureau of the Permanent Court of Arbitration (The Hague: Peace Palace Papers, 2004), p. 65.

<sup>125</sup> Kowalski, "Claims for Works of Art and Their Legal Nature," p. 33.

<sup>126</sup> *Ibid.*, p. 48.

*Heritage to Those Who Created It*’ using the term ‘return’ instead of ‘restitution’.<sup>127</sup> The separated notions were formally reflected in the explicitly formulated ‘Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Cases of Illicit Appropriation’ (ICPRCP).<sup>128</sup> The distinction between the contexts of ‘restitution’ and ‘return’ is also apparent in the 1995 UNIDROIT Convention that separates the two issues in different chapters: Chapter Two of the UNIDROIT Convention is entitled ‘Restitution of Stolen Cultural Objects’, whereas Chapter Three is entitled ‘Return of Illegally Exported Cultural Objects’.<sup>129</sup> This conforms to the general distinction between ‘stolen’ and ‘illegally exported’ objects as described above. Cases involving the return of cultural objects include the restoration of the ‘stone of Scone’ to Scotland seven hundred years after its removal from Edinburgh to London,<sup>130</sup> and the decision of the Glasgow City Council to return the ‘Lakota Ghost Dance Shirt’ to the ‘Wounded Knee Survivors’ in the United States (South Dakota).<sup>131</sup>

This short appraisal of terminology has shown that the use of ‘restitution’ (which refers to stolen cultural objects – either through looting during war or theft during times of peace) can be differentiated from ‘return’ (which refers to illegally exported cultural objects as well as to removal during the colonial era). However, the use of the original non-legal term ‘return’ (or sometimes simply ‘transfer’) by negotiating parties has become more and more frequent in settings that ought to use legal terminology to designate legal rights. Whereas the term ‘restitution’ is generally associated with ‘claim’ or ‘dispute’ – making the term ‘restitution disputes’ into a commonly used collocation in this field of study, the term ‘restitution’ almost never appears in the wording that attests the actual settlement of ‘restitution disputes’.<sup>132</sup> Thus, it can be noted that the parties involved often actively choose

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<sup>127</sup> Amadou-Mahtar M’Bow, *A Plea for the Return of an Irreplaceable Cultural Heritage to Those Who Created It*, 7 June 1978, as available in Annex VII of the Resolution of Cultural Property Disputes, Peace Palace Papers (2004).

<sup>128</sup> Committee of Experts on the Establishment of an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Cases of Illicit Appropriation, Dakar, March 1978, Final Report 20 C/86, available at: [http://www.unesco.org/culture/legalprotection/committee/html\\_eng/index\\_en.shtml](http://www.unesco.org/culture/legalprotection/committee/html_eng/index_en.shtml) (accessed 23 September 2011)

<sup>129</sup> UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* (Rome, adopted 24 June 1995, entering into force 1 July 1998, 34 ILM 1322).

<sup>130</sup> Norman Palmer, "Sending Them Home: Some Observations on the Relocation of Cultural Objects from Uk Museums Collections " *Art, Antiquity and Law* 5, no. 4 (2000): p. 343.

<sup>131</sup> Memorandum submitted by Glasgow City Council to the Select Committee on Culture, Media and Sport, reprinted in 5(4) *Art, Antiquity and Law*, 15 (2000), p.371. This case is described in detail, see Chapter Six, Section 3.1.

<sup>132</sup> For a detailed case study, see Chapter Three, Section 2.10.

to avoid the term ‘restitution’ in an effort to exclude legal connotation. This has a twofold effect: firstly, it allows the parties to avoid the mentioning of any legal obligations automatically associated with the term ‘restitution’. Secondly, it allows the parties to retain their position on the initial legality of the removal without being side-tracked into sterile argument too early on in negotiations. Although this might be quite promising for the development of a more result-oriented and cooperation-focused practices in restitution disputes, the legal certainty and the implementation of a consistent framework for restitution practices risks being impaired by the use of the terms in this manner.

In summarizing, it is important to emphasize that despite the complexity of the terms ‘restitution’ and ‘return’ and the different legal connotation associated with them, these terms are often used interchangeably. This thesis will utilize the commonly employed collocation of ‘restitution dispute’, although the broader but much longer collocation of ‘international cultural heritage disputes’ is clearly preferred, as indicated in the title of this thesis. Moreover, this thesis will use – unless otherwise indicated – the terms of ‘restitution and return’ as one set of remedies for resolving ‘restitution disputes’. However, as this thesis attempts to go ‘beyond restitution’, the term ‘return’ will be given preference over the term ‘restitution’ (in line with current State practice) – particularly when it comes to defining alternative solutions to current restitution practices. Going ‘beyond’ restitution means to overcome what can be described as zero-sum solution – meaning that the cultural object in question is returned (or retained) without any mutual gain for the parties involved.<sup>133</sup>

### 3.3 Repatriation

In the legal literature, the term ‘repatriation’ is used less frequently than ‘restitution and return’ and is more comparable, due to its terminological origin, to the term of ‘reparation’.<sup>134</sup> Originally, the term of repatriation referred to the process of returning refugees, so-called displaced persons, or soldiers, following an armed conflict. However, the term has been used in legal literature in order to describe two scenarios, on the one hand, restitution disputes that relate to the succession of States,<sup>135</sup> and, on the other, disputes related to human remains.<sup>136</sup> In contrast to the terms ‘restitution and return’, which are based on the

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<sup>133</sup> For details, see Chapter Two, Section 5.

<sup>134</sup> See, *supra* Chapter Two, Section 3.1.

<sup>135</sup> Kowalski, "Claims for Works of Art and Their Legal Nature," p. 50.

<sup>136</sup> For example, the 1990 U.S. *Native American Graves Protection and Repatriation Act* (NAGPRA) prescribes the process of returning Native-American human remains found on federal land to culturally affiliated tribes with the notion of ‘repatriation’. Other incidents cover the collections of heads and other body parts of mainly

premise that the cultural material in question has been removed, the term ‘repatriation’ has been used to describe situations in which the object itself has not moved, but national borders have changed; as a result of this change, the item appeared to be out of its original cultural context.<sup>137</sup> During the process of nation-State-building in the nineteenth century, the status of cultural objects altered without physical dislocation, when various territories were subject to political reassignment due to territorial cession, or through the dissolution of multi-ethnic States. The Austrian-Italian Treaty of 1866<sup>138</sup> should be mentioned as one of the first emerging cases of repatriation on a larger scale.<sup>139</sup> The treaty settled the conflicts between Italy and Austria following the Austrian succession of Venetia to the French Empire, which in turn ceded Venetia to the Kingdom of Italy. Italy, which was in the process of unifying at this time, requested that the Austro-Hungarian Empire returns all works of art, historical relics, and archives removed under the Habsburg reign. The treaty was based on the territorial link between Italy and the cultural objects in question. However, ‘repatriation’ was only performed after protracted negotiations, and only on an item-by-item basis, and was contingent upon reciprocity on the part of Italy. Whereas questions of ‘repatriation’ in the case of the collapse of Yugoslavia in the early 1990s, for example, seem to have finally been settled by a 2001 agreement,<sup>140</sup> the removal of cultural objects after WWII as well as issues pertaining the collapse of the Soviet Union remain unresolved between Germany, Poland and Russia on the one hand, and Russia and the former Soviet Republics on the other.<sup>141</sup>

Criticizing the use of the term ‘repatriation’ as a general term in cultural heritage matters, Merryman argues that the term ‘repatriation’ “asserts that an object has a *patria*, a homeland, a nation to which, and in which, it belongs.”<sup>142</sup> He suggests that scholars should

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indigenous peoples such as Indigenous Australians and Maori for display in museums as they have been exhibited as an “anthropological curiosity”. See, for example, the controversial case of the repatriation of the Yagan’s skull from London to Australia in 1997. The head spent over a century in storage at a museum, was buried in 1964, exhumed and repatriated to the Noongar tribe. To date, the head remains unburied.

<sup>137</sup> Last, “The Resolution of Cultural Property Disputes: Some Issues of Definition,” p. 69.

<sup>138</sup> Treaty of Peace between Austro-Hungary and Italy, Vienna, 3 October 1866, I *Recueil manuel et pratique de traits, conventions et autres actes diplomatiques* (ser. 2), p. 387 (Charles de Martens, Ferdinand de Cussy/ Friedrich H. Geffcken eds., Leipzig 1885).

<sup>139</sup> Kowalski, “Claims for Works of Art and Their Legal Nature,” p. 44.

<sup>140</sup> Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia, 41 I.L.M. p. 5 (2002).

<sup>141</sup> See, for example, Agreement on the Repatriation of Cultural Property to the States of origin, Minsk (Belarus), 14 February 1992, *Ross. Gazeta*, 24 February 1992. The process of ‘repatriation’ and the enforcement of the agreement lacks of the necessary approval by the Russian State Duma.

<sup>142</sup> John Henry Merryman, “Protection of the Cultural Heritage?,” *American Journal of Comparative Law* 38 (Supplement 1990)(1990): p. 521.

therefore avoid this term, as it stems from a form of “romantic nationalism”.<sup>143</sup> Congruously, he also criticizes the use of the term ‘heritage’, because it also implies a ‘right to repatriation’, with which he disagrees, given his internationalist point of view.<sup>144</sup> Despite this criticism of the concept of ‘heritage’, another question arises as to what conditions generate the relevant link between a cultural object and its ‘country of origin’ (*pays d’origine*) that would justify its ‘repatriation’.<sup>145</sup> Among others, such conditions might include the place of manufacture; the nationality of the maker; the State of its archaeological discovery; the State of the longest history of reception; or, the State in which the object was held for the longest period of time.<sup>146</sup> Whereas, in some cases, the question of the ‘country of origin’ can easily be answered, in others, the answer is not that straightforward. This question is further complicated in cases of underwater cultural heritage, such as sunken vessels (incapacitated by either natural or war-related disasters) that have arbitrarily found their final resting place in territorial or international waters.<sup>147</sup>

A definition of the notion ‘country of origin’, offered by the UNESCO Intergovernmental Committee,<sup>148</sup> refers to “the country with the traditional culture to which the object was related”. This definition, however, remains unsatisfactory, since the strongest traditional link does not necessarily correlate with the ‘country of origin’; as Siehr points out, sometimes cultural objects can only be assigned locally rather than nationally.<sup>149</sup> The problems associated with shifting State borders during the course of history, which has been addressed by the term ‘repatriation’, thus recurs when defining the term ‘country of origin’. It is notable that the link to a specific people, community, as well as ethnic or religious group may be historically more consistent than the sometimes random link to a State territory that exists in the current legal system.<sup>150</sup> Since, however, States (and not peoples or communities) are still the fundamental actors in international law, the territorial link to States remains the dominant conceptualization in current international law, despite well-founded criticism.

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid.: p. 522.

<sup>145</sup> Stefan Turner, *Das Restitutionsrecht Des Staates Nach Illegaler Ausfuhr Von Kulturgütern*, Schriften Zum Kulturgüterschutz (2002), p. 9.

<sup>146</sup> Greenfield, *The Return of Cultural Treasures*, p. 367.

<sup>147</sup> For a detailed discussion on the 2001 UNESCO Underwater Cultural Heritage Convention, see Chapter Three, Section 2.5.

<sup>148</sup> UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP); for details, see Chapter Three, Section 3.2.

<sup>149</sup> Siehr, "International Art Trade and the Law," p. 147.

<sup>150</sup> For the provisions of the 1970 UNESCO Convention, see Chapter Three, Section 2.2.

Although a totally satisfying definition of the notion ‘country of origin’ cannot be found, the term ‘repatriation’ can be defined as serving the purpose of protecting the integrity of a nation’s cultural heritage in the circumstance of a territorial cession or the collapse of a multi-national State.<sup>151</sup> Depending on the situation, ‘repatriation’ can refer to a place or country whence a cultural object originated or an ethnic group to which it once belonged. The major criterion for restoration under these circumstances is the territorial or ethnic link to a given component of that heritage (established, for example, through archives or parish registers).<sup>152</sup>

This short appraisal of the terminology in this area of the law demonstrates that three main terms, namely ‘restitution’, ‘return’, and ‘repatriation’, are commonly used within the general debate on international cultural heritage disputes. Thus, choosing completely different terms for the purpose of this thesis would be somehow artificial and would not facilitate the debate. Whereas ‘restitution and return’ will be used as one set of remedies for resolving international cultural heritage disputes,<sup>153</sup> the term ‘repatriation’ will not be used in this thesis, since it has not yet been sufficiently established in international legal codifications apart from cases associated with human remains and State succession. Furthermore, although Merryman’s criticism pertaining to ‘repatriation’ might be exaggerated, it cannot be denied that the term is terminologically encumbered and is not likely to foster the attempt at identifying alternative mechanisms in the resolution of international cultural heritage disputes.

### 3.4 Retention

The opposing term to the concept of ‘restitution and return’ is that of ‘retention’. This non-legal term is generally used either to refer to national export restrictions or to describe a certain position or general attitude that aims at keeping current collections in (Western) museums. In both cases, ‘retentive schemes’ are often described as a means of ‘protecting’ cultural heritage.<sup>154</sup> Retentive approaches, for example, have been deployed in the above-mentioned 2002 ‘Declaration on the Importance and Value of Universal Museums’.<sup>155</sup> The collections of several Western museums, which were compiled mainly through purchase, donation, bequest, or the division of archeological excavations (‘partage’) during the

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<sup>151</sup> Kowalski, "Claims for Works of Art and Their Legal Nature," p. 50.

<sup>152</sup> *Ibid.*, p. 50.

<sup>153</sup> See, *supra* Chapter Two, Section 3.2.

<sup>154</sup> Craig Forrest, *International Law and the Protection of Cultural Heritage* (2010), p. 16.

<sup>155</sup> *Declaration on the Importance and Value of Universal Museums* (December 2002), reprinted in ICOM News No. 1 (2004).

nineteenth and the early twentieth century, have been continually enlarged through the removal of cultural materials from occupied or colonized parts of the world. Those who oppose the return of cultural materials to their ‘countries of origin’ argue that these removals were in compliance with the applicable laws of the period. In the majority of cases, national export restrictions, mainly passed in the twentieth century, did not exist at the time of removal and do not have retroactive impact.

Merryman, for example, contrasts the term ‘retention’ with ‘protection’ in reference to the inability of certain requesting States, indigenous people, or ethnic and religious groups to guarantee the preservation, access, study, and research of cultural objects, especially when they refuse to allow even duplicate cultural material to be taken abroad.<sup>156</sup> The opposing position, which favors the return of cultural material to its ‘countries of origin’, uses ‘retention’ as a derogatory term in reference to the arguments made by the so-called art-market countries in favor of maintaining possession of cultural materials, without regard to the rights of requesting States and indigenous people to cultural participation and self-determination. Although the negative connotation now associated with the term ‘retention’ is almost unavoidable, this thesis will use the term ‘retention’ to refer to the position of the requested party who refuses the prompt and immediate return of the requested cultural object. The approach taken by this thesis does not intend to advocate for either ‘restitution and return’ or ‘retention’, rather, it suggests mechanisms that provide complementary and alternative means of resolving debates over provenance and possession.

#### **4. Legal Categorization of Claims for Restitution and Return**

While distinguishing between the different categories of claims for the restitution and return of cultural materials is not an easy task, it is an essential one. Several attempts have been made to identify categories that fit the wide range of possible claims arising under international law. Some of these attempts have been helpful in terms of simplification; others have failed to provide a useful schematic in terms of terminology and categorization, primarily because they introduce unnecessary complications into this already complex issue. An attempt at classification has been made, for example, by Last, who identifies three categories of claims: ‘disputes concerning ownership’; ‘disputes concerning location’; and ‘disputes concerning stewardship’;<sup>157</sup> Gerstenblith has also proposed a classification triad:

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<sup>156</sup> Merryman, Elsen, and Urice, *Law, Ethics and the Visual Arts*, p. 418.

<sup>157</sup> Last, "The Resolution of Cultural Property Disputes: Some Issues of Definition," p. 65.

‘works of aesthetic values intended for sale’; ‘archaeological objects’; and ‘ethnographic objects of cultural or religious value’.<sup>158</sup> While these categories seem to be comprehensible and constructive at first, closer analysis demonstrates that they end up further complicating the scholarship on restitution matters, since these categories are not exclusive (given that claims may fall within more than one of these categories) and the different legal instruments associated with these classifications are not adequately defined. Understandably, every scholar in this field is tempted to develop their own classification system for these claims in an effort to improve on existing classification systems. Nevertheless, the added value of such classification systems to efforts at finding solutions to these claims is questionable, since re-grouping does not change the legal framework applicable to these cases. Therefore, rather than inventing a new classification system, this thesis adopts the conventional categories of claims as currently recognized by international law.

As demonstrated in the historical overview<sup>159</sup> and the discussion of terminological issues,<sup>160</sup> the legal provisions pertaining to ‘restitution and return’ have evolved primarily to protect cultural sites, monuments and movable cultural objects during times of armed conflicts (war time regime). The protection of cultural heritage during times of peace (peace time regime) evolved only as a consequence of the massive destruction, looting and theft during wartimes – which served to raise awareness that destruction, plunder and theft of cultural materials is not only an issue during wartime. While legal provisions focusing on the protection of cultural heritage serves a preventive function, restitution and return as such are not part of this protective-preventive regime; rather, they aim at reversing the effects of a breach of protective measures.<sup>161</sup> Generally, the aim of restitution (and return) is the full restoration of the former state of affairs<sup>162</sup> (*restitutio in integrum*): the removed cultural material is ‘restituted’ to its previous rightful owner. This, of course, applies both to looting during times of war, and to theft during times of peace. Therefore, the overall distinction between the legal provisions in international cultural heritage law is between the wartime and the peacetime regimes.<sup>163</sup>

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<sup>158</sup> Patty Gerstenblith, "The Public Interest in the Restitution of Cultural Objects," *Connecticut Journal of International Law*, no. 16 (2001): p. 197.

<sup>159</sup> See, *supra* Chapter Two, Section 2.

<sup>160</sup> See, *supra* Chapter Two, Section 3.

<sup>161</sup> Kowalski, "Claims for Works of Art and Their Legal Nature," p. 33.

<sup>162</sup> Cf. Jote, *International Legal Protection of Cultural Heritage*, p. 262.

<sup>163</sup> Cf. Christiane Freytag, "Cultural Heritage: Rückgabeansprüche Von Ursprungsländern Auf "Ihr" Kulturgut?," in *Prinzipien Des Kulturgüterschutzes - Ansätze Im Deutschen, Europäischen Und Internationalen Recht*, ed. Frank Fechner, Thomas Oppermann, and Lyndel V. Prott (Berlin), p. 175.

In addition to the two rather broad wartime and peacetime regime categories, developments after WWII necessitated that international law adopts additional legal provisions in order to respond adequately to: firstly, the Holocaust-related looting of Jewish cultural property (defined as genocide not war); and secondly, the process of decolonization and the requests for the return of cultural materials to their ‘country of origin’ (although colonization is defined neither as war nor peace, it still encompasses elements such as genocide);<sup>164</sup> and thirdly, the dramatic increase of illicit trafficking in cultural materials since the 1950s (which is not depend on definitions of war and peace, but in violation of national export regulations).

The following section analyzing the different categories of claims for the return and restitution of cultural materials will complete the historical framework outlined above and will also pave the way for the legal analysis of the instruments dealing with return and restitution in international law (Chapter Three). Apart from the terminological inconsistency in the field, a clear understanding of the different categories of claims is essential, since confusing the different categories of claims (and thus the application of different legal regimes) is a major obstacle in the accurate assessment of international cultural heritage disputes. Based on the traditional regimes established under international law (the wartime and peacetime regimes), five major categories of claims for restitution and return can be identified in international cultural heritage law:<sup>165</sup> (1) claims related to the removal of cultural objects during armed conflicts (wartime regime); (2) claims related to illicit trafficking (peacetime regime); (3) claims made for the return of cultural objects to the ‘countries of origin’(in neither war nor peace); (4) claims made on the grounds of former ownership, mainly in relationship to Nazi-confiscated art; and (5) claims made for the return of cultural objects to a particular people, group or community.

#### **4.1 Return of Cultural Objects removed during Wartime**

The earliest provisions on restitution and return, namely the 1648 Treaty of Westphalia ending the Thirty Years War,<sup>166</sup> were established within the context of armed

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<sup>164</sup> Paterson, "Resolving Material Culture Disputes: Human Rights, Property Rights, and Crimes against Humanity," p. 376.

<sup>165</sup> Cf. Kerstin Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* (2005), pp. 161.

<sup>166</sup> See Article CXIV of the Treaty of Westphalia, signed at Münster, Germany in 1648.

conflict.<sup>167</sup> Against the backdrop of conflict and belligerent occupation, the need to develop a regime to protect cultural materials within the auspices of international humanitarian law became essential. Thus, over the centuries, customary international law developed obligations pertaining to the protection of cultural heritage against the four fundamental wartime threats: deliberate attack, incidental damage, pillage and outright theft.<sup>168</sup> Today, the legal core of these provisions has been cemented in international law by the early provisions of the 1899<sup>169</sup> and 1907<sup>170</sup> Hague Conventions, and the more recently, the 1954 Hague Convention and its Protocols;<sup>171</sup> taken as a group, these conventions prohibit theft, pillage, misappropriation, and any act of vandalism directed against monuments and works of art while simultaneously establishing the obligation to return objects displaced during armed conflict.<sup>172</sup>

Where looting during the armed conflict could not be prevented, post-war treaties were drawn up to regulate the return of cultural materials. Among these early treaties are the 1815 Congress Treaty of Vienna,<sup>173</sup> the 1919 Peace Treaties of Versailles,<sup>174</sup> and the 1921 Treaty of Riga between Poland and Soviet Russia<sup>175</sup>, all of which provide general provisions on restitution.<sup>176</sup> These peace treaties were successful in facilitating the return of appropriated cultural materials in certain cases – one of the most recent being the return of the Axum Obelisk to Ethiopia in 2005 on the basis of a 1947 Peace Treaty;<sup>177</sup> other incidents, such as the spoliation committed by the Soviet army in Central and Eastern Europe in 1945, remain unresolved.<sup>178</sup> While Russia classifies the objects taken by the officially deployed Soviet ‘Trophy Committee’ as ‘compensatory restitution’, Germany, Hungary, Poland and the Baltic

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<sup>167</sup> See, *supra* Chapter Two, Section 2.

<sup>168</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 186.

<sup>169</sup> 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 (The Hague, adopted 29 July 1899, entering into force 4 September 1900), reprinted in AJIL, vol. 1 (1907), p. 129.

<sup>170</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, adopted 18 October 1907, entering into force 26 January 1910), reprinted in AJIL, vol. 2 (1908), p. 90.

<sup>171</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts (adopted 14 May 1954, entering into force 7 August 1956), 249 UNTS 215.

<sup>172</sup> For a detailed analysis of customary international law, see Chapter Three, Section 6.

<sup>173</sup> Final Act of the Congress of Vienna, embodying all separate treaties (signed on 9 June 1815).

<sup>174</sup> Treaty of Peace between the Allied and Associated Powers and Germany, Versailles (signed on 28 June 1919, in force 10 January 1920), (1919) 225 Parry's CTS 189.

<sup>175</sup> Treaty of Peace between Poland and the Soviet Republics of Russia and Ukraine, Riga, (signed on 18 March 1921, LNTS, Vol. 6, No. 149, pp. 51-169, available at:

<http://treaties.un.org/doc/publication/unts/lon/volume%206/v6.pdf> (accessed 23 September 2011).

<sup>176</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 7.

<sup>177</sup> For detailed information on the case of the return of the Axum Obelisk from Italy to Ethiopia in 2005, see case study Chapter Three, Section 2.9.1.

<sup>178</sup> See, *supra* Chapter Two, Section 2.

States still await the return of thousands of cultural items, including artworks, books and archival materials.<sup>179</sup> Since the early 1990s, Germany has drawn up several bilateral neighborhood treaties and cultural agreements with Russia and several other former Soviet States in order to resolve this problem.<sup>180</sup> However, these treaties have only resulted in the return of individual items; one successful example is the 2008 return of the fourteenth century stained-glass windows by Russia to the cathedral of Frankfurt (Oder) in Germany.<sup>181</sup>

#### 4.2 Return of Illicitly Exported Cultural Objects

Within the ‘peace time regime’, claims for restitution and return are made on the grounds that cultural objects have been illicitly exported from one State to another. Thus, the second category of claims is primarily a consequence of illicit trafficking in cultural materials. An export is considered to be illicit if the object was exported outside a State’s territory in breach of its national export regulations. National regulations on the export (as well as on the import) of cultural goods either completely prohibit the export (and/or import)<sup>182</sup> of certain cultural objects (or groups of objects), or require that an object intended to be exported is accompanied by an official export certificate.<sup>183</sup> The conditions under which such an export certificate is issued or not depend on national legislation and therefore vary from State to State (generally depending on the age and/or value of the object).<sup>184</sup> Without an export certificate, the export is considered to be illicit. Today, a growing number of States have passed export regulations pertaining to the protection of their national cultural patrimony (thus prohibiting the export), and the surveillance of trade (thus restricting the import and export of cultural objects).<sup>185</sup> However, because of the fundamental principle of State sovereignty in international law, domestic legislation (including regulations on the export of

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<sup>179</sup> Cf. Fodor, "The Restitution of Works of Art in Hungary," p. 92.

<sup>180</sup> See, for example, Treaty between the Federal Republic of Germany and the Union of Socialist Republics on Good-Neighborliness Partnership and Cooperation, (signed on 9 November 1990), in: 30 I.L.M. 505 (1991) and Cultural Agreement between the German Federal Republic and the Russian Federation, (signed on 16 December 1992 in Moscow), BGBl. II, 1256 (1993); See in this respect also: Siehr, "International Art Trade and the Law," p. 119.

<sup>181</sup> See: <http://www.fr-online.de/kultur/fenster-der-marienkirche-wieder-komplett/-/1472786/3299184/-/index.html> (accessed 23 September 2011).

<sup>182</sup> See, for example, Council Regulation (EC) No. 1210/2003 that establishes a ban on the import, export, and trade of cultural items exported from Iraq after 2 August 1990: Council Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No. 2465/96, (*Official Journal* 2003, L 169/6).

<sup>183</sup> See, for example, Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods, (*Official Journal* L 39/1, 10 February 2009). This regulation was enacted to control the export of cultural objects outside the area of the European internal market. The respective categories of cultural objects are defined through minimum age and/or economic value, see Annex I of the regulation.

<sup>184</sup> For examples of national export regulations, see Chapter Three, Section 2.2.

<sup>185</sup> Lyndel V. Prott and Patrick J. O'Keefe, *Handbook of National Regulations Concerning the Export of Cultural Property* (Paris 1988).

cultural materials), is generally not enforced by courts of foreign States.<sup>186</sup> In order to provide an international legal framework for the recognition of national export regulations among States, two conventions have been established: the 1970 UNESCO Convention and the 1995 UNIDROIT Convention. Whereas the 1995 UNIDROIT Convention is self-executing, and as such does not require national implementation (and is therefore still lacking major international acceptance by States), the 1970 UNESCO Convention, (by now ratified by 120 States),<sup>187</sup> must be implemented into national law by its States parties. These national laws, however, differ extensively from State to State, and create several practical problems in providing for the return of illicitly exported cultural objects.<sup>188</sup>

Whereas the protection of cultural materials and the restitution of appropriated cultural materials provided by the wartime regime are already considered to be part of customary international law,<sup>189</sup> the provisions pertaining to the return of cultural materials under the peacetime regime remains less developed. This is primarily because the peacetime regime developed much later – initially in the late 1930s<sup>190</sup> and substantially only after WWII – and therefore has not yet achieved customary international law status (although promising tendencies in this direction can be observed).<sup>191</sup> Moreover, this regime is more sensitive to the legal difficulty associated with interfacing national and international law when it comes to regulations against trafficking in cultural materials.<sup>192</sup> The return of an illicitly exported object might necessitate, firstly, the expropriation of the current possessor, and, secondly, payment of compensation if the object had been acquired in good faith. These requirements might conflict with civil law provisions or constitutional rights, namely property rights, of the

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<sup>186</sup> Recent developments in which foreign courts recognize national ownership laws of another State, such as in the case of *Iran vs. Barakat* (2007) will be discussed separately, see Chapter Three, Section 2.2.

<sup>187</sup> See list of States Parties to the 1970 UNESCO Convention, available at: <http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha> (accessed 23 September 2011).

<sup>188</sup> In detail on the 1970 UNESCO Convention, see Chapter Three, Section 2.2.

<sup>189</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 124 and 69. Wilfried Fiedler, "Zur Entwicklung Des Völkergewohnheitsrechts Im Bereich Des Internationalen Kulturgüterschutzes," in *Staat Und Völkerrechtsordnung. Festschrift Für Karl Doehring*, ed. Kay Hailbronner, Georg Röss, and Torsten Stein (1989), p. 217.

<sup>190</sup> One of the earliest examples is the *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments* among the States of the Pan-American Union (Treaty of Washington), (signed 15 April 1935, entering into force 26 August 1935) 49 Stat. 3267, 167 L.N.T.S. 289.

<sup>191</sup> Cf. Tullio Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," *Rivista di Diritto Internazionale* 94, no. 2 (2011): p. 366. For detailed analysis on customary international law, see Chapter Three, Section 6.

<sup>192</sup> Manlio Frigo, "Réflexions Sur Quelques Aspects Juridiques De La Protection Internationale Des Biens Culturels," in *La Protezione Internazionale Dei Beni Culturali*, ed. Istituto Internazionale di Diritto Umanitario (Rome: 1986), pp. 218.

requested State, and therefore must be resolved through each State's national implementation of the 1970 UNESCO Convention. Despite all of these obstacles, many claims – some of which have been successful in recent years – are brought forward on the basis of the 1970 UNESCO Convention and the national laws that serve to implement this Convention.<sup>193</sup>

#### **4.3 Return of Cultural Objects to the 'Countries of Origin'**

This third category encompasses claims made on cultural materials that were appropriated from their place of origin during the period of colonial domination or earlier appropriation of territory. The colonial removal of cultural materials constitutes a problematic category of its own, as – legally speaking – such claims do not fit properly into either the war or the peace-time regime category.<sup>194</sup> Thus, this category comprises both legal and illegal removal of cultural materials resulting from – sometimes quite dubious – acquisitions or trade-offs as well as theft or pillage. Although colonial domination included removal through the extensive use of force and violence (which could therefore be understood as a type of prolonged foreign occupation),<sup>195</sup> these removals, nonetheless, do not properly fall within the scope of the 'peacetime regime' or the 'wartime regime' as they are traditionally understood in international law. Under international law, the process of colonization is by definition not considered to be war; colonized territories were – at least at that time – considered to be an extension of national territory, rather than under foreign occupation.<sup>196</sup> Thus, claims for the return of cultural materials falling into this third category can also be described as 'historical claims', since – as common in international law<sup>197</sup> – international treaties, such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, do not apply retroactively.<sup>198</sup> As a consequence, these claims cannot be decided on the basis of these conventions. Rather, they must be considered within the wider framework of ethical and historical considerations that influence the formation of custom and general principles under international law.<sup>199</sup> One forum that has been given a mandate to deal with claims prior to the entry into force of

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<sup>193</sup> For a detailed analysis, see Chapter Three, Section 2.2.

<sup>194</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 181.

<sup>195</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 370.

<sup>196</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 181.

<sup>197</sup> See Article 28 of the *Vienna Convention on the Law of Treaties*, (adopted 23 May 1969, entering into force 27 January 1980); 1155 UNTS 331.

<sup>198</sup> More information on the 1970 UNESCO Convention is provided in Chapter Three, Section 2.2; more information on the 1995 UNIDROIT Convention is provided in Chapter Three, Section 2.4.

<sup>199</sup> A detailed legal analysis is provided in Chapter Three, Section 5 and 6.

current legal instruments is the UNESCO *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*, created in 1978.<sup>200</sup> Despite all efforts at improving the work of the UNESCO Intergovernmental Committee over the past thirty years of its existence, the number of cases brought in front of the Committee is rather disappointing, given the number of incidents of colonial removals that are likely to exist (since its establishment in 1978, only eight requests for return have been submitted to the Committee of which six were resolved).<sup>201</sup> The principal reasons for the few number of cases brought before the UNESCO Committee are twofold: firstly, States are generally rather reluctant to handle restitution disputes at the international level for various political and diplomatic reasons; and secondly, parties are often unable to properly document the actual circumstances surrounding the colonial removal of cultural materials to the extent necessary to present a claim.<sup>202</sup> While the facts of certain removals are well known, such as the Benin bronzes taken from the territory of what is now Nigeria by the 1897 British Punitive Expedition, the vast majority are not.<sup>203</sup> The scope of colonial removal was vast, both in geographical and numerical terms: many items were traded or gifted, while others were stolen, obtained through force or misunderstanding, or removed by early missionaries and others.<sup>204</sup>

While the scope of the two previous categories of claims is more or less apparent, the scope of this third category of claims, especially as it pertains to the return to the ‘countries of origin’, remains highly controversial.<sup>205</sup> Museums and cultural institutions currently holding cultural materials that fall under this category frequently object to claims brought by the ‘countries of origin’, alleging that the artifacts were obtained through valid acquisition or with the permission of the governing authority at that time (for example, agreements on the ‘partage’ of archeological finds). Moreover, the argument is often put forward that these

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<sup>200</sup> The Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) was created by the General Conference of UNESCO, Resolution adopted by 20 C/Resolution 4/7.6/5 of its 20<sup>th</sup> Session, 24 October-28 November 1978. More on the mandate and function of the UNESCO Committee is provided in Chapter Three, Section 3.2. Information on proposals amending the current mandate of the Committee is provided in Chapter Six, Section 4.2.

<sup>201</sup> See list of cases of return and restitution under the aegis of the UNESCO Intergovernmental Committee, available at: <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/return-of-cultural-property/committees-successful-restitutions/> (accessed 18 August 2011).

<sup>202</sup> Paterson, "Resolving Material Culture Disputes: Human Rights, Property Rights, and Crimes against Humanity," p. 376.

<sup>203</sup> Greenfield, *The Return of Cultural Treasures*, pp. 141.

<sup>204</sup> Cf. Paterson, "Resolving Material Culture Disputes: Human Rights, Property Rights, and Crimes against Humanity," p. 376.

<sup>205</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 181.

institutions have saved cultural materials from deterioration by removing them, and this is often difficult to deny (at least in some cases). Due to the difficulty of reconstructing the actual circumstances of the removals, as well as the amount of time that has elapsed since removal, most claims falling in this third category lack legal rather than moral grounds.<sup>206</sup> As a result, arguments in favor of the concept of ‘remedying historical injustice’ have been articulated as a mean through which the gap between legal and moral obligations might be filled.<sup>207</sup> This approach does not argue with the legality or illegality of the removal; rather, it views the removals within the context of current standards of human rights in international law, based on concepts such as the ‘right to self-determination’.<sup>208</sup> Through the discourse of ‘remedying historical injustice’, several claims have been resolved,<sup>209</sup> while others – such as the famous Parthenon Marbles in the British Museum – remain unresolved.

#### 4.4 Return of Cultural Objects to Individual Owners

Unlike the first three categories of claims, which are based on territory (namely States requesting the return of cultural materials to their territory), this fourth category is based on private ownership. In principle, the question of private ownership is a matter of national civil law rather than international law.<sup>210</sup> Whereas questions of ownership with a transnational dimension (i.e. across States) are covered by private international law, international (public) law is generally not engaged with the question of private ownership, because of the principle of State sovereignty under international law. Despite this fact, States may conclude multi-or bilateral treaties in order to harmonize their civil law provisions; this has been done, for example, within the framework of the 1995 UNIDROIT Convention.<sup>211</sup>

While not previously mentioned, the distinction between national and international (public) law with regard to the matter of ownership is also evident in the three categories discussed above: in the cases of (1) removal during wartime, (2) removal through illicit export, and (3) removal under colonial domination, the legal and/or moral obligation to return refers to the return of the cultural object in question to a State, not the actual individual (rightful) owner. Whether or not the State subsequently transfers the returned object to the

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<sup>206</sup> Ibid., p. 187.

<sup>207</sup> For more details, see Chapter Three, Section 5.

<sup>208</sup> See Chapter Three, Section 6.3.

<sup>209</sup> See, for example, the voluntary return of the ‘Lakota Ghost Dance Shirt’ by the Glasgow Museum (UK) to the Wounded Knee Survivors’ Association in South Dakota (US), see Chapter Six, Section 1.1.

<sup>210</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 187.

<sup>211</sup> For more details, see Chapter Three, Section 2.4.

former private or public owner is the prerogative of that State, and is based on the provisions of its national civil or administrative law. Therefore, neither the 1954 Hague Convention nor the 1970 UNESCO Convention contain provisions on ownership; claims in the third category (i.e. return to the ‘country of origin’) inherently imply the return of cultural materials to States that had recently gained sovereignty as a result of decolonization. However, this does not ensure return to communities or tribes, who might have been the ‘true owners’ of the returned cultural items.

Consequently, this fourth category forms an exception by circumventing the general principle that supports the position that exclusive protection of ownership rights is a matter for national legislation. Whereas the massive looting of cultural property by the Nazis outside German territory during WWII and the Holocaust (1939-1945) falls within the provisions of the first category (i.e. removal during wartime), the massive looting and privation of Jewish individuals in Germany (1933-1945) falls under national jurisdiction. Given this situation, specific provisions were established under national German law in the early 1950s to provide restitution and compensation.<sup>212</sup> Due to the large scale of Holocaust-related looting, and early attempts to deal with them internationally rather than nationally – such as by the 1943 London Declaration<sup>213</sup> – additional obligations to return cultural materials to individuals (not to States) have been drawn up under international law. Despite recoupment and restitution programs such as the ‘Central Collecting Points’ set up by the Allies in 1945, several cases of Nazi-confiscated art remained unresolved. This is due to several important factors: firstly, the massive amount of looting; secondly, the brief statutes of limitations associated with the restitution provisions from the 1950s (it was thought that these problems could be resolved within a few years); and, thirdly, the creation of the Iron curtain that blocked access to archives in the Soviet Bloc States. In several cases, Nazi-confiscated Jewish cultural property was return to Austria, France, the Netherlands and other European countries; however, instead of identifying the owners or their heirs, many objects were transferred to public museums, eventually becoming part of their collections.

After the fall of the Berlin Wall, a new international attempt was made to resolve the avalanche of open cases related to Nazi-confiscated art. In 1998, forty-four States adopted the

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<sup>212</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 189.

<sup>213</sup> For more details on the 1943 London Declaration, see *supra* Chapter Two, Section 2.

non-legally binding *Washington Principles of Nazi-Confiscated Art*<sup>214</sup> to assist the resolution of issues relating to Nazi-confiscated art. The underlying assumption of these principles was that restitution could be arrived at through negotiations based on the good will of the relevant States, thus avoiding legal proceedings and the inherent difficulty in providing evidence, as well as legal complications (such as those arising from the protection of *bona fide* purchasers under national law or national provisions on the statutes of limitations).<sup>215</sup> In order to strengthen the application of the principles articulated by the 1998 Washington Conference, the International Council of Museums (ICOM) drew up the 1999 *Recommendations concerning the Return of Works of Art Belonging to Jewish Owners*; it contained the same principles, but was addressed to museums rather than States.<sup>216</sup>

Another set of cases falling in this category of return to individual owners is the return of cultural objects to victims of Soviet communism.<sup>217</sup> Thousands of people, mainly wealthy (non-Jewish) Eastern Europeans, immigrated to Western Europe or the United States as a result of imposition of communism in Eastern Europe. The problem then arose as to whether their Nazi-confiscated cultural property should be returned to their former countries of residence (i.e. behind the Iron curtain), or to these individuals wherever they might reside. In abrogation of the traditional State practice of returning such objects to the States of origin (see categories one to three) and against the political protest of the communist States concerned, the United States decided to return cultural objects not to the communist States in Eastern Europe but to individual refugees, i.e. the rightful owners of that property. Since the United States was not obliged under international law to return objects to individual owners, the decision to do so must be understood against the backdrop of the Cold War and thus as a matter of U.S. politics rather than of law.<sup>218</sup> With the exception of this instance of Cold War politics, the return of cultural materials to the individual owners in cases of Nazi-confiscated art remains legally non-binding, although it can now be seen as a solid category of its own under international law.

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<sup>214</sup> Washington Conference Principles on Nazi-Confiscated Art, agreed upon Washington, D.C., 3 December 1998, full text available at: <http://www.state.gov/p/eur/rt/hlcst/23231.htm> (accessed 23 September 2011); reprinted as Annex I to this thesis.

<sup>215</sup> Kowalski, "Claims for Works of Art and Their Legal Nature," p. 43.

<sup>216</sup> ICOM Recommendations concerning the Return of Works of Art Belonging to Jewish Owners, 14 January 1999, available at: [www.icom.museum/wordlwar2.html](http://www.icom.museum/wordlwar2.html) (accessed 23 September 2011). For further information, see Chapter Three, Section 3.5.

<sup>217</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 190.

<sup>218</sup> *Ibid.*, p. 191.

#### 4.5 Return of Cultural Objects to a People or Community

As seen in the analysis of the abovementioned three categories, the return of cultural materials is traditionally based on territory: States submit claims for the return of cultural materials to their national territory. The fourth category, as discussed above, forms an exception to this traditional principle of territory, because it focuses on the link of individual ownership – traditionally not recognized in international law in relation to the question of restitution and return. The fifth and last category of claims focuses neither on the link of State territory nor the link of individual ownership but rather on ‘collective ownership’, i.e. the link between a certain people or community and (their) cultural materials. The concept of a nation-State or that of ‘country of origin’ is, however, not always congruent with the concept of a ‘people’ or an ethnic community. Whereas many ethnic communities or ‘peoples’ may build a case for the return of their cultural material based upon a territorial link (within a current nation-State), they often lack governmental support in requesting (their) cultural materials. This is because many governments fear that the return of cultural (symbolic) materials to a specific ethnic minority within their territory could foster separatist movements within the State, thereby endangering the integrity of the State. Religious communities, in turn, might have political support in their claim, but lack the other fundamental link in restitution and return cases, namely territory and individual ownership.

The genesis and historic need for this fifth category of claims lies, once more, in the massive looting related to the Holocaust (Shoah). Whereas Nazi-confiscated art is returned if the owner or the heirs can be traced, return is not possible if the owner or heirs cannot be identified. Moreover, religious and sacred items (judaica) were frequently left without a ‘place of origin’ to which they could be returned, since in many cases synagogues were destroyed and local Jewish populations were murdered. Consequently, such heirless or ‘orphan’ objects could be returned to neither individual owners, nor to the State in which the religious community was formerly located.<sup>219</sup> Instead, these objects were returned to international Jewish organizations, such as the Jewish Restitution Successor Organization<sup>220</sup>

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<sup>219</sup> These communities were mainly located in Eastern European countries.

<sup>220</sup> The Jewish Restitution Successor Organization (JRSO), New York, founded in 1948, information available at: [http://www.jewishvirtuallibrary.org/jsourc/judaica/ejud\\_0002\\_0011\\_0\\_10155.html](http://www.jewishvirtuallibrary.org/jsourc/judaica/ejud_0002_0011_0_10155.html) (accessed 23 September 2011).

or the later Jewish Claims Conference<sup>221</sup> that received these heirless objects and distributed them among the Jewish communities mainly in the United States (and later, in Israel). Initial protests by Eastern European countries as well as by Germany in the 1950s did not prevent this practice by the Allies.<sup>222</sup>

The historic need to deal with Holocaust-related cultural (religious) materials shifted international legal perspectives with regard to other incidents of forced removals of cultural materials, namely to questions regarding the restitution and return of cultural objects to indigenous people. Whereas nation-States and newly independent States with their own claims (category three) have traditionally strongly objected to claims made by indigenous peoples, some States with large indigenous populations (e.g. Canada, Australia, New Zealand and the United States) began dealing with these claims and created legal provisions (in the United States, for example, the Protection and Repatriation Act of 1990 (NAGPRA)<sup>223</sup>) for *intra*-State returns to indigenous communities within their State territory.<sup>224</sup> Examples of returning cultural materials to indigenous communities across State borders (*inter*-State), such as the return of the ‘Lakota Ghost Dance Shirt’ from Glasgow to the Wounded Knee Survivors’ Association in 1999<sup>225</sup> are exceptional, since indigenous people do not yet have international legal personality. Recent developments in international law, however, provide concepts – such as the right to self-determination<sup>226</sup> – which are opening up the debate beyond the *intra*-State return.

## 5. The Interest-oriented Approach to Restitution and Return

Both the historical analysis and the analysis of the classification of legal categories of claims given in this introductory chapter have demonstrated the complexity of this subject matter. Traditionally, the matter of restitution and return was exclusively related to armed conflicts; over time, however, it gained widespread recognition in times of peace. Thus, as will be argued, the protection of cultural heritage has found common ground in international

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<sup>221</sup> The Conference on Jewish Material Claims against Germany (JCC), New York, founded in 1951, information available at: <http://www.claimscon.org/> (accessed 23 September 2011).

<sup>222</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 192.

<sup>223</sup> Native American Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601 of 16 November 1990. The Act prescribes the process of returning Native American Indian human remains as well as related cultural objects found on federal land to culturally affiliated tribes. Full text of the Act available at: <http://www.nps.gov/history/nagpra/MANDATES/25USC3001etseq.htm> (accessed 23 September 2011).

<sup>224</sup> For more information, see Chapter Three, Section 2.9.1.

<sup>225</sup> For detailed case study, see Chapter Six, Section 1.

<sup>226</sup> See Chapter Three, Section 6.3.

cultural heritage law, since it represents a fundamental interest of humankind.<sup>227</sup> Against this backdrop, the thesis attempts to demonstrate that common ground can be found not only in the principle of protecting cultural heritage but also in restitution matters. This, of course, is not an easy undertaking, since – as has been shown in the introductory remarks of this chapter – the matter of restitution and return remains highly controversial within international law on both legal and moral grounds.

Recent trends in international law indicate movement towards a broader understanding of restitution matters. This can be seen in the growing recognition of ethical and historical considerations as part of the effort to ‘remedy historical injustice’. To go a step further, this thesis argues that it is not only ethical and historical considerations that have to be taken into account, but also the various interests of the stakeholders involved in restitution disputes. Due to the variety of stakeholders involved, the interests in the resolution of restitution disputes might be competitive or sometimes even mutually exclusive. It is, however, the objective of this thesis to make the argument that by taking into account the various interests of stakeholders, common interests can be identified. Based on the assessment articulated above – namely, that legal instruments and current restitution practices do not adequately encompass the variety of interests involved (Chapter Three and Four) – this thesis argues for the use of complementary and alternative mechanisms in resolving restitution disputes (Chapter Five and Six). The solutions to be discussed are both complementary and alternative, as it is by no means the intent of this work to exclude ‘restitution’ – either as legal principle or as practical outcome – but rather to add value to it. The solutions to be discussed include the following: (1) voluntary returns, (2) temporary loan agreements, the creation of replicas and the exchange of cultural objects, (3) permanent loan agreements and return without transfer of ownership, (4) joint custody and shared management, as well as transfer of expertise, (5) re-purchase of objects, compensation funds, and (6) consideration of the international reputation of museums and other art-holding institutions as an effective mechanism in restitution disputes.

In this thesis, it will be argued, that complementary and alternative mechanisms can reinvigorate deadlocked restitution disputes. Going ‘beyond’ restitution means overcoming

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<sup>227</sup> Cf. Francesco Francioni, "Principi E Criteri Ispiratori Per La Protezione Internazionale Del Patrimonio Culturale," in *Protezione Internazionale Del Patrimonio Culturale : Interessi Nazionali E Difesa Del Patrimonio Comune Della Cultura* ed. Francesco Francioni (2000), p. 13.

what can be described as zero-sum solutions, in which the cultural object in question is returned (or retained) without any mutual gain for the parties involved. This kind of outcome could be described as ‘barren return’ – without any added (‘fruitful’) value or outcome. Moreover, the notion ‘barren return’ as applied to a cultural object claimed for restitution and return can metaphorically be compared to the situation in child custody law.<sup>228</sup> In both cases, two opposing parties claim custody rights. Whereas child custody law has established a general interest-based principle, namely the doctrine of ‘the best interest of the child’, no such general principle has been established in international cultural heritage law. Since child custody law bears a striking resemblance to the approach taken by this thesis, the ‘best interest’ doctrine will be discussed as a legal analogy to the resolution of restitution disputes.<sup>229</sup> In order to frame the legal basis for complementary and alternatives solutions, this thesis proposes an interest-oriented approach to restitution disputes that seeks to balance the respective interests involved and aims at identifying common interests in resolving restitution disputes. The need for such an interest-oriented approach is based on the three rationales discussed below.

### **5.1 Rationale One: From ‘Cultural Property’ to ‘Cultural Heritage’**

Firstly, the conceptual shift in international law from the notion of ‘cultural property’ towards the notion of ‘cultural heritage’ over the past thirty years<sup>230</sup> necessitates a corresponding shift in the way in which restitution disputes are handled in international law. The notion ‘cultural property’ was first used in an international legal context by the 1954 Hague Convention.<sup>231</sup> This notion was supposed to serve as a wide-ranging and synthetic category of objects, both movable and immovable, worthy of protection because of their inherent value, rather than because of their fragile nature.<sup>232</sup> However, ‘cultural property’ as such is limited in its scope, since it does not incorporate the social value associated with cultural materials, also referred to as ‘intangible cultural heritage’. Although the intangible aspect of cultural heritage may not seem particularly relevant to the scope of this thesis

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<sup>228</sup> In a similar vein of comparison: Harry S. Martin, "In the Best Interests of the Art," *Kunstrechtsspiegel*, no. 3 (2007): p. 170-71.

<sup>229</sup> See Chapter Four, Section 1.2.

<sup>230</sup> Cf. Francesco Francioni, "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage," in *Standard-Setting in Unesco*, ed. Abdulqawi Yusuf (2007), p. 221.

<sup>231</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts (adopted 14 May 1954, entering into force 7 August 1956), 249 UNTS 215; available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>232</sup> Francioni, "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage," p. 225.

(which focuses on tangible, movable objects in restitution disputes), most restitution disputes involve social and cultural issues, since appropriation has frequently occurred within the context of foreign or colonial occupation and/or genocide. Furthermore, the notion of ‘cultural property’ highlights another limitation highly relevant to the scope of this thesis. This limitation derives from the fact that ‘cultural property’ emphasizes the aspect of private (and public) ownership and the exclusive sovereign interests of the private owner or the territorial State in which the ‘property’ is located.<sup>233</sup> Generally speaking, property rights entail the exclusion of other interests, which are not linked to ownership rights.

Therefore, a conceptually broader notion has been introduced into international law – namely, the notion of ‘cultural heritage’. Although the notion was first established in the 1954 Hague Convention (like the notion of ‘cultural property’),<sup>234</sup> it was only with the 1972 UNESCO World Heritage Convention<sup>235</sup> that it developed as a broader legal concept. The 1972 UNESCO Convention is based on the premise that “parts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole”.<sup>236</sup> Thus, ‘cultural heritage’, as articulated by the 1972 UNESCO Convention, includes both cultural and natural heritage, and encompasses considerations independent of property rights, namely protection, preservation, integrity and public access.<sup>237</sup> Consequently, the concept of ‘heritage’ has become emancipated from that of ‘property’ so as to acquire a connotation associated with the ‘historical or artistic legacy’ of cultural material whose value and safeguarding are necessary in order to protect the public interest, irrespective of ownership rights.<sup>238</sup> It is this shift that is highly relevant to the scope of this thesis, as it is argued that dispute resolution must account for factors beyond those of title and ownership, and a shift towards a broader approach that is able to include ‘common interests’, such as the above mentioned (i.e. preservation, access, integrity and cooperation). Although this shift has happened within the scope of the 1972 UNESCO Convention with

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<sup>233</sup> For details on the aspect of property rights, see Chapter Four, Section 2.4.

<sup>234</sup> See the Preamble of the 1954 Hague Convention and Article 1 that reads: “For the purpose of the present Convention, the term ‘cultural property’ shall cover [...] (a) movable or immovable property of great importance to the cultural heritage of every people”.

<sup>235</sup> UNESCO *Convention concerning the Protection of the World Cultural and Natural Heritage*, (adopted 16 November 1972, entering into force 17 December 1975), 1037 UNTS 151; for details on the 1972 UNESCO Convention, see Chapter Three, Section 2.3.

<sup>236</sup> See, Sixth recital of the 1972 UNESCO World Heritage Convention.

<sup>237</sup> Lyndel V. Prott and Patrick J. O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?,” *International Journal of Cultural Property* (1992): p. 309.

<sup>238</sup> Francesco Francioni, “Culture, Heritage and Human Rights: An Introduction,” in *Cultural Human Rights*, ed. Francesco Francioni and Martin Scheinin (2008), p. 7.

regard to cultural and natural sites designated as World Heritage sites,<sup>239</sup> this shift has not yet occurred in the context of resolving restitution disputes, since States and their national (property) interests are still the main concern in the current regime of international law. In recent years, however, several attempts to resolve restitution disputes have been undertaken on non-legal grounds, simply through diplomatic negotiations and bilateral agreements. This recent trend leads to the need for the second rationale for the interest-oriented approach taken by this thesis.

## **5.2 Rationale Two: Contracts and Unequal Bargaining Power**

Diplomatic negotiations and bilateral agreements have played an increasingly important role in the resolution of international cultural heritage disputes both among States and between States and private entities (such as private museums and collectors).<sup>240</sup> Since bilateral agreements are contractual in nature, they suffer from a major shortcoming insofar as their terms depend, in part, on the bargaining power of the negotiating parties. This is particularly problematic, if legal aspects are explicitly excluded in bilateral agreements settling restitution disputes, as is frequently the case. As a result, successful outcomes in restitution disputes often depend to a significant extent on political and diplomatic commitment of States as well as their bargaining power, rather than on general principles of law. The usage of the national and international media in order to create public awareness and political pressure only exacerbates differences in bargaining power. It goes without saying that bargaining power is unequally distributed, in particular with regard to the parties involved in restitution disputes. This, however, not only affects the final outcome of negotiations in terms of mutual gain and cooperation, but also inhibits the development and application of a consistent legal framework in restitution matters. Furthermore, restitution claims often reflect difficult issues associated with war, foreign or colonial occupation, or significant human rights violations that have resulted in the looting and the appropriation of cultural materials. Attempts made to ‘remedy historical injustices’ by addressing the question of restitution and return<sup>241</sup> are often hampered by unequal bargaining powers as hegemony and dependence tend to persist in international relations – dividing parties into so-called ‘source countries’ and ‘art-market countries’. While inequality in bargaining power is frequently unavoidable in many adverse disputes, it might be possible to mitigate this disparity by counterbalancing the

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<sup>239</sup> See Chapter Three, Section 2.3 and Chapter Six, Section 4.4.

<sup>240</sup> See Chapter Three, Section 2.9.

<sup>241</sup> See Chapter Three, Section 5.

respective interests on the basis of general principles that aim at creating solutions that result in mutual gain, exchange and cooperation.

### **5.3 Rationale Three: The Protection of Cultural Heritage as a Common Interest**

Both legal concepts of ‘property’ and ‘contract’ generally fail to adequately resolve international cultural heritage disputes in a sustainable, cooperative manner; they also fail to take the different interests of the various stakeholders involved into account, and fail to provide a consistent legal framework pertaining to the resolution of disputes over cultural materials. Therefore, an alternative approach to current restitution practices is very much needed. This leads to the third rationale for an alternative approach, which relies on the common denominator in international cultural heritage law: namely, the ‘common interest’ in the protection of cultural heritage.

While the various legal instruments pertaining to cultural heritage in international law each function within their respective spheres of application,<sup>242</sup> they all have one common theme, namely that the protection of cultural heritage is a ‘common concern’ – or in other words – the ‘common interest’ of humankind.<sup>243</sup> The analysis of the legal framework will demonstrate that all legal instruments pertaining to cultural heritage in international law contain terms that describe cultural heritage as belonging to or being protected in the interest of all humankind.<sup>244</sup> Consequently, as will be argued, the concept of ‘protection’ is common ground in cultural heritage issues and establishes a general responsibility of States (and other stakeholders) to protect cultural heritage in war and peace. Furthermore, it will be argued that within the scope of the ‘common interest’ in protecting cultural heritage, certain other interests can be identified; these include: physical and cultural preservation, access, integrity, and cooperation.<sup>245</sup> Since these interests form part of the ‘common interest’, they are valid not only for general cultural heritage issues in periods of war and peace, but must also be taken into account in the resolution of international cultural heritage disputes. However, current restitution practices do little to accommodate the ‘common interest’ in the protection of cultural heritage.

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<sup>242</sup> These various needs include, *inter alia*, the protection of immovable and movable cultural heritage in armed conflict (1954 Hague Convention), the protection of movable cultural heritage in case of theft and illicit trafficking (1970 UNESCO Convention), the protection of underwater cultural heritage (2001 UNESCO Underwater Cultural Heritage Convention), and the safeguarding of intangible cultural heritage (2003 Intangible Cultural Heritage Convention). For a detailed analysis of the legal instruments, see Chapter Three, Section 2.

<sup>243</sup> Cf. Forrest, *International Law and the Protection of Cultural Heritage*, p. 405.

<sup>244</sup> *Ibid.*

<sup>245</sup> For detailed analysis, see Chapter Four, Section 1.1 and Chapter Five, Section 3.

Therefore, this thesis attempts to introduce an alternative approach to currently employed restitution practices, in order to not only facilitate and accelerate the return of cultural material when legitimate and appropriate, but also to provide a basis for the denial of a request for the return of an object, if its return would contradict the ‘common interest’. It will be one of the tasks of this thesis to outline complementary and alternative mechanisms that facilitate the application of methods that are able to balance the various interests of the stakeholders involved in order to resolve disputes in a more satisfactory and cooperative manner. By moving ‘beyond restitution’, this approach raises the questions pertaining to who should legitimately control and determine which cultural material, and what rights of access, usage, preservation, and disposition should be granted or retained. Certain cases of restitution and return are quite straight forward; in others, however, complementary and alternative mechanisms might lead to a win-win situation instead of zero-sum solutions (i.e. ‘barren return’ or simple retention). Thus, the interest-oriented approach proposed by this thesis may enhance cooperation and exchange in cultural heritage matters, while preserving cultural materials and preventing their loss and dispersion.

It is, however, important to clarify that this thesis does not argue against restitution; rather, it attempts to approach international cultural heritage disputes from a problem-solving perspective. As a result, going ‘beyond restitution’ means exceeding the predominant importance of title and ownership by attempting to create alternative solutions to current restitution practices.<sup>246</sup> However, this can only be accomplished by reconciling the tangible characteristics of cultural heritage (i.e. physical preservation of and access to cultural objects) with the intangible characteristics, such as cultural affiliation and the recognition of rights. The latter element is particularly essential, as claims for restitution and return stem from the infringement of rights, including property rights, the right to self-determination, the right to cultural and religious participation, and the right to cultural diversity and development.

In short, the approach taken by this thesis aims at providing at least four additional contributions to the restitution debate: firstly, an analysis of the shortcomings of the existing legal regime of international cultural heritage law and the current State practice in resolving restitution disputes, both of which are primarily driven by the interests of States and property

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<sup>246</sup> For detailed analysis, see Chapter Six, Section 3.

considerations; secondly, an analysis of the different stakeholders and their various interests and motives in restitution disputes; thirdly, the application of the concept of ‘common interest’ and similar recently developed concepts in international law to the resolution of international cultural heritage disputes; and fourthly, the identification of complementary and alternative mechanisms to current restitution practices, in terms of both law and policy.

***Summary of the Chapter:***

This chapter has prepared the foundation of this thesis. It began by exploring the current dilemmas in international cultural heritage disputes and provided a short history of the evolution of international cultural heritage law – from the ‘right to plunder’ to customary obligations protecting cultural heritage in times of war and peace. The historical overview was followed by an analysis of the commonly-used – but rather inconsistently defined – terminology associated with this field of study, including the terms of ‘reparation’, ‘restitution and return’, ‘repatriation’, and ‘retention’.

Subsequently, five categories of claims were identified: (1) claims related to the removal of cultural objects during armed conflicts (war time regime); (2) claims related to illicit trafficking (peace time regime); (3) claims made for the return of cultural objects to the ‘countries of origin’; (4) claims made on the grounds of former ownership, mainly in relationship to Nazi-confiscated art; and (5) claims made for the return of cultural objects to a certain people, group or community. Whereas the first three categories of claims are based on the link of territory (States requesting the return of property belonging to their territory), the fourth and fifth category are not based on the territorial link between an object and a State; the fourth category is based on the link of individual ownership (property rights), whereas the fifth category foregoes both territory and traditional property rights, being based on the idea of a ‘collective ownership’ and the cultural affiliation of cultural materials to a certain people or community.

On the basis of this conceptual framework, the chapter introduced the interest-oriented approach proposed by this thesis. This approach is based on the assumption that by taking into account the various interests of the stakeholders involved in restitution disputes, more equitable solutions for the resolution of restitution disputes can be found. Whereas current approaches to restitution and return are mainly based on arguments related to location, title and ownership, the interest-oriented approach aims at developing complementary and

alternative mechanisms that go beyond the ‘barren return’ of cultural materials. Three rationales have been identified that demonstrate the need for such an alternative approach: firstly, the conceptual shift away from ‘cultural property’ towards ‘cultural heritage’ that has been made in the overall context of international cultural heritage law but not yet applied in terms of resolving restitution disputes; secondly, the lack of general principles for resolving restitution disputes, given that diplomatic negotiations and contractual agreements are mainly based on bargaining power, which is too often unequally distributed among the interested parties; and thirdly, as ‘property’ and ‘contract’ predominantly fail to provide a general legal framework for dispute resolutions, the need for taking the ‘common interest’ in preservation into account in the resolution of international cultural heritage disputes.



## **CHAPTER III: The Regime of International Cultural Heritage Law – An Appraisal**

### ***Overview of the Chapter:***

This chapter provides a critical analysis of the existing legal instruments in international cultural heritage law, by ascertaining the current limits and shortcomings of these instruments as they pertain to restitution and return. Four major categories of legal instruments in international cultural heritage law can be identified: (1) international conventions and bilateral agreements; (2) soft law instruments; (3) codes of conduct and codes of ethics; and (4) customary international law. In addition to these four categories of legal instruments, a reflection on ethical and historical considerations will be provided in order to augment the legal analysis. Although not strictly legal in nature, such considerations are essential within the particular context of restitution disputes for two reasons: firstly, because restitution disputes are frequently resolved on the basis of non-legal considerations (e.g. through political commitment and moral acknowledgment); and, secondly, because ethical and historical considerations have decisively shaped international State practice pertaining to restitution and return (as for example in cases pertaining to Nazi-looted art), thus contributing to the further development of international law.

In order to illustrate the recent developments in the field of restitution and return, the legal analysis of this chapter includes several examples of recently resolved restitution disputes. Against the backdrop of the existing law as well as these cases, it will be demonstrated that the majority of restitution disputes either remain unresolved or are resolved through bilateral agreements and out-of-court-settlements. In many cases, it is apparent that the purely legal approach does not provide adequate solutions in restitution disputes, since the ethical and historical dimensions intrinsic to issues of restitution and return are not sufficiently taken into account by the existing legal provisions. Therefore, as will be argued in this chapter, both legal and non-legal considerations as well as customary international law play a vital role in the resolution of restitution disputes.

## 1. The Legal Framework of International Cultural Heritage Law

The area of international cultural heritage law is unique in three aspects. Firstly, international cultural heritage law deals with objects of unique and irreplaceable value; this distinguishes it from other legal fields (such as, for example, commercial law). The desirability of cultural material is frequently associated with both their singularity and the aesthetic pleasure they provide. This is less of a factor with other valuable chattels such as jewels and automobiles, because they are normally fungible and can be acquired almost anywhere by anyone with the requisite financial resources. In contrast, cultural objects are by their very nature unique.<sup>247</sup> Given this focus, it is readily apparent why this field of law cannot concern itself solely with property rights, but must instead also address other issues, such as the interests of stakeholders other than those of the current possessor, as well as the physical and the cultural aspect of preserving cultural heritage.<sup>248</sup>

Secondly, no other area of the law must consistently challenge non-legal considerations, including ethical as well as archeological, anthropological and historical concerns; these concerns may come into play either as a complement to legal considerations or as the sole basis for a claim made on ethical and historical considerations when legal instruments are not available, due to the non-retroactivity of legal provisions or a statute of limitations.

Thirdly, from a legal point of view, international cultural heritage law, and specifically the matter of restitution and return, is unique insofar as it overlaps with several other legal areas, including: international and national private law (such as property or contract law); international and national public law (including tax and customs legislation) as well as criminal law regarding stolen cultural objects and clandestine excavations; intellectual property rights law (with regard to rights to copy, publish and use the proceeds deriving from the commercial aspects of cultural materials); and international humanitarian law as well as international human rights law (in cases dealing with the removal of cultural materials during wartime, foreign or colonial occupation, and the annexation of territory). Especially the latter two fields of international law play an overall important role in dealing with restitution disputes, since they provide specific provisions on State responsibility, State succession, and

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<sup>247</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 155.

<sup>248</sup> Cf. Roger W. Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," *Fordham International Law Journal* 16(1992-1993): p. 1035.

the right to self-determination. Thus international cultural heritage law is concerned with legal provisions and general principles derived from all these areas of international law.

Since restitution and return engages with different legal fields and involves various stakeholders,<sup>249</sup> restitution disputes generally occur in three major constellations: (1) international public law, pertaining traditionally to claims between States but also more recently to claims between States and non-State actors; (2) international private law, dealing with claims between non-State actors and governments, where the question is not whether a rule of public international law should be applied but rather which applicable domestic law should apply; and (3) national public law, namely claims within a State, where the legitimacy of the claim is not dealt with by international law mechanisms (although attempts have been made to raise restitution claims to that level),<sup>250</sup> but rather on grounds of national regulations.<sup>251</sup> This thesis focuses primarily on the first constellation of restitution disputes, which fall within the framework of international public law, as the other two constellations extend beyond the scope of this research. References to the two other constellations, however, are made if deemed appropriate. Furthermore, the interest-oriented approach – as conceptual methodology – is not limited in its scope and might therefore be fruitfully applied to situations pertaining to restitution disputes that do not fall within the application of international public law.

The legal problem addressed by this thesis can best be summarized by referring to the example of the stolen Iraqi vase provided in the introductory chapter of this thesis. It is important to reiterate that it is neither exceptionally remarkable nor legally questionable that the antique vase stolen from the National Museum of Iraq in Baghdad in the aftermath of the war in Iraq in 2003, which later turned up in the hands of a Swiss dealer, has to be returned to the museum and to the people of Iraq. As previously noted, the return is clearly indicated, since firstly, the vase was stolen under breach of national and international law; secondly, the theft occurred in the context of war and occupation, and therefore has been removed in breach of customary international law; and thirdly, the vase has been classified as an inalienable object (*res extra commercium*) of national importance to Iraq and thus can neither be legally traded under Iraqi antiquities law nor be legally exported without an official export license.

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<sup>249</sup> For detailed analysis of the stakeholders involved, see Chapter Five, Section 1.

<sup>250</sup> Prott and O'Keefe, *Law and the Cultural Heritage*, p. 803.

<sup>251</sup> An example for such a national regulation is the U.S. Native American Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601, 16 November 1990.

Even the self-described “cultural internationalists”<sup>252</sup> would agree that stolen material should be returned.<sup>253</sup>

In contrast to this straight-forward example, the international community has difficulty agreeing on a common approach to restitution in cases, in which the appropriation has taken place decades or centuries ago and thus no legal instruments are applicable and the circumstances of the removal are obscure or cannot be definitively clarified. In such cases, it is frequently difficult to find a single means of facilitating an appropriate solution to restitution disputes, even when all legal circumstances, given the evidence at hand, have been properly taken into account. There are certainly many cases in which material and ‘moral’ restitution should be made without reservation; however, there are just as many, in which the claim for restitution and return is much more questionable on both legal and ethical grounds. It is therefore the attempt of this thesis to identify complementary and alternative mechanisms on the basis of an interest-oriented approach to restitution, in order to facilitate the resolution of restitution disputes. Although this thesis focuses primarily on a set of cases in which legal remedies were not available or the circumstances of the removal were obscure, it does not limit itself to this set of cases. This is because the application of complementary and alternative mechanisms on the basis of the interests involved is likely to add value even in cases to which legal remedies are applicable.

### **1.1 The Responsibility to Protect Cultural Heritage**

The task of the present chapter is not only to analyze the legal instruments that provide the basis for claiming restitution and return of cultural materials but also to determine those norms of international law that indicate: firstly, that there is a ‘common interest’ in the protection of cultural heritage, and secondly, that there is a general responsibility to protect cultural heritage. This appraisal is important, since the identification of a general responsibility to protect cultural heritage binds States as well as the international community as a whole to commit to the ‘common interest’ in cultural heritage matters. Since cultural heritage can be damaged or destroyed in both times of war and times of peace, such a responsibility to protect must be a component of both legal regimes.<sup>254</sup>

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<sup>252</sup> For the debate on ‘nationalism vs. internationalism’, see Chapter Four, Section 2.1. The so-called ‘cultural internationalists’ would only disagree with regard to national export regulations limiting the free market of cultural objects but not to the return of objects stolen from museums.

<sup>253</sup> Nafziger, “The Present State of Research,” p. 246.

<sup>254</sup> For the legal categorization of claims, see *supra* Chapter Two, Section 3.1.

The protection of cultural heritage during times of peace has traditionally been considered as the exclusive prerogative of the State, obstructing the development of international law within the peace time regime.<sup>255</sup> Historically, the protection of cultural heritage during times of peace has been overshadowed by incidents of destruction and plunder of cultural heritage during times of war, since combat has always represented the major threat to cultural heritage.<sup>256</sup> Nevertheless, the destruction or deterioration of cultural heritage has occurred not only in times of war but also during times of peace. Early examples of peacetime destruction include the historical use of ancient structures as stone quarries (such as the Colosseum in Rome); the destruction of artifacts that were considered as symbols of royal or religious oppression in the aftermath of the French revolution (such as the beheading of figures at the façade of Notre Dame in Paris and other incidents of massive iconoclasm, such as the destruction of religious icons by the Protestants in the early modern period);<sup>257</sup> or the demolition of churches and castles in the Era of Stalinism in Central and Eastern Europe. Traditionally, almost every regime change in history has been followed by the destruction or removal of its symbols of power. Examples include the destruction of the Bastille subsequent to its liberation in 1789; the demolition of the Berlin wall in 1989; or the removal of the statue of Saddam Hussein in Baghdad in 2003. These deliberate destructive acts mainly occurred as a result of the visual and symbolic potency of these statues and monuments. The literal ‘fall’ of a monument or a statue seems to be predestined to symbolize the metaphorical fall of the same regime that had ordered its erection.<sup>258</sup> Generally, it is not until a certain period of time has elapsed that certain symbols and monuments are recognized as historically unique and worthy of preservation.

It was not until the mid-twentieth century with the evolution of international conventions (such as the instruments adopted by UNESCO) that the protection of cultural heritage during times of peace became a concern of the international community.<sup>259</sup> As a consequence, the standards establishing protection of cultural heritage in the armed conflict

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<sup>255</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 150.

<sup>256</sup> For the history of international cultural heritage law, see *supra* Chapter Two, Section 2.

<sup>257</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 17.

<sup>258</sup> Dario Gamboni, *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution* (1997), p. 51.

<sup>259</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 129.

regime are more advanced than the legal provision on the protection of cultural materials in times of peace. Whereas the armed conflict regime concerns legal provisions pertaining to conduct on foreign territory and with respect to foreign cultural materials, legal provisions within the peace time regime concern cultural materials within a State's own territorial boundaries; moreover, these provisions serve to limit national decision making authority within a State's sovereign territory.<sup>260</sup> It is, however, questionable whether the extent to which the differentiation between the armed conflict and the peace time regime in terms of protective standards is still legitimate in international cultural heritage law, especially in view of the 'cultural heritage of all mankind' argument, and whether the standards that are valid within the context of the armed conflict regime ought *a fortiori* to be valid within that of the peace time regime.

The international awareness of the importance of protecting cultural heritage has increased tremendously over the last decades, and the legal emphasis has shifted from a 'negative' responsibility of States to avoid destruction of cultural heritage in times of armed conflicts towards the development of a 'positive' responsibility for the protection of cultural heritage in peacetime, which is binding on not only States, but also the international community as a whole. It has been recognized that the threats to cultural heritage during times of peace, such as the illicit trade in cultural materials, mass tourism, environmental pollution, clandestine excavations or underwater expeditions have an international dimension.<sup>261</sup> Therefore, the protection of cultural heritage during times of peace is no longer considered as exclusively a matter of state sovereignty, but rather as a common concern of the international legal community.<sup>262</sup> This can be seen both generally in the increasing efforts made by States to combat illicit trafficking in cultural materials, and in several conventions, declarations and recommendations protecting the 'cultural heritage of all mankind' adopted by the United Nations and its specialized agency UNESCO. More specifically, general approval for the protection of cultural heritage has been expressed by the international community through the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage,<sup>263</sup>

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<sup>260</sup> Ibid., p. 150.

<sup>261</sup> Cf. Sabine Schorlemer von, *Internationaler Kulturgüterschutz - Ansätze Zur Prävention Im Frieden Sowie Im Bewaffneten Konflikt* (1992), pp. 101.

<sup>262</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 130.

<sup>263</sup> UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the UNESCO General Conference, 17 October 2003, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=17718&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

which was made in response to the destruction of the Buddhas of Bamiyan in 2001.<sup>264</sup> This declaration refers explicitly to the regime of State responsibility, while condemning the willful destruction of cultural heritage “wherever such heritage is located” as a “crime against the common heritage of humanity” (Article 3).<sup>265</sup> Taking this general shift in international law pursuant to cultural heritage into account, it is important to identify those provisions in the instruments of international cultural heritage law that demonstrate the existence of a general responsibility to protect cultural heritage, since this responsibility will be an indispensable basis for the introduction of general principles in restitution matters.

## 1.2 Recent Normative Developments in International Law

The purpose of this thesis is to explore alternatives in the resolution of international cultural heritage disputes that go beyond restitution. For that reason, the approach adopted here clearly goes beyond an analysis of current restitution practices and therefore cannot be limited to the legal analysis of international law currently in force (*lex lata*); rather, it must extend its considerations to include recent normative developments and evolutionary trends in international law (*lex ferenda*).<sup>266</sup> The emergence of new legal norms and the growing recognition of non-State actors as stakeholders in international law have stimulated new developments in cultural heritage matters.<sup>267</sup> With regard to the resolution of restitution disputes, these recent development include the following: firstly, a debate on the relevance of human rights obligations to restitution matters;<sup>268</sup> secondly, a debate on the appropriateness of recognizing ethical and historical considerations in restitution;<sup>269</sup> thirdly, the question of the impact of the right to self-determination on issues of restitution and return;<sup>270</sup> fourthly, the relevance of *erga omnes* obligations pertaining to the protection of cultural heritage (responsibility to protect);<sup>271</sup> and fifthly, the impact of legal concepts, such as ‘common heritage of humankind’, ‘common concern’ and ‘common but differentiated responsibility’ on

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<sup>264</sup> The 2003 UNESCO Declaration’s Preamble states: “Recalling the tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole”.

<sup>265</sup> Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 37.

<sup>266</sup> With a similar objective, see: Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 341.

<sup>267</sup> Francesco Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity," *Michigan Journal of International Law*, no. 25 (2004): p. 1209.

<sup>268</sup> For details on human rights obligations under Article 27 UDHR and both Covenants, see Chapter Three, Section 2.6; for details on customary international law and general principles, see Chapter Three, Section 6.

<sup>269</sup> For a discussion on the concept of ‘remedying historical injustice’, see Chapter Three, Section 5.

<sup>270</sup> For a discussion on the right to self-determination, see Chapter Three, Section 6.3.

<sup>271</sup> For details, see Chapter Three, Section 6.4.

restitution matters – concepts that have recently been developed in other areas of international law (i.e. the law of the sea and international environmental law).<sup>272</sup>

While the various legal instruments pertaining to cultural heritage in international law have developed in response to specific needs within their particular scope of application (e.g. peace and wartime regime), they all have one common theme, namely that the protection of cultural heritage is a ‘common concern’ – or positively expressed – a ‘common interest’ of humankind.<sup>273</sup> As the legal analysis in this chapter will demonstrate, all legal instruments pertaining to cultural heritage in international law contain terms that describe cultural heritage as belonging to or being protected in the interest of all humankind.<sup>274</sup> Consequently, the concept of ‘protection’ constitutes common ground in cultural heritage matters, while also establishing a general responsibility of States (and other stakeholders) to protect cultural heritage. This general responsibility to protect comprises, first of all, the legal obligation to return cultural materials that have been removed in violation of international law, particularly in view of the principles of State responsibility (as in the above mentioned case of the Iraq vase).<sup>275</sup>

Since, however, the appropriation of the cultural material in question in many restitution disputes occurred prior to the establishment of the respective norms of international law, these norms do not apply. However, against the backdrop of the concept of ‘remedying historical injustices’ and in conjunction with the concept of the ‘common interest’ of humanity in the protection of cultural heritage, it will be argued that the responsibility to protect cultural heritage encompasses the moral obligation to recognize the various interests involved in cultural heritage matters. Within the context of international law, the recognition of and commitment to such moral obligations is, however, not novel by any means, and has provided the basis for international instruments such as the 1998 Washington Principles pertaining to Nazi-confiscated art, which have been agreed to by more than forty States.<sup>276</sup> In these principles the participating States declared their intention to achieve ‘just and fair

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<sup>272</sup> See Chapter Four, Section 2.

<sup>273</sup> Cf. Forrest, *International Law and the Protection of Cultural Heritage*, p. 405.

<sup>274</sup> Ibid.

<sup>275</sup> Cf. Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 8.

<sup>276</sup> Principles of the Washington Conference with Respect to Nazi-Confiscated Art, released 3 December 1998, full text available at: <http://www.state.gov/p/eur/rt/hlcst/122038.htm> (accessed 23 September 2011). For detailed analysis see Chapter Three, Section 3.5.

solutions’ in restitution disputes,<sup>277</sup> and to develop ‘alternative dispute resolution mechanisms for resolving ownership issues’.<sup>278</sup> Although these principles establish soft law (rather than hard law) mechanisms, they nevertheless shape State practice, and therefore serve to influence the development of international law. Other recent developments, such as the ‘Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material’ which was adopted by the International Law Association in 2006,<sup>279</sup> demonstrate the need for general principles in the resolution of restitution disputes.<sup>280</sup>

## 2. International Treaty Law: Multi-lateral Conventions and Bilateral Agreements

Five major codifications shape the legal framework of the current international cultural heritage law, within these the UNESCO conventions are of primary importance: the 1954 Hague Convention<sup>281</sup> and its two Protocols of 1954<sup>282</sup> and 1999,<sup>283</sup> the 1970 UNESCO Convention;<sup>284</sup> the 1972 UNESCO World Heritage Convention;<sup>285</sup> the 1995 UNIDROIT Convention;<sup>286</sup> and the 2001 UNESCO Underwater Cultural Heritage Convention.<sup>287</sup> Two other principal instruments were also specifically designed to ensure the protection of intangible cultural heritage: the 2003 UNESCO Intangible Cultural Heritage Convention,<sup>288</sup> and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression.<sup>289</sup>

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<sup>277</sup> See principles 8 and 9 of the 1998 Washington Principles.

<sup>278</sup> See principle 11 of the 1998 Washington Principles.

<sup>279</sup> Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, adopted by the International Law Association (ILA), Resolution No. 4/2006, 72<sup>nd</sup> Conference, held in Toronto, 4-8 June 2006 (hereinafter: 2006 ILA Principles).

<sup>280</sup> For a detailed discussion on the 2006 ILA Principles, see Chapter Three, Section 4.2.

<sup>281</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflicts*, (adopted 14 May 1954, entering into force 7 August 1956), 249 UNTS 240.

<sup>282</sup> *Protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts* (adopted 14 May 1954, entering into force 7 August 1956); 249 UNTS 358.

<sup>283</sup> *Second Protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (adopted 26 March 1999, entering into force 9 March 2004), 38 ILM (1999) 769.

<sup>284</sup> *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, (adopted 14 November 1970, entering into force 24 April 1972), 823 UNTS 231.

<sup>285</sup> *UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage*, (adopted 16 November 1972, entering into force 17 December 1975), 1037 UNTS 151.

<sup>286</sup> *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, (adopted 24 June 1995, entering into force 1 July 1998), 34 ILM (1995) 1322.

<sup>287</sup> *UNESCO Convention on the Protection of the Underwater Cultural Heritage*, (adopted 2 November 2001, entering into force 2 January 2009), 41 ILM (2002) 37.

<sup>288</sup> *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* (adopted 17 October 2003, entering into force 20 April 2006), 2368 UNTS 1.

<sup>289</sup> *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression* (adopted 20 October 2005, entering into force 18 March 2007, 2440 UNTS 311. Note: this convention will not be discussed, as it exceeds the scope of this thesis.

These multi-lateral conventions (open to all States) are complemented by bilateral agreements between individual States, as well as between States and non-State actors. Within the field of international cultural heritage law, the development of international treaty law within the last sixty years has served to improve the protection of tangible cultural heritage in times of both war and peace; these developments have also improved the recognition and protection of intangible cultural heritage. Despite all these improvements, it is clear that international treaty law in the field of cultural heritage has not yet reached its full potential, especially in comparison with the developments in other legal areas, such as international environmental law.<sup>290</sup> Whereas the protection of tangible cultural heritage during times of war (including the obligation to return cultural objects appropriated during times of war and subsequent occupation) is commonly accepted and constitutes customary international law, the protection of cultural heritage, including an obligation to return stolen and illicitly exported object in times of peace, is much less developed.<sup>291</sup> Even taking into account the fact that the ‘peace time regime’ has only developed within the last sixty years,<sup>292</sup> the disparity between the protection of cultural materials in war and peace remains notable, for three reasons: firstly, it is only until recently that the protection of cultural heritage in times of peace is not any longer considered an area of exclusive State sovereignty;<sup>293</sup> secondly, the scope of protection through national export regulations varies from State to State and is far from being standardized; thirdly, the complex interplay between international and national law creates many conflicts, as international treaty law may conflict with national provisions on property rights, the protection of the *bona fide* purchaser, and questions pertaining to compensation in cases that require the return of cultural materials.<sup>294</sup> In order to identify the limits and shortcomings as well as the potential areas of development, the current legal regime in international cultural heritage law will be analyzed in the following sections of this chapter.

## 2.1 1954 Hague Convention and its Protocols

The Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>295</sup> (hereinafter 1954 Hague Convention) prohibits theft, pillage, misappropriation,

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<sup>290</sup> Cf. Nafziger, "Cultural Heritage Law: The International Regime," p. 163.

<sup>291</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 172.

<sup>292</sup> For details, see *supra* Chapter Two, Section 2.

<sup>293</sup> For details on recent normative developments in international law, see *supra* Chapter Three, Section 1.2.

<sup>294</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 173.

<sup>295</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts (adopted 14 May 1954, entering into force 7 August 1956), 249 UNTS 215.

any act of vandalism directed against monuments and works of art; moreover, it extends protective obligations to occupying powers in the case of war (Art.4 (3)). The 1954 Hague Convention is built upon a foundation of previous legal provisions and custom in international law: particularly the 1899<sup>296</sup> and 1907<sup>297</sup> Hague Conventions Respecting the Laws and Customs of War on Land; the Nuremberg and Tokyo prosecutions of war criminals related to the massive destruction and looting during WWII; as well as upon the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>298</sup> In addition to the early provisions of 1899 and 1907, the 1954 Hague Convention can be seen as the first comprehensive international treaty addressing the protection of tangible cultural heritage. Since its entry into force in 1956, more than 120 States have ratified the 1954 Hague Convention, the United States being one of the most recent ratifying States.<sup>299</sup>

During wartime, destruction and plunder of cultural objects are prohibited, unless they are imperatively demanded by the necessities of war (Art.23g), as this derives from the customary rule of military necessity.<sup>300</sup> Under the regulations applicable to occupation, all plunder is expressly forbidden and private property cannot be confiscated (Art. 46, 47). In times of peace, the convention requires the States parties to prepare against foreseeable effects of armed conflicts on cultural heritage, and establishes designated zones of protection for cultural heritage sites (designated with a distinctive emblem). Whereas the 1954 Hague Convention does not provide detailed provisions on the removal of cultural objects from occupied territories, the 1954 Protocol<sup>301</sup> does and it requires occupying powers to prevent the illegal export of cultural material and imposes the obligation on States to seize and return illegal imports. Therefore, cultural objects traded in the aftermath of war are subject to return to the occupied territory.<sup>302</sup> The 1954 Protocol also restates in Article 1(3) the principle according to which cultural property taken during war “[...] shall never be retained as war

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<sup>296</sup> 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 (The Hague, adopted 29 July 1899, entering into force 4 September 1900), reprinted in AJIL, vol. 1 (1907), p. 129.

<sup>297</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, adopted 18 October 1907, entering into force 26 January 1910, reprinted in AJIL, vol. 2 (1908), p. 90.

<sup>298</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), (adopted 12 August 1949, entering into force 21 October 1950) 75 UNTS 287.

<sup>299</sup> As of 23 September 2011: 123 States Parties (by acceptance, ratification, or notification of succession); see current status of State Parties at: <http://portal.unesco.org/la/convention.asp?KO=13637&language=E> (accessed 23 September 2011).

<sup>300</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 164.

<sup>301</sup> Protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts (adopted 14 May 1954, entering into force 7 August 1956); 249 UNTS 358.

<sup>302</sup> Cf. Prott and O'Keefe, *Law and the Cultural Heritage*, p. 812.

reparations". Moreover, the occupying forces are obliged to aid the occupied State in the preservation of its cultural heritage.<sup>303</sup> A Second Protocol (adopted in 1999)<sup>304</sup> reinforces existing rules, mandates prosecution or extradition of violators, sets forth procedures to designate enhanced zones of protection, and establishes an implementing States Committee. Most of the provisions of the 1954 Hague Convention and its 1954 Protocol, including those on the prohibition of the removal of cultural material and the obligation to return removed objects, correspond with the general principles of international law and can be considered as belonging to customary international law.<sup>305</sup>

Regardless the universal character of the 1954 Hague Convention, recent incidents illustrate that the 1954 Hague Convention has not been well respected, since intentional destruction of cultural heritage has repetitively taken place. Recent examples include: the Yugoslav Wars between 1991 and 1995 with the destruction of mosques, churches and historic city centers; the conflicts in Afghanistan with the destruction of the Buddhas of Bamiyan in March 2001; and the massive looting of museums, libraries and archeological sites in the aftermath of the 2003 Iraq War. With regard to the Iraq War, it should be mentioned that although the United States as the major military power did not ratify the 1954 Convention until March 2009, it was bound by the overall principles constituted by the 1954 Hague Convention and thus obliged to protect Iraqi cultural heritage. In other words, while the Hague Convention has not yet been legally binding on the United States when the Iraq War began in 2003, the United States, as a signatory of the Hague Convention in 1954, was obliged to refrain from all actions that would defeat the objectives and purposes of the Convention. Moreover, irrespectively of the legal status, the U.S. Pentagon had made a pledge to respect the rules associated with the 1954 Hague Convention in its military operational guidelines.<sup>306</sup> Thus, any substantial diversion of resources away from minimal protection of monuments and sites in occupied Iraq contravened the obligation of the United States.<sup>307</sup>

Although the scope of the 1954 Hague Convention focuses on the protection of cultural heritage in times of war, it, nevertheless, imposes duties that relate to times of peace.

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<sup>303</sup> See Article 1 (1) of the 1954 Protocol.

<sup>304</sup> Second Protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entering into force 9 March 2004), 38 ILM (1999) 769.

<sup>305</sup> Cf. Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 356. For details on customary international law, see Chapter Three, Section 6.

<sup>306</sup> Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 38.

<sup>307</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 165.

As mentioned above, States parties are obliged under Article 3 to prepare in time of peace against foreseeable effects of armed conflicts “by taking appropriate measures”. Although the interpretation of what is meant by “appropriate measures” is left to the parties, this provision clearly imposes an obligation to undertake measures to protect one’s own cultural heritage. In Article 5, the 1999 Second Protocol outlines these preparatory measures in some details. Preparatory measures shall include the “preparation of inventories, the planning of emergency measures for the protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such cultural property, and the designation of competent authorities responsible for the safeguarding of cultural property”. Moreover, the Second Protocol also includes a waiver for imperative military necessity conceded by Article 4(2) of the Hague Convention as well as a provision on “enhanced protection” (Article 10). In summarizing, the 1954 Hague Convention and both Protocols impose specific obligations during both war and peace: during war, States are obliged to prevent the appropriation of cultural objects from occupied territories; moreover, they are required to seize and return to the occupied territories any cultural object illegally removed during war or occupation. In times of peace, States are obliged to undertake preparatory measures to protect cultural objects on their own territory.

## 2.2 1970 UNESCO Convention and its National Implementations

The 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>308</sup> (hereinafter 1970 UNESCO Convention) was drafted based on a growing awareness in the international community of the increase in the illicit trafficking in cultural materials.<sup>309</sup> In order to inhibit the illicit trafficking in cultural materials, the States parties agree to oppose the “impoverishment of the cultural heritage” through “illicit import, export and transfer of ownership”; consent that trade in cultural objects exported contrary to the law of the State of origin is “illicit”; and agree to prevent the importation of such objects and to facilitate their return (Articles 2 and 3).<sup>310</sup> Despite the initial controversy over its wording and the

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<sup>308</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, adopted 14 November 1970, entering into force 24 April 1972), 823 UNTS 231, full text also available at: [http://www.unesco.org/culture/laws/1970/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml) (accessed 23 September 2011).

<sup>309</sup> Paul M. Bator, "An Essay on the International Trade in Art," *Stanford Law Review* 34(1982): p. 280.

<sup>310</sup> Cf. Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1054.

difficulties pertaining to how to implement the 1970 UNESCO Convention into national law, the Convention has so far been ratified, forty years after its adoption, by 120 States.<sup>311</sup>

The 1970 UNESCO Convention does not prohibit the export of cultural objects in itself and therefore does not impose a general obligation on States parties to procure the return of stolen or illegally exported objects. Rather, it is designed to give international effect to national export provisions by obliging the State parties “to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State party which has been illegally exported” and “to take appropriate steps to recover and return any such cultural property imported.”<sup>312</sup> The approach taken by the 1970 UNESCO Convention is to protect cultural property at its source by preventing its illegal export from one State to another. These national export regulations, however, are often fairly general in terms of their scope and vary from State to State. Many States have established a specific date, and objects created prior to this date are not allowed to be exported without a valid export certificate; examples include Israel (before 1700 B.C.), Cyprus (before 1850), Brunei (before 1894), and Nigeria (before 1918). Other States have established a ‘moving date’ based on the age of the object; examples include Kuwait (for objects more than 40 years old), Indonesia (for objects more than 50 years old), Iceland (for objects more than 100 years old), Belize (for objects more than 150 years old), and Yemen (for objects more than 500 years old).<sup>313</sup> Other States are more selective, and only limit the export of certain categories of objects based on cultural categories (as for example ‘objects of national importance’) or monetary value thresholds.<sup>314</sup> In addition to export regulation law, several States have established so-called national ownership laws; these laws generally aim to protect cultural sites, limit archeological excavations, and determine that all archeological items are State property upon discovery. Early examples of such laws include Greece (1834), Egypt (1883), the Ottoman Empire (1874), and Italy (1907).<sup>315</sup> Many other States enacted such laws following their ratification of the 1970 UNESCO Convention.<sup>316</sup>

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<sup>311</sup> As of 23 September 2011: 120 States Parties (by acceptance, ratification, or notification of succession); see current status of State Parties at: <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (accessed 23 September 2011).

<sup>312</sup> See Article 7 (a) in connection with Article 7(b)(ii) of the 1970 UNESCO Convention.

<sup>313</sup> Prott and O’Keefe, *Law and the Cultural Heritage*, p. 29.

<sup>314</sup> Cf. Nafziger, “Cultural Heritage Law: The International Regime,” p. 159.

<sup>315</sup> Legge N. 386 Tutela della conservazione dei monumenti e degli oggetti d’antichità e d’arte, 27 June 1907, available at: [http://www.unesco.org/culture/natlaws/media/pdf/italy/italia\\_loi27\\_06\\_1907\\_ita\\_orof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/italy/italia_loi27_06_1907_ita_orof.pdf) (accessed 23 September 2011). The law of 1907 has been amended in 1939 and in 2004, see Law no. 1089 of 1939 has been replaced by the Italian Code of the Cultural and Landscape Heritage (Codice dei beni culturali e del paesaggio), Legislative Decree No. 42 of January 22, 2004, available at:

With regard to the obligation to return cultural materials, the 1970 UNESCO Convention does not employ the term ‘restitution’; instead it utilizes the terms of ‘reparation’ (in Article 2) and ‘return’ (in Article 7).<sup>317</sup> Article 7(b) (ii) establishes the obligation “to take appropriate steps to recover and return cultural property” to a State upon request. The concept of “appropriate steps” is relative, since this may mean taking no action other than advising the requesting State to take legal action (e.g. civil or criminal proceedings in a foreign court).<sup>318</sup> The requesting State, in turn, is obligated “to pay just compensation to an innocent purchaser or to a person who has valid title to that property”.<sup>319</sup> Due to the narrowly defined category of objects in Article 7(b) (i), the return – as provide in Article 7 (b) (ii) – is restricted to cultural objects stolen from a very limited number of places: firstly, “from a museum, a religious or secular public monument, or similar institution”. Moreover, such objects must be “documented as appertaining to the inventory of that institution”. This, however, leaves two fundamental gaps, because many States lack proper inventories of their museum collections, and because objects originating from illicit archaeological excavations do not fall under the provisions of the 1970 UNESCO Convention.<sup>320</sup>

In addition to being designated as ‘cultural property’ and falling into one of the relevant categories laid out in eleven different categories (Article 1(a-k)), the cultural object must also have a sufficient connection to the requesting State, and must form part of its cultural heritage so that its loss would constitute “the impoverishment of the cultural heritage of the countries of origin of such property”.<sup>321</sup> However, this connection between a State and a cultural object in question is not sufficiently defined within the Convention and is – in line with the overall ‘national spirit’ of the Convention – left to the determination of each State party’s national regulation on cultural heritage without a right of review by the State against which the request for return has been submitted.<sup>322</sup> The only requirement the 1970 UNESCO Convention sets out is that the object has been found in, created in, or has legitimately entered

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[http://www.unesco.org/culture/natlaws/media/pdf/italy/it\\_cult\\_landscapeheritge2004\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/italy/it_cult_landscapeheritge2004_engtof.pdf). (accessed 23 September 2011).

<sup>316</sup> Jonathan S. Moore, "Enforcing Foreign Ownership Claims in the Antiquities Market," *Yale Law Journal*, no. 97 (1988): p. 467.

<sup>317</sup> For detailed discussion on the terminology in restitution matters, see *supra* Chapter Two, Section 3.

<sup>318</sup> Patrick J O’Keefe, *Commentary on the 1970 Unesco Convention*, 2 ed. (2007), p. 60.

<sup>319</sup> Article 7 (b) (ii) of the 1970 UNESCO Convention.

<sup>320</sup> O’Keefe, *Commentary on the 1970 Unesco Convention*, p. 59.

<sup>321</sup> Article 2 para. 1 of the 1970 UNESCO Convention.

<sup>322</sup> Cf. Stephanie Schulz-Hombach and Katrin Schenk, "Der Gesetzesentwurf Zur Ausführung Des Unesco-Kulturgutübereinkommens," *Kunst und Recht (KUR)* (2006): p. 50.

the State beforehand (Article 4 (a-e)). There is, however, no time limit for a cultural object to have remained in a State's territory before that State may legitimately claim it as its national heritage.

The non-self-executing character of convention requires national implementation; however, only a small number of the currently 120 States parties passed specific implementing legislation, such as the United States (1983), Switzerland (2005), Germany (2007), and the Netherlands (2009).<sup>323</sup> The United States was one of the first so-called 'art-market countries' to ratify and implement the Convention (in 1972, and 1983 respectively). Although the U.S. implementation act, entitled 'Convention on Cultural Property Implementation Act',<sup>324</sup> has given momentum to the international acceptance of the 1970 UNESCO Convention, several provisions of that act have been subject to criticism. Whereas the 1970 UNESCO Convention is designed to give international effect to national export provisions,<sup>325</sup> foreign export regulations are *per se* not enforceable in the United States (as in many other States).<sup>326</sup> Thus, the U.S. act sets out provisions that allow the U.S. authorities to conclude bilateral agreements with other States parties in order to restrict the import of archaeological and ethnological materials into the United States.<sup>327</sup> Consequently, the enforceability of U.S. import restrictions (and the subsequent return of illegally imported cultural materials) is preconditioned on whether or not the U.S. has concluded a bilateral agreement with the requesting States. The establishment of such bilateral agreements, however, requires that the requesting State demonstrates that (1) its cultural patrimony is "in jeopardy from the pillage of archaeological or ethnological materials";<sup>328</sup> (2) it has taken measures consistent with the UNESCO Convention to protect its cultural patrimony; (3) the application of import restrictions would be of "substantial benefit in deterring a serious situation of pillage"; and (4) that the application of the import restrictions is "consistent with the general interest of the international community in the interchange of cultural property

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<sup>323</sup> See for number of ratifications: <http://portal.unesco.org/la/convention.asp?KO=13039&language=E>; see for national implementation laws the UNESCO Database on National Cultural Heritage Laws, available at: [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=33928&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=33928&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>324</sup> Convention on Cultural Property Implementation Act (CPIA) 19 U.S.C. 2601 (1983).

<sup>325</sup> See Article 7 (a) of the 1970 UNESCO Convention.

<sup>326</sup> Cf. Maria P. Kouroupas, "Die Unesco-Konvention Von 1970: Die Erfahrungen Der Vereinigten Staaten," *KUR*, no. 5 (2010): p. 156.

<sup>327</sup> U.S. provisions 2601-2613 implement Article 9 in connection with Article 7 (b)(i) of the 1970 UNESCO Convention.

<sup>328</sup> On how the term „patrimony“ fits very poorly with the rest of the wording of the 1970 UNESCO Convention, see O'Keefe, *Commentary on the 1970 Unesco Convention*, p. 69.

among nations for scientific, cultural, and educational purposes”.<sup>329</sup> Thus, the U.S. approach of implementation requires subsidiary provisions in addition to the primary obligation of States parties to uphold own measures to protect cultural heritage. The U.S. has justified these additional requirements by arguing that national deficits of protection and safekeeping should not be compensated on the international level by creating obligations for third parties.<sup>330</sup>

Although this argument is comprehensible to a certain extent, the U.S. approach has been criticized as being too narrow; in particular, the requirement that a prior bilateral agreement must exist has been describe as nothing more than an “agreement to agree”.<sup>331</sup> As a matter of fact, it is not apparent why international treaty law, whose primarily purpose is to regulate an issue among all its States parties, is implemented into national law by drawing up additional bilateral agreements only with some selected States parties, with the consequence that all other States parties cannot evoke the provisions of the 1970 UNESCO Convention in cases involving the United States. Despite this criticism, the U.S. has concluded bilateral agreements with several countries, including Bolivia, Cambodia, Canada,<sup>332</sup> China, Colombia, Cyprus, El Salvador, Guatemala, Honduras, Iraq (special additional legal provisions), Italy, Mali, Nicaragua, and Peru.<sup>333</sup> Switzerland has also taken the same selective approach for implementing the 1970 UNESCO Convention. Having ratified the Convention in 2003, Switzerland has concluded bilateral agreements with Italy and Peru (2006), Greece (2007), Colombia and Egypt (2010).<sup>334</sup>

Generally speaking, however, the 1970 UNESCO Convention does not work properly, since most States have failed to pass legislation implementing the Convention, which means

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<sup>329</sup> Section 2602 U.S. CIPA.

<sup>330</sup> Cf. Martin Philipp Wyss, "Rückgabeansprüche Für Illegal Ausgeführte Kulturgüter," in *Prinzipien Des Kulturgüterschutzes - Ansätze Im Deutschen, Europäischen Und Internationalen Recht*, ed. Frank Fechner, Thomas Oppermann, and Lyndel V. Prott (1996), p. 214.

<sup>331</sup> O'Keefe, *Commentary on the 1970 Unesco Convention*, p. 110. See also Wyss, "Rückgabeansprüche Für Illegal Ausgeführte Kulturgüter," p. 213.

<sup>332</sup> The bilateral agreement with Canada expired in 2002.

<sup>333</sup> The list of the bilateral agreements concluded between the U.S. and foreign States is available at: <http://exchanges.state.gov/heritage/culprop.html> (accessed 23 September 2011). For further information see Kouroupas, "Die Unesco-Konvention Von 1970: Die Erfahrungen Der Vereinigten Staaten," p. 156.

<sup>334</sup> While four of these agreements (which impose import restrictions and provide for the return of specifically designated cultural objects) have already entered into force, namely with Italy (since April 2008), Egypt (since February 2011), Greece (since April 2011), and Colombia (since August 2011), the agreement with Peru has not yet entered into force. As an example, the bilateral agreement between Switzerland and Italy covers cultural materials, including stone, metal, ceramics, glass, bone, wood, organic materials, paintings and amber dating from 1500 B.C. until 1500 A.D.). The list of the bilateral agreements is available at: <http://www.bak.admin.ch/themen/kulturguettertransfer/01985/index.html?lang=en> (accessed 23 September 2011).

that the Convention is not enforceable in domestic courts in many States that are party to the Convention.<sup>335</sup> The following example from France illustrates the problem foreign States have if national implementation is missing. In the case of *Nigeria vs. France* for the return of Nok and Sokoto statuettes in 2004, Nigeria based its claim on the 1970 UNESECO Convention but the claim was rejected by the French Court of Appeal based on the fact that the Convention, ratified by France in 1997, was not directly applicable and no legislation implementing the provisions of the Convention had been enacted.<sup>336</sup> Had the 1970 UNESCO Convention been a provision of EU law, France would have been penalized for non-compliance for its failure to take measures ensuring that the provisions had been implemented into national law, with the effect that EU law would be directly applicable.<sup>337</sup> However, since no such instruments exist within the framework of international law, non-compliance ends up burdening the claiming party, and not the non-implementing States party. In this particular case, France agreed, upon the intervention of ICOM, to enter into negotiations with Nigeria.<sup>338</sup> Without making a legal reference to the 1970 UNESCO Convention, both parties completed a joint agreement in 2006 acknowledging Nigeria's ownership of the objects but granting a renewable twenty-five year loan to the Quai Branly Museum in Paris.<sup>339</sup> Similarly, Italy ratified the 1970 UNESCO Convention as early as 1978, but has not yet enacted specific implementing legislation. When challenged on this issue, the Italian authorities indicate that the provisions of the 1970 UNESCO Convention are sufficiently covered by existing Italian legislation.<sup>340</sup> They also refer to the ratification of the self-executing 1995 UNIDROIT Convention; this Convention, however, does not provide legal grounds for requesting returns for States that have not ratified the UNIDROIT Convention.<sup>341</sup>

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<sup>335</sup> Kurt Siehr, "Globalization and National Culture: Recent Trends toward a Liberal Exchange of Cultural Objects," *Vanderbilt Journal of Transnational Law* 38(2005): p. 1067, 77.

<sup>336</sup> The Federal Republic of Nigeria vs. Alain de Montbrison, Court of Appeal, Paris Judgment of 5 April 2004 (2002/09897), upheld by the Court of Cassation, Judgment of 20 September 2006 (JCP 2006, IV, 3005, pp. 1917); cf. Marie Cornu and Marc-André Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," *International Journal of Cultural Property*, no. 17 (2010): p. 2.

<sup>337</sup> This would be the case if an EU Member State fails to implement an EU directive within the given period of time.

<sup>338</sup> Kwame Opoku, Revisiting Looted Nigerian Terracotta Sculptures in Louvre/Musée du Quai Branly, Paris, 14 July 2011, available at: <http://www.myweku.com/2011/07/revisiting-looted-nigerian-nok-terracotta-sculptures-in-louvre-musee-du-quai-branly-paris/> (accessed 23 September 2011).

<sup>339</sup> Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 3. For details on the complementary and alternative mechanisms, see Chapter Six, Section 3.

<sup>340</sup> Italian Code of the Cultural and Landscape Heritage (Codice dei beni culturali e del paesaggio), Legislative Decree No. 42 of January 22, 2004, available at: [http://www.unesco.org/culture/natlaws/media/pdf/italy/it\\_cult\\_landscapeheritge2004\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/italy/it_cult_landscapeheritge2004_engtof.pdf) (accessed 23 September 2011).

<sup>341</sup> For details on the 1995 UNIDROIT Convention, see Chapter Three, Section 2.4.

Criticisms have been levied against not only the lack of national implementation of the 1970 UNESCO Convention, but also the Convention itself. First of all, the wide variety of cultural items that hinder the Convention's effective functioning has been criticized: there are no less than eleven broad categories, ranging from antiquities to stamps. Moreover, the rather vague provision on the duty "to ensure the protection of their cultural property against illicit import, export and transfer of ownership [...] as appropriate for each country"<sup>342</sup> has also been criticized, which leaves wide discretion to States parties on how they structure their export prohibitions; this, consequently, broadens the provisions, rather than harmonizing export standards.<sup>343</sup> Along the same vein, criticism has been voiced regarding the imposition of a system of differing national export limitations, given that this might increase the risk of corrupt practices in poorly equipped States, and the contribution of this provision to efforts to combat the illicit trafficking in cultural material is questionable.<sup>344</sup> Moreover, the State-centric elements of the Convention have frequently been criticized, since the Convention determines the cultural significance of objects in terms of their "importance for archaeology, prehistory, history, literature, art or science", rather than in terms of their importance to the cultural or religious identity of a people, group, or community. Thus, only the nation-State is the unit of identity, rather than the ethnic group or indigenous peoples to whom such objects may have the greatest cultural significance.

As mentioned above, the 1970 UNESCO Convention does not cover undocumented cultural materials, thus excluding from its provisions the largest category of cultural objects vulnerable to illicit trafficking, namely archeological artifacts deriving from clandestine excavations. In addition, the Convention has been criticized for its failure to permit private action against a foreign State and that it does not operate retroactively.<sup>345</sup> Article 15 of the Convention does provide States parties the possibility by concluding special (bilateral) agreements in order to overcome the general principle of non-retroactivity;<sup>346</sup> however, so far no State has made use of this provision.<sup>347</sup> Lastly, in terms of statutes of limitation the 1970 UNESCO Convention does not establish time limits for the request of return and is thus the

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<sup>342</sup> Article 5 of the 1970 UNESCO Convention.

<sup>343</sup> Kuitenbrouwer, "The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance," p. 597, 99.

<sup>344</sup> Cf. *Ibid.*

<sup>345</sup> O'Keefe, *Commentary on the 1970 Unesco Convention*, p. 9.

<sup>346</sup> The principle of non-retroactivity is a general principle of customary international law and is codified in Article 28 of the Vienna Convention on the Law of Treaties. For details see, Chapter Six, Section 1.1.

<sup>347</sup> Freytag, "Cultural Heritage: Rückgabeansprüche Von Ursprungsländern Auf "Ihr" Kulturgut?," p. 181.

only international convention in this field without such a limitation.<sup>348</sup> This, of course, might be interpreted either as an advantage or disadvantage in terms of legal certainty. Apart from the fact that there is no apparent distinction between publicly and privately owned cultural property within the Convention, the question of the status of the *bona fide* purchaser and the rather pronounced gap in understanding between the Continental-European and the Anglo-American legal tradition was not touched upon in the 1970 UNESCO Convention, and was only later addressed in 1995 by the UNIDROIT Convention.<sup>349</sup>

Despite these various shortcomings and the general reluctance of States to enforce foreign export law, domestic courts have repeatedly used the 1970 UNESCO Convention to underline to the emergence of an international public policy that prohibits the illicit trafficking in cultural objects. One of the earliest examples is the decision of the German *Bundesgerichtshof* (BGH) in 1972 concerning several Nigerian masks.<sup>350</sup> The traditional masks were shipped to Germany in violation of Nigerian export laws. During the transport, several mask disappeared from the container ship under unknown circumstances. Based on the insurance contract, the insurer paid the loss insured and sued the shipping company for compensation. The BGH ruled that the insurance contract was *contra bonos mores* (against public policy) and thus was void under German civil law. By referring to the international public policy pertaining to the illicit trafficking in cultural objects, which has began to emerge with the adoption of the 1970 UNESCO Convention, the BGH declared that “in the interest of the moral principles of international trade, the export of cultural objects in violation of an export prohibition of the State of origin does not deserve protection under private law, including protection through the insurance of the transportation of cultural goods from the territory of a foreign State in violation of that State’s export control laws”.<sup>351</sup> Interestingly, the BGH referred in its decision of June 1972 explicitly to the 1970 UNESCO Convention, even though the Convention had only entered into force shortly before the decision was issued (in April 1972), and Germany was not a States party to the Convention at that time.<sup>352</sup>

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<sup>348</sup> Greenfield, *The Return of Cultural Treasures*, p. 369.

<sup>349</sup> For details on the 1995 UNIDROIT Convention, see Chapter Three, Section 2.4.

<sup>350</sup> BGH, 22 June 1972, BGHZ 59, 14.

<sup>351</sup> BGH, 22 June 1972, BGHZ 59,14, para. 82.

<sup>352</sup> Germany ratified the 1970 UNESCO Convention not before 2007.

Along a similar vein, the 2007 *Barakat vs. Iran* case is notable,<sup>353</sup> since in this case the British Court of Appeal also made reference to public policy arguments. Moreover, the Court has asserted – in light of the existing international treaty law – that States should assist one another in preventing the unlawful removal of cultural materials.<sup>354</sup> The case concerned eighteen artifacts offered for sale at Barakat Galleries, London. The third-millennium B.C. artifacts were alleged illicitly excavated and thus considered stolen under Iranian ownership laws. The High Court dismissed the claim for restitution, since Iranian national legislation granting State ownership to archeological artifacts was not enforceable in the United Kingdom.<sup>355</sup> The Court of Appeal, however, reversed the decision on ground that the Iranian law<sup>356</sup> grants both ownership and immediate rights to possession to the State. Having examined the existing international treaty law (the court referred to the 1970 UNESCO Convention, the 1995 UNIDROIT Convention, Directive 93/7/EEC, and the 1993 ‘Commonwealth Scheme for the Protection of the Material Cultural Heritage’), the Court of Appeal asserted that “none of these instruments directly affects the outcome of this appeal, but they do illustrate the international acceptance of the desirability of protection of the national heritage. A refusal to recognize the title of a foreign State, conferred by its law, to antiquities unless they had come into the possession of such State, would in most cases render it impossible for this country to recognize any claim by such a State to recover antiquities unlawfully exported to this country”.<sup>357</sup> In conclusion, the Court of Appeal affirmed that if the rights granted by Iranian law were equivalent to ownership in English law, then English law would have treated that as ownership for the purpose of resolving the conflict of laws; thus, it is British public policy to recognize the ownership claim of foreign States to cultural materials that belong to their patrimony.<sup>358</sup> Both cases therefore demonstrate that even if the legal provisions of the 1970 UNESCO Convention are not applicable, general principles established in international treaty law have an impact on national public policies pertaining to the prevention of illicit trafficking in cultural materials and the interpretation of national civil laws.

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<sup>353</sup> *Government of the Islamic Republic of Iran vs. The Barakat Galleries Ltd.* (2007) EWCA Civ. 1374; Court of Appeal, 21 December 2007.

<sup>354</sup> *Supra*, paras.154-155.

<sup>355</sup> *Government of the Islamic Republic of Iran vs. The Barakat Galleries Ltd.* (2007) EWHC 705 QB; Queen’s Bench Division, 29 March 2007.

<sup>356</sup> National Heritage Protection Act (3 November 1930), Administrative Regulations of the National Heritage Protection Act 1930 (19 November 1932), as well as the Legal Bill regarding Prevention of Unauthorized Excavations and Diggings (17 May 1979).

<sup>357</sup> *Government of the Islamic Republic of Iran vs. The Barakat Galleries Ltd.* (2007) EWCA Civ. 1374, paras.155-163.

<sup>358</sup> *Supra*, para. 152.

With regard to the question as to whether the 1970 UNESCO Convention provides provisions that support the existence of a general responsibility to protect cultural heritage, the following provisions can be mentioned: Article 2(1) establishes that international cooperation is “one of the most efficient means of protecting each country's cultural property against all dangers resulting from illicit import, export and transfer of cultural property” and that “necessary reparations” can constitute an effective outcome in certain instances.<sup>359</sup> Moreover, Article 5(a) stresses that all States parties should “undertake measures to secure the protection of cultural heritage”. Although this provision aims at ensuring the protection of cultural heritage primarily through the creation of provisions against illicit trafficking, it inevitable also includes the physical protection of cultural materials. In other words, physical protection of cultural heritage is necessary to mitigate against the reduction of a State's cultural heritage. This assumption is confirmed by several of the Convention's provisions, including: the establishment of specific administrative services for the protection of cultural heritage (Article 5); the establishment and maintenance of national inventories of protected property (Article 5(b)); the provision on educational measures to stimulate and develop respect for cultural heritage (Article 5(f)); and the provision of appropriate publicity in cases when an item of cultural property has disappeared (Article 5(g)). Although the 1970 UNESCO Convention has been heavily criticized and it does not provide clear measures or remedies in cases of non-compliance, it nevertheless includes the obligation to establish measures for the protection of cultural heritage, and thereby establishes a general obligation to protect cultural heritage. As a result, the 1970 UNESCO Convention has shaped the development of international cultural heritage law and, as demonstrated, has had an impact on the development of national public policies pertaining to the prevention of illicit trafficking in cultural materials.

### **2.3 1972 UNESCO World Heritage Convention**

The 1972 UNESCO *Convention concerning the Protection of the World Cultural and Natural Heritage*<sup>360</sup> (hereinafter 1972 UNESCO Convention) attempts to promote a system of international cooperation and assistance among States in the context of preserving outstanding cultural and natural sites as part of the ‘world heritage of mankind’.<sup>361</sup> Since 1972, 188 States

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<sup>359</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 206.

<sup>360</sup> UNESCO *Convention concerning the Protection of the World Cultural and Natural Heritage*, (adopted 16 November 1972, entering into force 17 December 1975), 1037 UNTS 151.

<sup>361</sup> See Preamble of the 1972 UNESCO Convention.

have become party to the Convention, which has, in consequence, gained general international acceptance.<sup>362</sup> The 1972 UNESCO Convention operates through the World Heritage Committee,<sup>363</sup> which firstly, sets out the criteria for establishing the ‘outstanding universal value’ of the cultural heritage to be designated (Operational Guidelines);<sup>364</sup> and secondly, decides on an annual basis whether or not the cultural and natural sites nominated by States parties will be included in the ‘World Heritage List’ (Article 11).<sup>365</sup> In order to comply with the overall threshold of ‘outstanding universal value’, the complex and difficult requirement is the identification of cultural heritage that represents “the totality and diversity of all cultures of the world in their intellectual, aesthetic, religious, and sociological expressions”.<sup>366</sup> Each site inscribed as World Heritage remains the property of the State upon whose territory the site is located. Early attempts in 1965 and 1971 to establish a ‘World Heritage Trust’ that would manage sites extraterritorially by placing them into international custody were rejected by the majority of States.<sup>367</sup> Although the Convention does not limit the sovereignty of its States parties, it clearly expresses that it is in the interest of the international community to preserve each site for future generations of humanity.<sup>368</sup> Therefore, the protection and preservation of these sites are a concern of all States parties to the 1972 UNESCO Convention. That said, it is difficult to evaluate the practical effect of such a Convention that consists for the most part of declaratory provisions.<sup>369</sup>

In contrast to the 1970 UNESCO Convention, the 1972 UNESCO Convention deals only with immovable cultural property including monuments, groups of buildings, and special sites of archaeological interest (Article 1). Although it is less relevant for the question of restitution and return of movable cultural property, it nevertheless has an impact on the

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<sup>362</sup> As of 23 September 2011: 188 States Parties (by acceptance, ratification, or notification of succession); see current status of States Parties at: <http://whc.unesco.org/en/statesparties/> (accessed 23 September 2011).

<sup>363</sup> The Committee is composed of 21 States parties elected by the General Conference of UNESCO.

<sup>364</sup> The ‘Operational Guidelines for the Implementation of the World Heritage Convention’ contain the criteria for determining the ‘outstanding universal value’ of cultural heritage. Since the criteria are not in the Convention itself, they can be amended from time to time when the Committee considers it to be appropriate. The current criteria in the 2008 Guidelines are the sixth manifestation of the Guidelines since they were first drafted in 1977. The 2008 Guidelines, as well as the previous manifestations, are available at: <http://whc.unesco.org/en/guidelines> (accessed 23 September 2011).

<sup>365</sup> The World Heritage List increases in the number of sites designated every year: with the decisions of the 35th session of the World Heritage Committee (July 2011), a total of 936 properties are designated: 725 cultural, 183 natural, and 28 mixed sites in 153 States. The list is available at: <http://whc.unesco.org/en/list/> (accessed 23 September 2011).

<sup>366</sup> Francesco Francioni, *The 1972 World Heritage Convention: A Commentary* (2008), p. 20.

<sup>367</sup> Preliminary Study, UNESCO Doc. 16 C/19 (Annex No. 50).

<sup>368</sup> Cf. Florian Pfeifle, *Unesco-Weltkulturerbe - Vom Globalen Völkerrecht Zur Lokalen Infrastrukturplanung*, vol. 4, Schriften Zum Öffentlichen Immobilienrecht Und Infrastrukturecht (2010), p. 21.

<sup>369</sup> Greenfield, *The Return of Cultural Treasures*, p. 226.

general debate regarding restitution and return.<sup>370</sup> Moreover, it is highly relevant in determining the obligation of States in the protection of cultural heritage. Such an obligation, as expounded in the beginning of this chapter, is the necessary basis for introducing general principles that can then be used to formulate general objectives in restitution practices. Along these lines, the 1972 UNESCO Convention stipulates that the States parties are not to damage any cultural heritage on another State's territory.<sup>371</sup> Moreover, the Convention binds all States parties to conserve and protect their own cultural properties (Article 4 and 12), even if they are not included in the World Heritage List.<sup>372</sup>

A violation of this provision has, for example, taken place in 2001, when the Buddhas of Bamiyan in Afghanistan were demolished. The giant Buddha Statues, dating back to the third and fifth centuries A.D. in Bamiyan and situated 230 km northwest of Kabul, were caved in sandstone cliffs fifty-three and thirty-six meters tall and represented one of the most important cultural sites in Afghanistan.<sup>373</sup> Their destruction is remarkable insofar as military damage to cultural materials normally concerns property belonging to an enemy; in this case, however, military and paramilitary forces of the Taliban demolished the pre-Islamic heritage that belonged to their own people. It took almost a month of intensive bombardment by tanks and dynamite to destroy the Buddhas. There is also evidence indicating that the demolition of the Buddha Statues was not an isolated incident, but was the apex of systematic policy of destruction pursued by the Taliban regime.<sup>374</sup> Even if one does not consider the Taliban as the official government at the time of the destruction in 2001, the actions of those acting as the 'government' (as it is generally assumed in case of so-called 'failed States') are still considered to be acts of State.<sup>375</sup> Despite the serious damage the Buddhas of Bamiyan suffered in 2001, the Buddhas remain an important site of cultural heritage and, moreover, a

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<sup>370</sup> For a detailed discussion on restitution and return in the context of World Heritage Sites, see Chapter Six, Section 4.4.

<sup>371</sup> Greenfield, *The Return of Cultural Treasures*, p. 226.

<sup>372</sup> Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 32.

<sup>373</sup> See: <http://www.rawa.org/statues.htm> (accessed 23 September 2011).

<sup>374</sup> Francesco Francioni and Federico Lenzerini, "The Destruction of the Buddhas of Bamiyan and International Law," *European Journal of International Law* 14, no. 4 (2003): p. 627.

<sup>375</sup> Article 9 of the *Articles on Responsibility of States for Internationally Wrongful Acts* completed by the International Law Commission (ILC) in 2001, ILC Report on the Work of Its Fifty-third Session, UN GAOR, 56th Session, Supp. No.10, 43, UN Doc. A/56/10 (2001). With Resolution 56/83 of 12 December 2001 the UNGA gave the Articles to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".

testimony to the tragic destruction by the Taliban.<sup>376</sup> Considering both the cultural importance of the Statues and their tragic destruction, the World Heritage Committee decided to include the “Cultural Landscape and Archaeological Remains of the Bamiyan Valley” in the ‘List of World Heritage in Danger’ in 2003.<sup>377</sup> This incident represents a clear case in which Afghanistan breached its obligations to protect its own cultural property under the 1972 UNESCO Convention.<sup>378</sup>

In summarizing this section on the 1972 UNESCO Convention, three main conclusions should be highlighted: firstly, although the Convention does not contain provisions on restitution and return, due to its scope in immovable cultural and natural heritage,<sup>379</sup> it clearly articulates the responsibility of the international community to protect cultural heritage of outstanding universal value. Since movable cultural materials are integral parts of many cultural sites inscribed in the World Heritage List, the responsibility to protect must inevitably be extended to the movable elements associated with designated sites. Without their movable contents, the Palace of Versailles,<sup>380</sup> the Museums Island of Berlin,<sup>381</sup> and the Taj Mahal,<sup>382</sup> would only be empty shells. Secondly, due to the universal acceptance of the Convention (i.e. 188 States out of the total of 194 States are party to the convention),<sup>383</sup> its provisions have become customary international law<sup>384</sup> and, for this very reason, binding for both States parties and non-States parties to the Convention.<sup>385</sup> Thirdly, although the Convention does not restrict the sovereign rights of States, it clearly expresses that it is in the

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<sup>376</sup> Cf. Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 31. The authors refer in comparison to the World Heritage List of a similar site that was included in 1996: namely, the Chinese *Mt. Emei and Leshan Giant Buddha*.

<sup>377</sup> Cultural Landscape and Archaeological Remains of the Bamiyan Valley: included in 2003 into the List of World Heritage in Danger, further information available at: <http://whc.unesco.org/en/list/208> (accessed 23 September 2011).

<sup>378</sup> In the same vein: Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 31.

<sup>379</sup> For details on the issue of restitution and return in the context of World Heritage sites, see Chapter Six, Section 4.4.

<sup>380</sup> See: Palace and Park of Versailles, inscribed as world heritage in 1979; detailed information available at: <http://whc.unesco.org/en/list/83> (accessed 23 September 2011).

<sup>381</sup> See: Museumsinsel Berlin (Museum Island), inscribed as world heritage in 1999, detailed information available at: <http://whc.unesco.org/en/list/896> (accessed 23 September 2011).

<sup>382</sup> See: Taj Mahal, inscribed as world heritage in 1983; detailed information available at: <http://whc.unesco.org/en/list/252> (accessed 23 September 2011).

<sup>383</sup> See above n. 362.

<sup>384</sup> For details on customary international law, see Chapter Three, Section 6.

<sup>385</sup> Francesco Francioni, "Thirty Years On: Is the World Heritage Convention Ready for the 21st Century?," *The Italian Yearbook of International Law* (2003): p. 22. Cf. George Rodrigo Bandeira Galindo, "The Unesco Declaration Concerning the Intentional Destruction of Cultural Heritage," in *Le Patrimoine Culturel De L'humanité - the Cultural Heritage of Mankind*, ed. James A. R. Nafziger and Tullio Scovazzi (Hague Academy of International Law, 2008), p. 428.

interest of the international community to preserve each site for future generations of humanity.<sup>386</sup>

## 2.4 1995 UNIDROIT Convention

The 1995 UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects*<sup>387</sup> (hereinafter UNIDROIT Convention) was prepared as a supplementary convention to the 1970 UNESCO Convention, in view of the significant number of gaps in that Convention, which have subsequently become apparent.<sup>388</sup> Thus, the focus of the 1995 UNIDROIT Convention was on questions pertaining to the interplay between public and private law concepts that were not addressed within the framework of the 1970 UNESCO Convention.<sup>389</sup> Improving the instruments pertaining to the protection of cultural objects and addressing, in particular, the lack of reference to the *bona fide* purchaser (omitted from the 1970 UNESCO Convention), the UNIDROIT Convention sets specific requirements for due diligence and expressly requires that the purchaser of cultural materials accepts the risks associated with failure to act prudently when acquiring cultural materials.<sup>390</sup> Imposing this responsibility for due diligence on the purchaser and therewith reversing the onus of proof,<sup>391</sup> the Convention reinforces the right of the *bona fide* purchaser to “fair and reasonable compensation” (Article 6). In contrast to the 1970 UNESCO Convention, the UNIDROIT Convention is self-executing and therefore does not require national implementation. However, it does not formulate an independent supranational policy of international protection, but instead restricts itself – once more – to the international enforcement of national export bans and, similarly to the 1970 UNESCO Convention, does not apply retroactively to objects removed prior to the date of entry into force of the Convention for each States party.<sup>392</sup>

The 1995 UNIDROIT Convention distinguishes between the contexts of ‘restitution’ and ‘return’ and separates the two issues in different chapters: Chapter Two is entitled

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<sup>386</sup> Cf. Pfeifle, *Unesco-Weltkulturerbe - Vom Globalen Völkerrecht Zur Lokalen Infrastrukturplanung*, p. 21.

<sup>387</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, (adopted 24 June 1995, entering into force 1 July 1998), 34 ILM (1995) 1322; full text also available at: <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm> (23 September 2011).

<sup>388</sup> Cf. Nafziger, "Cultural Heritage Law: The International Regime," p. 207. For detailed discussion on the shortcomings of the 1970 UNESCO Convention, see *supra* Chapter Three, Section 2.2.

<sup>389</sup> Cf. Gerte Reichelt, "Prinzipien Der Unidroit-Konvention 1995," in *Rechtsfragen Der Restitution Von Kulturgut*, ed. Gerte Reichelt (2008), p. 43.

<sup>390</sup> See Article 4 (4) of the 1995 UNIDROIT Convention, which identifies factors that apply to the determination of whether this requirement of due diligence is satisfied, such as the price paid, whether registers of stolen objects have been consulted, and “the character of the parties” involved.

<sup>391</sup> Reichelt, "Prinzipien Der Unidroit-Konvention 1995," p. 48.

<sup>392</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 207.

“restitution of stolen cultural objects”, whereas Chapter Three is entitled as “return of illegally exported cultural objects”.<sup>393</sup> Under the context of ‘restitution’ the term “stolen cultural object” is extended to include objects unlawfully excavated or lawfully excavated but unlawfully retained (Article 3). In terms of statute of limitations, claims for restitution expire three years after the claimant actually discovers where the stolen object is located and who possesses it. All claims must be made within fifty years from the time of the theft. This rule of repose does not apply to objects belonging to public collections, forming part of identified monuments or archeological sites, or belonging to certain categories of tribal or indigenous cultural objects.<sup>394</sup> With regard to the ‘return’ of “illegally exported cultural objects”, Chapter Three of the Convention requires that objects must be returned upon the request of a States party if they have been illegally exported according to the national laws of the requesting State (Article 5(2)). Whereas States must recognize other States’ export controls under the 1970 UNESCO Convention (which they often not do), the 1995 UNIDROIT Convention does not require the recognition of foreign export law; instead, it requires that the requesting State must establish that the requested object has been “illegally exported” under its national law.<sup>395</sup> Therefore, States can no longer refuse to return cultural materials by simply arguing that they cannot exercise foreign national export laws.<sup>396</sup>

In order to limit this broad scope of application, the 1995 UNIDROIT Convention provides for additional criteria for the return of illegally exported cultural objects. Thus, Article 5(3) requires that the requesting State must prove that the removal of the object from its territory “significantly impairs” specific interests; unless one or more of these interests listed interests are given, the return of the requested object is not required under the Convention.<sup>397</sup> These criteria for claiming a cultural object include specific interests in: (a) the physical preservation of the object and/or its context; (b) the integrity of the object and its components; (c) the preservation of the scientific or historical information pertaining to the object; (d) the traditional or ritual use of the object by a tribe or indigenous community; as well as the overall “significant cultural importance for the requesting State”. The approach taken by the 1995 UNIDROIT Convention is quite remarkable, since it expands the interests

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<sup>393</sup> For detailed discussion on the terminology employed in the debate over restitution and return, see *supra* Chapter Two, Section 3.

<sup>394</sup> Nafziger, "The Present State of Research," p. 251.

<sup>395</sup> Beat Schönenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung* (2009), p. 89.

<sup>396</sup> Kurt Siehr, "Vereinheitlichung Des Rechts Der Kulturgüter in Europa?," in *Aufbruch Nach Europa, 75 Jahre Max-Planck-Institut Für Privatrecht*, ed. Jürgen Basedow, et al. (2001), p. 89.

<sup>397</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 208.

supported by its provisions beyond the territorial interest of States to other non-territorial interests associated with the object itself: namely, the physical preservation of the object, preservation of its context and integrity; provisions to address scientific and historical issues; and, most revolutionary, recognition of its cultural importance for groups and/or peoples within the territory of the requesting State. By including the latter criteria pertaining to cultural importance, the Convention emphasizes that the interest of affiliation is one of equal value in determining whether or not the requested object should be returned.<sup>398</sup>

The preliminary draft version of the UNIDROIT Convention placed an even stronger emphasis on these interests, insofar as it required that “any request [...] shall contain all material information regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State.”<sup>399</sup> However, this provision suggested by the study group was rejected without substitution by the governmental expert group due to lack of consent, since some States feared this additional requirement might be used as a pretext for systematically refusing the return of requested objects.<sup>400</sup> Another mitigating change was made with regard to Article 5(3), which reads that the requesting State “establishes” (draft version: “proves”) that the removal of the object from its territory significantly impairs one of the interests.<sup>401</sup> In addition to the four criteria listed in Article 5(3)(a-d), a fifth criterion was included in the drafting process, which functions as a ‘catchall category’, and as such serves to supersede the other four criteria.<sup>402</sup> Consequently, the State requesting the return can avoid fulfilling the four criteria set out in the Convention (criteria a-d) by simply establishing the fact that the object was of “significant cultural importance” of that State. In determining whether an object would fall within this ‘catchall category’, it should be noted that, firstly, an item might easily be of “significant cultural importance” to more than just one State; and secondly, that the draft version referred to “outstanding” rather than “significant” cultural importance, and thus the threshold of this fifth criteria had been broadened without ever having been clearly defined.<sup>403</sup> Consequently, the four specific criteria established on general interest considerations have been weakened by the addition of a

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<sup>398</sup> Schöenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung*, p. 89. With regard to the element of cultural preservation, see Chapter Five, Section 3.1.2.

<sup>399</sup> *Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* (approved by the UNIDROIT Study Group on the International Protection of Cultural Property at its Third Session on 26 January 1990, UNIDROIT, LXX-Doc 51.

<sup>400</sup> Wyss, "Rückgabeansprüche Für Illegal Ausgeführte Kulturgüter," p. 212.

<sup>401</sup> Lyndel V. Prott, *Commentary on the Unidroit Convention* (1997), p. 55.

<sup>402</sup> Nafziger, "The Present State of Research," p. 253.

<sup>403</sup> *Ibid.* For details on this discussion, see also: Prott, *Commentary on the Unidroit Convention*, p. 60.

non-specific, not clearly defined criterion that endorses the traditional approach of prioritizing the territorial interest of States.

Despite the inclusion of this fifth criterion that undermines the impact of the other criteria in the final draft, the 1995 UNIDROIT Convention clearly highlights the importance of interest considerations. In practical terms, however, requesting States are not required to comply with these specific criteria, since they can simply refer to the “significant cultural importance” of the requested object. More progressively, however, the 1995 UNIDROIT Convention provides an alternative approach to the conventional scheme of return or retention in Article 6(3): it provides that the party required to return an object may decide – in agreement with the requesting State – either to retain ownership, to transfer ownership against payment, or to transfer possession of the object in question gratuitously to a person of its choice residing in the requesting State, who can guarantee that the object will be properly safeguarded.<sup>404</sup> Both the rather small number of ratifications and the absence of cases resolved under the UNIDROIT Convention (so far no case has been decided under the provisions of 1995 UNIDROIT Convention)<sup>405</sup> demonstrate the general reluctance of States to commit to this self-executing convention. None of the currently thirty-two States parties is one of the leading art and antiquities market States (e.g. United States, United Kingdom, Japan and Germany never signed the UNIDROIT Convention; whereas France, Switzerland, the Netherlands and Russia signed but have not yet ratify).<sup>406</sup> In 2011, Denmark and Sweden ratified the Convention, and consequently the number of EU Member States that are party to the 1995 UNIDROIT Convention continues to steadily increase.<sup>407</sup>

Interestingly, given the lack of broad international support for the 1995 UNIDROIT Convention, the 1970 UNESCO Convention seems to have unexpectedly gained new attractiveness.<sup>408</sup> This is probably due to the fact that the ratification of the 1970 UNESCO Convention enables States to show political commitment in this field of international law, but

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<sup>404</sup> For detailed discussion on these options, see: Nafziger, "Cultural Heritage Law: The International Regime," p. 208.

<sup>405</sup> Cf. Siehr, "Globalization and National Culture: Recent Trends toward a Liberal Exchange of Cultural Objects," pp. 1067.

<sup>406</sup> The 1995 UNIDROIT Convention entered into force on 1 January 2005; for the current list of States Parties, see: <http://www.unidroit.org/english/implement/i-main.htm> (accessed 23 September 2011).

<sup>407</sup> So far the following States of the European Union have ratified the Convention: Cyprus (2004), Denmark (2011), Finland (1999), Greece (2007), Hungary (1998), Italy (1999), Lithuania (1997), Portugal (2002), Romania (1998), Slovakia (2003), Slovenia (2004), Spain (2002), Sweden (2011).

<sup>408</sup> Cf. Kuitenbrouwer, "The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance," p. 597, 602.

– unlike the self-executing UNIDROIT Convention – the 1970 UNESCO Convention allows States to make certain reservations and to employ a wide margin of discretion in implementing the Convention. While, for example, the UNIDROIT Convention does not recognize *bona fide* purchase as a valid ownership title,<sup>409</sup> many civil law States do;<sup>410</sup> thus, by ratifying the 1970 UNESCO Convention (instead of UNIDROIT) States do not have to amend their national legal norms that give the *bona fide* purchaser a valid title. Moreover, while the 1970 UNESCO Convention envisages diplomatic action and bilateral agreements at the *inter*-State level to achieve the return of cultural objects, the 1995 UNIDROIT Convention attempts to provide individuals with the right to bring an action before domestic courts for the restitution of stolen and the return of illegally exported cultural objects.<sup>411</sup> Although this Convention permits direct legal action, it can be assumed that States are reluctant to bring court actions in front of a foreign court in order to recover cultural materials.

In summarizing, the 1995 UNIDROIT Convention represents a major advancement in harmonizing and unifying otherwise conflicting national laws under the umbrella of linking public and private law provisions. It provides specific provisions pertaining to restitution and return and, moreover, stipulates general criteria based on interest considerations. In other words, by introducing these interests as additional conditions for the return of illegally exported cultural objects, the 1995 UNIDROIT Convention distinctly presumes the existence of universal values associated with cultural objects: namely, preservation, integrity and affiliation.<sup>412</sup> Although the 1995 UNIDROIT Convention does not explicitly intend to establish alternative solutions to current restitution practices, it established remarkably new standards. With regard to the question of whether the 1995 UNIDROIT Convention also confirms a general obligation to protect cultural heritage, such an obligation can be seen in the overall objective of “[...] improving the preservation and protection of the cultural heritage in the interest of all.”<sup>413</sup> Both elements – the interest considerations and the explicit focus on the

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<sup>409</sup> Cf. Article 6 of the 1995 UNIDROIT Convention.

<sup>410</sup> Whereas in common law States, the original owner of stolen property is entitled to recover his property not only from the thief but also from any *bona fide* purchaser that holds it, in civil law States the protection of the *bona fide* purchaser often prevails the original ownership rights. Cf. Schönenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung*, pp. 112.

<sup>411</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 374.

<sup>412</sup> See Merryman that speaks about “the injection of object-oriented values into the UNIDROIT Convention”, in: John Henry Merryman, "The Nation and the Object," *International Journal of Cultural Property* 3, no. 1 (1994): p. 71.

<sup>413</sup> See Preamble of the 1995 UNIDROIT Convention.

inherent aspects of preservation, integrity and affiliation – underline the existence of general interests as argued for by this thesis.

## 2.5 2001 UNESCO Underwater Cultural Heritage Convention

Although the matter of restitution and return is traditionally linked to tangible property on land, illicit trafficking increasingly affects cultural materials found on the seabed. Thus, restitution claims might be made concerning cultural materials appropriated from underwater archaeological sites, such as submerged ancient ports, shipwrecks, or even a single object of lost cargo.<sup>414</sup> In terms of international law, the question of who has the rights to claim objects found in underwater sites that have yet to be explored or have yet to be identified remains to be determined. In particular, the issue of the commercial exploitation of these sites is highly important, since the looting and destruction of underwater sites by commercial companies as well as private treasure hunters have increased over the past years.<sup>415</sup> This is mainly due to the fact that new diving technologies have made underwater sites more accessible and thus more vulnerable. Domestic legislation can only provide protection to underwater cultural sites located within territorial waters, that is, the part of the sea adjacent to the territory that falls within the exclusive jurisdiction of the coastal State. The lack of protection of underwater cultural sites in international waters has resulted in the adoption of the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage*<sup>416</sup> (hereinafter 2001 UNESCO Convention), which addresses the issue of underwater cultural heritage beyond coastal States' jurisdiction. Interestingly, the 2001 Underwater Convention employs the concept of 'heritage' instead of using 'property' in its phrasing, thus being in line with the 1972 UNESCO Convention. Underwater cultural heritage is defined in Article 1 of the 2001 UNESCO Convention as: "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least hundred years." The Convention's blanket protection, which applies to all vessels and shipwrecks older than hundred years, has been criticized as too broad, since it does not take the scientific, historical, or archaeological significance or non-significance

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<sup>414</sup> As, for example, in the case of the so-called 'Victorious Youth' (*Athleta di Fano*), a bronze statue at the Getty Museum in Los Angeles, requested by Italy; more details on the case, see Chapter Three, Section 2.10.

<sup>415</sup> For example, the legendary luxury liner 'Titanic' that sank in 1912 was not located until 1985. Several other examples and statistics can be found in the UNESCO information kit on Underwater Cultural Heritage, available at: [http://www.unesco.org/culture/underwater/infokit\\_en/](http://www.unesco.org/culture/underwater/infokit_en/) (accessed 23 September 2011).

<sup>416</sup> UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, (adopted 2 November 2001, entering into force 2 January 2009), 41 ILM 37 (2002).

into consideration.<sup>417</sup> Nevertheless, the Convention advocates the comprehensive protection of underwater cultural heritage *in situ* as a fundamental principle;<sup>418</sup> moreover, it requires that underwater cultural heritage should not be commercially exploited.<sup>419</sup>

Claims related to the restitution and return of cultural materials found on the seabed are likely to occur in two scenarios: in the first scenario, cultural materials recovered from the seabed eventually appear on the international antiquity market (e.g. many ancient coins are obtained from shipwrecks). Determining the place of origin of cultural objects found on land is already a difficult undertaking; this task becomes nearly impossible if the place of origin is located underwater. One recent example is the case of the so-called ‘Victorious Youth’ (*Atleta di Fano*). While the dispute between the Getty Museum and the Italian government over 52 archeological objects was resolved in 2007 through bilateral agreements, the dispute over the ‘Victorious Youth’, a bronze athlete dating back to the fourth century BC, remains unresolved, since neither party has yet been able to satisfactorily ascertain whether the bronze was found in Italian or international waters.<sup>420</sup>

The second scenario is related to the growing number of commercial salvage companies, which specialize in detecting underwater sites. Historic shipwrecks in deep waters are particularly valuable for two reasons: since these shipwrecks have been conserved and untouched by man often for centuries, they contain valuable historical information for archeologists; at the same time, since these ships frequently carried valuable cargo, they are especially prized by commercial companies and private treasure hunters. The concurrence of archeological and commercial interests may result in restitution disputes, as in *Black Swan* case.<sup>421</sup> In May 2007, the U.S. salvage company ‘Odyssey Marine Exploration’ announced its discovery of a colonial-era sunken vessel in the Atlantic Ocean. However, the company refused to reveal either the identity of the wreck (code-named *Black Swan*) or disclosed its exact location. The artifacts recovered included, among other objects, over 500,000 silver

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<sup>417</sup> Greenfield, *The Return of Cultural Treasures*, p. 231.

<sup>418</sup> Article 2(5) of the 2001 UNESCO Underwater Cultural Heritage Convention states: “The preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage”.

<sup>419</sup> Article 2(7) of the UNESCO Underwater Cultural Heritage Convention.

<sup>420</sup> For details on the bilateral agreement between the Getty Museum and Italy and the sculpture of the ‘Victorious Youth’ see, Chapter Three, Section 2.10.

<sup>421</sup> For detailed analysis of the case, see Amy Strecker, "Pirates of the Mediterranean? The Case of the Black Swan and Its Implications for the Protection of Underwater Cultural Heritage in the Region," *Conference Paper, 9th Mediterranean Research Meeting* (2008).

coins weighing more than 17 tons and hundreds of gold coins, making it the largest maritime discovery of its kind with an overall value at upwards of U.S. \$500 million.<sup>422</sup> Similarly to the previously mentioned case of the ‘Victorious Youth’, the point of contention in this case is the exact location of the shipwreck. While the company refuses to disclose the wreck’s identity and exact location, it asserts that the wreck was found in international waters. Spain, however, suspects that the wreck is located within Spanish territorial waters, and – given the cargo – that the ship is actually the *Nuestra Senora de las Mercedes*, a Spanish navy frigate that was returning from the then-Spanish colony of Peru when it was sunk by a British bombardment in October 1804.<sup>423</sup>

Since the vessel’s cargo had been transferred to Florida before the company announced the treasure’s discovery, Spain filed an ownership claim in the U.S. Federal Court in Tampa, Florida, where the company is based.<sup>424</sup> Spain demanded the disclosure of the identity and location of the shipwreck and the return of the salvaged cargo, since Spain had never abandoned its sovereignty over the vessel. The U.S. salvage company, however, claimed that, firstly, the salvage took place outside of territorial waters and thus was outside legal jurisdiction of any State, and, secondly, that the import of the vessel’s cargo into the United States was in conformity with salvage law and with the 1982 Convention on the Law of the Sea (UNCLOS), which gives precedence to the application of salvage law.<sup>425</sup> The court ordered the company to reveal its findings to Spain and ruled in December 2009 that the company should return the cargo to Spain. Much of the arguments centered on whether the vessel should be classified as merchant ship or warship, since under UNCLOS only the latter grants Spain clear rights to the vessel, its cargo, and any human remains at the site. The company appealed to the Eleventh Circuit Court of Appeals in May 2010. After hearings in May 2011, the case is still pending.<sup>426</sup> It is interesting to note that not only Spain but also two dozen descendants of merchants who were transporting goods on the *Mercedes* have laid

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<sup>422</sup> Stacy Mitch, *Treasure Hunters in Dispute with Spain*, 24 January 2008, in: ABC News, available at: <http://abcnews.go.com/US/WireStory?id=4184190&page=1> (accessed 23 September 2011).

<sup>423</sup> Lisa Abend, *Spain Claims Sunken Treasure*, 8 May 2008, in: Time World, available at: <http://www.time.com/time/world/article/0,8599,1738445,00.html> (accessed 23 September 2011).

<sup>424</sup> *Odyssey Marine Exploration, Inc. vs. The Unidentified, Shipwrecked Vessel or Vessels* (No.8, 2006 cv01685, 13 September 2006).

<sup>425</sup> Article 303(3) of the *United Nations Convention on the Law of the Sea* (UNCLOS), (signed on 10 December 1982, entering into force 16 November 1994), 1982, 21 ILM 1261.

<sup>426</sup> Further details and updated information available at: <http://www.shipwreck.net/blackswanlegal.php> (accessed 23 September 2011).

claim to a portion of the salvaged cargo, along with Peru, which also filed a claim to the cargo, arguing that the gold was most likely minted in what is today Peru's territory.<sup>427</sup>

Both presented cases demonstrate that there is a need for legal clarification pertaining to underwater cultural heritage. In addition to the archeological question of how to best protect underwater sites, the legal subsumption in this field is quite complex. Under private maritime international law,<sup>428</sup> the title to shipwrecks discovered outside the territorial waters of States is granted to the salvor (salvage law).<sup>429</sup> The 2001 UNESCO Convention reverses the rules of salvage law by stating that "any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds."<sup>430</sup> Although the 2001 UNESCO Convention prohibits the appropriation and commercial exploitation of cultural objects found underwater, and thus activities of salvage companies such as the one involved in the *Black Swan* case, it is, however, questionable whether the principle of *in situ* protection should generally prevail over other interests, such as property rights of descendents, or interests in the preservation of and access to such cultural material.

Since the 2001 UNESCO Convention still lacks wide-spread recognition of States,<sup>431</sup> and (like all other international treaties) does not apply retroactively, the potential number of restitution disputes not covered by the 2001 UNESCO Convention requires emendation through the inclusion of policy and interest-oriented considerations. The granting of property rights on a random basis, which occurs under current salvage law, is certainly out-dated, and thus needs revision in respect to the fundamental principle of the protection of cultural heritage. In light of the interest-oriented approach advocated by this thesis, the area of underwater cultural heritage is particularly interesting. In contrast to cultural objects found in and on land, cultural materials found in international waters corresponds exactly to the

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<sup>427</sup> For further discussion, see *Whose Treasure is it really?* in: The New York Times, 4 September 2007.

<sup>428</sup> Maritime law is a distinct body of private international law governing the relationships between private entities that operate vessels on the oceans. It must be distinguished from the Law of the Sea (UNCLOS), which is a body of public international law dealing with navigational rights, mineral rights, and jurisdiction over coastal waters governing relationships between States.

<sup>429</sup> Strecker, "Pirates of the Mediterranean? The Case of the Black Swan and Its Implications for the Protection of Underwater Cultural Heritage in the Region," p. 15.

<sup>430</sup> Article 4 of the 2001 UNESCO Underwater Cultural Heritage provides for the following exceptions: "(a) is authorized by the competent authorities, (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection."

<sup>431</sup> As of September 2011, the Convention has forty States parties, a list is available at: <http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha> (accessed 23 September 2011). Major international actors with maritime interests, such as the United States, the United Kingdom, and France have not yet ratified the 2001 UNESCO Underwater Cultural Heritage Convention.

concept of ‘common heritage of humankind’,<sup>432</sup> since objects found in international waters are outside of any State’s territory and national jurisdiction. On the basis of the concept of ‘common heritage of humankind’ and the presupposition that the protection of cultural heritage, both on land and underwater, is a common interest, alternative mechanisms could not only facilitate dispute resolutions but could also rectify current legal shortcomings.<sup>433</sup>

## 2.6 2003 UNESCO Intangible Cultural Heritage Convention

Although this thesis focuses on restitution and return of tangible, movable cultural objects, some remarks should be made on the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (hereinafter 2003 UNESCO Convention).<sup>434</sup> While the intangible aspects of an object have always existed within the tangible object itself, the 2003 UNESCO Convention must be credited with differentiating the two; as a result, the recognition and articulation of the importance of these intangible aspects of cultural heritage has facilitated their protection – independent of the protection of the physical object itself.<sup>435</sup> The Convention substantially replicates the 1972 UNESCO World Heritage Convention by imposing upon States the obligation to protect intangible heritage located in their territory.<sup>436</sup> Similarly to the 1972 UNESCO World Heritage Convention, the 2003 UNESCO Convention embeds this principle obligation of the States parties within a structure of international cooperation and assistance designed to assist the territorial State in the protection of cultural heritage (or to use the vocabulary of the 2003 UNESCO Convention, “the safeguarding of cultural heritage”).<sup>437</sup> In light of the success and wide recognition of the World Heritage List,<sup>438</sup> the 2003 Convention establishes a ‘Representative List of the Intangible Cultural Heritage of Humanity’ in order “to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity.”<sup>439</sup> Discussing the very complex and difficult question of what might fall within the

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<sup>432</sup> For details, see Chapter Four, Section 2.1.

<sup>433</sup> For detailed discussion and legal analysis, see Chapter Six, Sections 1 and 2.

<sup>434</sup> UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (adopted 17 October 2003, entering into force 20 April 2006) UNESCO Doc. 32C/Resolution 32, 2368 UNTS 1.

<sup>435</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 385.

<sup>436</sup> *Ibid.*, p. 373.

<sup>437</sup> *Ibid.*

<sup>438</sup> The 1972 World Heritage Convention is almost universally accepted (188 States parties as of 23 September 2011). For details see, *supra* Chapter Three, Section 2.3.

<sup>439</sup> Article 16 (1) of the 2003 Intangible Cultural Heritage Convention. The 2003 Intangible Cultural Heritage Convention, only eight years since its adoption, has already been ratified by 137 States parties (as of 23 September 2011).

scope of ‘intangible cultural heritage’ is outside the scope of this thesis.<sup>440</sup> However, for the limited purpose of this thesis, the rather vague definition given in Article 2 of the Convention should suffice: according to the Convention, intangible cultural heritage is defined as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”.

Against the backdrop of restitution and return, two observations on intangible cultural heritage that are relevant for the scope of this thesis must be made: firstly, tangible and intangible cultural heritage cannot be strictly separated, since – as expressed by the definition of Article 2 – intangible heritage has associated physical attributes.<sup>441</sup> Thus, aspects of intangible heritage might be of importance to restitution disputes, since restitution claims are frequently based on the symbolic value of objects and aspects of ‘cultural identity’ related to a wider human rights discourse.<sup>442</sup> Secondly, while at first glance, the Convention appears to take account of stakeholders other than States (namely, communities, groups and individuals that practice intangible traditions),<sup>443</sup> the 2003 UNESCO Convention primarily outlines the obligations and prerogatives of States.<sup>444</sup> Thus, the Convention conforms to the traditional pattern of State dominance in international law, even though the very subject matter dealt with by the Convention demands an approach that reflects the various stakeholders who created the oral traditions, expressions and social practices that the Convention intends to protect. The Convention does contain much more progressive language in its provisions on international cooperation and assistance, especially the section that demands that “the States parties recognize that the safeguarding of intangible cultural heritage is of general interest of humanity”.<sup>445</sup> On the basis of this assumption, States parties are requested to undertake “bilateral, sub-regional, regional and international cooperation” through, inter alia, “the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance to States parties in their efforts to safeguard the intangible cultural heritage.”<sup>446</sup> Both of these elements – the aspect of a ‘general interest of humanity’, and the

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<sup>440</sup> For details on the debate and the development leading to the adoption of the 2003 Convention, see Janet Blake, "On Developing a New International Convention for Safeguarding International Cultural Heritage," *Art, Antiquity and Law* 8, no. 4 (2003): p. 381.

<sup>441</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 373.

<sup>442</sup> For details, see Chapter Three, Sections 2.8 and 5.

<sup>443</sup> Article 2 of the 2003 UNESCO Convention.

<sup>444</sup> Cf. Francioni, "Culture, Heritage and Human Rights: An Introduction," p. 6.

<sup>445</sup> Article 19 (2) of the 2003 Intangible Cultural Heritage Convention.

<sup>446</sup> Article 19 (1) of the 2003 Intangible Cultural Heritage Convention.

concept of ‘international cooperation and assistance’ – will be explored further, since both are fundamental to the interest-oriented approach introduced by this thesis.<sup>447</sup>

## 2.7 Council of Europe Conventions on Cultural Heritage

In 2005, the Council of Europe adopted a ‘Framework Convention on the Value of Cultural Heritage for Society’.<sup>448</sup> This framework convention (not yet in force) focuses on ethics and principles pertaining to the use and development of European heritage under the influences of the globalization.<sup>449</sup> It is intended to underpin the currently existing legal instruments of the Council of Europe, namely the 1985 *Convention for the Protection of the Architectural Heritage of Europe* (Granada Convention);<sup>450</sup> the 1992 *European Convention on the Protection of Archaeological* (Valetta Convention, subsequently revised);<sup>451</sup> and the 1985 *European Convention on Offences relating to Cultural Property* (Delphi Convention).<sup>452</sup>

Whereas the first two instruments (namely the Granada and Valetta Conventions) promote conservation policies and guidelines by facilitating cooperation among the States parties, in order to enhance the exchange of experience and experts in the field of European cultural heritage, the 1985 Delphi Convention aims to protect cultural property against criminal activities. On the basis of “the concept of common responsibility and solidarity in the protection of European cultural heritage”,<sup>453</sup> the 1985 Delphi Convention creates a legal obligation to return cultural objects, which have been subject to theft, appropriation through violence or menace, or have been illegally obtained. Moreover, the destruction and damage of cultural property constitutes an offence under this Convention (Article 6 in conjunction with

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<sup>447</sup> For details, see Chapter Four, Section 2.1 and 2.3.

<sup>448</sup> Council of Europe Framework Convention on the Value of Cultural Heritage for Society, CETS No.199, signed in Faro, 27 October 2005, not yet entered into force, full text version available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/199.htm> (accessed 23 September 2011).

<sup>449</sup> See: Explanatory Report to the 2005 Framework Convention, available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/199.htm> (accessed 23 September 2011).

<sup>450</sup> European Convention for the Protection of the Architectural Heritage of Europe, CETS No. 121, signed in Granada, adopted 3 October 1985, entering into force December 1, 1987, full text version available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/121.htm> (accessed 23 September 2011).

<sup>451</sup> European Convention on the Protection of the Archaeological Heritage (revised), CETS No. 143, signed in Valetta, adopted 16 January 1992, entering into force 25 May 1995, full text version available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/143.htm> (accessed 23 September 2011).

<sup>452</sup> European Convention on Offences relating to Cultural Property, CETS No. 119, signed in Delphi, 23 June 1985, not yet entered into force; by 23 September 2011 six States have signed the convention (Cyprus, Greece, Italy, Lichtenstein, Portugal, Turkey, all in 1985), no ratifications have been made so far (3 ratifications needed for the entry into force), full text version available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/119.htm> (accessed 23 September 2011).

<sup>453</sup> See: Summary of the treaty, provided by the Council of Europe, available at: <http://conventions.coe.int/Treaty/en/Summaries/Html/119.htm> (accessed 23 September 2011).

Article 3, Appendix III). The 1985 Delphi Convention has distinguished itself from other international legal instruments insofar as it does not refer to national export regulations (as the 1970 UNESCO Convention and 1995 UNIDROIT Convention do) but instead delineates a list of offences set out in the Convention (Appendix III).<sup>454</sup> It is notably, however, that none of the forty-seven member States of the Council of Europe has yet ratified the 1985 Delphi Convention. This demonstrates, once more, the general reluctance of States (both on the international and regional level) to commit to a treaty which creates legal obligation in conjunction with the restitution of cultural materials.

## **2.8 Human Rights Obligations under Art. 27 UDHR and both Covenants**

Restitution claims by Holocaust survivors and their heirs as well as the growing number of claims by indigenous peoples and ethnic minority groups highlights the potential importance of restitution and return of cultural objects as a remedy for human right violations. Throughout history, the looting, removal, and destruction of cultural heritage have been an intrinsic part of campaigns designed to discriminate against, segregate and ultimately eliminate targeted groups.<sup>455</sup> Such strategies have been used in times of war, belligerent occupation, and colonization; they were used excessively during WWII, and more recently in Bosnia and Herzegovina through the intentional destruction of mosques, churches, historical bridges and libraries, as well as in Afghanistan, with the destruction of the Buddhas of Bamiyan. Although there is a shortage of legal provisions dealing with cultural rights within the framework of human rights law, the development of the law over the last fifty years has demonstrated that targeted destruction of cultural heritage is highly relevant to human rights law.<sup>456</sup> Therefore, restitution and return have been an important aspect of restorative justice following acts of genocide and gross violations of human rights, including racial and religious discrimination.

The 1948 *Universal Declaration of Human Rights*<sup>457</sup> (hereinafter UDHR) proclaims in Article 27 that all people have the right of free participation in the cultural life. In line with

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<sup>454</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 176.

<sup>455</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 9.

<sup>456</sup> Francioni, "Culture, Heritage and Human Rights: An Introduction," pp. 7.

<sup>457</sup> Universal Declaration of Human Rights (UDHR), adopted by the UNGA, Resolution 217 A (III), 10 December 1948, UN Doc. A/810 (1948), full text available at: <http://www.un.org/en/documents/udhr/> (accessed 23 September 2011).

this, Article 15 of the *International Covenant on Economic Social and Cultural Rights*<sup>458</sup> (hereinafter ICESCR) addresses the right: “to take part in cultural life and the right to enjoy the benefits of scientific progress and its applications”, and goes on to discuss “the conservation, the development and the diffusion of science and culture” that should be fully realized by the State members. The ‘right to participation in cultural life’ has also been confirmed in the *International Covenant on Civil and Political Rights*<sup>459</sup> (hereinafter ICCPR), which states that: “persons belonging to [ethnic, linguistic, or religious] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [...]” Although these rather general provisions do not specifically create about a right to restitution or return of cultural materials, it is self-evident that the absence of cultural materials forecloses participation in cultural life and precludes the exercise of this particular cultural right. Nigeria, for example, claims to have lost more than half of its cultural heritage through colonization.<sup>460</sup> These provisions entail a ‘negative obligation’ for all States to abstain from conduct aimed at the destruction, damage, alteration or profanation of cultural objects, while also imposing a ‘positive obligation’ to take steps to protect, conserve and develop cultural groups and communities and therein implicitly the cultural heritage of the groups and minorities living within the nation-State borders.<sup>461</sup>

However, provisions pertaining to cultural rights often do not establish substantive rights, with corresponding precise and unconditional obligations, but rather express common political commitments of a programmatic character.<sup>462</sup> Therefore, the link between cultural rights and ethnic minority groups, which has been established through human rights law, is essential to both the protection and restitution of cultural heritage, for two reasons. Firstly, States tend to protect only the cultural heritage that corresponds to the desired national State-image; cultural symbols that do not fit into this scheme are either neglected, or are simply destroyed. This phenomenon can be observed in many cases in which, for example, the current predominant religion does not coincide with former religious traditions (as was the case with the destruction of the Buddhist cultural past by the Taliban in Afghanistan, or the destruction of mosques in former Yugoslavia). Other examples are the ‘Cultural Revolution’

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<sup>458</sup> *International Covenant of Economic, Social, and Cultural Rights* (adopted 16 December 1966, entering into force 3 January 1976) 993 UNTS 3.

<sup>459</sup> *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entering into force 23 March 1976) 999 UNTS 171.

<sup>460</sup> Ekpo Eyo, "Nigeria, In: Return and Restitution of Cultural Property (Special Issue)," *Museum (UNESCO)* XXXI, no. 1 (1979): pp. 31.

<sup>461</sup> Francioni, "Culture, Heritage and Human Rights: An Introduction," pp. 11.

<sup>462</sup> *Ibid.*

in China between 1966 and 1968 or the stealthy ‘cultural cleansing’ in Middle and Eastern Europe following WWII and continuing through 1989, during which many churches, cloisters, castles and symbols of religious and national identity were demolished. Therefore, the obligation of States to protect, in particular, the culture and therein the cultural heritage of minorities and ethnic groups is fundamental in terms of the general protection of cultural heritage.

Secondly, for many indigenous peoples and minorities, decolonization was an incomplete process that merely replaced one occupier, the former colonial power, with another, the newly independent nation-State.<sup>463</sup> Furthermore, during the 1950s, 1960s and even 1970s international initiatives for the protection and restitution of cultural objects refer exclusively to the State as the formal claimant. The limitations in international law on the ability of indigenous peoples and ethnic minority groups to obtain claimant status have a direct impact on their ability to preserve and develop their cultural identity. These groups could only rely on the rights afforded individual members under the international human rights framework, or the benevolence of the relevant State to provide a measure of protection for their collective identity.<sup>464</sup> States rarely claim cultural objects on the behalf of indigenous peoples located within their territory, and are even less likely to assign property rights to minority groups after requested cultural materials have returned. Therefore, the acknowledgment of the right of indigenous peoples and ethnic minority groups to act on their own behalf as claimants for the restitution and return of cultural materials is a precondition to their full right of participation.<sup>465</sup>

## **2.9 Bilateral Agreements: *intra*-and *inter*-State Provisions**

International cultural heritage disputes are frequently resolved not on the legal basis of international treaty law (such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention), but through bilateral agreements. These bilateral agreements might establish a legal obligation to return certain cultural materials, or might facilitate the return of cultural objects without referring to any legal obligations pertaining to restitution and return. Two major categories of bilateral agreements can be identified: *intra*-State agreements, which

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<sup>463</sup> Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, p. 198.

<sup>464</sup> *Ibid.*, p. 199.

<sup>465</sup> For a discussion on the return of cultural objects to a people or community, see *supra* Chapter Two, Section 4.5; for a discussion on indigenous peoples, ethnic and religious groups as stakeholders in restitution disputes, see Chapter Five, Section 1.5.

address cultural objects removed within the territory of a State (for example due to war or the colonization of indigenous peoples within the own territory); and *inter*-State agreements, which deal with cultural objects removed across former or current State borders (for example due to war, foreign or colonial occupation and State succession). Within the latter category of *inter*-State agreements, provisions for restitution and return can be found in the provisions of peace treaties, and, much less frequent, in bilateral agreements dealing with the removal of cultural materials during the period of colonization. Whereas peace treaty provisions on restitution and return are traditional in international law, the negotiation of bilateral agreements between States and private actors (such as museums and other art-holding institutions) in order to resolve restitution disputes is a rather recent phenomenon, and one which may increasingly gain international importance, as States cede their position as the exclusive stakeholder in international law.<sup>466</sup>

### 2.9.1 Peace Treaty Provisions

As early as in the 1648 Treaty of Westphalia,<sup>467</sup> provisions for the return of appropriated cultural objects have been a part of peace treaties.<sup>468</sup> Since at least the nineteenth century, peace treaties that redrew territorial boundaries frequently included provisions for the return or exchange of selected cultural materials. Early examples, such as the 1815 Congress of Vienna<sup>469</sup> as well as the 1919 Versailles Peace Treaties,<sup>470</sup> included lists of specific items deemed of particular significance, including paintings, libraries, and archives. Nevertheless, these treaties generally contained no formal obligation for return or compensation.<sup>471</sup> It was only gradually that provisions pertaining to restitution and return developed so that they applied generally rather than to a specific object or set of selected objects. In contrast to the predetermined lists in early peace treaties, treaties such as the 1919 Saint-Germain-en-Laye<sup>472</sup> and the 1921 Treaty of Riga<sup>473</sup> between Poland and the Soviet Union<sup>474</sup> recognized a general

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<sup>466</sup> For a detailed discussion on the various stakeholders in international cultural heritage disputes, see Chapter Five, Section 1.

<sup>467</sup> Treaty of Westphalia, signed at Münster, Germany in 1648, Article CXIV.

<sup>468</sup> Prott, "The History and Development of Processes for the Recovery of Cultural Heritage," p. 175.

<sup>469</sup> The Final Act of Vienna, embodying all the separate treaties, signed on 9 June 1815.

<sup>470</sup> Peace Treaty of Versailles between the Allied Powers of WWI and Germany, 28 June 1919.

<sup>471</sup> The Peace Treaty of Versailles provided provisions on return (Article 245), compensation *in specie* by delivery of similar objects, and compensation by reunification of dispersed parts of two triptychs (Article 247); see also: Siehr, "International Art Trade and the Law," p. 116.

<sup>472</sup> Peace Treaty of Saint-Germain-en-Laye between the Allied Powers of WWI and Austria, 10 September 1919.

<sup>473</sup> Peace Treaty of Riga between Poland and Soviet Russia/Soviet Ukraine, 18 March 1921.

<sup>474</sup> The Soviet Union was to surrender Polish national treasure and works of art acquired from Polish territories after 1772 (for example the objects associated with the Zaluski Library).

right to restitution by enunciating principles and processes for the resolution of claims.<sup>475</sup> Such general provisions on the restitution and return of removed cultural materials were also included in the 1947 Peace Treaties between the Allied and the (with Nazi-Germany) associated powers after WWII.<sup>476</sup> It is notable, however, that no such provisions were included in the peace treaty with Japan, and thus the return of cultural materials appropriated by Japanese troops from China and Korea still remains unresolved.<sup>477</sup>

An example of a successful restitution case based on a peace treaty provision is the return of the Obelisk of Axum (or Aksum) from Italy to Ethiopia in 2005. The return was mandated by the 1947 Peace Treaty, in which Italy renounced sovereignty over its former colonies of Libya, Eritrea, and Italian Somaliland, and subsequently recognized their sovereignty and independence. In addition, Italy was required to return all works of art, religious objects, archives, and objects of historical value removed after 3 October 1935.<sup>478</sup> In accordance with Article 37 of the Peace Treaty, Italy promised to “restore” the obelisk within eighteen months, vowed to do so again within six months in a 1956 Agreement on the settlement of economic and financial matters, and renewed its promise a third time in a joint statement in 1997.<sup>479</sup> Neither the United Kingdom nor the United States sought to enforce the provision of the 1947 Peace Treaty,<sup>480</sup> and despite several requests by the Ethiopian government over these decades the obelisk remained in Rome until April 2005.

The 152 ton, 23.5 meter stone funeral stele, dating back to 100-300 B.C., was removed by occupying Italian troops and shipped to Rome to celebrate Mussolini's fifteenth year of power in 1937. The obelisk, which had broken in five fragments as a result of an earthquake centuries earlier, was transported by the Italian troops over land from Axum to Massawa, by ship to Naples and was finally brought to Rome to the *Piazza di Porta Capena* in 1937 and erected in front of what was back then the Italian Ministry of Colonies, where it stood as a reminder of former Italian colonial ambitions and as a symbol of Mussolini's annexation

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<sup>475</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 7.

<sup>476</sup> The Paris Peace Conference (29 July-15 October 1946) resulted in the Paris Peace Treaties between the Allied and the Associated Powers, respectively Bulgaria (Art. 22), Finland and Hungary (Art. 24), Italy and Romania (Art. 23), respectively. They were signed on 10 February 1947, entering into force 15 September 1947.

<sup>477</sup> Protz, "The History and Development of Processes for the Recovery of Cultural Heritage," p. 183.

<sup>478</sup> Apart from the return of the Obelisk of Axum in 2005, Italy also returned the throne of Emperor Menelek II to Ethiopia on the basis of the 1947 Peace Treaty and subsequent negotiations in 1982.

<sup>479</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 358.

<sup>480</sup> Protz, "The History and Development of Processes for the Recovery of Cultural Heritage," p. 183.

policy in the 1930s and 1940s.<sup>481</sup> Since 1951, this building has served as headquarters of the United Nations Food and Agriculture Organization (FAO).

A number of arguments were advanced against returning the stele, including the political instability of Ethiopia and the resulting uncertainty about the country's ability to preserve the obelisk, the logistical challenges of safely returning it, and the high cost of transport. Instead, Italy suggested extending the international territory of the FAO in order to include the Obelisk as a gift of Ethiopia to the organization. Since the costs of returning of the obelisk had been estimated at six million Euros, Italy also offered to invest this amount in social projects in Ethiopia. The Ethiopians, however, refused both proposals and in turn pointed to the highly damaging air pollution in Rome and the outstanding importance of the obelisk to their national heritage.<sup>482</sup> The monolith is one of the most important surviving artifacts of a pre-Christian site in Northern Ethiopia in the Tigray region close to the Eritrean border. Axum, founded around 100 B.C., was the capital of the Kingdom of Axum that flourished as a major trading centre from the fifth century B.C. to the 10th century A.D. At its height, Axum was the heart of a kingdom that extended across the areas of modern Ethiopia, Eritrea, Sudan, Somalia, and Yemen; as such, the Kingdom of Axum was the most powerful State between the Eastern Roman Empire and Persia of the time. Even long after its political decline in the 10th century AD, Ethiopian emperors continued to be crowned in Axum. In 1980, the ancient site of Axum, with its monolithic obelisks, giant stele, royal tombs, and ruins of ancient castles, was inscribed in the World Heritage List under the 1972 UNESCO World Heritage Convention.<sup>483</sup>

In 2002, lightning struck the obelisk in Rome, which had no lightning rod attached, and broke off several feet of granite, which effectively undercut the argument that Italy could take better care of the artifact, and strengthening the Ethiopian case for return. After a renewed promise in 1997 to enhance bilateral relations on the basis of the 1947 Peace Treaty, Italy and Ethiopia defined the procedures for the return in a joint statement and Ethiopia formed a national committee for the return of the obelisk. This committee, working with the International Centre for the Study of the Preservation and Restoration of Cultural Property

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<sup>481</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 357.

<sup>482</sup> Alberto Sbacchi, "Italia E Etiopia: La Rilettura Del Periodo Coloniale E La Valutazione Delle Sue Conseguenze Sul Paese Africano," *I Sentieri della Ricerca* 6(2007): p. 192.

<sup>483</sup> World Heritage List, Aksum, Ethiopia, date of inscription: 1980 (Ref. 15); further information available at: <http://whc.unesco.org/en/list/15> (accessed 23 September 2011).

(ICCROM), carried out research and technical analyses to prepare the segmentation and transportation of the obelisk to Ethiopia.

The obelisk was dismantled into three segments in November 2003 and remained in a warehouse near Rome's airport until April 2005. In November 2004,<sup>484</sup> the Italian government concluded a Memorandum of Understanding with Ethiopia, in which Italy agreed to finance the transportation of the obelisk to Ethiopia, the preparatory studies and archaeological conservation undertaken by UNESCO (phase 1), as well as the reinstallation of the obelisk *in situ* (phase 2). The total budget for activities implemented by UNESCO was estimated at U.S. \$ 4.78 million,<sup>485</sup> of which U.S. \$ 2.83 million was provided by Italy.<sup>486</sup> Both States requested UNESCO's cooperation in returning the obelisk and agreed in light of the 1972 UNESCO World Heritage Convention that UNESCO experts should oversee the reinstallation. Therefore, in June 2007 UNESCO signed a contract with an Italian construction company to carry out the reinstallation, including the construction of a foundation for the obelisk and a temporary steel tower for lifting the three separate segments and positioning them. In a final step (phase 3) the obelisk would be cleaned and restored, and the steel support structure dismantled and removed.<sup>487</sup>

The return of the obelisk encountered a series of obstacles: access through the nearby Eritrean port of Massawa – which was the port through which the obelisk had originally left Ethiopia in 1937 – was impossible due to the strained relations between Eritrea and Ethiopia. Therefore, a Russian Antonov was needed to carry the heaviest object ever to be transported by air. The runway at Axum Airport had to be upgraded and extended because it was too short for a cargo plane of this size, and streets and bridges had to be renovated to bear the load. Upon the arrival of the third segment in Axum in April 2005, archaeologists announced the discovery of a large network of underground tombs beneath the site where the obelisk was to be erected, so the stele was put in storage in January 2006. Meanwhile, the original footings

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<sup>484</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 358.

<sup>485</sup> See: Press Kit Axum Obelisk Reinstallation Project, Fact Sheet UNESCO Culture Sector by World Heritage Centre, May 2008, available at: <http://whc.unesco.org/uploads/news/documents/news-436-2.doc> (accessed 23 September 2011).

<sup>486</sup> See: UNESCO World Heritage Center Press Release, "UNESCO launches the re-erection project of the Axum Obelisk", 19 June 2007, available at: <http://whc.unesco.org/en/news/350/> (accessed 23 September 2011).

<sup>487</sup> See: Press Kit Axum Obelisk Reinstallation Project, Fact Sheet UNESCO Culture Sector by World Heritage Centre, May 2008, available at: <http://whc.unesco.org/uploads/news/documents/news-436-2.doc> (accessed 23 September 2011).

of the obelisk were discovered, making it possible to re-erect the monument at its original location. Some experts, however, suggested that it would be fare better in a museum.<sup>488</sup> The continued delay was not only expensive, but also seemed to demonstrate a lack of political will on the Ethiopian side. A petition was drafted to the Ethiopian Minister of Culture and Tourism, stating: “We, Ethiopians, groups and concerned individuals, are signing this petition to express our frustration over the delays in re-erecting our returned Axum Obelisk. If the Axum Obelisk could stand in Rome, it cannot be allowed to lie on the ground in Axum. [...] We also request the re-erection of all the fallen obelisks of Axum, to restore the city to its former greatness”.<sup>489</sup>

The reinstallation works at Axum started in October 2007, two years after the stele’s arrival. On 31 July 2008, the third and last segment of the obelisk was mounted, and on 4 September 2008 the inauguration ceremony for the Axum Obelisk has taken place.<sup>490</sup> In October 2008, the UNESCO Executive Board expressed its “deep appreciation for the successful completion of the project and congratulated Italy and Ethiopia for their exemplary cooperation”.<sup>491</sup> After the delay of about 57 years from the deadline set out in the 1947 Peace Treaty, Italy had complied with its obligation under the Peace Treaty. However, two questions arise: firstly, whether Italy had an obligation to return the Obelisk not only under the 1947 Peace Treaty provisions but also under customary international law, and secondly, whether Italy was required not only to return but also to re-erect the obelisk, since the re-erection was a major part of the costs.

It could be argued that since the obelisk was appropriated from Ethiopian soil by occupying Italian troops in 1937, Italy was bound by the provisions of the 1899<sup>492</sup> and 1907<sup>493</sup>

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<sup>488</sup> Angela M.H. Schuster, “Axum Obelisk To Go Home”, 27 May 1998, available at: <http://www.archaeology.org/online/news/axum.html> (accessed 23 September 2011).

<sup>489</sup> The ‘Reerect Axum Obelisks Petition’ to the Ethiopian Ministry of Culture and Tourism was created by Members of Axum Alumni Association and written by Beyene Haile, Kokeb Tarekegn, Richard Punkhurst, Andrew Lawrence, available at: <http://www.petitiononline.com/Axum2000/petition.html> (accessed 23 September 2011).

<sup>490</sup> See: UNESCO World Heritage Center Press Release, “Inauguration Ceremony for the Axum Obelisk”, 5 September 2008, available at: <http://whc.unesco.org/en/news/458>; “Mission Accomplished: Aksum Obelisk successfully reinstalled”, 1 August 2008, available at: <http://whc.unesco.org/en/news/456>; and “Second block of Aksum Obelisk successfully reinstalled”, 28 July 2008, available at: <http://whc.unesco.org/en/news/455> (accessed 23 September 2011).

<sup>491</sup> UNESCO Executive Board, Decisions Adopted by the Executive Board at its 180<sup>th</sup> Session, doc. 180 EX/Decisions of 17 November 2008, p. 20.

<sup>492</sup> 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 (The Hague, adopted 29 July 1899), entering into force September 4, 1900, reprinted in AJIL, vol. 1 (1907), p. 129.

Hague Conventions. While there was no formal state-of-war declared between Ethiopia and Italy, one could say that the illegality of the removal resulted from the fact that the bellicose annexation of Ethiopia was itself illegal.<sup>494</sup> This is underlined by the fact that the Council of the League of Nations condemned the annexation of Ethiopia on 7 October 1935, based on the argument that Italy had resorted to armed aggression in violation of the Covenant of the League of Nations.<sup>495</sup> On this basis, it could be argued that Italy was obliged to return the obelisk not only on grounds of the 1947 Peace Treaty, but also because it was obliged under customary international law to do so. However, the question remains as to whether Italy was similarly bound to re-erect the obelisk. The general aim of restitution is the full restoration of the former state of affairs (*restitutio in integrum*).<sup>496</sup> Along the same vein, the 1947 Peace Treaty directs Italy to “[restore] the obelisk within eighteen months”. The obligation to “restore” might comprise – to a certain degree – preservative measures. Generally speaking, however, this obligation does not include any further measures, such as the re-erection. Italy, however, voluntarily improved the former situation *in situ* by re-erecting the obelisk, which was on the ground in fragments when it was expropriated in 1937. Thus, the re-erection can be considered as a sort of reparation for the delayed return.<sup>497</sup>

## 2.9.2 Bilateral *inter-State* Agreements regarding Restitution and Return

Several other bilateral agreements regarding the return of objects removed from their place of origin to a former colonial power have been negotiated, such as the agreement between France and Laos (1950) concerning Laotian objects of art; an agreement between France and Algeria (1968), which led to the return of some 300 paintings; and an 1977 arrangement between the Netherlands and Indonesia for the return of Buddhist and Hindu statues. In addition, Belgium returned 114 ethnographic works to Zaire (now Democratic Republic of the Congo) in 1970 and several thousand additional cultural items in 1977 on the basis of an agreement between the Royal Museum of Central Africa, Tervuren, and the National Museum of Kinshasa. However, the Belgian Royal Museum has since opposed any further restitution, because a large number of the returned objects were stolen amid political

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<sup>493</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, adopted 18 October 1907, entering into force 26 January 1910), reprinted in AJIL, vol. 2 (1908), p. 90.

<sup>494</sup> Cf. Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 358.

<sup>495</sup> Ibid.

<sup>496</sup> Cf. Jote, *International Legal Protection of Cultural Heritage*, p. 262.

<sup>497</sup> See: Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 360.

turmoil in Congo; these objects are now said to have reappeared on the international commercial antiquity market.<sup>498</sup> Although this agreement is remarkable in formal terms (as it was concluded directly between the museums without governmental involvement), it failed in practical terms. This disappointing result convinced the Royal Museum that the wholesale return of objects collected during the colonial era is not a viable option.<sup>499</sup>

Other examples include the agreements between France and Iraq in 1980 that arranged a mutual long-term loan under which fragments of Babylonian codes that had been held in the Louvre for study were returned to the National Museum in Baghdad (and which have been partially missing since 2003); the 1981 ‘exchange agreement’ between South Africa and Zimbabwe arranging the return of carved birds that were held in the South African Museum of Cape Town; or, more recently, the 2006 agreement between France and Nigeria concerning three terracotta Nok and Sokoto statuettes. The latter recognizes Nigerian ownership of the statuettes in exchange for a twenty-five year renewable loan of the three statuettes to the Quai Branly Museum in Paris.<sup>500</sup>

### **2.9.3 Bilateral *inter-State* Agreements regarding National Import Restrictions**

In consequence of the 1970 UNESCO Convention, several States (most notably the United States and Switzerland) have concluded bilateral agreements specifying the provisions of the 1970 UNESCO Convention with regard to import restrictions in relation to a particular State and to a specific designated group of cultural materials. Within these bilateral agreements, the States parties normally agree to conduct all necessary administrative and judicial proceedings under their national legal system, in order to facilitate the return of stolen or illicitly imported cultural materials. The major shortcomings of these bilateral agreements are twofold: firstly, they frequently apply only to designated categories of cultural objects (e.g. archaeological or ethnological materials), and secondly, they apply only to States with whom a bilateral agreement has been concluded, since only these States are entitled to place a claim for the return of cultural materials under the provisions of the 1970 UNESCO Convention.

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<sup>498</sup> For many other instances of return, see: Jeanette Greenfield, *The Return of Cultural Treasures*, p. 371.

<sup>499</sup> Guido Gryseels, Assuming our Responsibilities in the Present, in: ICOM News, No. 1 (2004), p. 8. or: [http://icom.museum/pdf/E\\_news2004/p8\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p8_2004-1.pdf) (accessed 23 September 2011).

<sup>500</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 3. For a detailed discussion on the case of the Nok and Sokoto statuettes, see Chapter Six, Section 3.2.

Whereas Switzerland has been utilizing bilateral agreements only since 2005 (ratification of the 1970 UNESCO Convention in 2003),<sup>501</sup> the United States have a much longer tradition in concluding bilateral agreements (starting with the ratification of the UNESCO Convention in 1972). Bilateral *inter*-State agreements have been set up by the U.S. State Department with several States, mainly in Latin-America, in order to prevent the import of designated cultural materials originating from the contracting State party. Early examples include: a treaty of cooperation with Mexico (1970),<sup>502</sup> Peru (1981),<sup>503</sup> and Guatemala (1984).<sup>504</sup> Interestingly, these early bilateral agreements did not fall under the provisions of the 1970 UNESCO Convention, since the national legislation implementing the Convention, which could have provided a legal basis for these agreements was not passed until 1983. The ‘Convention on Cultural Property Implementation Act’ (CPIA),<sup>505</sup> allows the U.S. State Department in line with Article 9 of the UNESCO Convention to impose import restrictions on stolen and illicitly exported archaeological and ethnological objects when so requested by States that are a party to the 1970 UNESCO Convention.<sup>506</sup> Upon the recommendation of the ‘Cultural Property Advisory Committee’ (CPAC), the U.S. State Department evaluates these requests and, if appropriate, may enter into a bilateral agreement with the requesting State.<sup>507</sup>

Originally, the United States limited the enforcement of foreign export restrictions exclusively to temporary so-called ‘emergency actions’ pertaining to a very specific category of cultural materials (e.g. textiles or stone sculptures from a certain region). Such emergency import restrictions have been concluded, for example, with: Bolivia (1989-1996) on the import of antique Aymara textiles from the region of Coroma; Cambodia (1999-2002) on the import of Khmer stone sculpture and architectural elements; and Cyprus (1999-2005) on the import of Byzantine ecclesiastical and ritual ethnological material.<sup>508</sup> Although the official

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<sup>501</sup> Switzerland has concluded bilateral agreements with Colombia, Egypt, Greece, Italy and Peru (the agreement with Peru has not yet entered into force); for further information see, *supra* Chapter Three, Section 2.2.

<sup>502</sup> Treaty of Cooperation between the United States and Mexico Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties (Art. III), signed July 17, 1970, reprinted in: ILM 9 (1970), pp. 1028, effective from 19 July 1970 until 19 July 1972 (expired).

<sup>503</sup> Agreement between the United States and Peru for the Recovery and the Return of Stolen Archaeological, Historical and Cultural Properties, signed 15 September 1981.

<sup>504</sup> Treaty for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties between the United States and Guatemala, signed 21 May 1984.

<sup>505</sup> Convention on Cultural Property Implementation Act (CPIA) 19 U.S.C. 2601 (1983).

<sup>506</sup> For details on the limited implementation of the 1970 UNESCO Convention in the United States, see *supra* Chapter Three, Section 2.2.

<sup>507</sup> A list of the bilateral agreement concluded between the U.S. and foreign States is available at: <http://exchanges.state.gov/heritage/culprop.html> (accessed 23 September 2011).

<sup>508</sup> A list of the emergency actions concluded between the U.S. and foreign States is available at: <http://exchanges.state.gov/heritage/culprop.html> (accessed 23 September 2011).

terminology used in these bilateral agreements continues to be ‘emergency actions’, these emergency import restrictions have lasted several years, and may be renewed if the threat to the designated category of cultural materials remains current. In recent years, however, most ‘emergency actions’ have been expanded to become bilateral agreements (so-called Memorandum of Understanding) that now impose import restriction not only for one specific category of cultural materials, but rather for various categories of archaeological or ethnological materials and frequently include additional provisions on cultural exchanges, technical assistance and loan programs (generally concluded for a period of five years with the option of renewal).<sup>509</sup> The overall intention of such bilateral agreements is therefore, “not only to impose import restrictions, but to promote international collaboration in developing sustainable safeguards for cultural heritage, and increased international access to it for cultural, educational, and scientific purposes”.<sup>510</sup> There are two main requirements for establishing such bilateral agreements: firstly, the requesting State must demonstrate that its cultural patrimony is in jeopardy; and, secondly, it must demonstrate that it has taken measures to protect its cultural patrimony (e.g. by creating inventories and protecting archeological sites).<sup>511</sup>

Since 1995, the United States has primarily concluded bilateral agreements pertaining to import restrictions (instead of ‘emergency actions’) with various States parties to the UNESCO Convention, including: El Salvador (1995), Peru (1997), Bolivia (2001), and Colombia (2006) on pre-Columbian archaeological objects and Colonial and Republican period ethnological materials; Guatemala (1997), Nicaragua (2002), and Honduras (2004) on pre-Columbian archaeological objects, Iraq (1990) on any archaeological and ethnological materials; Mali (1997) on archaeological materials dating from the Paleolithic Era (Stone Age) to approximately the mid-eighteenth century; Canada (1997-2002) on Indian archaeological and ethnological materials; Cambodia (2003) on archaeological materials dating from the Bronze Age to the end of the Khmer Empire; Italy (2001) on pre-Classical, Classical, and Imperial Roman archaeological materials; Cyprus (2002) on Pre-Classical and Classical archaeological objects; and China (2009) on archaeological materials from the Paleolithic Period through the Tang Dynasty, and monumental sculpture and wall art that is at

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<sup>509</sup> Kouroupas, "Die Unesco-Konvention Von 1970: Die Erfahrungen Der Vereinigten Staaten," p. 157.

<sup>510</sup> Citation taken from the homepage of the U.S. Department of State, Bureau of Educational and Cultural Affairs, which is available at: <http://exchanges.state.gov/heritage/culprop.html> (accessed 23 September 2011).

<sup>511</sup> See Section 2602 U.S. CIPA. For further details on the specific requirements under the CIPA, see *supra* Chapter Three, Section 2.2.

least 250 years old. With the exception of the bilateral agreement with Canada that expired and was not extended, most agreements are valid at least until 2012.<sup>512</sup> As a consequence of these agreements, the designated cultural materials can enter the United States only if accompanied by an official export permission issued by the respective State authority, or by verifiable documentation demonstrating that the exportation occurred prior to the date upon which the agreement came into force. Notably, the burden of proof lies with the importer, not with the requesting State.<sup>513</sup> If these requirements are not met, the import is assumed to be illegal, and the object must consequently be returned to the State of origin. The scope of these bilateral agreements, however, is not confined to the return of illegally exported cultural objects, but also encompasses the establishment of a broader cooperation between the contracting parties through loans, exhibitions, joint research programs and excavation campaigns.<sup>514</sup> Similar cooperative provisions in the context of returning cultural objects have also been included in recent bilateral agreements between States and private actors.

## **2.10 Bilateral Agreements between States and Non-State Actors**

Bilateral agreements between States and private actors regarding the return of cultural objects are a quite recent phenomenon. As this section will demonstrate, this trend is associated with the emergence of other non-State actors in this field of international law, who act on their own behalf on the international level. Memorandum of Understanding (MoU) or agreements are concluded between the government and a foreign – mainly private – museum or cultural institution. Although they cannot be considered as international treaties in the narrowest sense, they do correspond with the international contracts that are regularly concluded between States and private companies, for example, for the exploitation of natural resources, such as carbon or oil.<sup>515</sup>

In contrast to agreements between State actors, the conclusion of bilateral agreements between States and non-State actors for the resolution of disputes has several advantages: (1) the requesting State can overcome the obstacle posted by the fact that the State in which the objects in question are located has no or little legal means to compel its citizens, private museums, or other privately run institutions to return claimed objects; (2) the requesting State

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<sup>512</sup> For further details see the list of concluded bilateral agreement between the U.S. and foreign States, available at: <http://exchanges.state.gov/heritage/culprop.html> (accessed 23 September 2011).

<sup>513</sup> Kouroupas, "Die Unesco-Konvention Von 1970: Die Erfahrungen Der Vereinigten Staaten," p. 157.

<sup>514</sup> See, for example, the 2001 U.S.-Italian Memorandum, Art II, para. E); Cf. Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 379.

<sup>515</sup> Ibid.

can overcome the obstacles posed by the uncertainty of litigations before a foreign court (e.g. in terms of costs, the burden of proof, and statutes of limitation);<sup>516</sup> (3) such agreements allow non-State actors, namely museums and art holding institutions, to preserve their international reputation as truthful partner that does not engage in pillage but instead participates in combating the illicit trafficking in cultural materials; and (4) both parties can utilize negotiations as a mean through which they can establish and strengthen their relationship for future cooperation and cultural exchange.<sup>517</sup>

There are several recent examples of agreements regarding the return of cultural objects. The bilateral agreement between the Yale University and Peru, that was concluded in 2007, failed in 2008,<sup>518</sup> and was subsequently renewed and carried out in 2010/2011, which led to the return of some 400 archaeological items from Machu Picchu (including whole skeletons and bones, pottery, ceramics, decorative objects and tools), which had been excavated by U.S. archeologists at the Machu Picchu in 1911 and 1915. The agreement includes provisions on cultural cooperation, such as the construction of a new museum and a research center at the National University of San Antonio Abad in Cuzco, Peru, traveling exhibits, and the share of rights in the research and use of the collection.<sup>519</sup> Another example includes the agreement reached between the University of Heidelberg and Greece in 2006 regarding the return of a small piece of the Parthenon frieze,<sup>520</sup> and the agreements between

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<sup>516</sup> For a detailed discussion on legal obstacles, see Chapter Six, Section 1.

<sup>517</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 380.

<sup>518</sup> In 2008, the government of Peru filed a lawsuit against Yale University to obtain the return of the Machu Picchu artifacts, only one year after the parties appeared to have settled the dispute, see *Republic of Peru vs. Yale University*, Case No.1:2008cv02109, 5 December 2008.

<sup>519</sup> See the Joint Statement by the government of Peru and Yale University of 14 September 2007, available at: <http://opa.yale.edu/news/article.aspx?id=2376>; more details available at: <http://news.bbc.co.uk/2/hi/americas/6998408.stm> (accessed 23 September 2011). Despite the bilateral agreement signed in 2007, Yale University was sued by Peru before U.S. Federal court in December 2008. In the lawsuit, Peru was seeking a declaration of its ownership of the Incan relics (excavated in 1911 and 1915) and to receive a portion any profits Yale made from exhibiting the pieces; see: <http://www.avvo.com/news/peru-sues-yale-university-over-artifacts-88.html> (accessed 23 September 2011). An out-of-court settlement was reached in November 2010.

<sup>520</sup> The Heidelberg University's Museum of Antiquities returned a piece of the Parthenon sculptures (8x11 cm in size) to Greece in January 2006. The return has been made "exclusively in recognition of the significance of the Parthenon as part of the world's cultural heritage". Although it is not entirely known how the fragment came to Heidelberg, it is most likely that it was originally acquired as a souvenir by a German visitor in Athens. The fragment was registered in the university's antiquities collection in 1871. Interestingly, at the back of the fragment is a modern incised inscription, in Greek, with the word "Parthenon". Thus, it is most likely that such small fragments were rather frequently sold to foreign tourists as souvenirs. Further details available at: <http://www.greekembassy.org/Embassy/content/en/Article.aspx?office=3&folder=218&article=16659> and <http://news.bbc.co.uk/2/hi/europe/6063970.stm> (accessed 23 September 2011).

Italy<sup>521</sup> and five major U.S. museums: namely, the Boston Museum of Fine Arts (2006),<sup>522</sup> the Metropolitan Museum of Art in New York (2006),<sup>523</sup> the J. Paul Getty Museum in Los Angeles (2007),<sup>524</sup> the Princeton University Art Museum (2007),<sup>525</sup> and the Cleveland Museum of Art (2008).<sup>526</sup> Of these, the only published agreement is that between Italy and the Metropolitan Museum of Art (MET).<sup>527</sup> It is, however, most likely that the other agreements are similar, especially because the general terms of the agreements were revealed in some detail through the press releases made in conjunction with the returns.<sup>528</sup>

The U.S.-Italian agreements reached in 2006-2008 are quite remarkable not only in legal terms but also in terms of reaching alternative solutions in restitution disputes. In addition to the general advantages of such bilateral agreements mentioned above, the following five particular aspects of the U.S.-Italian agreements are particularly noteworthy: (1) the agreements constitute efficient out-of-court settlements and thereby avoid protracted litigation and legal expenses; (2) the major part of the disputed objects of rather dubious provenance (nearly all of them most likely obtained through illicit excavations) were returned; (3) the objects were returned in exchange for the Italian commitment to loan out similar works, some of which are specifically listed in the agreements;<sup>529</sup> (4) the agreements combined the return with extensive cultural collaborations, including reciprocal loans of major works of art, joint exhibitions, research, and conservation projects;<sup>530</sup> and (5) since both sides, the U.S. museums (mainly the J. Paul Getty museum) and the Italian authorities did not hesitate to utilize the media for their purposes, the U.S.-Italian restitution campaign

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<sup>521</sup> The Italian Ministry of Culture jointly with the Commission for Cultural Materials of the Region of Sicily, hereinafter Italy.

<sup>522</sup> Press release of 28 September 2006: "Museum of Fine Arts, Boston and Italian Ministry of Cultural Sign Agreement Marking New Era of Cultural Exchange", available at: <http://www.mfa.org/collections/art-past/italian-ministry-culture-agreement> (accessed 23 September 2011).

<sup>523</sup> The Agreement between the New York Metropolitan Museum of Art and the Republic of Italy, concluded on 21 February 2006, has been reprinted in: *International Journal of Cultural Property* (2006) 13, p. 427-434.

<sup>524</sup> Press release of 25 September 2007: "Italian Ministry of Culture and the J.Paul Getty Sign Agreement in Rome", available at: [www.getty.edu/news/press/center/italy\\_getty\\_joint\\_statement\\_092507.html](http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html) (accessed 23 September 2011).

<sup>525</sup> Press release of 30 October 2007: "Princeton University Art Museum and Italy Sign Agreement over Antiquities", available at: [www.princeton.edu/press\\_release](http://www.princeton.edu/press_release) (accessed 23 September 2011).

<sup>526</sup> Elisabetta Povoledo, "Pact Will Relocate Artifacts to Italy from Cleveland," *New York Times*, 20 November 2008.

<sup>527</sup> See: *International Journal of Cultural Property* (2006) 13, p. 427-434. The agreements with the other U.S. museums have not been published to the best knowledge of the author.

<sup>528</sup> *Ibid.*

<sup>529</sup> The term of the agreements is forty years, renewable by agreement between the parties.

<sup>530</sup> Cf. Claire L. Lyons, "Museums as Sites of Reconciliation," in *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, ed. James A. R. Nafziger and Ann M. Nicgorski (2009), p. 431.

was covered by the world media, demonstrating a rising awareness of the problem of illicit trafficking in cultural artifacts.

The U.S.-Italian agreements were made possible because of a series of criminal investigations by Italian authorities into illicitly exported cultural objects. Much of the distinct evidence came from a raid on the warehousing facility of Giacomo Medici in the Geneva Freeport in Switzerland in 1995. The raid revealed trafficking patterns between Italian tomb robbers (*tombaroli*) and dealers in Italy and abroad, mainly in Switzerland, the United Kingdom, but also the United States. Most of these dealers (including the five U.S. museums) have subsequently said that they purchased the objects unaware of their illicit origin. The Italian investigators seized looted antiquities and uncovered more than 4,000 photographs and negatives of archaeological objects, partially arranged into albums that looked almost like prospectuses for potential purchasers. Many photographs showed ancient vases and pots still encrusted with dirt, in some cases photographed in the open countryside. Others showed fragments of ancient artifacts wrapped in local newspapers to prove their Italian provenance, and still others depicted recently discovered tombs, their crude openings sealed with makeshift covers.<sup>531</sup> Moreover, documents were found, including shipment invoices, relating to business relations between art dealers and several museums. The Italian investors also found handwritten notes revealing by name the chain of persons involved, including tomb robbers, middle men, art dealer, as well as the five U.S. museums.<sup>532</sup>

These photographs allowed the Italian authorities to identify items on exhibition in several museums. Most identified items were on display at the J. Paul Getty Museum in Los Angeles. Thus, in January 2006, Italy formally issued a claim against the Getty for the return of fifty-two antiquities, alleging that they had been illegally excavated and exported before being purchased by U.S. museums during the 1980s and early 1990s. This was not the first time that Italy had questioned the legitimacy of the purchase of artifacts: the dispute over a 2,500 year-old *Euphronios* crater (a vessel for mixing water and wine), began shortly after the Metropolitan Museum purchased it for \$1 million in 1972. However, unlike former claims,

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<sup>531</sup> See for example: Helena Smith, "It's art squad vs. tomb raiders as Greece reclaims its pillaged past", in: *The Guardian*, 21 July 2006, available at: <http://www.guardian.co.uk/world/2006/jul/21/parthenon.arttheft>; Hugh Eakin, "Director of Getty is unrattled by claims of Italy and Greece to Antiquities", in: *New York Times*, 15 May 2006, available at: <http://travel.nytimes.com/2006/05/15/arts/design/15bran.html?fta=y> (accessed 23 September 2011).

<sup>532</sup> Peter Watson and Cecilia Todeschini, *The Medici Conspiracy - the Illicit Journey of Looted Antiquities* (2006), p. 16.

these were supported by the compelling evidence of seized photographs. With criminal proceedings initiated against Marion True, the Getty's former antiquities curator, and Robert Emanuel Hecht, a Swiss art merchant,<sup>533</sup> the Getty Museum offered to return twenty-six of the disputed objects in November 2006.<sup>534</sup>

Following several breakdowns in the negotiations, the parties came to a compromise and finalized an agreement in August 2007, which obligates the J. Paul Getty Museum to return forty out of the fifty-two originally requested items to Italy. In the meantime, Italy also negotiated with the other U.S. museums mentioned above; however, the negotiations with the Getty were particularly contentious. Although the Getty had brought up the question of joint ownership for some objects, this suggestion was not incorporated in the agreements.<sup>535</sup> The agreement with the J. Paul Getty Museum could only be finalized without making reference to a disputed bronze statue, the so-called 'Victorious Youth' (*Athleta di Fano*). Both parties agreed on the adjournment of further discussions on the bronze statue due to the pending legal proceedings in Italian courts in 2007.<sup>536</sup> This bronze statue, dating back to the fourth century BC, was purchased by the Getty in 1977 after it was found by Italian fishermen in the northern Adriatic Sea in 1964. The fishermen hauled it ashore and hid it rather than declaring it to Italian authorities, as required under Italian law. Three fishermen and a priest, who helped to hide the statue, were convicted of trafficking in stolen property, but an appeals court overruled the conviction in 1970 because of insufficient evidence. At the time, however, the statue was still missing and its value was unknown. In the early 1970s, the statue resurfaced in London and was offered for sale and bought by the Getty museum. However, the records indicate that J. Paul Getty himself never authorized the purchase of the statute, since he had concerns about its legal status (J. Paul Getty died in 1976, the bronze was purchased by the Getty Museum Trust in 1977).<sup>537</sup> Experts assume that the bronze statute may be the lone surviving work of the Greek artist Lysippus, who served Alexander the Great. The bronze was most likely lost at sea after being looted by Roman soldiers in Greece around the time of

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<sup>533</sup> Both are charged with conspiracy to traffic in looted artifacts, currently pending before the Tribunale di Roma.

<sup>534</sup> "The Getty's side", *Los Angeles Times*, 28 November 2006, p. 21.

<sup>535</sup> Ibid.

<sup>536</sup> Lyons, "Museums as Sites of Reconciliation," p. 431.

<sup>537</sup> Jason Felch, Italian official seeks return of 'Getty Bronze', *Los Angeles Times*, 27 March 2011, available at: <http://articles.latimes.com/2011/mar/27/entertainment/la-et-getty-bronze-20110328> (accessed 23 September 2011).

Christ (the Greek government, however, has never intervened in the case by asking for the return of the bronze to Greece).<sup>538</sup>

In 2007, the main points of contention between Italy and the Getty were twofold: the precise spot where the bronze statue had been found (namely, whether it had been in national (Italian) or international waters); and whether the Getty museum acquired the statute in good faith. As a result of the 2007 agreement with the Getty, Italy followed through with the promise to drop civil charges against Marion True.<sup>539</sup> Her criminal trial, however, continued for five years until October 2010, when the charges of having received stolen art and conspiring to deal in looted artifacts were dropped due to the statute of limitations.<sup>540</sup> The matter of the bronze statue, which had been adjourned in 2007, resurfaced again in February 2010, when the regional tribunal of Pesaro (*Tribunale di Pesaro*) found that – despite the uncertainty over the bronze’s precise underwater find spot – it was illegally exported once it passed through Italian territory. Accordingly, the Italian tribunal ordered the bronze’s immediate forfeiture and its return to Italy – the Getty, in turn, appealed the order to the Italian Court of Cassation. The enforcement of the Italian confiscation order would require a grant of authority by a U.S. court in a proceeding to enforce the Italian judgment.<sup>541</sup> This, however, appears unlikely to happen. In the meantime, the Italian Court of Cassation refused to hear the case; it is now pending again before the tribunal of Pesaro.<sup>542</sup>

As mentioned above, the Italian government has signed similar agreements with other major U.S. museums in addition to the bilateral agreement with the Getty museum. In the light of these bilateral agreement, Italian authorities have continued to negotiate with other museums that might have acquired antiquities of Italian origin but of dubious provenance, including with: the National Museum of Antiquities in Leiden, Netherlands; the Toledo

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<sup>538</sup> Ibid.

<sup>539</sup> See: Livia Borghese, “Italy exhibits its recovered masterpieces”, *Los Angeles Times*, 18 December 2007; available at: <http://www.latimes.com/news/nationworld/world/la-fg-getty18dec18,0,7195492.story?coll=la-home-center> (accessed 23 September 2011).

<sup>540</sup> Side note: it even might be possible that dropping the criminal charges against Marion True was also part of the (unofficial) deal. For further details, see *CBC News*, Antiquities case vs. ex-Getty curator dismissed, 13 October 2010, available at: <http://www.cbc.ca/arts/artdesign/story/2010/10/13/antiquities-looted-getty-true-marion.html> (accessed 23 September 2011).

<sup>541</sup> Martha Lufkin, Greek bronze will stay in the Getty Villa – Museum rejects Italian judge’s decision because the Fano Athlete was found outside Italian waters, *The Art Newspaper*, 14 April 2010, available at: <http://www.theartnewspaper.com/articles/Greek-bronze-will-stay-in-the-Getty-Villa%20/20504> (accessed 23 September 2011).

<sup>542</sup> Jason Felch, Italian official seeks return of ‘Getty Bronze’, *Los Angeles Times*, 27 March 2011, available at: <http://articles.latimes.com/2011/mar/27/entertainment/la-et-getty-bronze-20110328> (accessed 23 September 2011).

Museum of Art in Ohio; the New Carlsberg Glyptotek in Copenhagen; the Minneapolis Institute of Art; the Miho Museum in Shiga, Japan; and the Antikensammlung in Munich. Current negotiations regarding the return of cultural materials might be concluded using bilateral agreements similar to those used with the U.S. museums.

After the antiquities were returned, a special exhibition was set up at the Italian presidential palace in Rome's *Palazzo del Quirinale* in December 2007.<sup>543</sup> The exhibition included sixty-nine of the most prized sculptures and vases purchased by the four U.S. museums, in order to both demonstrate the government's success and to grant immediate public access to the returned objects. The exhibit was titled "*Nostoi*," meaning "*homecoming*", alluding to a lost epic poem recounting the return of heroes from the Trojan War. Italy has not announced where the objects will definitely go, but many are expected to return to regional museums near where they are believed to have been illegally excavated.<sup>544</sup> The exhibit also features five of eight pieces returned to Greece in 2007 by the Royal Athena Galleries in New York. The Greek government lent the objects to thank Italy for its help in pressing separate Greek claims for objects said to be looted.<sup>545</sup> As a result, the Greek government and the J. Paul Getty museum, for example, concluded an agreement for the return of a gold funerary wreath and a Parian marble statue in 2007.<sup>546</sup> Some objects on the *Nostoi* exhibition are the result of other recoveries, like the fragment of an ivory head from the first century B.C. that was seized in 2003 from the collection of a London antique dealer. As Greece and Italy have agreed to work together in their attempt to retrieve illegally exported artifacts from abroad, the *Nostoi* exhibition was temporarily transferred to the new Acropolis Museum in Athens on 26 September 2008 after having been on display in Rome.<sup>547</sup> The Acropolis Museum still lacks major exhibits as it is still waiting for the arrival of the Parthenon Marbles, which were removed in 1801 and placed in the British Museum in

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<sup>543</sup> "*Nostoi: Capolavori ritrovati*" – (English: "*Nostoi: Recovered Masterpieces*"), Roma, Palazzo del Quirinale, Galleria di Alessandro VII, Exposition from 21 December 2007 until 30 March 2008, and afterwards at the Palazzo Poli a Fontana di Trevi; catalogue of the exhibition published by: Segretario generale della presidenza della Repubblica Italiana.

<sup>544</sup> See: Livia Borghese, "Italy exhibits its recovered masterpieces", *Los Angeles Times*, 18 December 2007; available at: <http://www.latimes.com/news/nationworld/world/la-fg-getty18dec18,0,7195492.story?coll=la-home-center> (accessed 23 September 2011).

<sup>545</sup> See Elisabetta Povoledo, "After Legal Odyssey, Homecoming Show for Looted Antiquities", *The New York Times*, 18 December 2007; available at: [http://www.nytimes.com/2007/12/18/arts/design/18trea.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/12/18/arts/design/18trea.html?_r=1&oref=slogin) (accessed 23 September 2011).

<sup>546</sup> Lyons, "Museums as Sites of Reconciliation," p. 431.

<sup>547</sup> *Nostoi* Exhibition at the New Acropolis Museum, 18 September, 2008; further information available at: <http://www.elginism.com/20080918/1340/> (accessed 23 September 2011).

London. Most of the objects of the 2007 *Nostoi* exhibition are currently on display in the Museo Nazionale (Palazzo Massimo) in Rome.<sup>548</sup>

The exhibition of the returned objects is part of a media campaign that has played an important role throughout the U.S. – Italian negotiations. Francesco Rutelli, the former Italian Minister of Culture, as well as Michael Brand, the Getty's director, conducted a war of words in interviews and statements in Italian and U.S. newspapers.<sup>549</sup> Minister Rutelli, for example, dedicated a one-page statement in *The Wall Street Journal* to present his version of why the talks with Getty stalled for almost eight months in 2006.<sup>550</sup> At the opening of the exhibit in Rome, Rutelli stated at a press briefing, "Excavated from the bowels of the earth, [...] deprived of their identity, and reduced to mere objects of beauty, without a soul, [these pieces] conclude their odyssey here today."<sup>551</sup>

The intense effort by Italy to negotiate the return of antiquities is also reflected in the exhibition placards, one of which reads "Attic black-figure amphora with Heracles fighting Geryon, circa 540 B.C., formerly J. Paul Getty Museum." Nevertheless, the inclusion of statements from each of the four U.S. museums in the introduction to the exhibition catalogue suggests no ill will. Thus, Philippe de Montebello, the director of the Metropolitan wrote, "An exhibition such as this serves to remind us all that we share a common heritage and a reverence for artistic achievement that cannot but unite, rather than divide, us in the future." Moreover, the Getty Museum's director, Michael Brand, declared "While the Getty Villa will greatly miss the carefully tended objects returning to Italy, the Getty can celebrate the long-term loans offered by Italy as part of the accord."

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<sup>548</sup> Further information available: <http://archeoroma.beniculturali.it/musei/museo-nazionale-romano-palazzo-massimo> (accessed 23 September 2011).

<sup>549</sup> See for example: Christopher Knight, "The grandstand erected by Italy – Why is its culture minister trying to rough up the Getty? Politics for the home crowd", in: *The Los Angeles Times*, 25 July 2007, available at: <http://articles.latimes.com/2007/jul/25/entertainment/et-getty25>; "Rutelli contro il Paul Getty Museum – Non possono esporre opera rubate", in: *La Repubblica*, 23 November 2006, available at: [http://www.repubblica.it/2006/11/sezioni/spettacoli\\_e\\_cultura/getty-museum-polemiche/parla-rutelli/parla-rutelli.html](http://www.repubblica.it/2006/11/sezioni/spettacoli_e_cultura/getty-museum-polemiche/parla-rutelli/parla-rutelli.html); Lee Rosenbaum, "Italy's Rutelli Threatens Getty with Sanctions", in: *Artsjournal*, 11 July 2007, available at: [http://www.artsjournal.com/culturegrill/2007/07/italys\\_rutelli\\_threatens\\_getty.html](http://www.artsjournal.com/culturegrill/2007/07/italys_rutelli_threatens_getty.html) (accessed 23 September 2011).

<sup>550</sup> Francesco Rutelli, "Italy vs. Getty", in: *The Wall Street Journal*, 17 January 2007, available at: <http://online.wsj.com/article/SB116900785965978585-search.html?KEYWORDS=Rutelli&COLLECTION=wsjie/6month> (accessed 23 September 2011).

<sup>551</sup> See: Elisabetta Povoledo, "After Legal Odyssey, Homecoming Show for Looted Antiquities", *New York Times*, 18 December 2007; available at: [http://www.nytimes.com/2007/12/18/arts/design/18trea.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/12/18/arts/design/18trea.html?_r=1&oref=slogin) (accessed 23 September 2011).

Indeed, the agreements between the Italian government and the U.S. museums did include several long-term loans, mainly for periods of four years, to the museums “on an agreed, continuing and rotating basis selected from archaeological artifacts, or objects of equivalent beauty and artistic/historical significance”. It is important to emphasize that these loans are not treated independently of the transfer of the requested objects; this is clearly demonstrated by the fact that the Italian ministry has agreed that the transfer shall take place in the context of these “long-term cultural cooperation agreements” to ensure the optimum utilization of the Italian cultural heritage, and as part of the policy of the ministry to recover Italian archaeological materials. The agreements also establish that the items on loan shall be exhibited with the legend: “Lent by the Republic of Italy.” Furthermore, both parties agreed to provisions on study and restoration that allow archaeological items originating from authorized excavations, undertaken on the initiative and at the expense of the respective museum, to leave Italy for the time necessary for study and restoration. Afterwards, the items shall be returned to Italy and then shall eventually be loaned to the museum for exhibition “for a period of four years, or for the maximum period permitted by Italian law at the time the loan begins”.

These bilateral agreements avoid using the legally-charged terms ‘restitution’, ‘return’ and ‘claim’ by employing instead more neutral words such as ‘transfer’ and ‘request’. These agreements also prevent Italy from taking any further legal action, since the museums reject any accusation that they had knowingly obtained objects of alleged illegal provenance in Italian territory. Furthermore, the decision to ‘transfer’ the requested items does not constitute an acknowledgment on the part of the museum of any type of civil, administrative or criminal liability for the original acquisition or holding of the items. The Italian government explicitly waives its right to pursue or support any legal action against the museums under Italian, U.S., or another jurisdiction. Despite the existence of evidence that was at the very least persuasive enough to support a compromise on the part of the U.S. museums, Italy chose not to take legal action, but instead pursued an out-of-court settlement based entirely on diplomatic negotiations.

These bilateral agreements are revolutionary for three reasons: First, the bilateral agreements are not between States but between a private actor and a State. Second, the existence of reliable evidence of the illicit origin of the objects under dispute afforded Italy the opportunity to open a criminal case and to make a plausible threat of civil action. This

threat was bolstered by an international media campaign, especially in the case of the Getty Museum, which drew the attention of the world's press. The third point concerns an aspect often neglected in current appraisals in the field of cultural heritage law that surely affects policy considerations: the relevance of the international public reputation of museums that have been asked to return cultural objects. In the U.S.-Italian agreements some of the world's most famous museums were involved; the Getty's reputation in particular was highly threatened during the dispute. Thus, these negotiations and final agreements can be described as a mix of legal threats and moral suasion bolstered by a news media campaign. Without question, the Italian strategy succeeded and certainly will revolutionize current practices in restitution disputes, especially since Greece has begun to follow the same pattern of negotiations; and other States may chose to follow, as well.

Summarizing briefly this section on bilateral agreements, it is important to emphasize that these bilateral agreements apply exclusively to specific cultural materials and do not create general provisions for restitution and return. However, the U.S-Italian agreements can definitely be described as groundbreaking, especially in terms of successful restitution outcomes between a State and private actors. Although the issue of unequal bargaining power in regard to bilateral agreements is surely a crucial one,<sup>552</sup> these agreements may set innovative standards by responding to the request for restitution in a cooperative manner, resulting in the mutual exchange of cultural materials between the two partners.

### **3. Soft Law Instruments**

In no other area of international law are soft law instruments as important as they are in the area of international cultural heritage law. Although, as discussed above, international treaties and bilateral agreements provide legal provisions for restitution and return to a certain extent, the resistance to the codification of legally binding instruments is still quite vigorous, especially among States. However, non-binding instruments – such as the 1998 Washington Conference Principles on Nazi-confiscated Art – provide guidelines and set out certain principles pertaining to restitution and return.<sup>553</sup> Therefore, this section of the chapter discusses the role of soft law instruments and aims at identifying those elements that advocate for towards cooperation, mutual agreement, and an exchange of information and cultural objects – principles that are in the center of the interest-oriented approach taken by this thesis.

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<sup>552</sup> The problem of unequal bargaining power in negotiations pertaining to the restitution and return of cultural materials will be discussed in detail in Chapter Four, Section 1.3.

<sup>553</sup> For details on the 1998 Washington Principles, see Chapter Three, Section 3.5.

Based on this analysis, the current role and mandate of the ‘Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation’ (hereinafter UNESCO Committee) will be scrutinized. Although the work of the UNESCO Committee has not been particularly successful since its creation in 1978, it is the only international body that deals specifically with restitution and return. Should its mandate be extended and its function improved,<sup>554</sup> the UNESCO Committee might become an essential organ in balancing the interests of stakeholders in restitution disputes.

Generally, ‘soft law’ is a rather vague description for a variety of legally non-binding instruments used in international law. According to Article 38 of the ICJ Statute, soft law is not a primary source of international law; nevertheless, it provides evidence of current legal standards or values, and indicates the direction of future developments in international law.<sup>555</sup> This means that soft law instruments *a priori* cannot establish a legal basis for a claim for restitution and return. However, once soft law begins to interact with binding instruments, its non-binding character may be altered and may function as a tool for interpreting or clarifying binding instruments. These provisions are ‘soft’ because they do not grant a right to make a claim; however the qualification as ‘law’ is justified because these regulations have substantial practical effect through their significant power of persuasion.<sup>556</sup>

Furthermore, the references to soft law instruments have become increasingly frequent, and the importance of these instruments to international law provides evidence to indicate that they are developing into legal norms. Therefore, soft law has a preparatory role in international law, insofar as it might pave the way for a legal provision that has not yet been commonly accepted in international law. Therefore, one could say that soft law instruments are not invariably law *per se*, but that they may be evidence of existing law, and therefore formative of the *opinio iuris* or State practice that generate new principles under customary international law<sup>557</sup>. There are three particular virtues of soft law: firstly, soft law is an attractive alternative to law-making by treaty, because it may often be easier to reach agreement when the form as such is non-binding. It is especially true in negotiations that might otherwise stall, if at the time of the negotiations the commitment to legally binding

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<sup>554</sup> For a detailed discussion on how to improve the work of the UNESCO Committee, see Chapter Six, Section 4.2.

<sup>555</sup> Michael Bothe et al., *Völkerrecht*, ed. Wolfgang Graf Vitzthum, 3 ed. (2004), p. 32.

<sup>556</sup> Beat Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments* (2009), p. 229.

<sup>557</sup> Alan Boyle and Christine Chinkin, *The Making of International Law* (2007), p. 212.

instruments does not find common ground. The use of soft law instruments enables states to agree to more detailed and precise provisions because there is no immediate legal consequence in case of non-compliance. Secondly, it may be easier for some states to adhere to non-binding instruments because they can avoid the domestic treaty ratification process, and perhaps escape democratic accountability for the policy to which they have agreed. Thirdly, soft law instruments are more flexible. Normally, they will be easier to supplement, amend or replace than treaties, and may therefore provide more immediate evidence of international support and consensus than a treaty, whose impact may be constricted by reservations, as well as the need to wait for ratification and entry into force.<sup>558</sup> When national parliaments make law, they also make policy choices about how to balance competing political, social, economic, or cultural objectives. These policy choices of States, and the interests expressed therein will play an important role in balancing the interests of stakeholders in international cultural heritage disputes.

With regard to the restitution and return of cultural materials, the following soft law instruments will be discussed: the recommendations and declarations of the UNESCO General Conference, including an excursus on the mandate of the 1978 UNESCO Committee; the resolutions adopted by the United Nations General Assembly (UNGA); the resolutions adopted by ECOSOC; and the 1998 Washington Principles on Nazi-confiscated art.

### 3.1 UNESCO Recommendations and Declarations

The United Nations Educational, Scientific and Cultural Organization (UNESCO), a specialized agency in the system of the United Nations, has adopted several recommendations and declarations that outline basic principles pertaining to cultural heritage;<sup>559</sup> these include considerations on the protection of archaeological excavations,<sup>560</sup> the protection and preservation of movable cultural objects,<sup>561</sup> the prevention of illicit trafficking in cultural

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<sup>558</sup> Ibid., p. 214.

<sup>559</sup> All recommendations and declarations adopted by the General Conference of UNESCO are available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=12026&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=12026&URL_DO=DO_TOPIC&URL_SECTION=-471.html) (accessed 23 September 2011).

<sup>560</sup> UNESCO *Recommendation on International Principles Applicable to Archaeological Excavations*, 5 December 1956; available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13062&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>561</sup> UNESCO *Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works*, adopted 19 November 1968, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13085&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13085&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011); and UNESCO *Recommendation for the Protection of Movable Cultural Property*, adopted 28 November 1978, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13137&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13137&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

materials and questions of their return,<sup>562</sup> access to cultural objects in museums,<sup>563</sup> the international exchange of cultural objects,<sup>564</sup> and general principles on international cultural cooperation.<sup>565</sup>

Whereas international conventions are legally binding to its States parties, both recommendations and declarations are of legally non-binding nature; however, they do constitute a method for standard-setting on a particular subject, in which preferred conduct by States is indicated without the imposition of any specific legal obligation.<sup>566</sup> Within this spectrum, recommendations might vary from a mere expression of hope or invitation to contribute to the achievement of a particular goal (without any procedure and means to be adopted) to an exhaustive study of the subject matter and a detailed analysis of a possible common approach to be adopted by member States.<sup>567</sup> UNESCO member States are required to present the recommendations of the UNESCO General Conference to their competent national authorities; these, in turn, are then required to submit a report on the national actions taken on the basis of the adopted recommendations; in practice, many States do not present these reports in a timely fashion or fail to present them at all. Declarations, in contrast, are (legally non-binding) normative texts constituting general principles that should guide the actions of the international organization and its member States.<sup>568</sup>

In the field of restitution and return, the major UNESCO recommendations that support general principles related to preservation, access, integrity and cooperation in cultural heritage matters, include the 1956 *Recommendation on International Principles Applicable to*

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<sup>562</sup> UNESCO *Recommendations on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property*, adopted 19 November 1964, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13083&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13083&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>563</sup> UNESCO *Recommendations concerning the Most Effective Means of Rendering Museums Accessible to Everyone*, adopted 14 December 1960, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13063&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13063&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>564</sup> UNESCO *Recommendation concerning the International Exchange of Cultural Property*, adopted 26 November 1976, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13132&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13132&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>565</sup> UNESCO *Declaration of Principles of International Cultural Cooperation*, adopted 4 November 1966, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13147&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13147&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>566</sup> Greenfield, *The Return of Cultural Treasures*, p. 222.

<sup>567</sup> Abdulqawi A. Yusuf, "Unesco Practices and Procedures for the Elaboration of Standard-Setting Instruments," in *Standard-Setting in Unesco - Volume I*, ed. Abdulqawi A. Yusuf (2007), p. 36.

<sup>568</sup> Laurence Boisson de Chazournes, "Monitoring, Supervision and Coordination of the Standard-Setting Instruments of Unesco," in *Standard-Setting in Unesco - Volume I*, ed. Abdulqawi A. Yusuf (2007), p. 56.

*Archaeological Excavations*.<sup>569</sup> This recommendation aims at restricting the illicit trade in antiquities and the illicit export of archaeological finds in particular, and seeks to facilitate the recovery of cultural objects from clandestine excavations or theft. Moreover, the 1976 *Recommendation concerning the International Exchange of Cultural Property*<sup>570</sup> aims at promoting international cooperation by facilitating the circulation of cultural objects between institutions, it states in its Preamble that “a systematic policy of exchanges among cultural institutions, by which each would part with its surplus items in return for objects that it lacked, would not only be enriching to all parties but would also lead to a better use of the international community's cultural heritage which is the sum of all the national heritages” and in Article 12 (4) that “the attention of cultural institutions [...] should be drawn especially to the opportunities for reassembling a presently dismembered work which would be afforded by a system of successive loans, [...] enabling each of the holding institutions to take its turn to display the work in its entirety”.

With a particular focus on restitution matters, the 1982 *Mexico City Declaration on Cultural Policies*, adopted by the World Conference on Cultural Policies<sup>571</sup> calls for bilateral negotiations between art-holding institutions and countries of origin with the goal of encouraging exchange and cooperation in restitution matters. Moreover, this declaration includes a specific recommendation concerning the Parthenon Marbles, recommending its return to Greece in application of “the principle that elements abstracted from national monuments should be returned to those monuments [...] under the heading of the safeguarding of the cultural heritage of mankind”.<sup>572</sup> Another individual case that has led to the adoption of a specific instrument, namely the 2003 *Declaration concerning the Intentional Destruction of Cultural Heritage*,<sup>573</sup> was the destruction of the Buddhas of Bamiyan in

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<sup>569</sup> UNESCO *Recommendation on International Principles Applicable to Archaeological Excavations*, adopted 5 December 1956, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13062&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>570</sup> UNESCO *Recommendation concerning the International Exchange of Cultural Property*, adopted 26 November 1976, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13132&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13132&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>571</sup> *Mexico City Declaration on Cultural Policies*, adopted by the World Conference on Cultural Policies, 6 August 1982, available at: [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=35197&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=35197&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>572</sup> Cf. Greenfield, *The Return of Cultural Treasures*, p. 223. (Recommendation No. 55).

<sup>573</sup> UNESCO *Declaration concerning the Intentional Destruction of Cultural Heritage*, adopted 17 October 2003, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=17718&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

Afghanistan in 2001.<sup>574</sup> In its declaration, the UNESCO General Conference refers explicitly to the regime of state responsibility and condemns the deliberate destruction of cultural materials as a “crime against the common heritage of humanity” (Article 3).<sup>575</sup> This declaration is the first instrument that exclusively deals with the intentional destruction of cultural heritage not related to war; that said, it does refer to several previous war-related instruments, such as the early 1907 Hague Convention.<sup>576</sup> The declaration assumes that States do not have unlimited freedom to destroy their own cultural heritage.<sup>577</sup> This, however, does not result in effective measures to prevent such incidents from occurring in the future. The international community and international organizations, such as UNESCO, can only fulfill their role in monitoring and sanctioning the violation of cultural heritage.

Whereas the two abovementioned declarations were motivated by individual cases of removal (Parthenon Marbles) and destruction (Buddhas of Bamiyan), another declaration taken note of by the General Conference of UNESCO in 2009 refers to a specific period of removals, namely WWII; it is entitled: *The Draft of the Declaration of Principles relating to cultural objects displaced in connection with the Second World War*.<sup>578</sup> The draft Declaration was the focus of lengthy discussion during the almost eight year period of its negotiations, primarily because of Russian and Polish attempts to include the principle of ‘restitution in kind’ in the wording of the draft Declaration.<sup>579</sup> Russia in particular called for legalizing the removal of cultural materials by Soviet troops from Germany and Eastern European countries at the end of WWII and the related legislation approved in the Duma in 1998 declaring these objects to State property of Russia.<sup>580</sup> Moreover, other States, namely Turkey, tried to include

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<sup>574</sup> The 2003 UNESCO Declaration’s Preamble states: “Recalling the tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole”.

<sup>575</sup> Cf. Francioni and Lenzerini, “The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq,” p. 37.

<sup>576</sup> Bandeira Galindo, “The Unesco Declaration Concerning the Intentional Destruction of Cultural Heritage,” p. 412.

<sup>577</sup> Ibid., p. 420.

<sup>578</sup> *Draft of the Declaration of Principles relating to cultural objects displaced in connection with the Second World War*, taken note of by the General Conference of UNESCO at its 35th session, Paris 6-23 October 2009, Doc. 35 C/24 (31 July 2009), available at: <http://unesdoc.unesco.org/images/0018/001834/183433E.pdf> (accessed 23 September 2011).

<sup>579</sup> See ‘Statement by the Russian Federation Delegation on the Draft of the Declaration’, 27 October 2009, declaring that “[...] individual culture items are to be retained as a non-pecuniary restitution for cultural property destroyed or irretrievably lost as a result of aggression”; available at: [http://www.mid.ru/brp\\_4.nsf/f68cd37b84711611c3256f6d00541094/acd8b550dd73f5c6c325765d005601d8?OpenDocument](http://www.mid.ru/brp_4.nsf/f68cd37b84711611c3256f6d00541094/acd8b550dd73f5c6c325765d005601d8?OpenDocument) (accessed 23 September 2011).

<sup>580</sup> For details, see *supra* Chapter Two, Section 2; in particular: Russian Federal Law on Cultural Valuables Displaced to the USSR as a Result of World War II and Located on the Territory of the Russian Federation, Federal Law N 64-FZ of 15 April 1998, adopted by the State Duma on 5 February 1997, English translation available at: <http://docproj.loyola.edu/rllaw/r2.html> (accessed 23 September 2001).

the principle of ‘the return to the countries of origin’ into the wording of the draft Declaration.<sup>581</sup> Due to the high level of controversy and the strong dissent among States, the draft Declaration was not adopted but only “taken note of” by the General Conference of UNESCO at its 35th session in October 2009.<sup>582</sup> It is, however, surprising that no consensus could be reached, as the final text of the draft Declaration is nothing more than simple reiteration of current customary international law pertaining to the removal of cultural objects in armed conflict. The draft Declaration includes, among other things, the following principles: States have the responsibility to return cultural objects removed during WWII (Principle III); cultural objects shall never be retained as war reparations (Principle IX); and nothing in these principles shall be interpreted as amending, abrogating or replacing relevant international law (Principle XI).

In summarizing the concerns expressed in the recommendations and declaration adopted by the General Conference of UNESCO over the last sixty years, it should be noted that the protection and preservation of cultural materials (both in terms of context and physical integrity) is one of the principles in cultural heritage matters. Moreover, several recommendations expressed the desire of the international community for international cooperation in this field of law, and that access to cultural materials is imperative in cultural heritage matters.

### **3.2 Establishment and Mandate of the UNESCO Intergovernmental Committee**

Following the diplomatic negotiations of the 1970 UNESCO Convention<sup>583</sup> it was clear that, due to the usual rules relating to treaty interpretation and especially the principle of non-retroactivity, two crucial issues would not come within the ambit of the 1970 Convention: firstly, the return of cultural materials removed over the preceding centuries of colonial domination; and secondly, the return of objects that have been appropriated prior the entry into force of the convention for the ratifying States.<sup>584</sup>

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<sup>581</sup> See Commission for Looted Art in Europe, Draft Declaration of Principles: “Latest status of amendments of which no consensus was reached by the Russian Federation, Poland and Turkey, available at: <http://www.lootedartcommission.com/OVNKN480270> (accessed 23 September 2011).

<sup>582</sup> See UNESCO 35C/Resolution 41 (p. 53), Records of the UNESCO General Conference, 35th session, Paris, 6-23 October 2009. The 35th session of the UNESCO General Conference adopted Resolution 41 which, among other items, determines to take note of the draft Declaration; available at: <http://unesdoc.unesco.org/images/0018/001864/186470e.pdf> (accessed 23 September 2011).

<sup>583</sup> For details on the 1970 UNESCO Convention, see *supra* Chapter Three, Section 2.2.

<sup>584</sup> Cf. O’Keefe, *Commentary on the 1970 Unesco Convention*, p. 9.

As a consequence of the limited application of the 1970 UNESCO Convention, the UNESCO General Conference opted to create an intergovernmental body in order to deal with the issues not covered by the 1970 UNESCO Convention.<sup>585</sup> In the course of establishing this intergovernmental body, the Director-General of UNESCO M'Bow issued "A *Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It*",<sup>586</sup> which gave impetus to the Committee's future work.<sup>587</sup> 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) was created by the General Conference of UNESCO, initially the Committee comprised twenty member States elected by the General Conference of UNESCO (since 1995 the Committee is comprised of twenty-two member States).<sup>588</sup> Its establishment was not only driven by the desire to fill the gaps left by the 1970 UNESCO Convention, but also by the desire to complete the decolonization process with regard to the removal of cultural objects from formerly colonized territories.<sup>589</sup>

Its first session was held in Paris in May 1980, and the Committee continues to meet on a biannual basis at UNESCO's headquarters; lately, it has met even more often, on a quasi annual basis (May 2009, September 2010, and July 2011).<sup>590</sup> Examining the historical documentation of the Committee's sessions since its first session in May 1980 reveals how much the expectations as well as the mandate of the Committee have changed. The initial 1977 ICOM Study<sup>591</sup> recommended, for example, that the Committee's mandate should be limited to a ten-year-period in the hope that this would be sufficient time to alleviate all the

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<sup>585</sup> The creation of an intergovernmental body was proposed in *Study on the Principles, Conditions and Means for the Restitution and Return of Cultural Property in view of Reconstituting Dispersed Heritages* (1977). This report was prepared by the Ad Hoc Committee appointed by the Executive Council of ICOM (established 1976); the report is published as UNESCO Doc. CC-78/CONF.609/3 Annex 1 and in (1979) *Museum*, Vol. XXXI, no. 1, Paris: UNESCO, pp. 62-66.

<sup>586</sup> 'A Plea for the Return of an Irreplaceable Cultural Heritage to those who created it', 7 June 1978, by Director-General of UNESCO Amadou-Mahtar M'Bow; See: UNESCO Doc. SHC-76/CONF.615.5,3.

<sup>587</sup> Prott, "The History and Development of Processes for the Recovery of Cultural Heritage," p. 188.

<sup>588</sup> Resolution of the General Conference of UNESCO: Resolution 4.128 C4/7.6/5; 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, adopted by 20 C/Resolution 4/7.6/5 of the 20<sup>th</sup> Session of the General Conference of UNESCO, Paris, 24 October - 28 November 1978; available at: <http://unesdoc.unesco.org/images/0014/001459/145960e.pdf> (accessed 23 September 2011).

<sup>589</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 11.

<sup>590</sup> The statutory documents, working documents and meeting results of all session of the Committee (first session in May 1980, last session in July 2011) are available at:

<http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/return-of-cultural-property/sessions-of-the-committee/> (accessed 23 September 2011).

<sup>591</sup> See, above n. 585.

requests of the States involved in claims.<sup>592</sup> Three decades later, in November 2009, the Committee celebrated its thirtieth anniversary with an extraordinary session in Korea, which clearly indicated that no special time limit can be set for the matter of restitution and return of cultural materials.

The Intergovernmental Committee's mandate, as set out in its Statutes, is multi-fold. It seeks ways and means: to facilitate bilateral negotiations for restitution and return; to promote multilateral and bilateral cooperation with the view to the restitution and return; to encourage the necessary research and studies for the establishment of coherent programs for the constitution of representative collections in countries whose cultural heritage has been dispersed; fostering public information campaigns on restitution matters; encouraging the establishment or reinforcement of museums or other institutions for the conservation of cultural property and the training of personnel; as well as promoting the exchange of cultural property.<sup>593</sup> Its general function can be described as advisory, through which it provides a framework for discussion and negotiation; its recommendations, however, are not legally binding on States.<sup>594</sup> A request for restitution and return can be brought to the Committee by any member State or associate member of UNESCO, if the cultural object in question has a "fundamental significance from the point of view of the spiritual values and cultural heritage of the people" of that State and "which has been lost as a result of colonial or foreign occupation or as a result of illicit appropriation".<sup>595</sup> Although the formal request must be made by a State or associate member of UNESCO, States may also represent the interests of their own nationals, who are requesting the return of cultural materials.

Starting in 1981, the UNESCO Committee concentrated on developing a 'Standard Form concerning Requests of Return or Restitution' (issued in 1986),<sup>596</sup> which it was hoped would facilitate the resolution of the high number of cases for restitution and return that were

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<sup>592</sup> Protz, "The History and Development of Processes for the Recovery of Cultural Heritage," p. 190.

<sup>593</sup> See: Article 4 of the Statutes of the Intergovernmental Committee, CLT/CH/INS-2005/21, adopted by the General Conference of UNESCO at its 20th session (1978), last amended in October 2005; available at: <http://unesdoc.unesco.org/images/0014/001459/145960e.pdf> (accessed 23 September 2011).

<sup>594</sup> Cf. UNESCO Information Kit on Restitution: Promote the Return or the Restitution of Cultural Property, p. 8; text available at: <http://unesdoc.unesco.org/images/0013/001394/139407eb.pdf> (accessed 23 September 2011).

<sup>595</sup> See: Article 3 (2) of the Statutes of the Intergovernmental Committee, CLT/CH/INS-2005/21, adopted by the General Conference of UNESCO at its 20th session (1978), and last amended in October 2005; available at: <http://unesdoc.unesco.org/images/0014/001459/145960e.pdf> (accessed 23 September 2011).

<sup>596</sup> ICPRCP Standard Form concerning Requests of Return or Restitution (January 1986); available at: [http://www.unesco.org/culture/laws/pdf/formulario\\_retorno.pdf](http://www.unesco.org/culture/laws/pdf/formulario_retorno.pdf) (accessed 23 September 2011).

expected by the Committee.<sup>597</sup> However, there have been no more than eight requests lodged with the Committee since its establishment in 1978. Of those eight cases, six have been resolved – the latest case (resolved in May 2011) is that of the ‘Sphinx of Bogazköy’ between Turkey and Germany. The case has been pending before the Committee since 1987, and was resolved through bilateral negotiations “in a spirit of friendship and cooperation” which resulted in a 2011 memorandum of understanding agreeing to the return of the Sphinx from the Berlin Museum (Museumsinsel) to Turkey (the Sphinx was returned in July 2011).<sup>598</sup> Currently, only one request remains pending before the UNESCO Committee: the case of the ‘Parthenon Marbles’ – also called Parthenon Sculptures – between Greece and the United Kingdom (specifically, the British Museum).<sup>599</sup> The case has been pending before the Committee since 1984 without notable progress in settling the matter. Another case is currently suspended due to national court litigations (Brussels Court of Appeal): namely, the case of the archaeological objects from the ‘Necropolis of Khorvin’ between Iran and Belgium. The case was submitted to the UNESCO Committee in 1985; however, consideration by the Committee was suspended in 1987 (in accordance with its Statutes) until all internal legal remedies have been exhausted.<sup>600</sup>

Out of the six cases submitted to the UNESCO Committee and subsequently resolved,<sup>601</sup> two were resolved by mediation: the case of the ‘Phra Narai lintel’ between Thailand and United States (1988); and the case of the ‘Panel of Tyche’ between Jordan and the United States (Cincinnati Art Museum, 1986). One case was solved by immediate return: the case of the ‘Bogazköy cuneiform tablets’ between Turkey and the German Democratic Republic (1987); and return after several years of bilateral negotiations: the case of the ‘Sphinx of Bogazköy’ (2011) between Turkey and the German Democratic Republic (until 1989) and Germany (1990-2011). One was resolved through seven years of national court litigation: namely, between Ecuador and Italy on pre-Columbian ceramics (1983); and one by an agreement for the donation of the object, the ‘Makondé mask’, from the Barbier-Müller

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<sup>597</sup> Protz, "The History and Development of Processes for the Recovery of Cultural Heritage," p. 191.

<sup>598</sup> See: Recommendation No. 3, adopted at the 17th session of the UNESCO-Committee (ICPRCP), held on 30 June-1 July 2011 in Paris, CLT-2011/CONF. 208/COM.17/5; available at: <http://unesdoc.unesco.org/images/0019/001937/193720E.pdf> (accessed 23 September 2011).

<sup>599</sup> See: Recommendation No. 2, adopted at the 17th session of the UNESCO-Committee (above n. 598).

<sup>600</sup> See: Secretariat Report to the 17th session of the Committee (ICPRCP), held on 30 June-1 July 2011 in Paris, CLT-2011/CONF.208/COM.17/2, p. 1, available at: <http://unesdoc.unesco.org/images/0019/001927/192728e.pdf> (accessed 23 September 2011).

<sup>601</sup> See list of cases of return and restitution under the aegis of the UNESCO Intergovernmental Committee, available at: <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/return-of-cultural-property/committees-successful-restitutions/> (accessed 23 September 2011).

Museum of Geneva, Switzerland to Tanzania (brought to the Committee in 2006, and resolved in May 2010<sup>602</sup>). Interestingly, several States that had shown the most interest in the establishment of an international forum for restitution matters not covered by the 1970 UNESCO Convention have never presented a request to the Committee (with the sole exception of Greece, whose request regarding the ‘Parthenon Marbles’ remains yet to be solved).<sup>603</sup> Most States seem to avoid engagement with any intergovernmental body and, if they engage at all, prefer bilateral negotiations, thereby avoiding consultation with the UNESCO Intergovernmental Committee.<sup>604</sup>

Considering the small number of requests lodged with the UNESCO Intergovernmental Committee and the increasing numbers of cases that are solved outside the Committee, its mandate was broadened in 2005 by the General Conference of UNESCO<sup>605</sup> adding mediation and conciliation to the Mandate of the Committee (Article 4.1. of the Statutes). Mediation involves a third party that seeks to assist disputing States in their negotiations. Although mediation falls short of adjudication, it involves the provision of suggestions, alternative proposals and attempts at reconciling the conflicting positions, the object of which is the resolution of the dispute through the negotiation of an agreed settlement. Conciliation, in contrast, is more formalized, and often involves the appointment of a conciliation commission by the disputing States. Although this might resemble an arbitral or judicial proceeding, the outcome of the mediation and conciliation is not binding on the parties concerned (Article 4.1. of the Statutes), and therefore takes the form of recommendations or opinions rather than a binding determination.<sup>606</sup> If no solution can be found in the mediation and conciliation proceedings, the request for return remains before the Committee, similarly to any other unresolved case submitted to the Committee (Article 4.1. of

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<sup>602</sup> See: Press File of ICOM, Paris, 10 May 2010 on the Agreement for the donation of the Makonde Mask from the Barbier-Müller Museum of Geneva to the National Museum of Tanzania, [http://icom.museum/press/MM\\_PressFile\\_eng.pdf](http://icom.museum/press/MM_PressFile_eng.pdf) (accessed 23 September 2011).

<sup>603</sup> Prott, "The History and Development of Processes for the Recovery of Cultural Heritage," p. 191. Prott refers to Brazil, the Byelorussian SSR, China, Greece, Iceland, Ireland, Mali, Panama, Portugal, South Africa, the United States and Zaire, all of whom spoke on behalf of Resolution 3817 but never presented a request to the UNESCO Intergovernmental Committee.

<sup>604</sup> As, for example, was the case between Ethiopia and Italy regarding the return of the Axum obelisk, see *supra* Chapter Three, Section 2.9.1; and the case of the U.S.-Italian agreements, see *supra* Chapter Three, Section 2.10).

<sup>605</sup> See: 33 C/Resolution 44, adopted by the General Conference of UNESCO at its 33rd session (3-21 October 2005).

<sup>606</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 15.

the Statutes).<sup>607</sup> The possibilities of improving the role of the Committee and amending its mandate in view of mediation and conciliation will be discussed more in detail in Chapter Six, in terms of the practical consequences and alternatives considered by this thesis.

### 3.3 Resolutions of the United Nations General Assembly

UNESCO is not the only UN body that has dealt with the issue of restitution and return. Since 1972, the UN General Assembly (hereinafter UNGA) has regularly issued resolutions aimed at filling the gaps left by the legal instruments discussed above. In contrast to the UN Security Council (hereinafter UNSC), UNGA has no general legislative power, except a very limited number of financial matters that do not include cultural heritage matters.<sup>608</sup> Therefore, resolutions adopted by the UNGA are legally non-binding (Article 10, 13 UN-Charter) and are only ‘recommendations’ to its member States, to the UNSC, or both.<sup>609</sup> However, the UNGA may also adopt declarations<sup>610</sup> that might restate ‘principles’ with the consequence that they may be binding as custom or as an informal agreement that serve to facilitate the interpretation of the UN Charter.

In 1973, the UNGA adopted its first resolution on the matter of restitution, which was entitled ‘Restitution of Works of Art to Countries Victims of Expropriation’<sup>611</sup>. This resolution made specific reference to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples as well as to the 1970 UNESCO Convention. It deplores “the wholesale removal, virtually without payment, of objects d’art from one country to another, frequently as a result of colonial or foreign occupation” and claims for “prompt restitution [...] without charge [...] as it constitutes just reparation for damages done.” In 1976, the terminological connotation of the resolution adopted changed; the UNGA resolution reissued under a new title: ‘The Protection and Restitution of Works of Art as Part of the

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<sup>607</sup> The UNESCO Intergovernmental Committee adopted at its 16th session (21-23 September 2010) Rules of Procedure for Mediation and Conciliation in accordance with Article 4, paragraph 1 of the Statutes of the Intergovernmental Committee, CLT-2010/CONF.203/COM.16/7; full text available at: <http://unesdoc.unesco.org/images/0019/001925/192534E.pdf> (accessed 23 September 2011).

<sup>608</sup> Cf. Greenfield, *The Return of Cultural Treasures*, p. 229.

<sup>609</sup> See Art. 10, 13 Charter of the United Nations; available at: <http://www.un.org/aboutun/charter/> (accessed 23 September 2011).

<sup>610</sup> For example, the 2007 UNGA *Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted by the UNGA on 13 September 2007; for detailed discussion, see Chapter Three, Section 6.3

<sup>611</sup> UNGA Resolution on *Restitution of Works of Art to Countries Victims of Expropriation*, (3187(XXVIII)), 28<sup>th</sup> Session, 18 December 1973; available at: <http://www.un.org/documents/ga/res/28/ares28.htm> (accessed 23 September 2011).

Preservation and further Development of Cultural Values'.<sup>612</sup> The change in the terminology demonstrates both an effort to mitigate against offending former colonial powers, and to emphasize the importance of protection and well as cooperation in cultural matters.<sup>613</sup> In 1978, the UNGA resolution introduces the term 'return' and speaks about 'Restitution and Return of Cultural Property to the Countries of Origin' in the resolution's title.<sup>614</sup> Only one year later, the 1979 UNGA resolution inverts the terms in favor of the more neutral term 'return', substitutes the 'and' with an 'or' – phrasing the title as 'Return or Restitution of Cultural Property to the Countries of Origin'.<sup>615</sup> The rapid modification of the terminology within only a few years is quite remarkable, considering the fact that the change affects not only the terms but also the concepts associated with this field of law. Since 1979, however, the titles of the UNGA resolutions pertaining to restitution and return have not modified.<sup>616</sup> It is notably that the focus of these UNGA resolutions has been broadened to include the importance of international cooperation in restitution matters and the need for the preservation of the common cultural heritage. Moreover, practical suggestions, such as in the 1981 UNGA Resolution, have been made that added an appeal to museums and private collectors "to return totally or partially, or make available to the countries of origin [...] the items kept in the storehouse of museums, and to help the countries of origin in their endeavors to prepare an inventory of collections".<sup>617</sup>

Despite the increasing recognition of the complexity of restitution matters over the past decades, the division of votes in the UNGA between the source countries, rich in cultural material, and the leading art-market countries has remained substantially the same.<sup>618</sup> It is

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<sup>612</sup> UNGA Resolution on: *Protection and Restitution of Works of Art as Part of the Preservation and further Development of Cultural Values*, (A/RES/31/40), 31<sup>st</sup> Session, 30 November 1976, available at: <http://www.un.org/documents/ga/res/31/ares31.htm> (accessed 23 September 2011).

<sup>613</sup> Fitschen, "30 Jahre Rückführung Von Kulturgut - Wie Der Generalversammlung Ihr Gegenstand Abhanden Kam," p. 47.

<sup>614</sup> UNGA resolution *Protection, Restitution and Return of Cultural and Artistic Property as Part of the Preservation and further Development of Cultural Values*, (A/RES/30/50), 33<sup>rd</sup> Session, 14 December 1978, available at: <http://www.un.org/documents/ga/res/33/ares33.htm> (accessed 23 September 2011).

<sup>615</sup> UNGA resolution *Return or Restitution of Cultural Property to the Countries of Origin*, (A/RES/34/64), 34<sup>th</sup> Session, 29 November 1979, available at: <http://www.un.org/documents/ga/res/34/ares34.htm> (accessed 23 September 2011).

<sup>616</sup> See, UNGA resolutions on the *Return or Restitution of Cultural Property to the Countries of Origin*: 33/50 of 14 December 1978, 34/64 of 29 November 1979, 35/127 and 35/128 of 11 December 1980, 36/64 of 27 November 1981, 38/34 of 25 November 1983, 40/19 of 21 November 1985, 42/7 of 22 October 1987, 44/18 of 6 November 1989, 46/10 of 22 October 1991, 48/15 of 2 November 1993, 50/56 of 11 December 1995, 52/24 of 25 November 1997, 54/190 of 17 December 1999, 56/97 of 14 December 2001, 58/17 of 3 December 2003, 61/52 of 4 December 2006 and 64/78 of 7 December 2009.

for example, UNGA resolution (A/RES/61/52), 61<sup>st</sup> Session, 4 December 2006.

<sup>617</sup> UNGA Resolution 36/64, 1981 para. 7.

<sup>618</sup> Cf. Prott and O'Keefe, *Law and the Cultural Heritage*, p. 818.

only in recent years that the voting pattern and, in particular, the number of abstentions in votes on these matters have changed.<sup>619</sup> This change can be seen, for example, in the voting history of the U.S. and the U.K. which are both major art-market countries. The U.S. originally indicated that its abstention on the UNGA resolutions in no way affected the U.S. support for the evolution of general principles pertaining to cultural heritage matters, but rather that it was opposed to any governmental obligation beyond the 1970 UNESCO Convention.<sup>620</sup> In 2003, however, the U.S. assented to the UNGA Resolution No. 58/17.<sup>621</sup> The U.K., in turn, originally said it could not accept the principle that cultural property, which over the years had been acquired freely and legitimately, should be returned to their countries of origin.<sup>622</sup> According to the U.K. position, the greater international collections of works of art constitute a unique international resource that benefits both the public and scholars alike. Nonetheless, the U.K. indicated that they would remain sympathetic to the wishes of States attempting to develop and improve their collections; and British museums would be pleased to collaborate.<sup>623</sup> In 2002, however, the U.K. moderated its position, at least towards the trafficking in cultural objects, by ratifying the 1970 UNESCO Convention. The general moderation of positions can also be seen in the wording of the UNGA resolutions, which has not been substantially modified in recent years.<sup>624</sup>

In summarizing, the resolutions adopted by the UN General Assembly have expressed many of the fundamental principles of interest in restitution and return, including: firstly, an affirmation of the implications of international cooperation in the matter of restitution and return of cultural materials; secondly, the necessity of taking adequate measures to prohibit and prevent illicit trafficking in cultural objects; thirdly, the necessity of preparing national inventories (as mentioned by the 1970 UNESCO Convention); fourthly, the desirability of strengthening museum facilities and infrastructures; and fifthly, the marshalling of professional expertise, the media and public opinion in favor of programs of restitution.<sup>625</sup>

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<sup>619</sup> Fitschen, "30 Jahre Rückführung Von Kulturgut - Wie Der Generalversammlung Ihr Gegenstand Abhanden Kam," p. 50.

<sup>620</sup> Greenfield, *The Return of Cultural Treasures*, p. 230.

<sup>621</sup> Cf. Fitschen, "30 Jahre Rückführung Von Kulturgut - Wie Der Generalversammlung Ihr Gegenstand Abhanden Kam," p. 50.

<sup>622</sup> Greenfield, *The Return of Cultural Treasures*, p. 231.

<sup>623</sup> Ibid., p. 231.

<sup>624</sup> See 2009 Resolution on the *Return or Restitution of Cultural Property to the Countries of Origin* (UN Doc. A/RES/64/78, 7 December 2009), which lists the relevant resolutions of the previous years since the first Resolution 3187 (XXVIII) of 18 December 1973 (UN Doc. A/RES./3187 (1974)); available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/466/51/PDF/N0946651.pdf?OpenElement> (accessed 23 September 2011).

<sup>625</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 212.

Moreover, it has to be noted that, despite their legally non-binding character, the UNGA resolutions demonstrate a shift in international law towards moderate wording with regards to restitution and return issues and thus indicate a change in how these matters are perceived by the international community.

### **3.4 ECOSOC Resolutions and UNODC on Crime Prevention**

Although the Economic and Social Council (ECOSOC), as one of the six principal organs of the UN, deals generally with the promotion of higher standards in economic and social affairs, it has recently begun to address the issue of trafficking in cultural materials. In order to facilitate the preparation of resolutions in this field, ECOSOC entrusted the UN Office on Drugs and Crime (UNODC) in 2004 and again in 2008,<sup>626</sup> to provide ECOSOC with recommendations. Established in 1997, UNODC is active in elaborating preventive mechanisms in the area of human trafficking, migrant smuggling and trafficking in firearms. In order to confront the transnational organized crime in these specific areas, the UN General Assembly adopted the Convention against Transnational Organized Crime (UNTOC, also known as Palermo Convention) in 2000,<sup>627</sup> along with three supplementing protocols.<sup>628</sup> At the request of ECOSOC, UNODC also undertakes activities in the field of illicit trafficking in cultural materials. This is only sensible, given that trafficking in cultural materials has become a major part of international crimes, in part due to cross-border nature of these activities and the structure of organized crime. In July 2010, ECOSOC adopted Resolution No. 2010/19, which was prepared by UNODC, on ‘Crime Prevention and Criminal Justice responses to protect cultural property especially with regard to its trafficking’.<sup>629</sup>

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<sup>626</sup> See, ECOSOC Resolution 2004/34, adopted 21 July 2004, available at: <http://www.un.org/en/ecosoc/docs/2004/resolution%202004-34.pdf> (accessed 23 September 2011), and Resolution 2008/23, adopted July 24, 2008, available at:

<http://www.un.org/en/ecosoc/docs/2008/resolution%202008-23.pdf> (accessed 23 September 2011).

<sup>627</sup> Convention against Transnational Organized Crime, adopted by UNGA Resolution A/RES/55/25 of 15 November 2000, 2225 UNTS 209, opened for signature in Palermo, Italy, 12-15 December 2000, and entering into force 29 September 2003. Currently the Convention has 164 States parties, further information available at: <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (accessed 23 September 2011).

<sup>628</sup> The UN General Assembly adopted three protocols: based on Resolution No. 55/25 of 15 November 2000; the Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2237 UNTS 319), entering into force 25 December 2003 (currently 146 States parties), the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2241 UNTS 507), entering into force 28 January 2004 (currently 129 States parties); and based on Resolution No. 55/255 of 31 May 2001, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (2326 UNTS 208), entering into force 3 July 2005 (currently 89 States parties).

<sup>629</sup> ECOSOC Resolution 2010/19, adopted July 22, 2010, available at: <http://www.un.org/en/ecosoc/docs/2010/res%202010-19.pdf> (accessed 23 September 2011).

As was demonstrated in the previous sections on UN resolutions and recommendations, the issue of illicit trafficking in cultural materials is interwoven with the issue of ‘restitution and return to the countries of origin’. Although most developed countries (art-market countries) attempt to separate these two issues in order to avoid a general (legal) obligation for the restitution and return of cultural objects, the wording of recent ECOSOC documents emphasizes the tendency towards a hybrid approach. The same tendency is also apparent within the works of UNODC. On the basis of the ECOSOC Resolution No. 2010/19 the mandate of UNODC in the area of cultural materials has been strengthened. Thus, in its 2010 resolution, ECOSOC requested that UNODC “further explore[s] the development of specific guidelines for crime prevention with respect to trafficking in cultural property” and the subsequent section adds “and its recovery and return”.<sup>630</sup> The prospective activities of UNODC will determine whether and how UNODC might be able to establish itself as an additional forum – next to UNESCO – for the matter of illicit trafficking in cultural materials in the context of crime prevention, and whether UNODC will deal with general questions with regard to restitution and return.

### **3.5 1998 Washington Conference Principles on Nazi-Confiscated Art**

One of the most relevant, non-binding instruments pertaining to the restitution and return of Nazi-confiscated art is the *Principles of the Washington Conference with Respect to Nazi-Confiscated Art*, released on 3 December 1998 in connection with the *Washington Conference on Holocaust-Era Assets*.<sup>631</sup> The Conference was initiated by the U.S. Undersecretary of State Stuart E. Eizenstat in order to find a general solution to the debate over unclaimed materials lost through Nazi persecution.<sup>632</sup> Forty-four States as well as several non-governmental organizations such as associations for Jewish victims of persecution took part in the conference. The original objective of the U.S. delegation – namely to ratify internationally binding obligations – could not be achieved due to the different legal systems of the participating States with regard to stolen or otherwise lost artworks. The preamble to the Washington Principles that was approved at the 1998 conference expressly addressed the differences in these legal systems.

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<sup>630</sup> Ibid, see para. 16 and 17.

<sup>631</sup> Principles of the Washington Conference with Respect to Nazi-Confiscated Art, released 3 December 1998, full text available at: <http://www.state.gov/p/eur/rt/hlcst/122038.htm> (accessed 23 August 2011); reprinted as Annex I of this thesis.

<sup>632</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 230.

The principles, agreed on by all participating governments, contain legally non-binding considerations; specifically, the principles contain no legal basis for bringing a claim to court.<sup>633</sup> They are, however, an attempt to assist States in resolving cases of Nazi-confiscated artworks. Thus, the general approach of these principles is to offer guidance in the informal resolution of these issues with the end-goal of brokering an agreement between otherwise litigious parties.<sup>634</sup> The eleven principles include: (1) the identification of that property (Principles 1-3); considerations regarding the proof of evidence (Principle 4); the publication of relevant information pertaining to confiscated art (Principles 5-7); the achievement of just and fair solutions (Principles 8-9); the establishment of national commissions (Principle 10); and the development of alternative dispute resolution mechanisms for resolving ownership issues (Principle 11). These principles urge the participating states to facilitate the identification of Nazi-confiscated property in their public institutions and museums. Based on the national implementation<sup>635</sup> of these non-binding principles, several cultural objects have been returned – involving not only German institutions<sup>636</sup> but also, for example, the British Museum,<sup>637</sup> the Swiss Art Museum in Chur,<sup>638</sup> and the Israel Museum in Jerusalem.<sup>639</sup>

Although the 1998 Washington Principles are only directed at States, some private institutions have also committed to implement them and accordingly have submitted their own declarations of self-regulations. Thus, the International Council of Museums (ICOM) released its own recommendations concerning the Return of Works of Art Belonging to

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<sup>633</sup> Cf. Gunnar Schnabel and Monika Tatzkow, *Nazi Looted Art, Handbuch Kunstrestitution Weltweit* (2007), p. 193.

<sup>634</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 198.

<sup>635</sup> Cf. for example the "Guidelines" for implementing the Washington Principles of February 2001, revised in November 2007, (in German: *Handreichung*). For an overview of other national implementations, see the Central Registry of Information on Looted Cultural Property 1933-45, available at: <http://www.lootedart.com/infobycountry> (accessed 23 September 2011).

<sup>636</sup> One of the most controversial cases involved the return of the painting "Berliner Strassenzene" by Ernst Ludwig Kirchner from the Berlin Brücke Museum to the heirs of Hans Hess, detailed information available at: <http://www.commartrecovery.org/germanex.php> (accessed 23 September 2011).

<sup>637</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 190.

<sup>638</sup> In 1999, the Bündner Foundation of the Art Museum Chur returned a painting entitled "Sewing School - The Workroom of the Amsterdam Orphanage" (German title: "Nähsschule im Waisenhaus Amsterdam") by Max Liebermann to the heirs of Max Silberberg, see for more details: Schönenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung*, p. 276.

<sup>639</sup> In 2010, the Israel Museum returned a Paul Klee drawing to the estate of the Jewish art collector who owned the work before it was confiscated by the Nazis in 1941. The drawing was received in 1950 by the Israel Museum's precursor, the Bezalel National Museum, through the Jewish Restitution Successor Organization, established after WWII to distribute Nazi-looted artworks whose owners or heirs were unknown; See: *Israel Returns Nazi-Looted Art*, Virtual Jerusalem, 29 September 2010, available at: <http://www.virtualjerusalem.com/judaism.php?Itemid=952> (accessed 23 September 2011).

Jewish Owners in January 1999.<sup>640</sup> A similar declaration to the Washington Principles was initiated by the European Council and expressed in the 2000 Declaration of Vilnius.<sup>641</sup> This declaration also demands that all governments undertake all reasonable efforts to return Holocaust looted art to the original owners or their heirs. It stresses the importance of obtaining information, opening archives and facilitating the international collaboration of experts. Similarly to the 1998 Washington Principles, the 2000 Declaration of Vilnius forms a non-binding declaration of intent.

The 1998 Washington Principles were reaffirmed by the Holocaust Era Materials Conference in June 2009, ten years after their coming into force. Under the auspices of the Czech presidency to the European Union, forty-six governments and several non-governmental organizations adopted the (non-legally binding) Terezin Declaration of 30 June 2009.<sup>642</sup> In addition to the issues addressed in the 1998 Washington Principles (which focuses specifically on Nazi-confiscated movable cultural property), the Terezin Declaration deals with issues such as welfare of Holocaust (Shoah) survivors and other victims of Nazi persecution, immovable property, Jewish cemeteries and burial sites, judaica (religious cultural materials), archival materials, remembrance, research and memorial sites.

#### **4. Forms of Self-regulation: Codes of Conduct and Codes of Ethics**

In addition to legal provisions and soft law instruments, public and private codes of conduct have been established not only to rectify the international acquisition policies of museums and art dealers, but also to stimulate restitution matters. While such codes of conduct do not provide legal basis of claims for restitution (as they are not binding or legally enforceable),<sup>643</sup> they might foster the development of good practices in a certain field of law and, eventually, might facilitate the evolution of legal provisions in that field. Given that this thesis argues for the construction of policy objectives in conjunction with the development of international legal provisions on restitution and return, these practical changes in museum codes of conducts and museum policies are highly relevant in defining the mechanisms that might alter current restitution practices.

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<sup>640</sup> ICOM Recommendations concerning the Return of Works of Art Belonging to Jewish Owners, December 14, 1999, available at: <http://icom.museum/worldwar2.html> (accessed 23 September 2011).

<sup>641</sup> Vilnius Forum Declaration, 5 October 2000, available at: <http://www.lootedart.com/MFV7EE39608> (accessed 23 September 2011).

<sup>642</sup> Holocaust Era Materials Conference, Prague and Terezin, 26-30 June, 2009. Terezin Declaration of 30 June 2009, text available at: <http://www.lootedartcommission.com/NPNMG484641> (accessed 23 September 2011).

<sup>643</sup> Brodie, An Archaeologist's View of the Trade in Unprovenanced Antiquities, in: *Art and Cultural Heritage* (2006), Hoffmann, p. 52, 58.

#### 4.1 ICOM Code of Ethics for Museums

Guidelines regarding restitution and return of cultural property have also been provided by non-governmental organizations. Major actor among the NGOs concerned with cultural property is the International Council of Museums (ICOM), as an affiliate of UNESCO. ICOM is the largest international association of museums, with members in more than 140 countries, and it represents the museum community at its broadest, most inclusive level. Museum professionals associated with ICOM include curators, collection managers, archaeologists, and anthropologists. In 1986, ICOM established its Code of Ethics for Museums<sup>644</sup> (hereinafter the ICOM Code) as a guide for professionals working with and within museums. Generally, such codes of ethics adopted by museums, other institutions and associations encourage compliance with legal requirements of return and restitution. They also serve to deter the doubtful acquisitions of cultural artifacts.<sup>645</sup> Amended and revised in 2001 and 2004, the ICOM Code of Ethics establishes basic expectations about the responsibility of museums and sets out minimum standards of professional practice and performance for museums and their staff. In May 2011, ICOM launched a so-called ‘Checklist on Ethics of Cultural Property Ownership’ in order to organize the rather detailed and comprehensive articles of the ICOM Code of Ethics into eight core principles.<sup>646</sup> Through the Code of Ethics as well as the 2011 Checklist, ICOM is attempting to raise awareness pertaining to ethical standards among the museum community. More specifically, ICOM is attempting to facilitate the international exchange of cultural objects by encouraging and standardizing the terms of loans and temporary exhibitions. It urges its member institutions to refuse the acquisition or display of works with an incomplete or doubtful provenance, and imposes an ethical obligation on members to uphold the export laws of foreign States and to establish a full history of a work of art prior to considering its acquisition.<sup>647</sup> Although ICOM also promotes the preservation of cultural materials as part of the common heritage of all mankind, it nevertheless considers cultural heritage as strongly linked to its original context, and is therefore in line with the provisions of the 1970 UNESCO Convention.<sup>648</sup>

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<sup>644</sup> ICOM Code of Ethics for Museums, 1986, amended 2001, 2004, available at: <http://icom.museum/ethics.html> (accessed 23 September 2011).

<sup>645</sup> Nafziger, "The Present State of Research," p. 257.

<sup>646</sup> ‘Checklist on Ethics of Cultural Property Ownership’ establishing ‘The Principles of the ICOM Code of Ethics for Museums’ compiled by ICOM and the Koordinierungsstelle Magdeburg, Germany, full text and further information available at: <http://icom.museum/who-we-are/the-vision/code-of-ethics/checklist-on-ethics.html> (accessed 23 September 2011). Text of the Principles reprinted as Annex III to this thesis.

<sup>647</sup> Robert Hallman, "Museums and Cultural Property: A Retreat from the Internationalist Approach," *International Journal of Cultural Property* 12(2005): p. 205.

<sup>648</sup> *Ibid.*: p. 204.

In terms of restitution, the ICOM Code includes the provision that members should be willing to consider restitution of cultural property by stating in its paragraphs 6.2 and 6.3 that: “[...] based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, [...] the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return”. More specifically, and at the request of UNESCO, ICOM prepared a 1977 document entitled ‘Study on Principles, Conditions and Means for Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritage’ that paved the way for the establishment of the UNESCO Intergovernmental Committee.<sup>649</sup> In this study, ICOM declared that the reassembly of dispersed heritage through restitution or the return of objects, which are of major importance for the cultural identity and history of States that had previously been deprived thereof, should be considered to be an ethical principle recognized and affirmed by the international community.<sup>650</sup> It also appealed to all its members “[...] to help disinherited countries to constitute representative collections of their heritage and to facilitate bilateral governmental negotiations in this field”.<sup>651</sup>

As a practical manner, ICOM recommended in its 1977 study the creation of a special fund to be used as the privileged instrument to facilitate the reinforcement of the actions of the UNESCO Intergovernmental Committee (created in 1978).<sup>652</sup> So far, this entity has failed to receive proper funding. Comparable codes formulated by the U.S. museum organizations, like the AAM Code of Ethics,<sup>653</sup> are demonstrably weaker. As a result, the rather strict ICOM Code has often been largely ignored in the past, although more and more museums and other art holding institutions now refer to the standards adopted by ICOM. However, trades in antiquities often still argue that it is the responsibility of States to protect their own heritage by national law, thereby implying that any material that slips out onto the market is fair game and therefore not illegal.<sup>654</sup> The ICOM Code has been criticized based on the fact that it has

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<sup>649</sup> For details, see *supra* Chapter Three, Section 3.2.

<sup>650</sup> Nafziger, "The Present State of Research," p. 257.

<sup>651</sup> Quoted and referred to in UNESCO Doc. 20C/86, General Conference of UNESCO, 20<sup>th</sup> Session, 1978, p. 1; see also Greenfield, *The Return of Cultural Treasures*, p. 234.

<sup>652</sup> ‘Information kit on Restitution’ (section on the Third Legal Development), published by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation; available at:

<http://unesdoc.unesco.org/images/0013/001394/139407eb.pdf> (accessed 23 September 2011).

<sup>653</sup> Statement on the Ethics of Acquisition by the American Association of Museum (AAM), 1993.

<sup>654</sup> Neil Brodie, "An Archaeologist's View of the Trade in Unprovenanced Antiquities," in *Art and Cultural Heritage*, ed. Barbara Hoffmann (Cambridge: 2006), p. 58.

not been fully accepted within the international museum community, partially because its State-based approach is unlikely to adequately represent the interest of the entire museum community, especially that of very actively collecting art institutions.<sup>655</sup> However, only a small proportion of the international museum community is composed of actual purchasers and institutions that actively collect cultural artifacts from beyond the borders of their home country. For the rest of the museum community, including smaller national, local and poorly funded museums, international acquisitions are a non-issue.<sup>656</sup> It should be noted that the Getty Museum in Los Angeles, one of the most active collecting institution in the world, had already introduced a revised acquisition policy, prior to concluding its bilateral agreement with Italy; this makes the Getty the first U.S. museum to adopt strict UNESCO standards.<sup>657</sup>

Generally speaking, codes of ethics function only as a set of guidelines, as they are not legally binding.<sup>658</sup> Although codes of conduct do not provide a legal basis for restitution claims, they nevertheless provide a system of voluntary regulations that shape international conducts and practices in the field. This is not only true for acquisition and collecting practices, but also for conducts in restitution matters. Whether it is openly acknowledged or not, the reassembly of dispersed heritage through restitution and return as well as the return of artifacts with a dubious provenance can already be considered to be an ethical principle that might eventually become an element of customary international law.<sup>659</sup> It is notable that the 1977 ICOM Study did not address the issue of restitution as an ‘ethical principle’, but instead connects the question of restitution with the interest to reassemble dispersed cultural materials. Furthermore, this idea of reassembling is restricted to dispersed objects of ‘major importance’ for the cultural identity and history of a certain country, although what this term specifically encompasses has not been clarified.

The best example of the issues associated with the reassembly of dispersed cultural heritage is best illustrated through perhaps the most famous restitution case: namely the claim by Greece for the return of the Parthenon Marbles, currently on display in the British

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<sup>655</sup> Hallman, "Museums and Cultural Property: A Retreat from the Internationalist Approach," p. 204.

<sup>656</sup> *Ibid.*: p. 203.

<sup>657</sup> As stated by the Getty Museum’s director Michael Brand, see: The Getty’s side, Los Angeles Times, 28 November 2006, p. 21.

<sup>658</sup> Brodie, "An Archaeologist’s View of the Trade in Unprovenanced Antiquities," p. 58.

<sup>659</sup> See, the 1977 ICOM Study on Principles, Conditions and Means for Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritage’ of the ICOM ad hoc ‘Committee for the restitution or return of cultural property to the country of origin.

Museum.<sup>660</sup> Since 1983, the Greek authorities have been requesting the return of the three sets of sculptures (the metopes, the frieze and the pediments) held by the British Museum,<sup>661</sup> other fragments of the Parthenon are dispersed across several museums in Europe, but have not yet been officially requested by Greece. Several fragments can be found: at the Louvre in Paris; two heads belonging to a metope that is in the British Museum are now in Copenhagen; and further fragments of the Parthenon frieze can be found in Palermo and the Vatican; at the Kunsthistorisches Museum in Vienna; at the Antikensammlung in Munich, at the Würzburg University Museum, and at the Strasbourg University Museum. This example illustrates two issues: firstly, that restitution disputes might involve multiple claims involving various States; and, secondly, that the interest in the integrity of a cultural object (or a group of objects, as in the case of the Parthenon Marbles) should play a role in the resolution of restitution disputes.

In some cases, the place in which an object is displayed and kept does not appear to make a significant difference to the cultural value of the object; however in other cases, the cultural value of the object might be significantly influenced by its spatial integrity and its proximity to its place of origin. This is certainly the case with the Parthenon Marbles. Therefore, restitution should perhaps be favored in cases in which the dispersed objects can be reassembled and their cultural unity can be restored; whereas restitution should perhaps be denied in cases in which restitution would result in the disruption of the unity of an object or – and this might be arguable – of a unique collection of objects.<sup>662</sup>

#### **4.2 2006 Principles of the International Law Association**

In order to move the regime of international law beyond its current, essentially adversarial status quo in restitution matters, the Committee on Cultural Heritage Law of the International Law Association (hereinafter: ILA) adopted the ‘Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material’ in 2006.<sup>663</sup> The ILA – originally

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<sup>660</sup> Kate Fitz Gibbon, "The Elgin Marbles – a Summary," in *Who Owns the Past? Cultural Policy, Cultural Property, and the Law*, ed. Kate Fitz Gibbon (2005), pp. 109.

<sup>661</sup> The case of the Parthenon Marbles is pending in front of the UNESCO Intergovernmental Committee since 1984, for details, see *supra* Chapter Three, Section 3.2.

<sup>662</sup> For detailed analysis of the interests in integrity and context, see Chapter Five, Section 3.3.

<sup>663</sup> Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, adopted by the International Law Association (ILA), Resolution No. 4/2006, 72<sup>nd</sup> Conference, held in Toronto, 4-8 June 2006; full text available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/13> (accessed 23 September 2011); text reprinted as Annex II to this thesis.

called the Association for the Reform and Codification of the Law of Nations<sup>664</sup> – is an international non-governmental organization founded in Brussels in 1873, which today has consultative status with a number of UN organizations, including UNESCO. The objectives set out in its constitution are "[...] the study, clarification and development of international law".<sup>665</sup>

In 1998, the Committee prepared a report, which was directed towards the development of a framework of principles that would include the sharing of and the public access to common cultural heritage.<sup>666</sup> The starting point for this report was the Committee's concern about the polarization of the legal framework in international cultural heritage law due to the existence of two extreme positions: on the one hand, the demand for the outright return of cultural objects and, on the other, the retentive view that cultural objects should only be returned under very limited circumstances.<sup>667</sup> In view of the concern over this polarity and of the growing interest in and need for the development of alternative schemes, the Committee set out to create a set of recommendations designed to advance "a broader regime based on sharing and enhanced circulation of cultural heritage, rather than on reconciling principles of retention and return".<sup>668</sup> The Committee detects a "persistent weaknesses in the conventional mechanisms" in international cooperation and the protection of cultural heritage. Moreover, the Committee determined these mechanisms to be a "failure", since they do not resolve the tensions between the claims for return and the art-market-based defenses for the retention of contested objects. In its report, the ILA also recommends that UNESCO should adopt cooperative, rather than unrealistically restrictive provisions in its standard-setting instruments.<sup>669</sup>

Based on the preparatory work of the 1998 ILA Report, the 2006 ILA Principles pursued two objectives: firstly, to provide assistance in the resolution of restitution disputes; and secondly, to facilitate cooperation, exchange and transfer of cultural materials. The exchange and transfer of cultural objects, according to the ILA, might not only support the core value of education, but might also provide alternatives to the controversial acquisitions

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<sup>664</sup> Cf. Robert K. Paterson, "The "Caring and Sharing" Alternative: Recent Progress in the International Law Association to Develop Draft Cultural Material Principles," *International Journal of Cultural Property* (2005): p. 63.

<sup>665</sup> See: <http://www.ila-hq.org/en/committees/index.cfm/cid/13> (accessed 23 September 2011).

<sup>666</sup> "Heritage Law Creation – 1998 Report", in Int'l L. Ass'n, Report of the 68<sup>th</sup> Conference, p. 217.

<sup>667</sup> Cf. Paterson, "The "Caring and Sharing" Alternative," p. 64.

<sup>668</sup> Report of 1998, p. 218.

<sup>669</sup> Cf. Nafziger, "The Present State of Research," p. 273.

of objects, in the present or past, that so often generate deadlocked restitution disputes.<sup>670</sup> Therefore, the 2006 ILA Principles introduce a multi-value framework of principles, which contain two major practical considerations. The first is the development of guidelines (by museums or other institutions) which “may include alternatives to outright transfer such as loans, productions of copies, and shared management and control”.<sup>671</sup> The second concerns public access, and suggests that objects, which are “seldom or never on public display or otherwise inaccessible should be lend or otherwise made available to the requesting party, particularly a party at the place of origin”.<sup>672</sup> Although the latter suggestion in particular might seem to be quite self-evident from a practical point of view, it is groundbreaking in view of current practices and realities in restitution matters.

The 2006 ILA Principles also attempt to cover new grounds in terms of overcoming the terminology that is traditionally used in legal instruments.<sup>673</sup> Thus, the ILA Principles employ the more neutral term of “requests” instead of using the more traditional “claims for restitution and return”; they speak of “cultural material” rather than of “cultural property”; and they replace the commonly used term of “restitution disputes” (that implies an adverse connotation) by a rather cumbersome description of “good-faith negotiations concerning requests for transfer”. This description not only employs the neutral term “request” but also the non-legal but unencumbered term of “transfer”.<sup>674</sup> Moreover, the 2006 ILA Principles also create a set of considerations to be taken into account by the negotiating parties. These include: the (1) significance of the object for the requesting party; (2) the reunification of dispersed cultural material; (3) the accessibility to the cultural material; and (4) its physical protection.<sup>675</sup> It is, however, important to notice that “none of these considerations [expressed in the ILA Principles] may be legally enforceable but their observance reflects changing public policy and the recognition of the special signification of much cultural material to humanity in general.”<sup>676</sup>

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<sup>670</sup> Ibid., p. 275.

<sup>671</sup> 2006 ILA Principles, Section Three (i), entitled: “Alternatives to the Transfer of Cultural Materials”.

<sup>672</sup> See, 2006 ILA Principles, Section Three (iii).

<sup>673</sup> For details on the problem of terminology in restitution matters, see *supra*, Chapter Two, Section 3.

<sup>674</sup> The neutral and non-legal term of “transfer” has also been used in the bilateral U.S.-Italian agreements, see *supra*: Chapter Three, Section 2.10 as well as in the 1970 UNESCO Convention, see *supra*, Chapter Three, Section 2.2. Moreover, the 2005 Swiss law that implements the 1970 UNESCO Convention is entitled: “Cultural Property Transfer Act” (CPTA), thus also this national law employs the notion “transfer”; the full text of the Swiss law is available at: <http://www.bak.admin.ch/themen/kulturguetertransfer/01104/index.html?lang=en> (accessed 23 September 2011).

<sup>675</sup> See, 2006 ILA Principles, Section Eight, entitled: “Considerations for Negotiations concerning Requests”.

<sup>676</sup> See, note on the 2006 ILA Principles, Section Eight.

In summarizing, the 2006 ILA Principles have moved the discussion pertaining to international cultural heritage disputes towards a greater consideration of policy solutions. The attempt undertaken by the ILA to overcome the “persistent weaknesses in the conventional (legal) mechanisms” indicates the need for alternative approaches to restitution that go beyond the current restitution practices. Moreover, the considerations set out by the 2006 ILA Principles clearly underline the general principles identified by this thesis, namely preservation, access, integrity, and cooperation. Most notably, the 2006 ILA Principles also include practical suggestions in terms of alternatives to the “outright transfer” of cultural objects, “such as loans, productions of copies, and shared management and control”.<sup>677</sup> It is this practical approach to restitution matters that is highly promising.<sup>678</sup>

## 5. Ethical and Historical Considerations – ‘Remedying Historical Injustice’

The decision to return cultural materials often involves moral or ethical concerns that are motivated by the desire to ‘remedy historical injustices’. Using different terminology to describe the same phenomena, ethical and historical considerations have also been described as: “repairing past injustices”, “reparations for past wrongs”, or “coming to terms with the past”.<sup>679</sup> Thus, the subject of removal and return of cultural materials raises not only legal but also complex ethical and historical issues.<sup>680</sup> Although not strictly a legal basis for a claim, ethical and historical considerations are essential in international cultural heritage law. This is primarily because the return of cultural materials is often undertaken based on non-legal considerations, but rather demonstrate political and diplomatic commitment,<sup>681</sup> as well as the moral acknowledgment of claims by the returning party. As will be demonstrated in this section, moral and historical considerations decisively shape international practice pertaining to restitution and return, probably more than in any other field of the law.

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<sup>677</sup> Cf. 2006 ILA Principles, Section Three (i), entitled: “Alternatives to the Transfer of Cultural Materials”.

<sup>678</sup> For a detailed discussion on complementary and alternative mechanisms beyond restitution, see Chapter Six, Section 3.

<sup>679</sup> Cf. Theodor W. Adorno, “What Does Coming to Terms with the Past Mean?,” in *Bitburg in Moral and Political Perspective*, ed. Geoffrey Hartman (1986). This essay is a translation of “Was bedeutet: Aufarbeitung der Vergangenheit”, first published in 1959, Suhrkamp Verlag Frankfurt am Main.

<sup>680</sup> Guido Carducci, “The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rule, Unsc Resolutions and Eu Regulations,” in *Art and Cultural Heritage*, ed. Barbara Hoffmann (2006), p. 68.

<sup>681</sup> On the importance of political and diplomatic commitment, see *supra* Chapter Three, Section 2.10.

While ethical and historical considerations may influence the elaboration of a legal rule, ethics as such are not legally binding *a priori*.<sup>682</sup> Unless a legal instrument expressly stipulates consequences, non-compliance with an ethical rule or principle per se does not result in legally enforceable action. However, ethical considerations – such as a code of ethics or a declaration of principles – can be used to define or interpret legal terms or even to lay out a set of principles modifying the current state of law.<sup>683</sup>

International legal instruments providing restitution and return have emerged primarily over the last sixty years,<sup>684</sup> and, as is commonly the case in international law, do not operate retroactively. This is problematic because many current restitution claims occurred as the result of historical events that took place before the promulgation of such measures (i.e. prior to 1945). Consequently, enforceable legal action is often not an option, and this results in an unsatisfying outcome for claimants, both legally and ethically. It is this concurrence of circumstances that has led to a situation in which ethical and historical considerations merge, and requires the law to consider what can be summarized as ‘the remedying of historical injustice’. This is particularly applicable in cases in which the removal of a particular cultural object might have been considered as ‘legal’ or at least ‘common practice’ at the time of its appropriation, but now fails to comply with present human rights standards, such as those that are classified as internationally wrongful acts, including war of aggression and genocide.<sup>685</sup>

Therefore, the question of removal and return of cultural materials is placed squarely within the context of the international community’s effort to provide legal protection for cultural heritage and human rights, while also requiring outcomes in restitution matters that are both legally and ethically satisfying.<sup>686</sup> The mandate to take ethical and historical considerations into account within the context of restitution matters might even facilitate restitution outcomes that are more appropriate to the interests of the parties concerned and more result-oriented in practical terms than the mere application of legal instruments. This is because legal instruments – if they were applicable – might provide the reinstatement of ownership, without consideration of the particular circumstances that led to the removal of the property.

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<sup>682</sup> Cf. Guido Carducci, "Ethics, Law and Heritage," *ICOM News*, no. 3 (2005): p. 5.

<sup>683</sup> For example, the 1998 Washington Principles on Nazi-confiscated Art; see *supra* Chapter Three, Section 3.5.

<sup>684</sup> For details on the history of international cultural heritage law, see *supra* Chapter Two, Section 2.

<sup>685</sup> Cf. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, p. 299.

<sup>686</sup> ———, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 13.

The current human rights regime in international law developed as a result of the end of WWII and the subsequent era of decolonization; both of these events have fueled the sense that actions that were not technically illegal at the time they took place are now being reclassified as illegitimate. Against the backdrop of this broader understanding of human rights, it is only logical for certain parties to argue that such historical injustices must be compensated or redressed.<sup>687</sup> In addition to the early developments in the new human rights regime following WWII, a new debate about how historical injustices could be redressed began with the end of the Cold War. This recent debate has increased the attention paid to efforts focused on the remedying of historical injustices, and the integration of ethical and historical considerations into the human rights discourse in international law. As a result, this recent focus on remedying historical injustices has also entered the debates surrounding the restitution and return of cultural materials.

The attempt to achieve redress for historical injustices is part of a process that could be described as the ‘democratization of international law’, which triangulates justice, morality, and human rights.<sup>688</sup> While general human rights considerations dominate the discussion, the critical discourse involves a rather vague set of ethic and moral values, which is cognizant of the tension between national governments, ethnic and minority groups and individuals. The intricate tension between group and individual rights is often at the core of restitution matters (as restitution and return of cultural materials can affect efforts at self-determination).<sup>689</sup> An equitable system should be able to balance the interests of the current possessor (and *bona fide* purchaser), and States, indigenous peoples, and ethnic or religious groups.<sup>690</sup> Contemporary theories that address the problem of redress have not successfully resolved this tension, and the appeal to abstract rights detached from any historical context has long been criticized.<sup>691</sup> That said, national governments, commercial companies, and even individuals have taken the burden of remedying past wrongs on themselves, by compensating for past injustice as well as present inequity and discrimination. The growing public awareness pertaining to the necessity of remedying historical injustices has given rise to restitution and reconciliation programs, official governmental apologies, and compensation funds. Examples

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<sup>687</sup> Torpey, "Politics and the Past," p. 4.

<sup>688</sup> Elazar Barkan, "Introduction: Reparation: A Moral and Political Dilemma," in *Reparations: Interdisciplinary Inquiries*, ed. Jon Miller and Rahul Kumar (2007), p. 2.

<sup>689</sup> On restitution and the right to self-determination, see Chapter Three, Section 6.3.

<sup>690</sup> For an analysis of the stakeholders, see Chapter Five, Section 1.

<sup>691</sup> Cf. Barkan, "Introduction: Reparation: A Moral and Political Dilemma," p. 2.

of redress include the South African “Restitution of Land Rights Act” of 1994, which provides for the restitution of land rights to both individuals and communities who were dispossessed under apartheid;<sup>692</sup> the attempt of more than forty governments to determine general principles that should be able to generate “just and fair” solutions with regard to Nazi-confiscated cultural properties in 1998 (Washington Principles);<sup>693</sup> the attempts by Germany to make reparations to those individuals subjected to forced labor during WWII through establishing the “Remembrance, Responsibility and Future” Foundation, which has provided special funds and an educational program since 2000;<sup>694</sup> and the apology made by the Australian Prime Minister to indigenous Australians in 2008.<sup>695</sup>

With regard to the return of cultural materials, the informal and voluntary return of such objects might be the material consequence of ethical and historical considerations pertaining to the circumstances of the removal or that of later acquisition. Although the aspect of ‘voluntary return’ pertaining to complementary and alternative mechanisms to current restitution practices will be dealt with in detail in Chapter Six,<sup>696</sup> some brief remarks will be made at this stage in conjunction with the discourse on ethical and historical considerations in restitution matters. Voluntary return means that the return is made without a request for financial compensation (in contrast to cases of *bona fide* purchase), it is conducted without any formal (legal) procedure, and was not facilitated by third-party mediation.<sup>697</sup> Voluntary return of cultural materials as an international practice is still controversial, since some fear that such initiatives would create legal precedence, and would eventually decimate the collections held by Western museums.<sup>698</sup> Despite these concerns, several voluntary returns of

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<sup>692</sup> No. 22 of 1994: Restitution of Land Rights Act, 25 November 1994, full text available at: <http://www.info.gov.za/acts/1994/a22-94.pdf> (accessed 23 September 2011); for details: Ruth Hall, "Two Cycles of Land Policy in South Africa: Tracing the Contours.," in *The Struggle over Land in Africa*, ed. Ward Anseeuw and Chris Alden (2010), pp. 176.

<sup>693</sup> See, principles eight and nine of the 1998 Washington Principles on Nazi-Confiscated Art, 3 December 1998; for a detailed discussion, see *supra* Chapter Three, Section 3.5.

<sup>694</sup> The Foundation "Remembrance, Responsibility and Future" with its German Forced Labor Compensation Program was established on 2 August 2000. A forced labor fund, financed jointly by the German government and private German enterprises involved in WWII, has paid out more than EUR 4.4 billion to 1.66 million of living victims around the world (these are one-off payments of between 2,500 to 7,500 Euros); details available at: <http://www.stiftung-evz.de/> (accessed 23 September 2011).

<sup>695</sup> The “Apology to the Stolen Generations” by the Australian Federal Parliament, read out by the Prime Minister Kevin Rudd regarding the removal of Aboriginal and Torres Strait Islander children, 13 February 2008; full text available at: <http://www.news.com.au/story/0,23599,23206157-2,00.html> (accessed 23 September 2011).

<sup>696</sup> For a detailed analysis, see Chapter Six, Section 3.

<sup>697</sup> Schönenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung*, p. 275.

<sup>698</sup> Such concerns, for example, have been expressed in the 2002 *Declaration on the Importance and Value of Universal Museums*, signed by major European and North-American Museums, stating: “We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values,

cultural objects have been undertaken over the last years, and many of these cases involved Nazi-looted art.<sup>699</sup>

Thus, voluntary actions might be considered as equivalent to soft law principles that also are not legally enforceable, but nevertheless influence current practices and standards, and indicate tendencies toward the further development of international law in the area of restitution and return.<sup>700</sup> One example of voluntary return, among many others, is the decision taken by the American art collector Shelby White to return nine Greek and Etruscan antiquities to the Italian government in 2008. Although White insisted that she had bought these items in good faith, she decided to return them in part because of informal allegations that these items had been illegally excavated.<sup>701</sup> Although voluntary return might be triggered in some cases by reputational concerns, or the fear of negative publicity and/or future litigation, the impetus to redress past injustices clearly dominates much of the debate surrounding restitution matters.

Ethical and historical considerations are particularly relevant to restitution matters that involve claims made by ethnic and religious (minority) groups. This is because the rights of these groups as well as their cultural perspectives and cultural identities were largely absent or essentially disregarded at the time of removal. In several cases, the museum or public institution currently holding appropriated cultural material are closely associated with the former colonial powers that were responsible for the removal, thereby perpetuating the denial of cultural rights.<sup>702</sup> Although some acquisitions by Western museums – whether by purchase, gift, or partage – have been legal, others are far more questionable. Moreover, the ethical and historical considerations pertaining to the circumstances of removal often taint the acquisition of such objects.<sup>703</sup> Especially in those cases that involve belligerent occupation

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reflective of that earlier era.”; reprinted in ICOM News No. 1 (2004), and available at: [http://icom.museum/pdf/E\\_news2004/p4\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p4_2004-1.pdf) (accessed 23 September 2011).

<sup>699</sup> Siehr, "Vereinheitlichung Des Rechts Der Kulturgüter in Europa?," p. 816. Siehr refers on p. 816 Fn. 33 to twelve cases of voluntary return in the period between 1998 and 2000.

<sup>700</sup> Cf. Bothe et al., *Völkerrecht*, p. 21.

<sup>701</sup> See: Elisabetta Povoledo, Collector Returns Art Italy Says Was Looted, in: The New York Times, 18 January 2008, available at: [http://www.nytimes.com/2008/01/18/arts/18collect.html?\\_r=1&ref=arts](http://www.nytimes.com/2008/01/18/arts/18collect.html?_r=1&ref=arts) (accessed 23 September 2011). A tenth and remaining piece, a rare fifth-century B.C. Greek vessel, will be returned to Italy in 2010.

<sup>702</sup> James D. Nason, "Beyond Repatriation: Cultural Policy and Practice for the Twenty-First Century," in *Borrowed Power: Essays on Cultural Appropriation*, ed. Bruce Ziff and Pratima V. Rao (1997), pp. 291.

<sup>703</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 392. See also: Vrdoljak, "Reparations for Cultural Loss," p. 197.

and genocide, the broader ethical dimension of international cultural heritage law cannot be neglected; rather this must play an active role in attempts to resolve restitution matters.

In summarizing, this section on ethical and historical considerations has clearly shown that attempts to resolve current restitution matters cannot be facilitate without the application of human rights consideration or considerations pertaining to the fairness and equity of the circumstances under which cultural materials were removed. Informal and voluntary return can be the practical consequence of attempts to remedy historical injustices. Moreover, ethical and historical considerations might facilitate the development and application of a more conciliatory restitution and returns regime. In contrast, the exclusive application of legal instruments may frequently prove unsatisfactory in attempts to remedy historical injustices.<sup>704</sup> Although the return (embedded in cooperation and exchange in cultural heritage matters) may be only a token gesture, it is, nevertheless, an important one, if undertaken properly.

## 6. Customary International Law

One of the primary sources of international law — other than international treaties and general principles of the law — is customary law.<sup>705</sup> Customary international law consists of rules of law derived from the consistent conduct of States that act in a certain manner out of a belief that they are legally required to act that way.<sup>706</sup> The elements of customary international law include: (1) the widespread repetition of similar international acts by States over time; this is referred to as State practice (objective element); (2) the requirement that these acts must occur out of a sense of obligation, i.e. the belief that a behavior was performed because it was a legal obligation; this is referred to *opinio juris* (subjective element); and (3) that the acts are simultaneously accepted by and not rejected by a significant number of States. In other words, customary international law must be derived from a clear consensus among States, which in turn may be expressed as international law through the United Nations.

The following section will assess the impact of customary international law on resolving restitution disputes with regard to following four issues: (1) restitution and return of cultural materials; (2) the reunification of dispersed cultural heritage; (3) the right to self-determination; and (4) the protection of cultural heritage.

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<sup>704</sup> Cf. Nafziger, "The Present State of Research," p. 238.

<sup>705</sup> See, Article 38(1)(b) of the Statute of the International Court of Justice.

<sup>706</sup> Shabtai Rosenne, *Practice and Methods of International Law* (1984), p. 55.

## 6.1 International Custom regarding Restitution and Return

Whereas for centuries looting and plunder of cultural materials have commonly been assumed to be the privilege of the victorious party in a conflict,<sup>707</sup> the beginning of the nineteenth century saw the establishment of a prohibition against such removals as a principle of international law.<sup>708</sup> The stipulation requiring the return of cultural materials appropriated during armed conflict under customary international law is indisputable, and is moreover ensured by the provisions of the 1899<sup>709</sup> and 1907<sup>710</sup> Hague Conventions Respecting the Laws and Customs of War on Land (Article 46 and 47).<sup>711</sup> Subsequent to the massive destruction and looting in WWII, these customs were reconfirmed by the 1954 Hague Convention,<sup>712</sup> which prohibits theft, pillage, misappropriation, and any act of vandalism directed against monuments and works of art. Whereas these provisions under customary international law pertain to combatants in armed conflicts, the obligation to restore cultural objects displaced by third parties uninvolved in the armed conflict (as provided by the 1954 Protocol to the Hague Convention) has yet to be generally accepted, and therefore cannot be viewed as part of customary international law.<sup>713</sup> Some scholars, however, assume that the prohibition on the removal of cultural materials from occupied territories and the corresponding obligation to return such property does not yet constitute customary international law.<sup>714</sup> Their argument is that there is a sufficient lack of State practice, since several States do not act accordingly. This is certainly true: Russia, for example, has contradicted this obligation to return cultural materials, as it pertains to the removals by Soviet troops at the end of WWII.<sup>715</sup> However, Russia does not dispute the general principle

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<sup>707</sup> Siehr, "International Art Trade and the Law," p. 109.

<sup>708</sup> For a detailed discussion, see Chapter Two, Section 2.

<sup>709</sup> 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 (The Hague, adopted 29 July 1899), entering into force September 4, 1900, reprinted in AJIL, vol. 1 (1907), p. 129.

<sup>710</sup> Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, adopted 18 October 1907, entering into force 26 January 1910), reprinted in AJIL, vol. 2 (1908), p. 90.

<sup>711</sup> Cf. Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 356. In the same vein: Freytag, "Cultural Heritage: Rückgabeansprüche Von Ursprungsländern Auf "Ihr" Kulturgut?," p. 183.

<sup>712</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts (adopted 14 May 1954, entering into force 7 August 1956), 249 UNTS 215; for details, see *supra* Chapter Three, Section 2.1.

<sup>713</sup> Francesco Francioni, "Au-Dela Des Traités: L'émergence D'un Nouveau Droit Coutumier Pour La Protection Du Patrimoine Culturel," *Revue Générale de Droit International Public* 1, no. 11 (2007): p. 29.; Freytag, "Cultural Heritage: Rückgabeansprüche Von Ursprungsländern Auf "Ihr" Kulturgut?," p. 183.

<sup>714</sup> Raymond Goy, "La Restitution Des Objets Culturels Déplacés En Relation Avec La Seconde Guerre Mondiale À L'unesco," *Hague Yearbook of International Law* (2008): p. 60-67. In the same vein: Guido Carducci, *La Restitution Internationale Des Biens Culturels Et Des Objets D'art: Droit Commun, Directive Cee, Convention De L'unesco Et D'unidroit* (1997), p. 123-24.

<sup>715</sup> See, *supra* Chapter Two, Section 2

of restitution, but argues that there should be exceptions to restitution and war reparations, namely ‘restitution in kind’, allowing Russia to retain cultural objects as “non-pecuniary restitution for cultural property destroyed or irretrievably lost as a result of aggression”.<sup>716</sup> The International Court of Justice (ICJ), however, ruled in the *Nicaragua case* that “the Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. [...] If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”.<sup>717</sup> On this basis, and the basis of the Hague Conventions of 1899, 1907 and 1954, it is clear that international legal custom prohibits the misappropriation of cultural materials from occupied territories during armed conflicts, and therefore imposes an obligation to return displaced cultural materials.

The question, however, is whether such an obligation under customary international law persists in times of peace. A simple application of the war-time provisions to the peace-time regime, while desirable, would contradict the principles of customary international law. The identification of a peace-time obligation to return cultural materials under customary international law begins with the widespread iteration of State practice, as mentioned above. This means that a decisive number of States must repetitively return cultural objects, and that they do so out of a sense of legal obligation, as required by *opinio juris*.

An indication of the development of such a custom can be seen in the several UNESCO recommendations and declarations on this issue adopted by UNESCO member States.<sup>718</sup> Moreover, the nearly biannual restatement of the resolution on the ‘Return or Restitution of Cultural Property to the Countries of Origin’ by the UN General Assembly since the early 1970s also point in this direction.<sup>719</sup> Although the number of States adopting

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<sup>716</sup> See in this regard the ‘Statement by the Russian Federation Delegation on the Draft of the Declaration of the Declaration of Principles relating to cultural objects displaced in connection with the Second World War’, 27 October 2009 on the occasion of the General Conference, 35th session, Paris 6-23 October 2009. For further details, see *supra* Chapter Three, Section 3.1. The statement by Russia is available at: [http://www.mid.ru/brp\\_4.nsf/f68cd37b84711611c3256f6d00541094/acd8b550dd73f5c6c325765d005601d8?OpenDocument](http://www.mid.ru/brp_4.nsf/f68cd37b84711611c3256f6d00541094/acd8b550dd73f5c6c325765d005601d8?OpenDocument) (accessed 23 September 2011).

<sup>717</sup> *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua vs. United States of America). Merits, Judgment of 26 June 1986, ICJ Reports 1986, p. 14, para. 186.

<sup>718</sup> For a detailed discussion, see *supra* Chapter Three, Section 3.1.

<sup>719</sup> For a detailed discussion, see *supra* Chapter Three, Section 3.3.

the UNGA resolution on restitution and return has increased over the last thirty years, it is doubtful as to whether the constant reiteration of resolutions by the UN General Assembly provides anything more than a reminder to the international community that the question of restitution and return has yet to be fully resolved.<sup>720</sup> The continuing vigorous debate among professionals associated with collecting institutions within art-market countries, as well as initiatives towards stricter codes of conduct (for example the ICOM code of conduct as well as others) indicate a growing awareness of restitution matters in the private sector as well. These developments both on the international and national level have also been furthered by the evolution of international treaties and bilateral agreements pertaining to restitution and return, as well as voluntary acts of return by States and individuals.<sup>721</sup>

Nevertheless, the question remains: have these well-intentioned activities served to both fundamentally increase international awareness regarding the issue of cultural restitution as well as alter State practice pertaining to the restitution and the return of cultural objects? Many museums and other art holding institutions seem to have realized their moral obligation to assist requesting States; however, this might often be done more out of a concern for their own international reputation or a sign of good will than out of altruism, especially since recent restitution disputes have involved major national as well as international media campaigns.<sup>722</sup> Many cultural items have been returned over the past years; therefore, one could argue that these returns form the basis of a new common State practice.<sup>723</sup> However, as mentioned above, this requires the repetitive return of cultural materials by States out of a sense of legal obligation. The problem with this line of thinking is the fact that most returns have not been made under a sense of general legal obligation, since States repetitively refer to the fact that these cases are *sui generis* and regularly exclude any kind of legal commitment when they agree to the ‘transfer’ of cultural materials.

Most interestingly, a 2008 decision of the Italian Supreme Administrative Tribunal (*Consiglio di Stato*) has diverged from the traditional understanding of customary international law pertaining to restitution and return by indicating that Italy had a legal

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<sup>720</sup> Prott and O’Keefe, *Law and the Cultural Heritage*, p. 825.;see, historical overview on the UNGA resolutions on Return and Restitution: Fitschen, "30 Jahre Rückführung Von Kulturgut - Wie Der Generalversammlung Ihr Gegenstand Abhanden Kam."

<sup>721</sup> Cf. Prott and O’Keefe, *Law and the Cultural Heritage*, p. 825.

<sup>722</sup> On the role of the media in the U.S.-Italian agreements, see *supra* Chapter Three, Section 2.10.

<sup>723</sup> Prott and O’Keefe, *Law and the Cultural Heritage*, p. 826.

commitment to return the ‘Venus of Cyrene’ to Libya.<sup>724</sup> While the return of this marble statue from Italy to Libya in 2008 was originally supposed to take place under the auspices of the Italian-Libyan Joint Declaration of 1998, the Italian Supreme Administrative Tribunal ruled that Italy was obliged under customary international law to return the statue to Libya. The headless marble statue of the ‘Venus of Cyrene’, which dates back to the Second Century A.D., was found nearby the ruins of the old Greek and Roman settlement of Cyrene by Italian troops in 1913. The Venus is a Roman copy of an original Hellenistic work that has never been found. In 1915, the Venus was removed to Rome, where it was exhibited at the National Roman Museum. At the time of the discovery, Italy had already unilaterally annexed Libya (Tripolitania and Cyrenaica), in response to the Italian-Turkish War (1911-1912) – territories that previously belonged to the Ottoman Empire. Similarly to the archeological site of Axum,<sup>725</sup> the archaeological site of Cyrene was included in the 1972 UNESCO World Heritage List in 1982.<sup>726</sup> In 1998, Italy and Libya signed a joint declaration, according to which Italy committed itself to the return of all cultural properties taken by Italy “[...] during and after the Italian colonization of Libya, pursuant to the 1970 UNESCO Convention”.<sup>727</sup> Consequently, the Venus was removed from the National Roman Museum in 2002 by a Ministerial decree and was returned to Libya on 31 August 2008, on the occasion of a visit by the Italian Prime Minister in Libya.<sup>728</sup>

Prior to its return, attempts were made to annul the Ministerial decree before the Regional Administrative Tribunal of Latium by a non-governmental organization, *Italia Nostra* (“Our Italy”). According to the plaintiff, the removal of cultural objects beyond State borders could be affected only through the creation of a law, since such cultural materials are inalienable under the provision of the Italian Civil Code. Furthermore, as the Ministerial decree was based on the assumption that it was necessary to return the statue into the cultural context to which it belonged, the plaintiff argued that the cultural context is Italy, not Libya, because “a Roman copy of a Greek original of the Hellenistic age is more relevant to Italy’s

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<sup>724</sup> Italian Supreme Administrative Tribunal (*Consiglio di Stato*), 23 June 2008, No. 3154: *Associazione nazionale Italia Nostra Onlus c. Ministero per i beni e le attività culturali et al. Tribunale Amministrativo Regionale (TAR) del Lazio (Sez. II-quarter)*, No.3518, 28 February 2007, in Guida al diritto-II Sole 24 Ore, 2007, No.21, pp.91-99. This decision was confirmed upon appeal (*Consiglio di Stato*, No.3154, 23 June 2008).

<sup>725</sup> For details on the return of the Axum Obelisk to Ethiopia, see *supra* Chapter Three, Section 2.9.1.

<sup>726</sup> World Heritage List, Archaeological Site of Cyrene, Libya, date of inscription: 1982 (Ref. 190); further information is available at: <http://whc.unesco.org/en/list/190> (accessed 23 September 2011).

<sup>727</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 360.

<sup>728</sup> See: *Ibid.*

artistic context than to the Islamic one.” According to the plaintiff, the return would establish a precedent leading to the impoverishment of the Italian artistic and archeological heritage.

The Regional Administrative Tribunal<sup>729</sup> dismissed the claim in a judgment issued in February 2007, arguing that the Italian domestic legislation protecting cultural goods (Civil Code) does not apply to cases falling under the auspices of international treaties such as the 1998 Italian-Libyan Joint Declaration, which outlines an obligation to return cultural materials.<sup>730</sup> For the Tribunal, however, the return of the Venus was not only provided for in the Joint Declaration, but also under an obligation already existing under two customary rules of international law. Firstly, in case of a newly independent State emerging out of State succession, all movable cultural property becomes the property of the successor-State (i.e. Libya).<sup>731</sup> Secondly, cultural objects removed in time of war are to be restored to their country of origin, as provided for in the 1899/1907 Hague Conventions, several peace treaties, and the 1954 Hague Convention. Consequently, the Tribunal contended that there was no need for the creation of a law in order to legalize domestic execution of the 1998 Joint Declaration, since rules of customary international law are already self-executing under Article 10 of the Italian Constitution. On appeal, the Italian Supreme Administrative Tribunal (*Consiglio di Stato*) upheld the judgment of the Regional Administrative Tribunal, thereby confirming that Italy was under a legal obligation to return the ‘Venus of Cyrene’ to Libya. The Supreme Tribunal found that customary international law provided the obligation to return all cultural materials which have been taken as a result of colonization or war. This new rule of customary international law has been developed as a result of the prohibition of use of force and of the principle of self-determination of peoples.<sup>732</sup>

This decision is remarkable because the judges acknowledged the importance of the inequalities that had led to the initial loss of cultural materials, and highlighted the importance

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<sup>729</sup> *Tribunale Amministrativo Regionale del Lazio*, the Italian Court of First Instance in the Region of Lazio (Rome).

<sup>730</sup> *Tribunale Amministrativo Regionale del Lazio*, February 28, 2007, No. 3518, *Associazione nazionale Italia Nostra Onlus c. Ministero per i beni e le attività culturali et al.*, Guida al diritto-Il Sole 24 Ore, 2007, No. 21, pp. 91-99.

<sup>731</sup> The Tribunal referred to the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (not yet entered into force).

<sup>732</sup> For further information on both decisions, see Alessandro Chechi, "The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene," *Italian Yearbook of International Law* (2008): pp. 159. See also: Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 363.

of redressing past wrongs.<sup>733</sup> However, it remains questionable as to whether such an obligation currently exists under customary international law. Doubts on this point can be raised based on the following three considerations: firstly, it is not commonly accepted that the principles of State succession apply to the process of decolonization and the formation of sovereign States. Moreover, the 1983 Vienna Convention on the Succession of States (to which both tribunals refer) is neither currently in force nor does it apply to cultural objects. Secondly, it is not commonly accepted that colonial domination is equivalent to the wartime status (and therefore the wartime regime) in international law.<sup>734</sup> Thirdly, the assumption of an obligation to return cultural objects under customary international law requires, as mentioned above, widespread iteration of State practice, namely that States engage in a common practice of returning cultural materials out of a sense of legal obligation. Although one could argue that recent incidents indicate a growing acceptance of the 1954 Hague and the 1970 UNESCO Conventions, most cultural artifacts returned within the context of colonial removal have been returned on grounds of political and diplomatic concessions, not on the basis of a legal obligation. Thus, the decision of the Italian Supreme Administrative Tribunal is quite revolutionary insofar as its ruling does not reflect the common State practice pertaining to the restitution of cultural materials removed during the colonial era.

In summarizing, it should be noted that States frequently return cultural materials either to foreign States or individuals; if they do so, they act within the framework of the 1970 UNESCO Convention or multi-or bilateral agreements. In most incidents of return (even those that might fall under the provisions of international treaty law), States generally avoid referring to any kind of legal obligation to which they might be bound.<sup>735</sup> Therefore, a common State practice that would confirm the recognition of a customary obligation to return cultural materials, which do not fall within the wartime context, cannot yet be identified in customary international law. The use of specific terminology by States, as discussed above,<sup>736</sup> is notably here insofar as the more neutral term ‘return’ is most frequently employed, whereas the term ‘restitution’ – which implicitly indicated a legal obligation – is rarely used; this provides further evidence against the assumption that States act out of legal obligation in these matters. Although the return of cultural materials appropriated during wartimes

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<sup>733</sup> Cf. Chechi, "The Return of Cultural Objects Removed in Times of Colonial Domination and International Law: The Case of the Venus of Cyrene," p. 174.

<sup>734</sup> For the discussion on the war time and peace time regime and the relation to the colonial era, see *supra* Chapter Two, Section 4.3.

<sup>735</sup> Cf. Greenfield, *The Return of Cultural Treasures*, pp. 224.

<sup>736</sup> For a detailed discussion on terminology, see *supra* Chapter Two, Section 3.

constitutes customary international law and, within times of peace, consensus has been reached by the international community that the threats posed to cultural heritage by illicit trafficking should be countered through international cooperation,<sup>737</sup> a general obligation to return cultural materials has not yet evolved under customary international law in times of peace.<sup>738</sup>

## 6.2 International Custom regarding the Reunification of Dispersed Heritage

The reunification of dispersed cultural objects refers to the re-constitution of the physical integrity of fragmented cultural objects, which have been dismembered over time. The concept also applies to collections. Therefore, issues pertaining to the reunification constitute its own category of legal custom with regard to cultural heritage practices. For example, the 1977 ICOM Study<sup>739</sup> considers the reassembly of dispersed heritage through restitution or the return as an ethical principle. Although ICOM limits its principle to “objects of major importance for the cultural identity and history of countries having been deprived thereof”, the reassembly of dispersed cultural materials may, at the very least, be understood as a ‘moral obligation’.<sup>740</sup> It is important to point out that the 1977 ICOM Study assumes that the reassembly of dispersed heritage of major importance is already established as an element of *jus cogens*; however, this clearly cannot be presumed. *Jus cogens* refers to a principle of international law so fundamental that no state may derogate from this principle through declaration, treaty or others means. Moreover, *jus cogens* is recognized under peremptory norms, including prohibitions against slavery, genocide and crimes against humanity. It is quite doubtful that the reunification of dispersed heritage would fall into this category of international customary law. Therefore, reunifying or reassembling dispersed objects through restitution or return cannot yet be identified as an element of *jus cogens*, even though it has been considered as a moral obligation under international law.

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<sup>737</sup> For details on provisions pertaining to international cooperation, see, for example, the provisions of the 1970 UNESCO Convention, see *supra* Chapter Three, Section 2.2. For a detailed discussion on international cooperation, see Chapter Four, Section 2.3.

<sup>738</sup> Cf. Freytag, "Cultural Heritage: Rückgabeansprüche Von Ursprungsländern Auf "Ihr" Kulturgut?," p. 183.

<sup>739</sup> *Study on the Principles, Conditions and Means for the Restitution and Return of Cultural Property in view of Reconstituting Dispersed Heritages* (1977). This report was prepared by the Ad Hoc Committee appointed by the Executive Council of ICOM (established 1976); published as UNESCO Doc. CC-78/CONF.609/3 Annex 1 and in (1979) *Museum*, Vol. XXXI, no. 1, Paris: UNESCO, pp. 62-66. This report led to the establishment of the UNESCO Intergovernmental Committee, see *supra* Chapter Three, Section 3.2.

<sup>740</sup> Greenfield, *The Return of Cultural Treasures*, p. 234.; see also: Freytag, "Cultural Heritage: Rückgabeansprüche Von Ursprungsländern Auf "Ihr" Kulturgut?," p. 196.

### 6.3 International Custom regarding Restitution and the Right to Self-determination

The right to self-determination is a principle of customary international law, which is often seen as both a moral and legal right. It was first mentioned in Articles 1(2) and 55 of the UN Charter of 1945, and has been further defined through various UN General Assembly resolutions starting in the 1960s. During the decolonization era, the right to self-determination became fused to the right to development, including cultural development.<sup>741</sup> Distinct from individual rights, as commonly understood under international law, the right to self-determination is seen as a specific collective right and therefore it remains disputed as a principle of international customary law. According to Article 1 of the *International Covenant on Civil and Political Rights*<sup>742</sup> as well as the *International Covenant of Economic, Social and Cultural Rights*<sup>743</sup> adopted in 1966, self-determination refers to the fact that "all peoples have the right [to] freely determine their political status and freely pursue their economic, social and cultural development". Promoted initially by the newly independent States of the 1950s and 1960s, peoples in international administered territories and occupied territories, and more recently indigenous peoples and minorities groups, the formulation of the right to self-determination has remained largely unchanged.<sup>744</sup>

Most recently, the right to self-determination has been confirmed by the 2007 UNGA *Declaration on the Rights of Indigenous Peoples* (hereinafter UNDRIP),<sup>745</sup> which was negotiated over a period of more than twenty years between representatives of indigenous peoples and States. Although States with large indigenous communities (i.e. Australia, Canada, New Zealand and the United States), voted against the declaration in 2007, they have reversed their positions and now endorse the declaration.<sup>746</sup> The UN Declaration recognizes

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<sup>741</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 10.

<sup>742</sup> *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entering into force 23 March 1976) 999 UNTS 171. For a detailed discussion on human rights obligations under both Covenants, see *supra* Chapter Three, Section 2.8.

<sup>743</sup> *International Covenant of Economic, Social, and Cultural Rights* (adopted 16 December 1966, entering into force 3 January 1976) 993 UNTS 3.

<sup>744</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 10.

<sup>745</sup> See Article 3 of the UN *Declaration on the Rights of Indigenous Peoples* adopted by the General Assembly on 13 September 2007, 61<sup>st</sup> session, (GA/10612), ILM, 2007, p.1013.

<sup>746</sup> The UNDRIP was adopted by a majority of 144 States in favor, with 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), the voting record is available at: <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (accessed 23 September 2011).

the wide range of basic human rights and fundamental freedoms of indigenous peoples;<sup>747</sup> without, however, providing a specific legal definition of ‘indigenous peoples’.<sup>748</sup> Among the recognized rights are (1) the right to unrestricted self-determination, (2) an inalienable collective right to the ownership, use and control of lands, territories and other natural resources, (3) rights regarding maintenance and development of political, religious, cultural and educational institutions, and (4) rights associated with the protection of cultural and intellectual property. The declaration emphasizes requirements pertaining to prior and informed consultation, participation and consents in State activities of any kind, which may have an impact on indigenous peoples, their property or territories. Moreover, and most importantly for this thesis, the declaration includes the recognition of a ‘right to redress’.<sup>749</sup> In this respect, Article 11 of the declaration states that “States shall provide 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.” Consequently, the declaration creates a reciprocal effect between the ‘right to self-determination’ on the one hand, and the ‘right to redress’, on the other. Thus, indigenous peoples may make requests for redress against one or more States with the aim of obtaining explicit recognition of their right to self-determination.<sup>750</sup> This, in terms of restitution and return, may comprise claims for ‘material redress’ of appropriated cultural objects and human remains.

Moreover, the right to self-determination has been used in attempts to establish a legal basis for restitution claims: firstly, based on the assumption that restitution is included in the concept of freedom to pursue cultural development;<sup>751</sup> and secondly, based on the interplay

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<sup>747</sup> For an extensive overview of the rights of indigenous peoples, see the 2010 Conference Report of the ILA Committee on the Rights of Indigenous Peoples (The Hague Conference), available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (accessed 23 September 2011).

<sup>748</sup> For details on the debate over the term and the various political and other factors at play, see Henry Minde, "The Destination and the Journey: Indigenous Peoples and the United Nations from the 1960s through 1985," in *Indigenous Peoples: Self-Determination, Knowledge, Indigeneity*, ed. Henry Minde (2008), pp. 49 ff.

<sup>749</sup> See Articles 11 and 28 of the 2007 UNDRIP.

<sup>750</sup> Francioni, "Reparation for Indigenous People: Is International Law Ready to Ensure Redress for Historical Injustices?," p. 28.

<sup>751</sup> The argument is based on the wording of Article 1(1) of both covenants (ICCPR and ICESCR) that reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their economic, social and cultural development." For details, see *supra* Chapter Three, Section 2.8.

between the principle that prohibits the use of force and the right to self-determination.<sup>752</sup> Although the Italian Supreme Administrative Tribunal (*Consiglio di Stato*) affirmed an obligation to return cultural materials taken as a result of colonization or war, the 2008 decision does not reflect the common State practice pertaining to the restitution of cultural materials removed during the colonial era.<sup>753</sup>

Whereas the right to self-determination may be deemed to be a part of customary international law, specific legal provisions pertaining to the restitution and return of cultural objects that may derive from the right to self-determination have yet to be established in customary international law. This should also be understood in light of the fact that the 2007 UN Declaration is not legally binding. Furthermore, linking the return of cultural objects to the right to self-determination (and the freedom to pursue cultural development) remains highly contentious: while human rights are usually held by an individual, the right to self-determination is exceptional, since it is a collective right under international law.<sup>754</sup> Moreover, the right to self-determination would imply a comprehensive right to restitution and return with the consequence that current legal status pertaining to ownership rights would be nullified.<sup>755</sup> In addition, such an interpretation would interfere with the general principle of non-retroactivity in international law. Although the right to self-determination of indigenous peoples has gained momentum, and certainly imposes some kind of legal obligations on States (i.e. to ensure cultural diversity, cultural participation, and minority rights, etc.); however, it cannot yet be considered as a principle of international law associated with an obligation to restitution and return under customary international law.

#### **6.4 International Custom regarding the Protection of Cultural Heritage**

The protection of cultural heritage within the ‘peace time regime’, derived from the protection established within the ‘armed conflict regime’, has made substantial progress in the

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<sup>752</sup> Italian Supreme Administrative Tribunal (*Consiglio di Stato*), 23 June 2008, No. 3154: *Associazione nazionale Italia Nostra Onlus c. Ministero per i beni e le attività culturali et al. Tribunale Amministrativo Regionale (TAR) del Lazio (Sez. II-quarter)*, No.3518, 28 February 2007, in Guida al diritto-II Sole 24 Ore, 2007, No.21, pp.91-99. This decision was confirmed upon appeal (*Consiglio di Stato*, No.3154, 23 June 2008).

<sup>753</sup> For a detailed discussion, see *supra* Chapter Two, Section 4.3 and Chapter Three, Section 6.1.

<sup>754</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 10.

<sup>755</sup> Rudolf Dolzer, "Kulturgüter Im Friedensvölkerrecht," in *Rechtsfragen Des Internationalen Kulturgüterschutzes*, ed. Rudolf Dolzer, Erik Jayme, and Reinhard Mussgnug (Heidelberg: 1994), p. 150.

past decades.<sup>756</sup> The general concept of cultural heritage protection is built upon the assumption that cultural heritage is an element of the ‘common interest’ of the international community.<sup>757</sup> Based on this ‘common interest’, acts of violence against cultural heritage during armed conflicts as well as the deliberate destruction of cultural heritage in peacetime are deemed to be prohibited under customary international law. Since the destruction of any nation’s cultural heritage can be considered to be a loss and an injury to the collective patrimony of mankind, it can be classified of having *erga omnes* character.<sup>758</sup> The International Court of Justice recognized in its Barcelona Traction case<sup>759</sup> these obligations as being *erga omnes*, which should be understood as obligations owed to the collectivity of States in the ‘public interest’. These obligations include the prohibition of violence, genocide as well as the protection of basic human rights.<sup>760</sup> Therefore, the prohibition of intentional destruction of cultural heritage can be subsumed under the category of *erga omnes* obligations because of its general and universal importance to the international community and humanity as a whole.<sup>761</sup>

The primary objective of cultural heritage protection is based upon the general interest in the preservation and enjoyment as well as the maintenance and protection of this heritage for the benefit of succeeding generations. The obligation to protect cultural heritage has been confirmed, for example, by the unfettered consensus of the international community, including both Western and Islamic governments as well as international organizations, in their condemnation of the destruction of the Buddhas of Bamiyan in 2001. This consensus was subsequently substantiated in the Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the UNESCO General Conference in 2003,<sup>762</sup> as discussed earlier in this thesis. Therefore, it can be said that the customary obligation to protect cultural

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<sup>756</sup> For a detailed discussion, see *supra* Chapter Two, Section 2 and 4.1.

<sup>757</sup> Francioni, "Au-Dela Des Traités: L'émérgence D'un Nouveau Droit Coutumier Pour La Protection Du Patrimoine Culturel," p. 33.

<sup>758</sup> Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 37. See also: *Declaration concerning the Intentional Destruction of Cultural Heritage*, adopted by the General Conference of UNESCO, 17 October 2003; as well as the Eritrea-Ethiopia Claims Commission that asserted that the destruction of the Stela of Matara by the military troops of Ethiopia during the war in 1998-2000 to be a violation of customary international law.

<sup>759</sup> See *Barcelona Traction, Light and Power Company, Limited (Belgium vs. Spain)*, Judgment of 5 February 1970, ICJ Reports, 1970, 3, p. 33.

<sup>760</sup> See overview: <http://www.icj-cij.org/icjwww/idecisions/isummaries/ibtsummary700205.htm> (accessed 28 September 2011).

<sup>761</sup> Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 34.

<sup>762</sup> UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the UNESCO General Conference, 17 October 2003.

heritage limits the power that a State has over cultural heritage located within the sphere of its territorial sovereignty. This customary obligation exists towards the international community as such, and thus, *a fortiori*, towards all States.<sup>763</sup>

Several manifestations of international State practice, which confirm the existence of such an obligation, can be identified; this has clearly been demonstrated in the previous sections of this chapter. As early as the beginning of the twentieth century, the Hague Conventions of 1899 and 1907 (Art. 46 and 47)<sup>764</sup> proclaimed that historic monuments must be protected during wartime. In addition to the 1970 UNESCO Convention and the 1995 UNIDROIT Convention that restate the importance of protecting cultural heritage to the international community, several UNESCO recommendations and conventions demonstrate a ‘common interest’ in the protection of cultural heritage. In particular, the 1972 UNESCO World Heritage Convention imposes an obligation on all of its current 188 States parties<sup>765</sup> to preserve their cultural heritage. As this is almost the entire international community, one can, for all practical purposes, speak of a unanimous consensus among States; this is more than it is required under customary international law.

Moreover, the obligation to protect cultural heritage also involves in another area of international law, namely that of international humanitarian law. In an effort to humanize and moderate war to some extent, humanitarian law attempts to limit the impact of hostilities on civilian populations as well as on cultural heritage. Although the main principles of humanitarian law originally only applied to international armed conflicts, international practices have over the last several decades extended the application of these main principles of humanitarian law to also include conflicts of non-international character, namely civil wars and ethnic conflicts within a State. This trend is apparent in the 1999 Second Protocol to the 1954 Hague Convention, as well as in the statutes of recently established international criminal tribunals, particularly the International Tribunal for the former Yugoslavia (ICTY). The ethnic conflicts in Bosnia-Herzegovina and Croatia led to the establishment of the ICTY

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<sup>763</sup> Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 37.

<sup>764</sup> See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Hague, 18 October 1907, full text version: <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument> (accessed 23 September 2011).

<sup>765</sup> States Parties to the 1972 World Heritage Convention: 188 States by 23 September 2011, list of States parties available at: <http://whc.unesco.org/en/statesparties/> (accessed 23 September 2011).

in 1993.<sup>766</sup> Under Article 3(d) of the statute of the ICTY, individual persons are legally liable for the violations of the laws and customs of war, including the “[...] destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and the sciences, historic monuments and works of art and science”. In several decisions, the ICTY clearly affirmed that the provisions established in the 1907 Hague Convention as well as the 1954 Hague Convention have the effect of customary international law;<sup>767</sup> specifying in *Prosecutor vs. Tadic* (1995) that the 1954 Hague Convention also applies under customary international law to non-international armed conflicts.<sup>768</sup>

In *Prosecutor vs. Strugar* (2001), the ICTY convicted the commander of the Yugoslav Army Forces and sentenced him to an eight year sentence under the principle of “command responsibility” for having ordered attacks on targets in the Dubrovnik region and having failed to prohibit attacks on the historic city center of Dubrovnik;<sup>769</sup> the court placed significant weight on the fact that the historic center of Dubrovnik is inscribed in the World Heritage List.<sup>770</sup> Moreover, the ICTY also established that the targeting of cultural assets belonging to a culturally distinct group constituted an ‘element of crimes against humanity’, specifically the crime of persecution, if this act is committed with discriminatory intent. Along this vein, the ICTY acknowledged a fundamental connection between the intent to destroy a group of people and the destruction of cultural works and religious sites that form part of that group’s history, culture, spiritual heritage, and identity.<sup>771</sup> Although the deliberate destruction of the cultural heritage of a specific ethnic group or minority might constitute evidence of the crime of genocide, the ICTY ruled in *Prosecutor vs. Krstic* (2001) that in customary international law, the definition of acts of genocide (as contained in the Genocide

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<sup>766</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (ICTY), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council Resolution 827 on 25 May 1993, U.N. Doc. S/RES/827 (1993).

<sup>767</sup> See *Prosecutor vs. Kordic & Cerkez* (IT-95-14/2-T, 26 February 2001, para.206); *Prosecutor vs. Strugar* (IT-01-42-PT, 31 January 2005, paras.227, 230), *Prosecutor vs. Tadic* (IT-94-1-I, 2 October 1995, para.98), and *Prosecutor vs. Hadžihanovic & Kubura* (IT-01-47, 15 March 2006, paras.57-64). For details on ICTY case law see Micaela Frulli, "Advancing the Protection of Cultural Property through the Implementation of Individual Criminal Responsibility: The Case Law of the International Criminal Tribunal for the Former Yugoslavia.," *Italian Yearbook of International Law* (2005): pp. 196-216.

<sup>768</sup> *Prosecutor vs. Tadic* (IT-94-1-I, 2 October 1995, paras.127, 268).

<sup>769</sup> *Prosecutor vs. Strugar* (IT-01-42-PT, 31 January 2005, paras.232, 279, 285, 302).

<sup>770</sup> Old City of Dubrovnik, reference 95bis, inscribed in 1979 on the basis of criteria (i)(iii)(iv), more information available at: <http://whc.unesco.org/en/list/95> (accessed 23 September 2011).

<sup>771</sup> *Prosecutor vs. Kordic & Cerkez* (IT-95-14/2-T, 26 February 2001) and *Prosecutor v. Hadžihanovic & Kubura* (IT-01-47, 15 March 2006).

Convention<sup>772</sup>) is limited to those acts aimed at the physical or biological destruction of a group.<sup>773</sup> Similarly to the statute of the ICTY, the statute of the International Criminal Court (ICC) qualifies as a war crime any attack directed against buildings dedicated to religion, educational, and artistic purposes, or historical monuments.<sup>774</sup> The customary obligation to protect cultural heritage in armed conflict was also confirmed by the 2004 decision of the Eritrea-Ethiopia Claims Commission (EECC)<sup>775</sup> concerning the destruction of the *Stele of Matara*. Eritrea claimed that the site of Matara, one of the most significant archaeological sites in Eritrea, was devastated and that the stele was deliberately destroyed by Ethiopian troops during their occupation of Eritrea in 1998-2000. The Commission held that Ethiopia was liable under customary international humanitarian law for the destruction of the stele, regardless the fact that neither Eritrea nor Ethiopia were party to the 1954 Hague Convention.<sup>776</sup>

Against the backdrop of the recent developments in customary international law and the jurisprudence of the ICTY, one could speak of the evolution of a custom pertaining to the protection of cultural heritage in both international and non-international (internal) armed conflicts. As a result, it is possible to argue that due to the customary prohibition against the destruction of cultural heritage in armed conflict, it would be incomprehensible to maintain the view that similar acts of destruction are permitted in times of peace. Thus, provisions pertaining to the protection of cultural heritage valid within the context of the ‘armed conflict regime’ should surely be valid within the ‘peace time regime’ as well.<sup>777</sup> Furthermore, the ‘common interest’ in the protection of cultural heritage seems to exclude a conceptual differentiation between the ‘wartime regime’ (or broader in terms of internal conflicts: armed

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<sup>772</sup> Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948, 78 UNTS 277).

<sup>773</sup> *Prosecutor vs. Krstic* (IT-98-33-T, 2 August 2001, para.580), confirmed by the Appeals Chamber (19 April 2004, para.25).

<sup>774</sup> See Article 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

<sup>775</sup> The EECC was established pursuant to Article 5 of the Peace Agreement signed on 12 December 2000 between the governments of Eritrea and Ethiopia. The Permanent Court of Arbitration (The Hague) served as registry to the Commission. The Commission was directed to “decide through binding arbitration all claims for loss, damage or injury” by one government against the other, and by nationals (including both natural and juridical persons) of one party against the government of the other party pertaining to violations of international humanitarian law and other violations of international law caused by the conflict between Eritrea and Ethiopia. The Commission rendered its Final Awards on Damages in each party's claims on 17 August 2009; for further details see: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1151](http://www.pca-cpa.org/showpage.asp?pag_id=1151) (accessed 23 September 2011).

<sup>776</sup> See “Partial Awards: Central Front – Eritrea’s claim” 2, 4, 6, 7, 8, and 22, 28 April 2004, ILM, 2004, p.1270, paras.112-113.

<sup>777</sup> For the distinction between the wartime and the peacetime regimes, see *supra* Chapter Two, Section 4.

conflict regime) and the ‘peace time regime’.<sup>778</sup> In contrast, it seems highly reasonable to require higher protective standards during peacetime, since these obligations are naturally easier to fulfill during peace than during armed conflict, which generally involves higher levels of devastation and destruction. The prohibition on the intentional destruction of cultural heritage, which establishes a ‘negative responsibility’ to avoid destruction, also implies an oblique ‘positive responsibility’ to protect. In other words, it can be argued that the act of intentional ‘non-protection’ establishes nonfeasance, violating the ‘common interest’ of the international community in the protection of cultural heritage. Considering both the developments in international cultural heritage law and customary international humanitarian law within recent years, it is clear that not only the prohibition against the deliberate destruction of cultural heritage, but also the protection of the cultural heritage for the sake of humankind is a ‘common interest’ of the international community as a whole and, therefore, constitutes a binding obligation not only under international treaty law but also under customary international law.<sup>779</sup>

***Summary of the Chapter:***

This chapter provided a critical analysis of the existing legal provisions in international cultural heritage law; it has defined the limits and shortcomings of these provisions, and explored those provisions that indicate new trends and developments in view of the resolution of international cultural heritage disputes. The analysis focused on two aspects: firstly, the legal instruments that serve the protection of cultural heritage; and secondly, those legal instruments that provide the basis for claims pertaining to the restitution and return of cultural materials. Five major categories of instruments have been identified: (1) international treaty law and bilateral agreements; (2) soft law instruments; (3) codes of conduct and codes of ethics; (4) ethical and historical considerations; and (5) international customary law. The chapter explored several non-legal considerations within the restitution debate, since, in its attempt to ‘remedy historical injustice’, an analysis of restitution and return cannot be limited to mere legal considerations. Against the backdrop of the existing international law as well as State practice, it has been demonstrated that the majority of restitution disputes either remain unresolved or are resolved through bilateral agreements and out-of-court-settlements. It is therefore evident that the purely legal approach does not provide

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<sup>778</sup> Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," p. 37.

<sup>779</sup> Cf. Francioni, "Au-Dela Des Traités: L'Emergence D'un Nouveau Droit Coutumier Pour La Protection Du Patrimoine Culturel," p. 33.

an adequate solution in restitution disputes, since the ethical and historical dimensions intrinsic to issues of restitution and return are not sufficiently taken into account by the existing legal provisions.

In order to overcome the shortcomings of current legal instruments, this chapter explored the existing legal provisions that indicate the existence of a general responsibility to protect cultural heritage, both in the ‘armed conflict regime’ (wartime) and the ‘peacetime regime’. Determining a general responsibility to protect cultural heritage prepared the conceptual basis of the interest-oriented approach taken by this thesis in terms of a ‘common interest’ in the protection of cultural heritage. Due to the variety of stakeholders involved, the interests in the resolution of restitution disputes might be competitive (or even mutually exclusive); nevertheless, they do overlap in terms of their common interest in the protection of cultural heritage. In other words, preservation is a prerequisite to both restitution and retention. The analysis in this chapter has illustrated that firstly, most legal instruments (in particular those provided in international treaty law) do not include mechanisms that allow for cooperative approaches to restitution and return, and secondly, that current legal instruments in international law pertaining to restitution and return have difficulty recognizing the various interests involved. The national interests of the territorial State and the focus on property rights overshadow the fact that a ‘common interest’ in the protection of cultural heritage and an obligation to protect truly exists in both international treaty law and customary international law.

## **CHAPTER IV: The Conceptual and Legal Foundations of the Interest-oriented Approach**

### *Overview of the Chapter:*

This chapter forms the theoretical core of this thesis by elaborating the conceptual and legal foundations of the interest-oriented approach. After recalling the three rationales of the interest-oriented approach introduced in Chapter One, this chapter continues to contour the framework and function of the approach taken by this thesis. It will be argued that within the scope of the ‘common interest’ in the protection of cultural heritage, other interests can be identified as being of a ‘common’ nature. Although the analysis of the law in terms of interests has found wide-spread recognition, legal provisions pertaining to the resolution of restitution disputes predominantly fail to adequately ensure the recognition of the various interests involved, since it is primarily States and therefore States’ interests as well as property rights arguments over title and possession that dominate international cultural heritage law.

The interest-oriented approach argues in favor of balancing interests on the basis of general principles. This approach is best illustrated by a strikingly similar legal doctrine: namely, the ‘best interest doctrine’ in child custody determinations. While, at first glance, child custody law seems to have little in common with international cultural heritage law and the resolution of restitution disputes, it does, however, provide several highly illustrative and useful conceptual comparisons. Child custody determination is, after all, based on a ‘welfare check-list’ of interests, established to protect the best interests of the child. This chapter will argue that, for similar reasons, such a ‘welfare check-list’ approach should also be introduced in restitution disputes, in order to ensure the best interest of the cultural object in question. Such an approach must include an articulation of general principles for the resolution of restitution disputes, in a manner which facilitates mutual gain and cooperation. While this may sound revolutionary in the context of international cultural heritage law, recently developed concepts in other but similar areas of international law (such as international environmental law) indicate that the concept of ‘common interest’ in the protection of cultural heritage finds equivalence in the legal concepts of the ‘common heritage of mankind’,

‘common concern’, ‘common but differentiated responsibility’, as well as in the concept of ‘international cooperation’. This chapter concludes by demonstrating that while limitations on property rights are commonly utilized in order to protect of the ‘national patrimony’ of States, the protection of the cultural heritage of humankind does not benefit from such nationalistic restrictions. Therefore, it will be argued that for the sake of the ‘common interest’ in the protection of cultural heritage, limitations on property rights should be extended and apply to the resolution of restitution disputes. Similarly to child custody determination, such limitations would allow restitution and return to be postponed or even denied, if conditions facilitating the common interests in physical and cultural preservation, access, integrity and cooperation are not adequately met.

### **1. Frame and Function of the Interest-oriented Approach**

The instruments provided in the current legal framework of international cultural heritage law often lack specific applicable provisions pertaining to resolving restitution disputes (e.g. the 1970 UNESCO Convention) and, if they do, they frequently lack broad international acceptance (e.g. the 1995 UNIDROIT Convention). Moreover, no legal instruments operate retroactively, and therefore they frequently fail to apply to many current restitution disputes. However, as the legal analysis in the previous chapter has demonstrated, recent trends have supported the possibility that restitution disputes might be resolved by alternative means: firstly, recognizing the impact of ethical and historical considerations;<sup>780</sup> and secondly, by the attempt to employ cooperative and mutually beneficial mechanisms.<sup>781</sup> However, these alternatives are often considered without reference to legal provisions, and, most importantly, without reference to general legal principles that might provide a framework for determining how restitution disputes should be best settled. This is because resolutions frequently occur in bilateral and often unpublished agreements.<sup>782</sup> Therefore, this thesis argues that the means of resolving restitution disputes can be found in the identification of the motives and interests of the parties involved – in particular those of the requesting party. The assessment of the interests at stake in restitution disputes will demonstrate that while some interests are mutually exclusive, others are not, and these non-exclusive interests can provide the basis for agreement in restitution disputes.<sup>783</sup>

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<sup>780</sup> For details, see *supra* Chapter Three, Section 5.

<sup>781</sup> For example the solutions reached in the U.S.-Italian agreements, see *supra* Chapter Three, Section 2.10.

<sup>782</sup> See *supra* Chapter Two, Section 2.9.

<sup>783</sup> For the assessment of the interests at stake, see Chapter Five, Section 3.

As outlined in Chapter One, the need for the interest-oriented approach in international cultural heritage can be demonstrated on the basis of three interdependent rationales: firstly, the conceptual shift in international law from the notion of ‘cultural property’ towards the notion of ‘cultural heritage’ necessitates a corresponding shift in the resolution of restitution disputes.<sup>784</sup> It is time that the negotiations in restitution matters move beyond consideration of factors such as title and possession towards the creation of a ‘common interest’ in cultural heritage. However, this shift has not yet happened because States and their national property interests remain the primary focus of concern in international cultural heritage law.

Secondly, both bilateral agreements among States and agreements between private actors and States are contractual in nature. Contracts, however, suffer from the major shortcoming insofar that their terms depend, in part, on the bargaining power of the negotiating parties.<sup>785</sup> This is particularly problematic, when legal provisions are explicitly excluded in the bilateral agreements used to settle restitution disputes (as is frequently the case). As a result, successful outcomes in restitution disputes often depend to a significant extent on the political and diplomatic commitment of States as well as their bargaining power, rather than on general principles of law. This, not only affects the final outcome of negotiations in terms of mutual gain and cooperation, but also inhibits the development and application of a consistent legal framework in restitution matters. Furthermore, restitution disputes are often related to difficult issues associated with war, foreign or colonial occupation, or significant human rights violations. Attempts made to ‘remedy historical injustices’ by addressing the question of restitution and return<sup>786</sup> are often hampered by unequal bargaining powers as hegemony and dependence tend to persist in international relations – dividing the parties into so-called ‘source countries’ and ‘art-market countries’.

Thirdly, as the concepts of ‘property’ and ‘contract’ predominantly fail to resolve restitution disputes in a sustainable, cooperative manner, fail to take the interests of both the various stakeholders and the common interest in the protection of cultural heritage into account, and fail to provide a consistent framework in international cultural heritage law pertaining to restitution matters, alternative approaches are very much needed. Although international law will never be able to wholly prevent illicit trade in cultural materials, the

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<sup>784</sup> Rationale One: From ‘Cultural Property’ to ‘Cultural Heritage’, see *supra* Chapter Two, Section 5.1.

<sup>785</sup> Rationale Two: Contracts and Unequal Bargaining Power, see *supra* Chapter Two, Section 5.2.

<sup>786</sup> See Chapter Three, Section 5.

growing recognition of concepts such as the ‘common heritage of humankind’ and ‘common concern’ promote the idea of a common interest in the protection of cultural heritage and indicate the need for the development of an interest-oriented approach.<sup>787</sup> Therefore, this thesis attempts to introduce an alternative approach to currently employed restitution practices, in order to both facilitate and accelerate the return of cultural material when legitimate and appropriate, and to postpone or even deny the return of a requested object, should its return contradict the ‘common interest’. Thus, the interest-oriented approach may enhance the cooperation and exchange in restitution matters, while both preserving cultural objects and preventing their loss and dispersion.

### **1.1 General Principles pertaining to the Resolution of Restitution Disputes**

Generally speaking, law is concerned with the conflict of interests. One of the most illustrative examples of a conflict is the biblical narrative of the judgment of Solomon.<sup>788</sup> King Solomon of Israel was asked to make a judgment regarding the fate of a child, when two women, both of whom were claiming to be the mother of the same infant, came before him. Solomon’s famous declaration that the baby should be ‘split in two’ has become a metaphor for a wise judgment. By pretending he would opt for a simple compromise, namely the destruction of the subject matter of the dispute, rather than allowing either disputing party to win at the expense of the other, Salomon revealed the true interest of the parties: Solomon gave the child to the woman who offered to give up her claim to the child in order to spare his life, reasoning that the true mother’s instincts were to protect her child, rather than to let him die. Although most restitution disputes are not this simple, the narrative illustrates the importance of determining the interests involved. Since ‘splitting the baby’ – or, within this context, the cultural object in question – is not a viable option, it is essential to facilitate alternatives that balance the interests of all the stakeholders involved in order to resolve restitution disputes in an adequate and reconciling manner.

The analysis of the law in terms of interests has its methodological antecedents in German legal theory (*Interessenjurisprudenz*)<sup>789</sup> and is typical, for example, of doctrinal

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<sup>787</sup> Rational Three: The Protection of Cultural Heritage as Common Interest, see *supra* Chapter Two, Section 5.3.

<sup>788</sup> 1 Kings 3:16-28.

<sup>789</sup> The analysis of law in terms of interests (*Interessenjurisprudenz*) has been formed by Philipp von Heck and Müller-Erzback; See: Philipp von Heck, *Gesetzesauslegung und Interessenjurisprudenz* (1914), *Begriffsbildung und Interessenjurisprudenz* (1932).

writing and legal policymaking in the United States.<sup>790</sup> This approach of analyzing the law in terms of interests is based on the assumption that every legal doctrine must be understood as a decision of the lawmaker in consideration of potential conflicts of interests. It is then the task of the judge to identify these interests, and to apply the law according to the interests involved in the particular case to be decided.<sup>791</sup> However, within the current legal framework of international cultural heritage law, the recognition of the various interests of the stakeholders involved is not adequately ensured, since it is primarily the State and therefore States' interests as well as property rights arguments over title and possession that dominate in international law. As the legal analysis in the previous chapter demonstrated, current legal provisions are unable to take into account the various interests involved, nor can they ensure that overlapping or competing interests are balanced in the resolution of disputes. Hence, the interest-oriented approach proposed by this thesis postulates a conceptual shift away from the current approach (which privileges States and their interests in national patrimony) towards an approach that can be applied in order to facilitate mutually satisfying resolutions in international cultural heritage disputes.

The demand for general principles in the resolution of restitution disputes is rooted in two fundamental considerations: firstly, the fact that international conventions and treaties often do not recognize the interests of the various stakeholders involved (including the 'common interest' of humanity in the protection of cultural heritage). Secondly, although bilateral agreements may be able to better recognize the interests of the parties involved, they are frequently unable to actualize their interests equitably, due to the unequal bargaining powers of the parties involved in restitution disputes. Therefore, this thesis argues in favor of general principles in restitution matters that – on the basis of common interests – may facilitate the resolution of restitution disputes regardless the bargaining power of the parties involved. These general principles include: the physical and cultural preservation of cultural materials; access to and preservation or reestablishment of the integrity of cultural materials; as well as cooperation and exchange in cultural matters. Based on these general principles, the resolution of restitution disputes might be facilitated through a variety of complementary and

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<sup>790</sup> Due to the influence of Roscoe Pound (1870-1964) at Harvard, and as restated by Julius Stone (1907-1985) in: "Social Dimensions of Law and Justice" (1966); Cf. Prott, *Commentary on the Unidroit Convention*, to Article 5(3), p. 56.; and Lyndel V. Prott, "The International Movement of Cultural Objects," *International Journal of Cultural Property* (2005): p. 240.

<sup>791</sup> Cf. Marietta Auer, "Methodenkritik Und Interessenjurisprudenz. Philipp Heck Zum 150. Geburtstag," *Zeitschrift für Europäisches Privatrecht*, no. 3 (2008): p. 517-33.

alternative solutions, with the result that dispute resolutions might avoid zero-sum outcomes in favor of fostering a sustainable and cooperative exchange in cultural heritage matters.

While preservation and access, in particular, may be conceptualized differently by different stakeholders, all parties involved in restitution disputes have at least an underlying investment in the preservation of cultural materials.<sup>792</sup> If cultural objects are partially damaged or completely destroyed, they can neither be exhibited, studied, nor be enjoyed; more importantly perhaps – at least within this context – they cannot be returned.<sup>793</sup> This is the case even in those situations in which cultural items are claimed in order to let them decay and ‘return to the earth’ (as, for example, in the case of the wooden war gods of the North-American Zuni tribe).<sup>794</sup> As the process of natural disintegration generally does not include the deliberate or negligent damage or destruction by a third party, but rather a ritual act performed by the people who created it, the physical preservation of cultural objects can be truly assumed as a fundamental interest, on the basis of which all other interests can be constructed. It is essential, however, that these general principles – since they are based on the premise of a common interest of humanity in cultural heritage – are flexible enough to accommodate the variety of potential restitution disputes. Over time, however, these general principles should evolve and, if they are successful and become accepted in restitution practices, might become more deeply embedded in legal instruments that regulate restitution matters.

The determination of common interests in restitution matters is, however, not a novelty in international cultural heritage law. As early as 1983, Nafziger asserted: “[t]he claimant State must ensure that the recovered property will be protected by conservation, safety and security measures that meet international standards, and that the object will be adequately displayed and, normally, accessible to the public.”<sup>795</sup> Similarly, Siehr also claims that retention of a claimed cultural object should be considered: “[...] until adequate physical

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<sup>792</sup> Mastalir calls this the “zone of agreement”: Cf. Mastalir, “A Proposal for Protecting The “Cultural” And “Property” Aspects of Cultural Property under International Law,” pp. 1064.

<sup>793</sup> Cf. John Henry Merryman, “The Public Interest in Cultural Property,” *California Law Review* 77, no. 2 (1989): p. 355.

<sup>794</sup> The case of the Zuni war gods will be discussed in detail in Chapter Five, Section 3.1.1.

<sup>795</sup> James A. R. Nafziger, “The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property,” *New York University Journal for International Law and Politics* 15(1983): p. 808.

preservation of the object is guaranteed in the requesting State of origin”.<sup>796</sup> Along a similar vein, Merryman argues that the 1970 UNESCO Convention deals primarily with retention of cultural property and only briefly addresses the issue of protection – in reference to protection against removal – not the protection of the cultural object as such.<sup>797</sup> Consequently, Merryman advocates for “an object-oriented cultural property policy” based on “preservation, truth, and access [...] in declining order of importance”.<sup>798</sup> “Preservation” in this sense means “protecting the object and its context from impairment”; “truth”, in turn, refers to the “quest for knowledge, for valid information about the human past, for the historical, scientific, cultural and aesthetic truth that the object and its context can provide”; in contrast, “access” means “the object [should] be optimally accessible to scholars and to the public”.<sup>799</sup>

Similar policy considerations have also been introduced in legal provisions. The 1995 UNIDROIT Convention, for example, identifies four ‘interests’<sup>800</sup> in its Article 5(3)(a-d): (a) “the physical preservation of the object and its context”; (b) “the integrity of complex object”; (c) “the preservation of information of, for example, a scientific or historical character” and; (d) “the traditional or ritual use of the object by a tribal or indigenous community”.<sup>801</sup> Similarly, section eight of the 2006 Principles of the International Law Association (ILA) entitled “Considerations for Negotiations Concerning Requests” include the following *inter alia* considerations: (1) “the significance of the requested material for the requesting party”; (2) “the reunification of dispersed cultural material”; (3) the “accessibility to the cultural material in the requesting State”; and (4) “the protection of the cultural material”.<sup>802</sup> As can clearly be seen from these examples, various proposals have been made in order to facilitate the resolution of restitution disputes; all of these have in common the fact that they refer to policy considerations or general principles based on common interests in cultural heritage matters. The proposals by Nafziger, Siehr, and Merryman mainly focus on the physical

<sup>796</sup> Kurt Siehr, "Öffentliches Recht Und Internationales Privatrecht Beim Grenzüberschreitenden Kulturgüterschutz," in *Rechtsfragen Des Internationalen Kulturgüterschutzes*, ed. Rudolf Dolzer, Erik Jayme, and Mussgnug (Heidelberg: 1994), p. 103.

<sup>797</sup> John Henry Merryman, "The Retention of Cultural Property," *University of California, Davis Law Review*, no. 21 (1988): p. 506.

<sup>798</sup> Merryman, "The Nation and the Object," p. 64. Similarly, Jayme speaks of ‘the interests of the artwork’: Erik Jayme, "Globalization in Art Law: Clash of Interests and International Tendencies," *Vanderbilt Journal of Transnational Law* 38(2005): p. 938.

<sup>799</sup> Merryman, "The Nation and the Object," p. 64. In an earlier work, Merryman uses a different “troika” (as he calls it), namely that of “preservation, context, and integrity” arguing that these “constitute a set of higher ‘public welfare’ values that transcend national interests and boundaries”, see: ———, "The Retention of Cultural Property," p.504.

<sup>800</sup> Cf. Article 5(3), Prott, *Commentary on the Unidroit Convention*, p. 56.

<sup>801</sup> Article 5(3)(a-d) of the 1995 UNIDROIT Convention, see *supra* Chapter Three, Section 2.4.

<sup>802</sup> Number 8 of the 2006 ILA Principles; for details, see *supra* Chapter Three, Section 4.2.

preservation of the object, as well as its context and the preservation of access to it, whereas both the 1995 UNIDROIT Convention and the 2006 ILA Principles also integrate the cultural (traditional and ritual) significance of the object for the requesting party into their framework for decision-making.

This thesis, however, argues that the issues of the physical preservation and of the cultural significance of a requested object should not be considered separately, since they are more or less (depending on the circumstances) interdependent. Cultural artifacts have both a ‘property’ component (physical preservation) and the cultural component (cultural significance). The first component is derived from the fact that cultural materials consist of tangible, movable objects that can – at least in Western legal tradition – be owned, possessed and controlled.<sup>803</sup> The second component is derived from the cultural (human) significance, its cultural and historical background, and the social nexus with the cultural community that created the object in question. Cultural objects cannot be stripped of their cultural significance; they are not mere items of ‘property’ any more than children are the property of divorcing parents.<sup>804</sup> Both components, therefore, must be taken into account in order to identify feasible solutions in restitution disputes.

The interest in the preservation of cultural materials consists therefore of both components: the physical preservation of the object (e.g. its physical safety and integrity) as well as the cultural preservation of the object (e.g. recognition and preservation of its cultural significance). The former addresses the necessity of treating cultural heritage as valuable unique objects that must be preserved in a way that avoids physical destruction and/or deterioration. The second interest is more concerned with the affiliation and cultural significance of cultural objects to a certain ethnic or religious group. The recognition of the cultural significance of the object is thus an integral part of determining the best means (the best interest) of preserving cultural materials. If either of the two components is disregarded, the value of the cultural object is diminished, which can subsequently lead to the destruction of the physical integrity and/or the cultural significance of the object.<sup>805</sup>

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<sup>803</sup> Cf. Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1037.

<sup>804</sup> Ibid.: p. 1035.

<sup>805</sup> Ibid.: p. 1046.

Therefore, it would be a great mistake to presume that the ‘best interest’ of a particular cultural object would automatically favor its physical safekeeping in a (Western) museum or conditioned storage. Rather, the cultural component of preservation might even trump the importance of the physical component, resulting in the return of a particular cultural object; even if the conditions for its best physical preservation and access are not (entirely or temporarily) met by the requesting party. Since this thesis proposes an interest-oriented approach, the general principles (namely physical and cultural preservation, access, integrity and cooperation) cannot be completely detached from the interests of the various stakeholders in restitution matters. The analysis of the stakeholders and their interests involved in restitution matters (Chapter Five) therefore explores the possibilities of parties achieving some common ground in restitution matters, and demonstrates that the general principles identified are thoroughly based on the ‘common interest’ in cultural heritage matters. By recognizing the merit in both individual and group rights, the starting point for the resolution of restitution disputes must aim at providing a mechanism for negotiating rivalries and recognizing the different interests rather than ignoring them.<sup>806</sup> Therefore, this thesis is based on an argument in favor of striking a balance between the interests of the stakeholders involved.

## **1.2 The Best Interest – a Legal Analogy to Child Custody Determination**

The ‘best interest’ of cultural objects claimed for restitution is not easily determined. This thesis, however, argues that the application of general principles facilitates the determination of the ‘best interest’ in terms of identifying the most appropriate solution in restitution disputes. What is meant by the ‘best interest’ of cultural objects subject to restitution can be best illustrated by an analogy to a strikingly similar legal doctrine in another field of law, namely that of ‘the best interest of the child’ doctrine in child custody law.<sup>807</sup>

While, at first glance, child custody law may seem to have little in common with the cultural heritage law, it does provide several useful and highly illustrative conceptual comparisons. One reason that this comparison is so apt is the fact that cultural objects without certain provenance are often described as ‘orphaned objects’ – in other words, they lack a verifiable origin.<sup>808</sup> This metaphor evokes the analogy between a cultural object in a

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<sup>806</sup> Cf. Barkan, "Introduction: Reparation: A Moral and Political Dilemma," p. 18.

<sup>807</sup> In a similar vein of comparison: Martin, "In the Best Interests of the Art," p. 170-71.

<sup>808</sup> See among many others: Merryman, Elsen, and Urice, *Law, Ethics and the Visual Arts*, p. 417.; Brodie, "An Archaeologist's View of the Trade in Unprovenanced Antiquities," p. 53.; Clemency Chase Coggins, "A

restitution disputes and a child in a child custody determination after a divorce or death, or in cases of child abandonment. Regardless of whether the object of contention is a child or a cultural object, the parties involved disagree over the right to legitimate custody. Moreover, this legal analogy illustrates both the similarities in the evolution of these two separate legal spheres and the need for the introduction of an approach that focuses on the interests involved. Child custody determination is, after all, based on a ‘welfare check-list’ of interests. For similar reasons, this thesis argues that there is a need to introduce such a ‘welfare check-list’ in restitution disputes as well, based on the fact that there are general interests involved in these disputes, as well.

The provisions of modern child custody determination are based on ‘the best interest of the child doctrine’ – a doctrine that bears a striking resemblance to the interest-oriented approach taken by this thesis. The application of the ‘best interest of the child doctrine’ in child custody law (first established in the 1970s) represented, at that time, a fundamental shift in policy terms in that particular area of the law.<sup>809</sup> This thesis argues that a similarly profound shift in policy is necessary in order to deal with restitution matters in the field of international cultural heritage law in a fair and effective manner. A brief history of the facts related to these changes in child custody determination is necessary to illustrate this point. Under Roman law, children were viewed as the property of their fathers. Later, under English common law, the father continued to have near absolute power over the child.<sup>810</sup> Until the early 1900s, in fact, the right of custody was in principle given to the father as he was assumed to provide, under a paternal point of view, the basic facilities necessary for the care of the child. In a direct parallel to the ‘paternal approach’, until the early 1920s, colonial powers often perceived the removal of cultural objects from the colonized territories *ad libitum* as their predetermined right and as in the best interest of the object.

Gradually this ‘paternal preference’ was replaced by a ‘maternal preference’ in child custody determination, and by the 1920s, this maternal preference in custody determination became as ubiquitous as the paternal preference had previously been. The new preference distinctly favored the mother as the primary provider of parental care, both in statutes and in

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Proposal for Museum Acquisition Policies in the Future," *International Journal of Cultural Property* 7, no. 2 (1998): p. 434.

<sup>809</sup> Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child* (Columbia University Press, 1996), pp. 121.

<sup>810</sup> Joan B. Kelly, "The Determination of Child Custody," *The Future of Children - Children and Divorce* 4, no. 1 (1994): p. 121.

judicial decision-making.<sup>811</sup> This shift to the ‘maternal preference’ in child custody is analogous to the process of decolonization in cultural heritage matters in the 1960s, during which the newly independent States began to submit claims for the return of cultural materials to their ‘countries of origin’.

This maternal presumption in custody determination predominated for many decades (from the 1920s onwards), but eventually began to be challenged after divorce rate dramatically rose in Western Europe and the United States during the 1960s. The rising divorce rate, the growing feminist movement, the entry of large numbers of women into the work force, as well as fathers’ claims for the right of contact and access to their children, weakened the concept of the mother as primary care-taker, with the result that the ‘maternal preference’ was abandoned in the United States by the Uniform Marriage and Divorce Act, enacted in 1970.<sup>812</sup> This Act introduced the ‘best interests of the child doctrine’. According to this doctrine, neither the father nor the mother is to be favored exclusively in child custody determination. In the course of their proceedings, family courts have now been directed to assess the ‘best interests of the child’ and to identify on an individual basis what may best suit each child’s needs. Over the years, the principle of ‘the best interest of the child’ has found extensive usage in the domestic law of many countries.<sup>813</sup>

Furthermore, the ‘best interest of the child’ principle has been incorporated in the United Nations *Convention on the Rights of the Child* (UNCRC) of 1989,<sup>814</sup> which is the world’s most widely ratified international treaty to date.<sup>815</sup> The convention employs the ‘best interest of the child’ as the general criterion for determining whether a child in a custody dispute should remain in the current host country or whether s/he should be sent back to his/her country of origin.<sup>816</sup> The overall principle of the convention is expressed in Article 3(1), which states that in all actions concerning children “the best interests of the child shall be a primary consideration.” The ‘best interest’ is not precisely defined, but the convention

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<sup>811</sup> Ibid.: p. 122.

<sup>812</sup> Ibid.

<sup>813</sup> Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," in *The Best Interests of the Child*, ed. Philip Alston (Oxford: Clarendon Press, 1994), p. 11.

<sup>814</sup> United Nations Convention on the Rights of the Child (adopted 20 November 1989, entering into force 2 September 1990) 1577 UNTS 3; full text available at: <http://www2.ohchr.org/english/law/crc.htm> (accessed 23 September 2011).

<sup>815</sup> By September 2011: 193 State Parties, see United Nations Treaty Collection at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (accessed 23 September 2011).

<sup>816</sup> Cf. Martin, "In the Best Interests of the Art," p. 170.

identifies a number of – potentially conflicting – rights, including, among others, protection and care for the child’s well-being (Article 3); the inherent right to life (Article 6); preserving the child’s cultural identity (Article 8); and free movement for the purpose of family reunification (Article 10).<sup>817</sup> In his analysis of the principle, Alston states that it is a mediating principle, which can assist in the resolution of conflicts between different yet equal rights.<sup>818</sup> It is this idea that makes the ‘best interest’ analogy interesting for disputes pertaining to cultural objects. The application of the ‘best interest of the child’ doctrine to cultural heritage matters can focus attention on the interests at stake in international cultural heritage disputes. Although the diversity of interests and the values that accompany them are the most commonly given reasons for the indeterminacy of the ‘best interest’ standard in the children’s rights on the international level,<sup>819</sup> a discussion of ‘best interest’ in cultural heritage matters may facilitate the debate pertaining to the development of feasible solutions in restitution disputes. While a ‘best interest’ perspective was introduced into domestic family law more than thirty years ago, and into international children’s rights more than twenty years ago, it has yet to find acceptance within the framework of international cultural heritage law.

In determining the ‘best interest’ of the child, domestic courts may order social workers, family court advisors, psychologists and other forensic experts to undertake various investigations in order to assess the child’s living conditions as well as those of his custodial and non-custodial parents. In order to ensure that the child’s interests are represented, U.S. courts often appoint a guardian *ad litem* to investigate and determine what is in the child’s best interests, adding, as *Martin* points out, a third, more dispassionate voice to what are often emotional and contentious debates.<sup>820</sup> Several issues – such as the stability of the child’s life, links with the community, and the stability of the home environment provided by each parent – may be considered by a court in deciding the child’s residency in custody and visitation proceedings. This ‘best interest’ doctrine requires the court to make reference to a so-called ‘welfare check-list’ in determining the child’s custody provisions.

This thesis argues that such investigations should also be undertaken in conjunction with the resolution of restitution disputes pertaining to cultural objects. Similar to the ‘welfare

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<sup>817</sup> Ibid.

<sup>818</sup> Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," p. 16.

<sup>819</sup> Stephen Parker, "The Best Interests of the Child - Principles and Problems," in *The Best Interests of the Child*, ed. Philip Alston (Oxford: Clarendon, 1994), p. 39.

<sup>820</sup> Martin, "In the Best Interests of the Art," p. 170.

check-list' in child custody law, the abstract interests of the cultural object in question should be taken into consideration in determining how a restitution dispute could be resolved. Similarly to child custody determination, this might involve asking the requesting party to meet certain requirements prior to return. When determining the welfare of the child, the court must consider certain pertinent facts relating to the child. These will be briefly outlined, as they serve to demonstrate the similarities between child custody considerations and those pertaining to cultural materials. The welfare checklist includes: (1) the ascertainable wishes and feelings of each child concerned (given their age and understanding); (2) physical, emotional and/or educational needs of the child, now and in the future; (3) the likely effect of any change in custody on the child; (4) the likelihood of any harm to the child or risk of suffering resulting from a change in custody; (5) the capabilities of each parents and related persons to meet the child's needs.<sup>821</sup> Summarizing, this 'welfare checklist' considers the needs, wishes and feelings of the child. Although this check-list cannot be applied directly to restitution disputes, it nevertheless expresses several major concerns that, if slightly modified, can be applied to cultural objects. In defining the interests of a cultural object, one can similarly speak of an interest in protection, physical and cultural preservation, maintenance of integrity and context, as well as reasonable conditions for access and scientific research. Martin summarizes the object's interests in a concise trilogy: firstly, an interest in not being at risk, secondly, an interest in being whole, and, thirdly, an interest in being known and having its background understood.<sup>822</sup>

Apart from the 'best interest of the child' doctrine, which is concerned with the physical and psychological integrity of the child, this historic shift to the standards that considering the 'best interest' of the child have also paved the way for a new type of custody arrangement to emerge, namely that of 'joint child custody'.<sup>823</sup> In the same way that the 'welfare check-list' corresponds with a framework of 'policy objectives' in international cultural heritage law, the concept of 'joint custody' in child custody determinations also corresponds remarkably well with the concept of 'joint ownership' or 'return without transfer of ownership'. Similarly, this provides a model for possible arrangements between the parties,

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<sup>821</sup> Mason, *From Father's Property to Children's Rights: The History of Child* pp. 121.

<sup>822</sup> Martin, "In the Best Interests of the Art," p. 171.

<sup>823</sup> Kelly, "The Determination of Child Custody," p. 122.

including temporary or long-term loans as well as the fabrication of replicas,<sup>824</sup> something that is not possible in child custody law.

### **1.3 Unequal Bargaining Power and Negotiations – Options for Mutual Gain**

Despite the flexibility that bilateral agreements bring in contrast to international treaty law, they suffer from a major shortcoming insofar as their terms depend, in part, on the bargaining power of the negotiating parties.<sup>825</sup> Whereas in the context of child custody determination, the bargaining power among the parties claiming for custody might be equally distributed (at least theoretically), the parties involved in restitution disputes are generally rather unequal in their bargaining powers. This is mostly due to the fact that the appropriation of cultural material that is now being claimed has frequently occurred in the context of war, or foreign or colonial domination. Although one could argue that unequal bargaining power is a given fact in almost all relations of contractual nature, bargaining power seems to be particularly unequal in many restitution disputes.

Moreover, the former colonial dominance frequently continues to be perpetuated by the unequal political and economic power of the respective parties involved in restitution disputes. This affects not only the final outcome of negotiations, but also inhibits the development and application of a consistent legal framework. It goes without saying that parties with strong bargaining power will always prefer individual agreements rather than general obligations pertaining to restitution and return. This, for example, can be detected in the general reluctance of major art-market countries to ratify international conventions. This has certainly been the case for years with regard to the 1970 UNESCO Convention, and continues to be the case with regard to the 1995 UNIDROIT Convention.<sup>826</sup> The 1970 UNESCO Convention has been ratified by 120 States; however only in recent years have several States with major art and antiquities markets become party to the convention; these include, France (1997); United Kingdom (2002); Japan (2002); Switzerland (2003); Germany (2007); Belgium and the Netherlands (both 2009). Although the United States ratified the convention earlier than many other major art-market players (1983), the U.S. implementation act (CPIA) places specific conditions on parties entering into bilateral agreements that

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<sup>824</sup> For details on complementary and alternative mechanisms, see Chapter Six, Section 3.

<sup>825</sup> Rationale Two: Contracts and Unequal Bargaining Power, see *supra* Chapter Two, Section 5.2.

<sup>826</sup> For details on the 1970 UNESCO Convention, see *supra* Chapter Three, Section 2.2; for details on the 1995 UNIDROIT Convention, see *supra* Chapter Three, Section 2.4.

effectively enacts import restrictions of cultural materials.<sup>827</sup> The 1995 UNIDROIT Convention, in turn, still lacks general recognition in major art-market countries (e.g. none of the States mentioned above have yet ratified UNIDROIT).<sup>828</sup>

The cases presented above in Chapter Three, in which Italy was both the requesting and requested party, pointedly illustrate the importance of bargaining power in negotiations. In the case of the return of the Axum obelisk, Italy dithered for almost sixty years before returning the obelisk to Ethiopia, even though the 1947 Peace Treaty required restitution within eighteen months.<sup>829</sup> In contrast, when acting as a requesting State, Italy has been able to conclude bilateral agreements with major U.S. museums following tough negotiations in less than three years.<sup>830</sup> Although Italy could rely on the existence of compelling evidence that the objects in question had been illicitly exported, allowing the Italian authorities to support their negotiations with plausible threat of civil action, this threat was extensively bolstered by diplomatic resoluteness and the extensive involvement of the international media, especially with regard to the negotiations with the Getty Museum. This reflects the substantial bargaining power of Italy, and contrasts starkly with Ethiopia, which did not have such bargaining power at its disposal during its negotiations with Italy, even though it was in possession of legal entitlement to the return of the obelisk on the basis of the 1947 Peace Treaty.

Without a doubt, the bilateral U.S.-Italian agreements can be perceived as an international success story in cultural restitution disputes, on the basis of both the resolute nature of the negotiations and the cooperation and exchange of cultural material found in the final accords. Nevertheless, they provide an excellent illustration of the impact of bargaining power differentials, which have generally proved to be the most influential factor in the final outcome of negotiations. If equal bargaining power is uncertain in the case of bilateral negotiations among States, it is even less assured in case of negotiations between States non-State actors (e.g. private entities, indigenous peoples, and minority groups). Less bargaining power is typically attributed to indigenous peoples and minority groups, since they generally

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<sup>827</sup> For details on bilateral inter-State agreements with regard to import regulations, see *supra*: Chapter Three, Section 2.9.2.

<sup>828</sup> For details on the 1995 UNIDROIT Convention, see *supra* Chapter Three, Section 2.4; for the status of ratifications see the list of State parties, available at: <http://www.unidroit.org/english/implement/i-main.htm> (accessed 23 August 2011).

<sup>829</sup> For details on the case of the return of the Obelisk of Axum, see *supra* Chapter Three, Section 2.9.1.

<sup>830</sup> For details on the U.S.-Italian agreements, see *supra* Chapter Three, Section 2.10.

have difficult establishing standing before national governments. However, the power differentials in negotiations between States and non-State actors do not necessarily always favor States. In particular, leading art institutions and museums might have strong bargaining power as well; the power differential between the British Museum and the Greek government in the case of the Parthenon Marbles is a case in point; a similar dynamic existed in the negotiations between Italy and several U.S. museums (including Boston Museum of Fine Arts, Metropolitan Museum, the Getty, and the Princeton Art Museum). If Italy had not been one of the world’s richest countries in terms of its art holding, and at the same time an economically developed country, but instead a country without the facilities to offer “objects of equivalent beauty and artistic/historical significance” to loan in return,<sup>831</sup> the agreements would most likely have turned out differently or not been reached at all. Because of Italy’s ability to suspend future exchanges in cultural objects as part of its negotiation strategy, the U.S. museums could not simply ignore Italy’s requests without risking the enactment of these countermeasures, which had already been threatened by Italian authorities<sup>832</sup> – a threat that no art institution can afford ignore, especially if the negotiation partner holds a significant proportion of the entire world heritage of Etruscan, Roman, Greek and Renaissance art. In cases where no such material resources are available for bargaining purposes, diplomatic or legal pressure cannot be used at all – or at least not as effectively – as was done by the Italian authorities in 2005-2008. This statement should not be understood as criticism of the strategies employed by the Italian governmental authorities, as this approach clearly facilitates negotiations and favors cooperative resolutions of restitution disputes; rather, it is a criticism of the inequality of bargaining power, which is generally found in bilateral agreements.<sup>833</sup>

If bilateral agreements were to be widely employed in restitution disputes, another difficulty would certainly arise; namely, it is not clear whether bilateral agreements would contribute to or detract from efforts to achieve a consistent framework in international cultural

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<sup>831</sup> See the text of the agreement between the New York Metropolitan Museum of Art and the Republic of Italy, concluded 21 February 2006, reprinted in: *International Journal of Cultural Property* (2006) 13, p. 427-434. The agreements with the other U.S. museums have not yet been published to the best of the author’s knowledge.

<sup>832</sup> For example, see: Christopher Knight, “The grandstand erected by Italy – Why is its culture minister trying to rough up the Getty? Politics for the home crowd”, in: *Los Angeles Times*, 25 July 2007, available at: <http://articles.latimes.com/2007/jul/25/entertainment/et-getty25>; “Rutelli contro il Paul Getty Museum – Non possono esporre opera rubate”, in: *La Repubblica*, 23 November 2006, available at: [http://www.repubblica.it/2006/11/sezioni/spettacoli\\_e\\_cultura/getty-museum-polemiche/parla-rutelli/parla-rutelli.html](http://www.repubblica.it/2006/11/sezioni/spettacoli_e_cultura/getty-museum-polemiche/parla-rutelli/parla-rutelli.html); Lee Rosenbaum, “Italy’s Rutelli Threatens Getty with Sanctions”, in: *Artsjournal*, 11 July 2007, available at: [http://www.artsjournal.com/culturegrl/2007/07/italys\\_rutelli\\_threatens\\_getty.html](http://www.artsjournal.com/culturegrl/2007/07/italys_rutelli_threatens_getty.html) (accessed 12 August 2011).

<sup>833</sup> For details on contracts and unequal bargaining power (Rationale Two), see *supra* Chapter Two, Section 5.2.

heritage law. On the one hand, it can be argued that these bilateral agreements facilitate the resolution of restitution disputes and strengthen efforts in fighting illicit trafficking in cultural materials. On the other hand, reliance on individualized diplomatic negotiations seems likely to lead to further fragmentation within this field of law; this fragmentation, at least to some degree, has been demonstrated above in the analysis of the existing legal framework.<sup>834</sup> While international cultural heritage law at present is by no means uniform,<sup>835</sup> common standards in restitution disputes are in fact needed, not only to reduce the risks associated with unequal bargaining power, but also to provide legal and diplomatic certainty to the resolution of restitution disputes. In this way, the interest-oriented approach proposed by this thesis contributes to the development of international law in this field, as it provides an alternative approach aimed at balancing the various interests in restitution disputes. Moreover, identifying general principles based on the ‘common interest’ in the protection of cultural heritage may allow negotiations in restitution disputes to proceed in a manner that facilitates problem-solving. Eventually, these general principles – preservation, access, integrity and cooperation – may create standards that lead to the formation of a legal framework, which depends less on the bargaining power of one or the other party in the resolution of restitution disputes, and more on equity since they would be based on common interests.

The crucial impact of unequal bargaining powers on the issue of restitution and return has been assessed by other scholars, including, for example, Scovazzi.<sup>836</sup> Whereas this thesis approaches the issue of unequal bargaining powers at the stage where claims for restitution of cultural materials are being made, Scovazzi considers unequal bargaining powers at the earlier stage – that of removal. He argues that the appropriation of cultural materials has often been the result of the inequality in bargaining powers and the former state of dependency on one of the involved parties. As a legal consequence, he argues that this inequality of bargaining powers calls for a “[...] principle of non-exploitation of the weakness of another subject to get a cultural gain” in international cultural heritage law.<sup>837</sup> According to Scovazzi, this principle should apply to cultural objects that were arbitrarily appropriated regardless of the means of appropriation, including apparently legal transactions, which only occurred because of the existing inequality in the bargaining powers between the parties at the time of the transaction.

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<sup>834</sup> For details, see *supra* Chapter Three.

<sup>835</sup> Cf. Forrest, *International Law and the Protection of Cultural Heritage*, p. 405.

<sup>836</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 369 ff.

<sup>837</sup> *Ibid.*: p. 370.

In particular, he refers to the UNESCO draft Declaration of Principles relating to Cultural Objects Displaced in Connection with WWII,<sup>838</sup> which concerns cultural artifacts “transferred pursuant to a transaction apparently, but not actually legal, or vitiated for whatever reason, even when the transaction purports to have been voluntarily effected” (Principle Two (iii)). Similar considerations have been adopted in the 1943 London Declaration regarding Nazi-looted art, which emphasize the fact that these transactions – even those “apparently legal in form, even when they purport to be voluntarily affected” might be declared invalid.<sup>839</sup> On this basis, Scovazzi argues that the principle prohibiting the exploitation of unequal bargaining power should be enlarged to encompass questions regarding the removal of cultural objects removed from peoples subjected to colonial or foreign occupation, as well as from indigenous peoples in similar circumstances.<sup>840</sup>

Although this principle cannot yet be seen as a general principle in customary international law, due to the lack of a respective State practice,<sup>841</sup> the argument that inequality of bargaining powers decisively influences negotiations and their outcome is an essential one. In order to overcome the inequity caused by unequal bargaining powers, this thesis argues that it is necessary to introduce general principles that facilitate the resolution of restitution disputes. Unequal bargaining power between the parties will never be completely eliminated; however, similar to any other area of law, inequality in restitution disputes could be minimized through general principles that shape the general conditions on whose basis restitution disputes could be resolved. Therefore, taking into account the interests of the various stakeholders involved and evaluating restitution claims on the basis of preservation, access, integrity and cooperation may serve the purpose of minimizing current inequalities between the requesting and the requested party, which, in turn, may facilitate mutually satisfying outcomes in international cultural heritage disputes.

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<sup>838</sup> See: UNESCO Draft Declaration of Principles to Cultural Objects Displaced in Connection with the Second World War, doc. 34 C/22 Annex I, adopted 5 September 2007. These Principles are of “a non-binding character and are intended to provide general guidance for bilateral or multilateral interstate negotiations in order to facilitate the conclusion of agreements related to cultural objects” (Principle One). For a detailed discussion, see *supra* Chapter Three, Section 3.1.

<sup>839</sup> For details to the 1943 Declaration of London, see *supra* Chapter Two, Section 2; for details on the 1998 Washington Principles on Holocaust-Era Materials, see *supra*: Chapter Three, Section 3.5.

<sup>840</sup> Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 369. See also: Vrdoljak, "Reparations for Cultural Loss," p. 197.

<sup>841</sup> For details on customary international law, see *supra* Chapter Three, Section 6.

In practical terms, by addressing the issue of unequal bargaining powers in negotiations, attention should be paid to the specific interests and motives of each party rather than their entrenched and often persistent negotiation positions. This focus on bargaining power must replace the current focus, which is on complete ‘restitution’ versus complete ‘retention’.<sup>842</sup> It is exactly these entrenched positions, which frequently sustain the misunderstandings in and confrontational nature of restitution disputes, and which perpetuate existing inequality in bargaining power. In other words, arguing over positions does not result in mutually beneficial solutions, since disputes over positions are inherently zero-sum situations (such as those frequently produced in current restitution disputes). Rather, by arguing over interests, the parties involved might discover common ground that could lead to a possible ‘win-win’ outcome, ideally satisfying the interests and needs of all parties involved in the dispute. In particular, restitution disputes pertaining to the appropriation of cultural materials during foreign or colonial domination are frequently overshadowed by confrontational interactions that reiterate the former colonial power’s long-held positions with its former colony. Therefore, it is essential to form an understanding of the interests and motivations upon which these positions are based and upon which restitution claims are brought, since they indicate the nature of likely outcomes of the negotiations.<sup>843</sup> If, however, attention is primarily paid to the parties’ positions in the negotiation, less attention will be devoted to addressing the underlying concerns (and interests) of the parties, or to identifying the common interests that could provide the basis for a mutually satisfactory outcome. In sum, three essential considerations facilitate the ability of the parties involved to achieve mutual gains in negotiations pertaining to restitution and return:<sup>844</sup> firstly, the focus on the parties’ interests and potential common ground (rather than on their adversarial positions that produce ‘all-or-nothing’ solutions and thus mainly end in deadlock); secondly, the use of an approach that focuses on the ‘common interest’ in the protection of cultural heritage; and thirdly, careful consideration of a variety of options in terms of complementary or alternative mechanisms that extend beyond the mere restitution of the object.

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<sup>842</sup> Cf. Roger Fischer, William Ury, and Bruce Patton, *Getting to Yes - Negotiating an Agreement without Giving In* (1997), p. 5.

<sup>843</sup> On the discussion regarding motive-based categories of claims, see *supra*: Chapter One, Section 3.2.

<sup>844</sup> Cf. Fischer, Ury, and Patton, *Getting to Yes - Negotiating an Agreement without Giving In*, p. 11.

## 2. The Legal Foundations of the Interest-oriented Approach

The approach taken by this thesis exceeds current restitution practices and, therefore, cannot be limited to the legal analysis of international law currently in force (*lex lata*);<sup>845</sup> rather, it must extend its considerations to recent normative developments and evolutionary trends in international law (*lex ferenda*).<sup>846</sup> Recent developments in international law, which have already been discussed above, include: human rights obligations in the context of restitution and return;<sup>847</sup> the recognition of ethical and historical considerations;<sup>848</sup> the right to self-determination;<sup>849</sup> and the relevance of *erga omnes* obligations pertaining to the protection of cultural heritage (responsibility to protect).<sup>850</sup> The following section will complement this analysis by exploring the emerging concepts in international law that indicate the existence of a ‘common interest’ in the protection of cultural heritage, and from which further obligations pertaining to the protection of cultural materials can be deduced.

### 2.1 Common Heritage of Humankind

While cultural objects may constitute the cultural heritage of a particular group, community, nation, or State, many of these objects have also been regarded as a testimonial to the common history of mankind. The history and development of humankind is of universal importance to all nations. Thus, archaeological and skeletal remains of the earliest traces of mankind, and the knowledge derived from their examination, are not only important to the State in which they are found, but to all peoples.<sup>851</sup> The same is true for unique and outstanding examples of human civilization, such as the pyramids of Egypt or the Maya temples. The recognition of ‘cultural heritage’ as having universal importance was first established in the 1954 Hague Convention and was further developed as a concept by the 1972 UNESCO Convention.<sup>852</sup> The 1972 UNESCO Convention is based on the premise that “parts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole”<sup>853</sup> and that the destruction or

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<sup>845</sup> For legal analysis, see *supra* Chapter Three.

<sup>846</sup> Cf. Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 341.

<sup>847</sup> For details on human rights obligations, see *supra*: Chapter Three, Section 2.8; for details on customary international law, see *supra* Chapter Three, Section 6.

<sup>848</sup> See *supra* Chapter Three, Section 5.

<sup>849</sup> See *supra* Chapter Three Section 6.3.

<sup>850</sup> See *supra* Chapter Three Section 6. 4.

<sup>851</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 11.

<sup>852</sup> *Ibid.*, p. 406. See also *supra* Chapter Two, Section 5.1.

<sup>853</sup> See sixth recital of the 1972 UNESCO Convention; for details on the convention, see *supra* Chapter Three, Section 2.3.

deterioration of the cultural heritage “constitutes a harmful impoverishment of the heritage of all the nations of the world”.<sup>854</sup> In a similar vein, the 2001 UNESCO Underwater Cultural Heritage Convention<sup>855</sup> refers to underwater cultural heritage as “an integral part of the cultural heritage of humanity”.<sup>856</sup> Although these and several other conventions<sup>857</sup>, in some form or another, contain notions such as ‘world heritage of mankind’ (1972 UNESCO Convention), ‘cultural heritage of all mankind’ (1954 Hague Convention), or ‘cultural heritage of humanity’ (2001 UNESCO Underwater Convention), the concept of ‘common heritage of humankind’ first emerged in a different area of international law, namely in the context of the Law of the Sea in the 1960s and 1970s with regard to access to and exploitation of the deep seabed.<sup>858</sup> The concept of ‘common heritage of humankind’ follows the supposition that the resources of the deep seabed can neither be appropriated, nor fall under the sovereign control of a single State or group of States. The presumption behind this concept is that certain areas and resources solicit the interest of the wider international community, and are thus beyond the national jurisdiction and sovereign control of any State, because they serve the interest of humanity. In light of this, the concept of a ‘common heritage of humankind’ has therefore been described as one of the most developed conceptions of ‘trusteeship’ in international law.<sup>859</sup> As a consequence, this common heritage should fall under the ‘stewardship’ of the international community as a whole, in the interest of present and future generations.<sup>860</sup> On this basis, it was hoped that the application of the concept would create a more equitable basis for sharing limited areas and resources – above and beyond the recognized territorial claims of States and their national interests.<sup>861</sup> Thus, the concept of a ‘common heritage of humankind’ was subsequently applied in other emerging areas of international law,<sup>862</sup> in particular, the outer space, the moon,<sup>863</sup> the Antarctica,<sup>864</sup> and the protection of the human genome.<sup>865</sup>

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<sup>854</sup> See second recital of the 1972 UNESCO Convention.

<sup>855</sup> For details on the 2001 UNESCO Convention, see *supra* Chapter Three, Section 2.5.

<sup>856</sup> See first recital of the 2001 UNESCO Underwater Cultural Heritage Convention.

<sup>857</sup> For example, the 1954 European Cultural Convention speaks of a ‘common cultural heritage of Europe’. The European Cultural Convention was launched by the Council of Europe, (1954, CETS No.18), signed on 19 December 1954, entering into force 5 May 1955; full text version available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/018.htm> (accessed 23 August 2011).

<sup>858</sup> In 1956 the United Nations held its first conference on the Law of the Sea (UNCLOS I), followed by UNCLOS II in 1960, and UNCLOS III in 1967. UNCLOS III resulted in the *United Nations Convention on the Law of the Sea* (UNCLOS), signed on 10 December 1982, entering into force 16 November 1994, (1982, 21 ILM 1261).

<sup>859</sup> Cf. Patricia Birnie and Alan Boyle, *International Law and the Environment* (2002), p. 144.

<sup>860</sup> Nuhaila Carmouche, "The New Concept of International Responsibility in International Environmental Law " *Report written for the British Institute for International and Comparative Law* December 9(2005): p. 31.

<sup>861</sup> Birnie and Boyle, *International Law and the Environment*, pp. 143.

<sup>862</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 407.

In the field of maritime law, the *Convention on the Law of the Sea* (UNCLOS)<sup>866</sup> led to the establishment of the International Seabed Authority;<sup>867</sup> in contrast, the 1972 World Heritage Convention did not lead to the establishment of an autonomous authority, which, for example, would have managed the World Heritage sites, since the territorial sovereignty of the State in which these sites are located is not abridged by the convention. Although early attempts in 1960s and 1970s were made to establish a ‘World Heritage Trust’, which would exercise extra-territorial control over the designated sites under international custody,<sup>868</sup> the fact that such proposals impinged on the territorial sovereignty of States led to their rejection. Thus, it is questionable whether and to what degree the concept of ‘common heritage of humankind’ as developed in international law can be employed in cultural heritage matters and what obligations might be imposed upon States. Although – as shown above – concepts such as ‘world heritage of mankind’ (1972 UNESCO Convention), ‘cultural heritage of all mankind’ (1954 Hague Convention), or ‘cultural heritage of humanity’ (2001 UNESCO Underwater Convention) are employed within the framework of international cultural heritage law, the 1970 UNESCO Convention (with its emphasis on the protection of movable cultural materials), follows a different path, since it views ‘cultural heritage’ predominantly in terms of national cultural property. The bond to a particular State, as assumed by the 1970 UNESCO Convention, is based on the concept of ‘country of origin’, namely the State from which the cultural material was stolen or illicitly exported in breach of its national export regulations. Thus, the question arises of how the concept of ‘common heritage of mankind’ is given content in the above mentioned conventions on cultural heritage.

The two different approaches in international cultural heritage disputes – namely the nation-State approach and the ‘cultural heritage of all mankind’ approach – have been described by Merryman as irreconcilable because they pit ‘nationalism’ versus

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<sup>863</sup> United Nations *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (adopted by the UNGA, 19 December 1966, entering into force 10 October 1967), 610 UNTS 205; *The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (known also as ‘Moon Treaty’), (signed 5 December 1979, entering into force 11 July 1984), 1979, 1363 UNTS 3.

<sup>864</sup> See *Antarctic Treaty* (signed 1 December 1959, entering into force 23 June 1961), 402 UNTS 71.

<sup>865</sup> See *Universal Declaration on the Human Genome and Human Rights* (signed 11 November 1997), available at: <http://unesdoc.unesco.org/images/0010/001096/109687eb.pdf> (accessed 8 August 2011).

<sup>866</sup> See *supra* n. 858.

<sup>867</sup> The International Seabed Authority (ISA), created in 1994, is an autonomous international organization established under the 1982 Convention on the Law of the Sea (UNCLOS, Part XI) with its headquarters in Kingston, Jamaica, see <http://www.isa.org.jm/en/home> (accessed 23 August 2011).

<sup>868</sup> Preliminary Study, UNESCO Doc. 16 C/19 (Annex No. 50).

‘internationalism’.<sup>869</sup> ‘Nationalism’ in this sense refers to national constraints on the trade in cultural artifacts, in protection of the integrity of national patrimony; in comparison, ‘internationalism’ refers to a preference for free trade in cultural artifacts and against national restrictions. This division has been criticized, for example by Nafziger, as a contrived dichotomy<sup>870</sup> in cultural heritage and as uni-dimensional, since it primarily substantiates a free trade-approach, which exclusively fosters the interests of the so-called art-market countries. What the ‘internationalists’ seem to have in mind, according to Nafziger, is a general free trade in cultural materials, unfettered by mutual cooperation among States.<sup>871</sup> As this mutual cooperation in cultural heritage would be, as a matter of fact, truly ‘international’, the rationale for ‘cultural internationalism’ turns out not to be international but rather commercial in nature, as Nafziger points out in his criticism on Merryman’s approach. Merryman, in turn, reaffirms his ‘internationalism’ approach with regard to the protection of underwater cultural heritage by advocating for an unconstrained freedom of the seas.<sup>872</sup> However, in doing so, Merryman ignores, in particular, the international legal developments within the framework of the Law of the Sea and the adoption of UNCLOS,<sup>873</sup> which opposes the traditional principle of unconstrained exploitation.

As demonstrated above, the concept of ‘common heritage of humankind’ is used in different areas of international law; it remains, however, a rather broad conceptual framework and therefore does not produce any specific legal implications.<sup>874</sup> Thus, the questions of what this concept effectively comprises and what legal obligations are to be derived from it are questions still to be answered. Generally, discussions of the concept of ‘common heritage of humankind’ are more or less centered on the question of composition – namely what this heritage should encompass – rather than what actual legal consequences would be derived from the application of this concept. Moreover, the notion of ‘humankind’ as legal entity is still not commonly asserted and questionable in practice, giving that there is currently no

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<sup>869</sup> John Henry Merryman, "Two Ways of Thinking About Cultural Property," *American Journal of International Law* (1986).

<sup>870</sup> Nafziger, "The Present State of Research," p. 244.

<sup>871</sup> *Ibid.*, p. 246.

<sup>872</sup> Merryman argues that the 2001 UNESCO Convention on the Protection of the Underwater Heritage exemplifies cultural nationalism because it expresses an “anti-market bias” prohibiting commercial exploitation of underwater heritage, John Henry Merryman, "Cultural Property Internationalism," *International Journal of Cultural Property*, no. 12 (2005). For details on the 2001 UNESCO Underwater Cultural Heritage Convention, see *supra*: Chapter Three, Section 2.5.

<sup>873</sup> See *supra* n. 858.

<sup>874</sup> Cf. Janet Blake, "On Defining the Cultural Heritage," *International & Comparative Law Quarterly* (2000): p. 83-84.

exclusion of State sovereignty in cultural heritage matters, as demonstrated by the 1972 UNESCO World Heritage Convention, and since nation States are generally still considered as the major actors in international law.

Despite all of these shortcomings, the international awareness of the importance of protecting cultural heritage in the interest of humankind has increased tremendously over the last several decades, and, as mentioned above, the legal emphasis shifted from the notion of ‘cultural property’ to ‘cultural heritage’,<sup>875</sup> thus broadening the framework of international cultural heritage law.<sup>876</sup> Moreover, the concept of ‘cultural heritage’ has also facilitated a shift in the legal obligations associated with cultural heritage, from a ‘negative’ responsibility of States to avoid destruction of cultural heritage in times of armed conflicts – as expressed by the 1954 Hague Convention – towards a ‘positive’ responsibility to protect cultural heritage not only in war but also in times of peace. This assumption is based on the recent re-appraisal that, firstly, it is in the interest of the international community to preserve cultural heritage for future generations of humanity, as articulated in several international conventions, declarations and recommendations pertaining to cultural heritage<sup>877</sup> and as expressed in the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage<sup>878</sup> in response to the destruction of the Buddhas of Bamiyan in 2001.<sup>879</sup> Secondly, it has been generally recognized that cultural heritage is threatened not only during times of war but also in times of peace through the illicit trafficking in cultural objects, mass tourism, environmental pollution, clandestine excavations, and underwater expeditions, and that these threats have developed in a way that requires international responses in order to protect the common interest of humankind.<sup>880</sup> Consequently, the protection and preservation of cultural heritage in both war and peace time is no longer considered to be a matter of exclusive State sovereignty, but rather a matter of common concern to the international community as a whole.<sup>881</sup>

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<sup>875</sup> For details, see *supra* Chapter Two, Section 5.1.

<sup>876</sup> Francioni, "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage," pp. 221.

<sup>877</sup> For analysis of the legal instruments, see *supra* Chapter Three.

<sup>878</sup> UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the UNESCO General Conference, 17 October 2003, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=17718&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 August 2011).

<sup>879</sup> Cf. Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," pp. 28.

<sup>880</sup> Cf. Schorlemer von, *Internationaler Kulturgüterschutz - Ansätze Zur Prävention Im Frieden Sowie Im Bewaffneten Konflikt*, pp. 101.

<sup>881</sup> For details see *supra* Chapter Three, Section 1.2.

With regard to the matter of restitution disputes, the concept of ‘common heritage of humankind’ does not imply that cultural materials may be retained by certain States or private entities, which purports to safeguard cultural heritage for the collectivity of humankind. Rather, it implies recognition of a common concern by the international community, and thus a common interest in the protection of cultural heritage.<sup>882</sup> The exclusive State sovereignty approach and the predominance of nation States’ interests in current restitution practices contradicts – at least partially – the concept of ‘common heritage of humankind’, which focuses on the international community rather than on single States. Although the concept of ‘common heritage of humankind’ does not provide a specific normative basis creating an obligation to protect or to return cultural materials, it does, however, clearly indicate, a general responsibility of the international community as a whole to protect cultural heritage and functions as a premise for further developments in international cultural heritage law.<sup>883</sup> As a result of this new conceptualization the following considerations should be included in the resolution of restitution disputes: firstly, defining common (minimum) standards and practices pertaining to the preservation of cultural heritage; secondly, burden-sharing in the attempt to preserve the cultural heritage of humankind for future generations; and thirdly, establishing common responsibilities and benefits derived from this cultural heritage in terms of public and scientific access, sustainable management and cooperation.

The answers to these questions cannot currently be found in the legal framework of international cultural heritage law. Legal developments, which might facilitate answers to these questions, can however be found in a related field of international law, particularly that of international environmental law. Interestingly, international environmental law introduces different concepts, namely that of a ‘common concern of mankind’ and that of a ‘common but differentiated responsibility’. Thus, the following section will discuss whether and how these concepts might be applied to and foster the debate on the resolution of international cultural heritage disputes.

## **2.2 Common Concern and Common but Differentiated Responsibility**

In recent years, international environmental law has probably been the most progressive area of international law. This is due in part to the trans-boundary nature of

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<sup>882</sup> Freytag, "Cultural Heritage: Rückgabeansprüche Von Ursprungsländern Auf "Ihr" Kulturgut?," p. 197.

<sup>883</sup> Nafziger, "The Present State of Research," p. 245.

pollution and climate change, which has, in turn, facilitated new normative developments. In contrast, the area of international cultural heritage law is still primarily understood against the backdrop of exclusive State sovereignty and State territoriality.<sup>884</sup> Recently developments in the area of environmental law have established concepts that are not only prolific and applicable in environmental issues, but also highly relevant within the context of international cultural heritage law. This is because both areas of law pertain fundamentally to the interplay between limited ‘resources’ and concepts pertaining to territory, State sovereignty and property rights. Consequently, the two areas of international law are comparable to a certain extent.<sup>885</sup> The differences between cultural heritage law and environmental law pertain to the nature of the ‘resource’: the latter deals with ‘resources’ of natural origin, such as water, oil or carbon, whereas cultural heritage refers to a different kind of ‘resource’, namely man-made works of art. Despite this essential difference, both areas of the law understand the international community as a collective and relevant actor and recognize the ‘common interest’ in the protection of limited resources.<sup>886</sup>

Based on these similarities, the recently developed concepts in international environmental law are particularly well-suited to problems in international cultural heritage law: firstly, the global interest in the protection of cultural heritage and the aim of preventing illicit trafficking in cultural materials is not confined exclusively to States, since non-State actors and their interests are increasingly recognized on the international level; secondly, and similarly to environmental issues, States no longer have the ability or actual capacity to protect cultural heritage on their own, since the protection of cultural heritage constitutes a shared interest of humanity.<sup>887</sup> In addition to the concept of ‘common heritage of humankind’, two other concepts take this ‘common interest’ into account and facilitate the development of legal instrument with regard to establishing common obligations in international law. The first concept which implements the idea of a ‘common interest’ is the concept of the ‘common concern of mankind’. This concept has been incorporated in several international treaties,

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<sup>884</sup> For example the provisions of the 1970 UNESCO Convention, see *supra* Chapter Three, Section 2.2.

<sup>885</sup> Along this vein, Mastalir, who draws a comparison between the measures to protect the ozone layer with those necessary to protect cultural property: Apples and Oranges? – Is there a Basis for Analogy between the Resolution of Environmental and Cultural Property Problems? in: Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," pp. 1075.

<sup>886</sup> Cf. Rudolf Dolzer, "Die Deklaration Des Kulturguts Zum 'Common Heritage of Mankind'," in *Rechtsfragen Des Internationale Kulturgüterschutzes*, ed. Rudolf Dolzer, Erik Jayme, and Reinhard Mussgnug (1994), p. 21.

<sup>887</sup> Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity," pp. 1209.

such as the protection of biodiversity,<sup>888</sup> as well as to the issue of climate change (1992 Rio Declaration).<sup>889</sup> The concept of ‘common concern of mankind’ is based on three fundamental assertions: firstly, the recognition of the immediacy and global dimension of environmental problems; secondly, the belief that global and sustainable solutions can only be accomplished through cooperative means; and thirdly, that the common concern leads to global responsibilities. These global responsibilities may have an *erga omnes* character, similar to human rights norms, which are owed not just to States, but rather to the international community as a whole. Although these global responsibilities are held in common by all States, obligations conferred upon developed and developing parties are differentiated in various ways, thereby incorporating elements of ‘equitable balancing’.<sup>890</sup> On the basis of these three assertions, the concept of ‘common concern’ portends “the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people” and calls for “an international agreements which respect the interest of all”.<sup>891</sup>

The proposed establishment of an “equitable global partnership”, as expressed in the 1992 Rio Declaration, highlights the second concept in international environmental law relevant in this context. The concept of a ‘common but differentiated responsibility’ includes both an understanding of the general equity of States in international law (traditionally linked to State sovereignty), as well as the existence of a ‘common concern’ pertaining to the protection of the environment.<sup>892</sup> This normative concept surfaced in 1992 at UN Conference on Environmental and Development (UNCED) and was included in its closing communiqué, namely the Rio Declaration, which affirms in Principle 7 that “[...] States have common but differentiated responsibilities; the developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the globe environment and of the technologies and financial resources they command”. Similarly, the 2001 Kyoto Protocol includes the concept of ‘common but

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<sup>888</sup> For example, Convention on Biological Diversity, 31 ILM (1992) 818, adopted 5 June 1992, entering into force 29 December 1993.

<sup>889</sup> Rio Declaration on Environment and Development, launched at the UN Conference on Environmental and Development (UNCED), also known as the ‘Earth Summit’ in Rio de Janeiro, 3-14 June 1992, full text version available at: [http://www.unescap.org/esd/environment/rio20/pages/Download/Rio\\_Declaration-E.pdf](http://www.unescap.org/esd/environment/rio20/pages/Download/Rio_Declaration-E.pdf). (accessed 24 August 2011).

<sup>890</sup> Birnie and Boyle, *International Law and the Environment*, p. 99.

<sup>891</sup> 1992 Rio Declaration on Environment and Development (pp 2 and 3).

<sup>892</sup> Cf. Philippe Sands, *Principles of International Environmental Law* (Cambridge 1995), p. 101.

differentiated responsibilities’ in Article 10.<sup>893</sup> In practical terms, this concept of an “equitable global partnership” requires developed countries to recognize the economic development aspirations of lesser developed countries, and the lesser developed countries to recognize the threat that continued development poses to the global environment. Thus, the concept of ‘common but differentiated responsibilities’ can be seen as an attempt to achieve an equitable balance between developed and developing States in environmental terms. When translated into the field of international cultural heritage law, this can be understood as the relation between the so-called ‘source countries’ and ‘art-market countries’. Similarly to the common concern for the global environment, the protection of cultural heritage for the sake of humanity constitutes a common concern, or positively expressed: a common interest.<sup>894</sup> The concept of ‘common but differentiated responsibilities’ spills over into another concept of international law, namely that of ‘international cooperation’.

### 2.3 International Cooperation and Assistance

Although the idea of ‘international cooperation’ does not appear to be a particularly recent phenomenon, it was, in fact, not until the second half of the nineteenth century that the concept of ‘international cooperation’ emerged in international law. The idea of ‘international cooperation’ subsequently led to the 1899 and 1907 Hague Peace Conferences (with the adoption of the early Hague Conventions),<sup>895</sup> the establishment of the League of Nations in 1920, and, following WWII, the establishment of the United Nations.<sup>896</sup> Until that point, international law was primarily ruled by what Friedman described as ‘international law of coexistence.’<sup>897</sup> Since, however, the maintenance of peace and security, the protection of human rights and the environment, as well as the protection of cultural heritage require more than the mere peaceful coexistence of States (and other stakeholders), Friedman coined the recognition of common concerns as a shift from ‘international law of coexistence’ to an ‘international law of cooperation’.<sup>898</sup> Unlike the law of coexistence, the law of cooperation is based on the assumption of common interests that cannot be protected or served except

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<sup>893</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), adopted 11 December 1997, entering into force 16 February 2005. The Protocol sets binding target for 37 industrialized countries and the European Union for reducing greenhouse gas emissions; full text version available at: [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) (accessed 23 September 2011).

<sup>894</sup> For a detailed analysis of the various interests, see Chapter Five, Section 3.

<sup>895</sup> For details on the 1899 and 1907 Hague Conventions, see *supra* Chapter 2, Section 2.

<sup>896</sup> Cf. Georges Abi-Saab, "General Conclusions," in *Standard-Setting in Unesco*, ed. Abdulqawi A. Yusuf (2007), p. 397.

<sup>897</sup> Wolfgang Friedmann, *The Changing Structure of International Law* (1964), p. 36 and 297.

<sup>898</sup> *Ibid.* See also: ———, "National Sovereignty, International Cooperation, and the Reality of International Law," *University of California UCLA Law Review*, no. 10 (1962-63): pp. 739 ff.

through collaborative endeavors.<sup>899</sup> Thus, the concept of ‘international cooperation’ can be defined as States proactively working together in order to achieve objectives that cannot be attained by a single actor acting alone.<sup>900</sup> As a consequence, cooperation goes beyond the passive obligation of non-interference in the territorial and functional spheres of other sovereign States, by prescribing a positive obligation to act – or rather to act cooperatively – in service of the common interest of humanity.<sup>901</sup>

Similarly to the UN Charter, whose fundament and guiding principle is that of cooperation,<sup>902</sup> several international treaties, resolutions, recommendations, and declarations have reaffirmed the imperative need for international cooperation in order to facilitate the protection of the cultural heritage.<sup>903</sup> Moreover, recently developed concepts, such as the concept of the ‘common heritage of humankind’, ‘common concern of mankind’, and ‘common but differentiated responsibility’ discussed above demonstrate that the traditional function of international law to accommodate the interests of States has become inadequate in light of these common interests. Notably, the 1995 UNIDROIT Convention states in its preamble that “this Convention will not be itself provide a solution to the problem raised by illicit trade, but that it initiates a process that will enhance international cultural cooperation and maintain a proper role for legal trading and inter-State agreements for cultural exchanges.”<sup>904</sup> In order to provide an operational basis for the international cooperation in cultural heritage issues among States and other non-State actors, UNESCO, as a specialized agency within the UN system, as well as several international bodies (such as ICOM,<sup>905</sup> ICCROM,<sup>906</sup> and Interpol<sup>907</sup>) have been established.

Despite the recent developments towards a positive obligation to cooperate in the protection of cultural heritage in international law, most legal instruments that contain provisions on international cooperation either fulfill simply declarative functions or must be

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<sup>899</sup> Abi-Saab, "General Conclusions," p. 397.

<sup>900</sup> Rüdiger Wolfrum, "International Law of Cooperation," in *Encyclopedia of Public International Law (Epil)*, ed. Rudolf Bernhardt (1995), pp. 1242.

<sup>901</sup> Abi-Saab, "General Conclusions," p. 397.

<sup>902</sup> See Article 1 para. 3; Articles 11 and 13 as well as Chapter IX of the UN Charter.

<sup>903</sup> For legal analysis, see *supra* Chapter Three, Sections 2 and 3.

<sup>904</sup> Preamble, pp. 7 of the 1995 UNIDROIT Convention. For details on the convention, see *supra* Chapter Three, Section 2.4.

<sup>905</sup> International Council of Museums. For information on the ICOM Code of Ethics, see *supra* Chapter Three, Section 4.1. Further information available at: <http://icom.museum/> (accessed 23 September 2011).

<sup>906</sup> International Centre for the Study of the Preservation and Restoration of Cultural Property, information available at: <http://www.icrom.org/> (accessed 23 September 2011).

<sup>907</sup> Interpol stands for International Criminal Police Organization, information available at: <http://www.interpol.int/> (accessed 23 September 2011).

considered to be ‘soft law’ provisions. Moreover, these provisions mainly refer to cooperation as a function of ‘capacities’, namely an obligation on States to make their ‘best efforts’ according to their ‘capacity’;<sup>908</sup> needless to say, this frequently limits ‘cooperation’ in practical terms and inhibits concrete results. However, there is one example of international cooperation in cultural heritage matters that has led to the development of a specific obligation for States, namely the ‘World Heritage Fund’, established by Article 15 of the 1972 UNESCO World Heritage Convention.<sup>909</sup> The fund is supplied by compulsory and voluntary contributions from States parties to the 1972 Convention, as well as from private donations,<sup>910</sup> and provides about U.S. \$4 million annually to support activities requested by States parties in need for international assistance in preserving world cultural heritage.<sup>911</sup> The World Heritage Committee allocates funds to States parties on the basis of the urgency of their request, in order to help them protect the World Heritage sites located on their territory, which are designated as protected sites either on the World Heritage List, the List of World Heritage in Danger, or on the States’ Tentative List. In the case of the Temple of Preah Vihear (whose inscription as World Heritage in 2008 sparked the border dispute between Cambodia and Thailand),<sup>912</sup> the Director-General of UNESCO Bokova stated that "World Heritage sites are the heritage of all humanity and the international community has a special responsibility to safeguard them. Further, she indicated that this responsibility “requires a collective effort that must be undertaken in a spirit of consultation and dialogue.”<sup>913</sup> Thus, it should be noted that World Heritage sites constitute not only an obligation of the State in which the site is located, but an additional twofold obligation of the international community: to protect and to cooperate for the sake of the protection of the common heritage of humankind.

With the adoption of the 1972 UNESCO Convention, the ‘World Heritage Fund’ was established in order to support World Heritage sites; however, no such fund was established within the framework of the 1970 UNESCO Convention. In 1999, the UNESCO General Conference decided to create a voluntary fund to enable the Intergovernmental Committee

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<sup>908</sup> Abi-Saab, "General Conclusions," p. 397.

<sup>909</sup> For details on the 1972 UNESCO Convention, see *supra* Chapter Three, Section 2.3.

<sup>910</sup> States parties with major voluntary contribution to the regular budget of 2010/2011 include, for example: the United States (1.43 million dollar), Germany (523.000 dollar), France (400.000 dollar), Brazil (105.000 dollar), and Norway (56.000 dollar). A list of all compulsory and voluntary contributions is available at: <http://whc.unesco.org/en/world-heritage-fund/> (accessed 23 September 2011).

<sup>911</sup> Further details are available at: <http://whc.unesco.org/en/world-heritage-fund/> (accessed 23 September 2011).

<sup>912</sup> See also *Temple of Preah Vihear (Cambodia vs. Thailand)*, Judgment of 15 June 1962, ICJ Reports, 1962, p. 6.

<sup>913</sup> UNESCO News, UNESCO to send mission to Preah Vihear, 8 February 2011, available at: <http://whc.unesco.org/en/news/708> (accessed 23 September 2011).

(ICPRCP) to function effectively within its mandate.<sup>914</sup> The purpose of the fund is to support UNESCO Member States in their efforts to pursue the restitution and return of cultural materials, particularly with regard to the verification of cultural materials by experts, transportation, exhibition facilities, and training of museum professionals in source countries.<sup>915</sup> However, despite a small contribution made by Greece shortly after its establishment, no major contributions have been made to the fund so far.

Whereas these UNESCO funds are examples of cooperation on the international level, the provisions of financial assistance for the protection of cultural heritage can also be found on the national level. One example is the U.S. Ambassadors Fund for Cultural Preservation. Created in 2001 by the U.S. Congress, the fund has provided financial support to more than 640 cultural preservation projects in more than one hundred countries.<sup>916</sup> Recent examples include: the documentation and assessment of buildings and sites in Port-au-Prince, Haiti, affected by the January 2010 earthquake; support for the conservation of a shipwreck collection at the National Museum of Namibia; and the restoration of an early 17th-century brick fort in Pakistan.<sup>917</sup> Since its creation, nearly U.S. \$26 million have been spent worldwide on the preservation of cultural heritage.<sup>918</sup> Similar to the U.S. Ambassadors Fund, the Swiss government grants “financial assistance for the benefit of maintaining cultural heritage”. The provision of financial support is legislated through Article 14 of the national act implementing the 1970 UNESCO Convention. It provides three different types of financial assistance: firstly, museums in Switzerland may apply for funding “for the temporary fiduciary custody and conservatory care of cultural property that is part of the cultural heritage of another State and is in jeopardy in that State due to exceptional events”;<sup>919</sup> secondly, funding may be granted for projects aimed at preserving the movable cultural heritage of other States parties to the 1970 UNESCO Convention; and thirdly, funding may be

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<sup>914</sup> For details on the UNESCO Intergovernmental Committee, see *supra* Chapter Three, Section 3.2.

<sup>915</sup> For details see: <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/return-of-cultural-property/fund-of-the-international-committee/> (accessed 23 September 2011).

<sup>916</sup> Kouroupas, "Die Unesco-Konvention Von 1970: Die Erfahrungen Der Vereinigten Staaten," p. 154.

<sup>917</sup> The fund is called Ambassadors Fund since U.S. ambassadors in developing countries can apply for funding on specific projects (each year around 70 % of U.S. ambassadors make use of this possibility). For further details on the fund and the annual reports, see <http://exchanges.state.gov/heritage/afcp.html> (accessed 23 September 2011).

<sup>918</sup> *Ibid.*

<sup>919</sup> An example of such a temporary fiduciary custody is the establishment of the ‘Afghanistan Museum-in-Exile’ in Bubendorf, Switzerland (1999-2007); for more details on this case, see Chapter Five, Section 3.7.

granted in order to facilitate the restitution and return of cultural objects to States parties.<sup>920</sup> Interestingly, some examples of recently funded projects include direct cooperation, such as projects pertaining to the conservation of movable cultural objects between the Musée d'Ethnographie in Geneva and a museum in Peru, and between the Museum Rietberg in Zurich and a museum in Cameroon.<sup>921</sup>

In summary, it is notable that both the U.S. and the Swiss funds have been created in order to protect the cultural heritage of foreign States as part of the cultural heritage of humankind. Consequently, both States have recognized the importance of (and, one could argue, their responsibility in) protecting cultural heritage beyond their own borders, and thus to act in accordance with the concept that States have a 'common but differentiated responsibility' to protect cultural heritage. The concepts of a 'common heritage of humankind', a 'common concern of mankind' as well as the concept of 'common but differentiated responsibilities' have heralded new normative shifts in international law. The development of these concepts illustrates two major issues pertaining to international cultural heritage law: firstly, the existence of a 'common interest' in the protection of cultural heritage and the responsibility of States to cooperate in order to facilitate this interest; and secondly, the acknowledgement of the fact that the concept of State sovereignty no longer constitutes unfettered domination; rather, State sovereignty must be 'functional' to the 'common interest'. This applies to environmental and cultural issues, as both have an impact on the common heritage of humankind. Although the problems associated with climate change differ from those associated with the loss or destruction of cultural heritage, the necessity of deploying a cooperative approach is the same in both areas of the law.<sup>922</sup> International treaty law as well as resolutions, declarations, recommendations and other soft law instruments, all acknowledge the fact that threats to cultural heritage caused by deliberate destruction, looting, and the illicit trafficking in cultural material cannot be solved without international cooperation;<sup>923</sup> the same logic must be valid in the resolution of restitution disputes. Moreover, it has been demonstrated that obligations pertaining to the protection of cultural heritage are emerging in a way which requires States to take on joint responsibilities that

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<sup>920</sup> Article 14 of the Swiss Cultural Property Transfer Act (CPTA), full text available at: <http://www.bak.admin.ch/themen/kulturguettertransfer/01104/index.html?lang=en> (accessed 23 September 2011).

<sup>921</sup> Benno Widmer, "Das Kulturgütertransfergesetz Und Seine Umsetzung in Der Schweiz," *KUR*, no. 5 (2010): p. 149.

<sup>922</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1079.

<sup>923</sup> For legal analysis, see *supra* Chapter Three.

extend beyond the traditional perceptions of State sovereignty and the interests of single States. Since all the concepts discussed refer to a ‘common interest’ and thus aim at strengthen international cooperation, they all underpin the interest-oriented approach taken by this thesis.

## **2.4 Limitations on Property Rights**

The subject of restitution disputes is inevitably linked to the issue of property rights. The decision to return (or to retain) cultural materials results in the loss or gain of title to that object by the parties involved – these rights include rights of control, access, use and disposal of the cultural object in question. The transfer of property rights is based on an assumed or clearly proven title held by the party claiming restitution of their stolen property or the return of illicitly exported cultural objects. The question of valid title is, however, much more complex when the circumstances surrounding the object’s appropriation remain ambiguous or can no longer be established. These problems are only multiplied when legal proceedings are not accessible, property rights are forfeited due to national provisions on statutes of limitations, or the *bona fide* purchaser is entitled to compensation with the consequence that the claiming party might be forced ‘to purchase the object twice’ in order to obtain the object and the property rights associated with it.<sup>924</sup>

Limitations on property rights might, however, not only occur in the restitution context, but also because of national legal restrictions on the preservation and the export of cultural materials. Whereas placing limitations on property rights is generally an uncommon practice in international law, it is, nonetheless, widely used and recognized when it comes to the protection of ‘national cultural heritage’ or ‘national cultural patrimony’. Specifically, it is generally assumed on both the national and international level (through the 1970 UNESCO Convention and the 1995 UNIDROIT Convention) that national export regulations serve to protect cultural heritage. With regard to the protection of the ‘common heritage of humankind’, however, specific protective regulations are lacking in international law. Given, however, the recent developments in international cultural heritage law and the recognition of the ‘common interest’ in the protection of cultural heritage, this thesis argues that the rationale of limiting property rights in favor of protection should be applied within a wider framework of protecting cultural heritage. It seems rather logically inconsistent for the law to protect

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<sup>924</sup> For a detailed discussion on the legal obstacles that impede the resolution of restitution disputes, see Chapter Six, Section 1.

cultural heritage on the basis of ‘national patrimony’, but not on the basis of rationales associated with the ‘common interest’ in protecting cultural heritage, namely preservation, access, integrity and cooperation.<sup>925</sup> However, it is self-evident that any intervention in property rights within the context of law can only be undertaken with good legal reasoning. Therefore, the following section will explore the current mechanisms that limit property rights on the basis of protecting national patrimony. Subsequently, the extent to which the rationale of limiting property rights can be further developed and be shifted into a broader framework of general principles that can be used in order to facilitate a wider protection of cultural heritage will be discussed.

Restriction of the export of cultural materials is widespread: around 140 States worldwide have adopted comprehensive export control laws aimed at protecting ‘national cultural patrimony’ through the partial or complete ban of exports.<sup>926</sup> Such national export regulations are based on either an enumerative system of items, specific categories of materials, or general classifications of objects not to be exported.<sup>927</sup> These systems vary largely from State to State in terms of scope, value and age of the object.<sup>928</sup> Many archaeologists and source countries favor strict export regulations, fearing that an unrestricted trade in cultural objects endangers knowledge about the past and harms efforts aimed at the protection of cultural heritage. On the other hand, most collectors, dealers and some museums question the legitimacy of these concerns, claiming that source countries exaggerate the risks they face, and by doing so only fuel the illicit trafficking in cultural materials.<sup>929</sup> For many States however, particularly those in Africa and parts of Oceania, the existence of such laws is itself largely irrelevant because most objects of any major significance from both a cultural and artistic perspective have already been taken abroad prior to the constitution of any national export laws.<sup>930</sup> For many other developing States, these export controls face serious enforcement problems, since many source-countries simply lack resources to protect their cultural heritage; the realization that objects have been stolen or illicitly exported usually

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<sup>925</sup> Cf. Janna Thompson, "Cultural Property, Restitution and Value," *Journal of Applied Philosophy* 20, no. 3 (2003): p. 257.

<sup>926</sup> The acts of national legislation pertaining to cultural heritage of UNESCO Member States are collected in the UNESCO Cultural Heritage Laws Databases, available at: <http://www.unesco.org/culture/natlaws/index.php?&lng=en> (accessed 23 September 2011).

<sup>927</sup> Prött and O'Keefe, *Law and the Cultural Heritage*, pp. 27.

<sup>928</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 172. For details on export regulations, see *supra* Chapter Three, Section 2.2.

<sup>929</sup> Cf. Merryman, "Protection of the Cultural Heritage?," p. 513.; For details on the various interests of the stakeholders involved, see Chapter Five, Section 1 and 3.

<sup>930</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 172.

occurs only as a consequence of these objects being offered for sale on the international art and antiquities market.<sup>931</sup>

National export regulations are generally approved of on the international level, through the treaties of several international organizations, such as the European Free Trade Association (EFTA); the World Trade Organization (WTO); the South American Economic Organization (Mercosur), as well as the European Union.<sup>932</sup> All of these international trade organizations allow restrictions to the principle of free movement of goods when trade applies to cultural objects. While the extent to which such restrictions are efficient remains unclear,<sup>933</sup> illicit trafficking in cultural materials continues to be a severe problem. Most export regulations are constituted in a way that they restrict the owner's ability to freely export or sell cultural property outside of national borders. Therefore, in economical terms (cultural materials as goods of trade), the owner is limited to the national (or even regional) market, which precludes the possibility that the owner will be able to receive the highest market price that could be obtained through sale or auction on the international art and antiquities market. Consequently, one could argue that this results in a devaluation of the intrinsic economical value of cultural materials.

It was precisely this argument that was brought in the case of *Beyeler vs. Italy*.<sup>934</sup> In 1977, the Swiss art dealer and collector Ernst Beyeler acquired the Van Gogh painting "Portrait of a Farmer's Boy" (1889) through an intermediary Italian agent. This painting had been declared by the Italian authorities in 1954 as being a work of "historical and artistic interest" and thus part of the "cultural patrimony of the nation" (Law No. 1089 of 1939). The law obliges the owner of cultural objects declared as being "cultural patrimony" to inform the Italian authorities of any intended transfer of title, since the law establishes a pre-emptive right for the Italian State to purchase the item. However, the Italian authorities were not informed of the purchase of the piece in 1977; it was only in 1983 that Beyeler informed the Italian authorities that he intended to sell the Van Gogh to the Peggy Guggenheim Collection. Years of negotiations between Beyeler and the Italian government followed, however, without any decision by the Italian government as to whether it would exercise its pre-emptive right of

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<sup>931</sup> See in this regard the First Report of the Committee on Cultural Heritage Law of the International Law Association (ILA), London Conference (2000), p. 6.

<sup>932</sup> See the provisions of Article 36 TFEU (ex Article 30 EC Treaty).

<sup>933</sup> Siehr, "Globalization and National Culture: Recent Trends toward a Liberal Exchange of Cultural Objects," p. 1079.

<sup>934</sup> *Beyeler vs. Italy* (ECtHR, Application No.33202/1996, 5 January 2000).

purchase. Presumably in order to speed up the decision, an Italian middleman associated with Beyeler applied in 1988 for an export license of the Van Gogh painting; Italy denied the request and decided to exercise its pre-emptive right of purchase. However, Italy compensated Beyeler only in the amount of the 1977 sale without taking into account the painting's market value in 1988. Beyeler challenged the amount paid, but lost in Italian courts, even upon appeal. In 1996, Beyeler brought his claim to the European Commission of Human Rights, arguing that the decisions of the Italian courts violated his right to “peaceful enjoyment of ownership rights”, as guaranteed by Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>935</sup> In 2000, the European Court of Human Rights (ECtHR) ruled that Italy had indeed violated Article 1 of Protocol No. 1. The ECtHR described the Italian proceedings as a matter of unjustified enrichment, firstly, due to the small amount paid to Beyeler as compensation in connection with the exercise of the pre-emptive right, and secondly, due to the delay associated with the decision of whether or not to exercise the pre-emptive right. On the basis of these two arguments, the ECtHR decided that Italy has failed to strike a fair and reasonable balance between the right to peaceful enjoyment of property on the one hand, and the national interest in preserving national patrimony on the other. Italy was ordered to compensate Beyeler adequately.

Interestingly, Beyeler challenged another aspect of the law in his case, namely the determination of what constitutes the ‘cultural patrimony’ of a nation; he argued that the painting, which was made by the Dutch artist Van Gogh who mainly worked in France, had no genuine link to Italian cultural heritage. Italy, in turn, justified its classification of the Van Gogh as national patrimony on the basis of public interest, namely the scarcity of Van Gogh paintings in Italian museums. The ECtHR dismissed Beyeler's argument and fully upheld the right of States to determine their national cultural heritage.<sup>936</sup> Thus, the ruling of the ECtHR confirmed the sovereign right of States as expressed in Article 4 of the 1970 UNESCO Convention. Article 4 lists various very broadly defined categories that may constitute the cultural heritage of States, among them: (a) cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property created within the territory of that State by foreign nationals; and (b) cultural property found within the national

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<sup>935</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe, 4 November 1950, entering into force 3 September 1953, CETS No. 005.

<sup>936</sup> Cf. Merryman, Elsen, and Urice, *Law, Ethics and the Visual Arts*, pp. 122.

territory. Thus, Italy – just like any other State in whose territory a Van Gogh is found – may declare Van Gogh paintings as their national patrimony. The French *Conseil d'État*, for example, once classified an antique Chinese Yuan vase as inalienable French property; Germany did the same with a painting by Caravaggio; and the famous portrait of the Duke of Wellington by the Spanish painter Velasquez has been classified as national patrimony in Great Britain.<sup>937</sup> The examples mentioned above as well as Article 4 of the 1970 UNESCO Convention demonstrate that the decision of what constitute the cultural patrimony of a nation (which can consequently limit the object's ability to be exported and thus limit the property rights associated with it) is left to the determination of the sovereign State, and as such it is not subject to review either by foreign States or international courts (as the ECtHR).

In the context of restitution disputes, the classification of an object as 'national patrimony' might interfere with the decision to return, since the classification prohibits its export. An example of such a case is the decision of the city of Rouen to return sixteen tattooed and mummified Maori warrior heads to New Zealand.<sup>938</sup> Since the Maori-heads were classified as French national patrimony and as such inalienable and banned of being exported, the City Council's decision to return the Maori heads was stopped by the French Ministry of Culture and subsequently challenged in French courts. In the end, the return was only made possible because the French parliament passed a specific law overruling the court's decision and ordering the restitution.<sup>939</sup>

From this discussion, one can draw two conclusions: firstly, the classification of an object as being part of the cultural patrimony of a nation is the exclusive decision of State authorities; although the classification may sometimes appear to be random, it is not subject to review by other States or international courts. Secondly, despite this exclusive right of States, the decision of the ECtHR in the *Beyeler* case makes clear that limitations on property rights can, in turn, be limited, and may require compensations equal (or nearly equal) to the current market price. Given the arguments put forward by this thesis, the fact that the concept

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<sup>937</sup> Kuitenbrouwer, "The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance," p. 600.

<sup>938</sup> Law No. 2010-501 of May 18, 2010: "Loi visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections", NOR: MCCX0914997L, legislation available at: <http://www.legifrance.gouv.fr> (accessed 23 September 2011).

<sup>939</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 9. For more details on the case see also: BBC News, "France votes to return Maori heads to New Zealand", 5 May 2010, available at: <http://news.bbc.co.uk/2/hi/8661231.stm> (accessed 23. September 2011).

of limitations on property rights has thus far only been applied in the context of ‘national patrimony’ seems short-sighted, given that such limitations might also be used in order to protect the cultural heritage of humankind, by linking such limitations with assurances associated with preservation, access, integrity and cooperation.

This question of whether limitations on property rights might be extended for other reasons highlights a much more fundamental question in cultural heritage matters: namely whether cultural material should be treated like any other ordinary good with the consequence that the laws that govern the treatment of ordinary property apply to cultural property without any restrictions,<sup>940</sup> or if cultural material constitutes a unique category of its own with the consequence that the ordinary legal regime designed for commodities does not (or not entirely) apply and distinctive legal provisions are reasonable and justified.<sup>941</sup> This latter understanding is linked to concepts that associate the ownership of cultural material with certain obligations connected with notions such as ‘qualified ownership’, ‘public trust’ or ‘custody’. Such concepts are based on the assumption that cultural materials are not mere objects but have an inherent cultural value to a certain people, community, or humankind with the consequence that ordinary private dominion over such objects cannot sufficiently take the immanent importance of cultural heritage into account.<sup>942</sup>

Current limitations on property rights are primarily based on the traditional concept of national patrimony and are invoked on the basis of State sovereignty. This thesis, however, argues that as a consequence of the conceptual shift from ‘cultural property’ to ‘cultural heritage’<sup>943</sup> and the recent developments in international law that move States towards a general responsibility to protect cultural heritage,<sup>944</sup> limitations on property rights should also be invoked in order to protect cultural heritage. As a consequence, the concept of limitations on property rights pertaining to the export of cultural objects should also be applied to restitution, if the protection of the cultural object offered by the current holder of the object or the requesting party is not adequate. A similar approach has been reflected, as discussed above, in the 2006 ILA Principles as well as in Article 5(3) of the 1995 UNIDROIT

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<sup>940</sup> Cf. Eric Posner, "The International Protection of Cultural Property: Some Skeptical Observations," *Chicago Public Law and Legal Theory Working Paper*, no. 141 (2006).

<sup>941</sup> Examples of distinctive legal provisions include: the classification as national patrimony or the status as being inalienable. For details on the discussion, see *supra* Chapter Three, Section 1.

<sup>942</sup> Joseph Sax, *Playing Darts with a Rembrandt, Public and Private Rights in Cultural Treasures* (1999), p. 197.

<sup>943</sup> For details on the shift from ‘cultural property’ to ‘cultural heritage’, see *supra* Chapter Two, Section 5.1.

<sup>944</sup> For details on the responsibility to protect, see *supra* Chapter Three, Section 1.1.

Convention. Both instruments introduce general principles pertaining to preservation, access, integrity and cooperation that should be recognized in the resolution of restitution disputes. Similarly, the criteria pertaining to preservation have also been introduced in national law, as, for example, through the 2005 Swiss Cultural Property Transfer Act (CPTA).<sup>945</sup> The CPTA implements the 1970 UNESCO Convention into national law and thus regulates the import, transit and export, as well as the return of cultural materials, to and from Switzerland. In Article 9(2), the CPTA establishes that the Swiss court is responsible for determining whether the return of a claimed object can be suspended until such time as the cultural object in question would no longer be in jeopardy, should it be returned. Although the CPTA presumably refers to situations of war, civil riots, natural disasters, or similar incidents, the provision could easily be extended to situations in which, for example, the physical preservation and the integrity of the object to be returned cannot be guaranteed.

***Summary of the Chapter:***

This chapter introduced the conceptual and legal foundations of the interest-oriented approach proposed by this thesis. It began by recalling the three rationales that demonstrate the need to balance the various interests of the stakeholders involved, in order to adequately resolve restitution disputes. Against the backdrop of a legal analogy to child custody determinations as well as recently developed concepts in other but similar areas of international law (such as the ‘common heritage of humankind’; ‘common concern’; ‘common but differentiated responsibilities’, and ‘international cooperation’), it has been demonstrated that the interest-oriented approach taken by this thesis finds legal equivalence in these concepts that are based on ‘common interests’.

In the current state of play, international treaty law fails to account for the interests of the stakeholders involved; at the same time, bilateral agreements pertaining to restitution and return are frequently unable to actualize these interests evenly, due to unequal bargaining powers between the parties involved in restitution disputes. Therefore, this thesis argues in favor of the development of general principles that – on the basis of the ‘common interest’ of humanity in the protection of cultural materials – may facilitate cooperative solutions in restitution disputes. As a result, the decision to return (or to retain) cultural materials may not necessarily result in the complete lost or gain of title and/or possession. Moreover, it has been

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<sup>945</sup> Federal Act on the International Transfer of Cultural Property (CPTA), passed 20 June 2003, entering into force 1 June 2005. Article 9(2) reads: “The court can suspend the execution of repatriation until such time as the cultural property is no longer in jeopardy during repatriation.”

noted that limitations on property rights are currently made exclusively on the basis of State sovereignty, as expressed through the concept of national patrimony. In contrast, the ‘common heritage of humankind’ and the ‘common interest’ in the protection of cultural heritage are currently not protected by such restrictions. Therefore, it has been argued that, for the sake of the ‘common interest’ in the protection of cultural heritage, the concept of limitations on property rights (and thus on the right to free disposition) should be extended to include the resolution of restitution disputes with the consequence that restitution and return might be postponed or refused outright, should the common interests in physical and cultural preservation, access, integrity and cooperation not adequately be met.

## **CHAPTER V: The Stakeholders and Their Interests in International Cultural Heritage Disputes**

### ***Overview of the Chapter:***

Having explored the legal framework of international cultural heritage law in Chapter Three, and having subsequently introduced the conceptual and legal foundations of the interest-oriented approach in Chapter Four, this chapter begins with an analysis of the various stakeholders who might be involved in international cultural heritage disputes. Determining the relevant stakeholders and their respective interests is a precondition for identifying what interests these parties may or may not have in common. The following six groups of stakeholders can be identified: (1) States; (2) private entities (namely art dealers, collectors, and auction houses); (3) public and private museums; (4) scientific and epistemic communities; (5) indigenous peoples, ethnic and religious groups; and (6) the international community as a whole.

The second part of this chapter consists of an assessment of the potential motives and interests involved in restitution matters. Of particular interest to this study is the fact that motives shape not only the nature of the request for restitution and return, but also serve as an early indicator of the likelihood that the negotiating parties might consider alternative solutions to ‘barren’ restitution and return. In addition, the interests of the stakeholder involved also determine the general basis and framework for alternative solutions. While some interests might be divergent and potentially incompatible, others might not be mutually exclusive. The chapter will demonstrate that certain interests may be considered ‘common ground’ and therefore reflect the ‘common interest’ in the protection cultural heritage. The assessment undertaken by this chapter will focus on the interests of the various stakeholders with the overall attempt to counterbalance and reconcile these interests in order to resolve restitution disputes in an adequate and cooperative manner.

Without claiming to be exhaustive, the following interests can be identified: (1) physical and cultural preservation; (2) public access; (3) integrity and the context; (4) access for scientific research; (5) economic interests; (6) political interests, including the aspect of

affiliation and the symbolic value of cultural objects; and (7) preventing the reappearance of returned objects on the illicit art and antiquity market. Although not strictly an interest, this list is incomplete without the inclusion of an additional consideration: (8) a digression regarding the problem of so-called ‘orphaned objects – cultural objects of uncertain provenance. Therefore, a discussion of how these objects deprived of their cultural context should be dealt with and whether (and whereto) they should be returned will be included in this analysis.

### **1. Stakeholders in International Cultural Heritage Disputes**

Within the context of cultural heritage matters, conflicts of interest are almost inevitable, since cultural materials are unique and irreproducible artifacts attracting the interest of many, thus leading to a multitude of interests. In comparison to other limited resources of natural origin (such as water, oil or carbon), cultural materials are of cultural origin, and are therefore linked to a certain cultural context: a people, a group of creators, or a single creator. Although international cultural heritage law is still mainly driven by States and their interests (as reflected in concepts such as ‘national cultural heritage’ and ‘national patrimony’), States are no longer the exclusive stakeholder in cultural heritage matters.<sup>946</sup> Other, non-State actors play an increasingly important role in cultural heritage matters, particularly in the context of restitution disputes. Despite the traditional dominance of States in international law, many disputed cultural objects are held in museums and private collections, which are not directly controlled by national governments.<sup>947</sup> This alone demonstrates that States (i.e. their governments) cannot be the only stakeholder to be recognized in cultural heritage matters. As will be demonstrated, the emergence and establishment of new sovereignties in addition to States lead to a process in which traditional heritage values and interests are being constituted or reconstituted in a way that consequently might trigger the need for alternative means of obtaining resolution in restitution disputes.<sup>948</sup>

Through the application of the interest-oriented approach, this thesis argues that the different interests of the various stakeholders must be balanced in order to overcome the current dilemmas in restitution disputes. According to Merryman, interests in preservation

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<sup>946</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 147.

<sup>947</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1084.

<sup>948</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 7.

and accessibility for study, as well as use and enjoyment, can be divided into matters of public and private concern; he points out that nations treasure cultural objects, living cultures use them, museums collect and exhibit them, scholars study them, and individuals enjoy possessing and viewing them.<sup>949</sup> Other scholars, for example Prott, argue that such distinction between public and private concerns is defective, since public (or social) interests continue to be the interests of individuals – just as individual interests may be looked upon as public (or social) interests.<sup>950</sup> Thus, the subject of restitution and return in particular evokes an assortment of overlapping, competing or even colliding interests. The analysis of the various stakeholders and their interests in the following section will illustrate that there are competing but also widely shared interests in cultural heritage matters that might be consolidated on the basis of ‘common interests’.

### 1.1 States

One of the essential elements of statehood is the occupation of a territory within which the laws of that State operate.<sup>951</sup> Under the concept of territorial sovereignty, jurisdiction is exercised by the State over persons and property to the exclusion of all other States. Thus, it is the principle of territoriality that establishes the link between cultural objects within a certain territorial area and that particular State. Consequently, it is the general assumption under international law that cultural objects are a resource that States have a right to control, similarly to any other resource found on or in the State’s soil.<sup>952</sup> This principle gives States almost exclusive rights over cultural materials situated in their territory. Therefore, it is usually States that claim the right of ownership over cultural objects, monuments, sites, or other archeological and cultural relics. Moreover, claims for the return of appropriated cultural objects are based on the assumption that what has been found within a State’s national borders inevitably belongs not only to its territory but also to its ‘national cultural heritage’.

This assumption, however, is questionable based on two specific considerations: firstly, the fact that modern State borders were mainly drawn in the nineteenth or early twentieth century and often do not correspond to the boundaries of the ancient civilizations that produced the cultural materials undermines the supposition that all such objects

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<sup>949</sup> Merryman, Elsen, and Urice, *Law, Ethics and the Visual Arts*, p. 113.

<sup>950</sup> Prott, "The International Movement of Cultural Objects," p. 240.

<sup>951</sup> Montevideo Convention on Rights and Duties of States (1933), 165 L.N.T.S. 19.

<sup>952</sup> Thompson, "Cultural Property, Restitution and Value," p. 252.

inherently belong to a current State's territory. State borders of most African States, for example, are drawn on the basis of the haphazardly colonial apportionment. Other regions, such as the current State borders in Central Asia, were intentionally divided into a patchwork of States whose borders were designed to fracture races and smash nationalism under the Soviet regime. Thus, in the 1920s, Stalin not only succeeded in preventing ethnic groups from uniting against him, but also ensured that each State is a hotbed of ethnic rivalry.<sup>953</sup> Secondly, it might be argued that the substantiation of a claim for the return of a cultural object to its 'country of origin' may weaken over time. This is because cultural identities and cultural symbols may change as time elapses, since the idea of a nation as a primeval community with an essence that remains the same through time is more-or-less a myth.<sup>954</sup> Nonetheless, the principle of territoriality is widely recognized in international law and forms the basis of most legal instruments in international cultural heritage law.<sup>955</sup> Based on the principle of territoriality, most States have adopted cultural patrimony laws (also called State ownership laws) that vest ownership of archaeological and cultural resources in that State. States claim that both their ownership laws and their export control laws<sup>956</sup> serve to protect sites from destruction and that keeping objects within their national borders assists in the preservation of these objects in their original cultural context.<sup>957</sup> States also confirm this by reciprocally enforcing other States' patrimony laws, as thought the 1970 UNESCO Convention or bilateral *inter*-State agreements.<sup>958</sup> Although the principle of territoriality gives States almost exclusive rights over cultural objects within its present borders, it does not include the right to destroy them deliberately – as seen in the case of the demolition of the Buddhas of Bamiyan<sup>959</sup> – since (at this time) international cultural heritage law constitutes a general responsibility to protect cultural heritage.<sup>960</sup>

Most claims for restitution and return by States are made against another State in order to accomplish their return to the State's territory – rather than for the return of the object to a

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<sup>953</sup> See: Stalin's latest victims, in: *The Economist*, June 19, 2010, p. 13, giving the example of Kyrgyzstan, Tajikistan and Uzbekistan.

<sup>954</sup> Thompson, "Cultural Property, Restitution and Value," p. 257.

<sup>955</sup> For legal analysis, see *supra* Chapter Three, Section 1.

<sup>956</sup> For bilateral *inter*-State agreements with regard to Import restrictions see, *supra* Chapter Three, Section 2.9.2.

<sup>957</sup> Alexander A. Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," *Fordham International Law Journal* 31(2008): p. 700.

<sup>958</sup> For details on the 1970 UNESCO Convention and national export restrictions, see *supra* Chapter Three, Section 2.2.

<sup>959</sup> Cf. Francioni and Lenzerini, "The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq," pp. 28.

<sup>960</sup> For legal analysis on a general responsibility to protect cultural heritage, see *supra*: Chapter Three, Section 1.1; on customary international law, see *supra* Chapter Three, Section 6.4.

particular ethnic or religious group that might correspond to the actual originators. Thus, restitution and return of a cultural object might result in the object being as removed from its true cultural context as it was while being held by a foreign museum.<sup>961</sup> This is particularly a problem in cases of items pillaged from archaeological sites, since these objects have been deprived of their original context and can therefore almost never be re-integrated into that context, even if this context had not already been destroyed at the time of the removal. Even if the original site can be identified, the preservation of the object requires conditions that are rarely available at the original site. As a consequence, returned cultural objects often end up in the national museum in the State capital (possibly quite far away from the original site), or in local museums (which are closer to the original site, but often less equipped to preserve the object, and to provide opportunities for study and general public access).

Although this chapter's analysis treats States as a single stakeholder, they are not a homogenous group. Traditionally, States have been divided into so-called 'source and art-market countries'. The former group consists of States which are 'rich' in cultural materials ('source countries'), but are developing economically (e.g. Columbia, Egypt, Ecuador, Nigeria, Peru, Syria and many others), whereas the latter consists of States 'poor' in ancient cultural artifacts but economically well-developed and thus attracting the art and antiquity market (e.g. United States, United Kingdom, Japan, Germany, Switzerland). Although some States may fit in neither (or both) of these categories (e.g. Italy, Greece, China), the two categories accurately reflect current international market realities. Several interests of States may therefore be divided along the lines of 'source' and 'art-market countries'; other interests, however, can be seen to coincide and may provide common ground (e.g. in the common market area of the European Union that includes States in both categories). Moreover, problems like illicit excavations of archaeological artifacts and illegal metal detecting (also known as 'nighthawking') is a concern to all States, since effectively guarding every archeological site is impossible, given the limited financial resources even in most developed countries for such activities.

For source countries, the first interest (or concern) is to avoid the removal of cultural materials from the culture and territory in which they are embedded (an interest generally not

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<sup>961</sup> Coggins, "A Proposal for Museum Acquisition Policies in the Future," p. 434.

shared with art-market countries).<sup>962</sup> Second, there is an archaeological interest in preventing the destruction of artifacts associated with ancient civilization, as well as an interest in preventing the dismemberment and physical deterioration of archeological sites (an interest shared with art-market countries). A third interest is the economical value of cultural objects, measured in terms of the price the object would bring on an open (licit) market (also known as its intrinsic value), and the marketing value in terms of attracting tourism (extrinsic value) generated by the presence of cultural objects (an interest shared with art-market countries).<sup>963</sup> Four is the so-called distribution interest – cultural objects may demonstrate to the world community the achievements of the culture of a nation, should it be disseminated (this is a disputable interest – not shared by all source countries). Fifth, there is an interest in terms of the mere retention, or ‘hording’, of one’s own cultural heritage (an interest not shared with most art-market countries).<sup>964</sup> Sixth, there is an interest in preserving the national patrimony as a matter of pride and identity, as well as intrinsic and extrinsic economic value (an interest mainly shared with art-market countries).<sup>965</sup>

The interests of art-market countries include, first of all, an interest in the preservation and the physical safekeeping of cultural objects (an interest generally shared with source countries, even if interests in the conditions of preservation may differ). Secondly, there is the interest in the protection of one’s own nationals and national institutions that are deemed to be ‘bona fide purchasers’ insofar as their property rights should not to be unjustly infringed upon – at least not without compensation (an interest not shared with source countries).<sup>966</sup> Thirdly, art-market countries have an interest in enriching their own ‘cultural patrimony’ through the acquisition of cultural objects from external sources (an interest not shared with source countries).<sup>967</sup> Fourthly, there is an interest in maintaining access to cultural objects (an interest partially shared with source countries). A fifth is avoiding the dismantlement of established museum collections (an interest not shared with source countries).<sup>968</sup> Sixthly, art-market countries support the idea that cultural objects have artistic value independent of its

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<sup>962</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1044.

<sup>963</sup> Ibid.

<sup>964</sup> Ibid.

<sup>965</sup> Bator, "An Essay on the International Trade in Art," p. 302-06.

<sup>966</sup> John Henry Merryman and Albert E. Elsen, "Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects," *Journal of Arts Management*, no. 12 (1982): p. 8-11.

<sup>967</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1044.

<sup>968</sup> Ibid.

cultural significance (an interest only partially shared with source countries). A seventh interest is historically originated: the interest among colonial powers and victorious powers in times of conflict in the humiliation of a conquered people by dispossessing them of their cultural and artistic treasures.<sup>969</sup> This historic interest – which under current human rights norms is considered a crime rather than an interest under international law – should be transformed on the basis of ethical and historical considerations into an interest in ‘remedying historical injustices’ through the acknowledgment of past injustice, compensation, and restitution and return.<sup>970</sup>

Legal concepts that attempt to combine the interests of both source and art-market countries are the concepts of ‘common concern’ and ‘common but differentiated responsibility’ that are, as discussed above,<sup>971</sup> derived from recent developments in international environmental law.<sup>972</sup> These concepts find their roots in the general assumption of the equity of States in international law.<sup>973</sup> The heart of this concept consists of the idea that, while all State may have a common concern in the protection of the environment (or analog in the context of this study: a common concern in the protection of cultural heritage), normative responsibilities between States can be differentiated on the basis of factors such as the economic development and the special needs of a State, since its historic contributions to environmental degradation (or similarly its historic contributions to cultural heritage) might differ.<sup>974</sup>

Applying the concept of ‘common but differentiated responsibility’ to cultural heritage matters means that developed States (‘art-market countries’) have differentiated obligations pertaining to the protection of cultural heritage than developing States (‘source countries’). Examples for the acknowledgment of such ‘differentiated responsibility’ in protecting cultural heritage are the ‘emergency actions’ issued by the United States under Article 9 of the 1970 UNESCO Convention: in circumstances when a certain category of archaeological or ethnological materials is being threatened, the U.S. State Department may decide to impose import restrictions on that particular category of cultural material based upon a request made

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<sup>969</sup> Ibid.

<sup>970</sup> For details on ethical and historical considerations in restitution disputes, see *supra* Chapter Three, Section 5.

<sup>971</sup> For details, see *supra* Chapter Four, Section 2.2.

<sup>972</sup> Birnie and Boyle, *International Law and the Environment*, at p. 100-09.; Sands, *Principles of International Environmental Law*, at p. 286-89.

<sup>973</sup> Sands, *Principles of International Environmental Law*, p. 101.

<sup>974</sup> Carmouche, "The New Concept of International Responsibility in International Environmental Law ": p. 15.

by a State that is party to the 1970 UNESCO Convention.<sup>975</sup> Notably, the State requesting such ‘emergency action’ does not only have to demonstrate that its cultural patrimony is in jeopardy; however, – as a trade-off in terms of mutual obligations – it must take measures to protect its cultural patrimony itself. Along a similar vein, the U.S. ‘Ambassadors Fund for Cultural Preservation’ provides financial support to foreign cultural preservation projects as well as the Swiss fund that specifically grants financial assistance for movable cultural heritage.<sup>976</sup> Both funds were created in order to protect cultural heritage of foreign States as part of the cultural heritage of mankind, thus recognizing the need (and responsibility) to protect cultural heritage beyond one’s own State borders. The intention to protect cultural heritage for the sake of mankind was also the driving force in the decision made by the UN Security Council to pass Resolution 1483/2003<sup>977</sup> that prohibits the import, export of, or trade in Iraqi cultural objects (similarly to EU Council Regulation No. 1210/2003).<sup>978</sup>

While measures imposing import restrictions and providing financial support within a wider frame of international cooperation are helpful, the concept of ‘common but differentiated responsibility’ could also be used to foster the attempt to ‘remedy historical injustice’ between ‘source countries’ and ‘market countries’ in terms of resolving restitution disputes. The legal and practical consequences of ‘common but differentiated responsibilities’ in not only environmental issues, but also in cultural heritage matters is articulated in the proposal made by this thesis, namely to address restitution disputes through alternative solutions in terms of loan agreements, the fabrication of replicas, transfer of expertise, joint custody and shared management programs.<sup>979</sup>

## **1.2 Private Entities – Art Dealers, Collectors and Auction Houses**

For States, the link to cultural materials is established by the principle of territoriality; for individuals, this link is established by property rights achieved through purchase or derived through inheritance. Thus, it is property rights that make a potential claimant for

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<sup>975</sup> See Section 2602 U.S. CIPA. The so-called ‘emergency actions’ might be expanded to bilateral agreements, which might not only impose import restrictions but also provisions on cooperative programs, such as cultural exchange and loan agreements. For further details on the specific requirements under the CIPA, see *supra* Chapter Three, Section 2.2 and Section 2.9.2.

<sup>976</sup> For details on international cooperation and assistance, see *supra* Chapter Four, Section 2.3.

<sup>977</sup> UNSC Resolution No. 1483/2003, (22 May 2003), UN Doc S/RES/1483, ILM, 2003, p.1016 ff; See: paragraph 7; full text version available at: <http://daccess-ods.un.org/TMP/1465505.html> (accessed 23 September 2011).

<sup>978</sup> Council Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No. 2465/96, (*Official Journal* 2003, L 169/6).

<sup>979</sup> For details, see Chapter Six, Section 3.

restitution and return legitimate. Based on the assertion of ownership and title, individuals are the legal entities that are, next to States, most commonly recognized by the law. Generally, there is no fundamental distinction between State ownership and private ownership; States and individuals alike have full and complete ownership rights, including the right of exclusion of use and access – the only difference lies in who takes decisions pertaining to use and access.<sup>980</sup> Although title normally guarantees the comprehensive right over property, this is not entirely the case for cultural materials, since most States exercise some degree of control over private owners. This is not only the case when it comes to export regulations (limiting the owner of a certain item to sell it only nationally and not on the international market, thus limiting sales revenue),<sup>981</sup> but also, to a much lesser degree, when it comes to provisions in which public authorities retain certain rights pertaining to preservation (mainly pertaining to architectural monuments and less to movable cultural objects). The general lack of legal provisions that limit property rights for the benefit of the preservation of cultural heritage has been criticized, for example, by Sax, with the highly illustrative caption: “Playing Darts with a Rembrandt”. He claims a general interest in the preservation of cultural materials and declares that the larger community has a legitimate stake (namely a common interest) in cultural materials because they embody ideas, or scientific and historic information of importance.<sup>982</sup> Nevertheless, most national legal regimes provide export restrictions, but not for restrictions on the destruction of privately owned cultural objects – like a painting by Rembrandt. Although destruction and intentional damage of privately owned works of art might generally not be preventable, such acts could at least be sanctioned by criminal provisions under national law.

The primary interest of private dealers, auction houses, and collectors is the authenticity and integrity of cultural objects, including the ability to own such objects (or pass title). Secondly, these actors have an interest in the preservation of cultural objects, since without preservation these objects lose both its aesthetic and its economical value. Thirdly, they have an interest in relatively unfettered access to cultural objects for disposal and acquisition.<sup>983</sup> Fourthly, in contrast to other stakeholders (particularly to archeologists and scientists), the activities of private dealers, auction houses, and collectors – in addition to

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<sup>980</sup> John Carman, *Against Cultural Property - Archaeology, Heritage, and Ownership* (2005), p. 29.

<sup>981</sup> For details on limitations on property rights, see *supra* Chapter Four, Section 2.4.

<sup>982</sup> Sax, *Playing Darts with a Rembrandt, Public and Private Rights in Cultural Treasures*, p. 9.

<sup>983</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 708.

aesthetic, scholarly, or merely possessing purposes – are primarily of a commercial nature, involving the buying and selling of cultural objects; thus, these actors have a strong interests in the recognition of title, possession, and *bona fide* purchase.<sup>984</sup> In some instances, the activities of private collectors are entwined with other kinds of non-state actors, such as when they donate objects or even entire collections to museums or other art holding institutions.<sup>985</sup> Therefore, private dealers, auction houses and collectors generally do not favor any kind of national or international restrictions on property rights and the free movement of cultural objects. Instead, they usually support an open and legitimate international art and antiquity market in cultural objects of interest to them.<sup>986</sup> This interest, however, is limited in most States, as discussed above, in view of national export regulations that restrict the right to unfettered disposal of cultural objects.<sup>987</sup>

Against the backdrop of the commonly imposed limitation to property rights and in light of the concept of ‘common heritage of humankind’,<sup>988</sup> one could argue that private owners of cultural objects that have a “significant cultural importance” (for humankind)<sup>989</sup> are merely ‘trustees’ or ‘custodians’, and their right to act in this capacity presumably depends on their ability to care for the objects that are entrusted to them. In these cases, the primary consideration should be based on the ability to guarantee preservation and access, determining how an object should be treated or where it should be located.<sup>990</sup> This argument, however, is frequently used by art dealers and collectors in order to justify their purchases of objects with dubious provenances: they argue that by purchasing these illicit items, they are actually rescuing cultural materials that would have otherwise been destroyed as a result of negligence and/or improper care in their country of origin.<sup>991</sup>

This type of argumentation is problematic because it legitimates the idea that ‘private rescue through purchase’, even though it deprives the objects of their original context and sustains illicit trafficking: as mentioned, without private demand for antiquities, there would

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<sup>984</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 147.

<sup>985</sup> Ibid.

<sup>986</sup> Ibid.

<sup>987</sup> For details on export restrictions, see *supra*: Chapter Three, Section 2.2 and Chapter Four, Section 2.4.

<sup>988</sup> For details on the concept, see *supra* Chapter Four, Section 2.1.

<sup>989</sup> Article 5(3) of the 1995 UNIDROIT Convention refers to “the significant cultural importance for the requesting State”.

<sup>990</sup> John Leslie King, "Cultural Property and National Sovereignty," in *The Ethics of Collecting Cultural Property*, ed. P. M. Messenger (1999), p. 199.

<sup>991</sup> Cf. Ibid.

be no profitable illicit trafficking (the same can be said for other goods, such as drugs and weapons). An audit of the sales of Egyptian antiquities at Sotheby's from 1998 to 2007 showed, for example, that 95 percent of the objects offered for auction could not be traced back to the place where they had been excavated. While not all these pieces were necessarily looted, it is likely that many of them probably were.<sup>992</sup> In recent years, however, lawsuits and criminal proceedings against art dealers and private collectors who traffic in illicit objects have been increasingly successful. One such an example is the famous *United States vs. Schultz* case in 2002.<sup>993</sup> Starting in the early 1990s, U.S. citizen Frederick Schultz<sup>994</sup> smuggled through the help of middlemen more than 3,000 highly valuable antiquities from Egypt to the United States by covering them with liquid plastic and paint to make them look like cheap souvenir reproductions. Schultz was convicted of conspiring to receive, possess and sell stolen property in violation of the U.S. 'National Stolen Property Act'.<sup>995</sup> Since the 1983 Egyptian Antiquity Law<sup>996</sup> conveys ownership of all undiscovered antiquities to the national government, the unauthorized excavation, removal and export of such antiquities is considered to be theft under Egyptian law. The New York court based its sentence on the so-called *McClain* doctrine, established in *United States vs. McClain*, a similar case involving stolen and smuggled Mexican antiquities.<sup>997</sup> The *McClain* doctrine says that U.S. courts recognize foreign national vesting law if that law is sufficiently clear to U.S. citizens in terms of what conduct is prohibited. Schultz claimed that the U.S. government had failed to prove that he knew or believed that he was engaging in theft. The court, however, concluded that a dealer may not purposefully remain ignorant of either the facts or the law in order to escape the consequences of the law. Thus, a sophisticated art and antiquity dealer who chooses to do business by entering into the market for antiquities from countries with national ownership laws cannot consciously avoid being aware of that law. Schultz was sentenced to 33 months in prison, fined \$50,000, and ordered to return objects still in his possession to the Egyptian government. Both the *McClain* (1979) and *Schultz* (2002) cases set legal precedent in the

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<sup>992</sup> Bennett Drake, "Finders, keepers – As museums ship ancient treasures back to the countries where they were found, some are now saying: Enough", in: *The Boston Globe*, 10 February 2008.

<sup>993</sup> *United States vs. Frederick Schultz*, 178 F. Supp. 2d445 (S.D.N.Y. 3 January 2002), affirmed 333 F.2d 393 (2d Cir. 10 June 2003).

<sup>994</sup> Frederick Schultz is owner of the Schulz Art Gallery in Manhattan, New York.

<sup>995</sup> National Stolen Property Act (NSPA), 18 U.S.C. Sections 2314 and 2315 (2006). The National Stolen Property Act (18 U.S.C. §2315) makes it a crime to receive, possess, sell, or dispose of any goods, wares, or merchandise of the value of \$ 5,000 or more, which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, or if the object is known to have been stolen, unlawfully converted, or taken.

<sup>996</sup> Egyptian Law 117 of 1983 declares all antiquities to be public property and forbids private ownership of possession of, transfer of, and trade in antiquities.

<sup>997</sup> *United States vs. McClain*, 545 F.2d 988 (5th Cir. 1977); 593 F.2d (5th Cir. 1979).

recognition of foreign export restrictions and in the conviction of antiquities dealers of conspiring in illicit trafficking.

Similar criminal proceedings against art dealers, collectors and curators include the conviction of the Italian art dealer Giacomo Medici,<sup>998</sup> the indictment of Marion True (former curator of antiquities at the Getty) and Robert E. Hecht (Swiss art and antiquity dealer) in 2005 in Rome.<sup>999</sup> Consequently, it has become an increasingly dubious proposition for art dealers and curators to acquire cultural objects without acting in due diligence and in reference to national export restrictions. As an immediate result of the indictment of Getty's former curator Marion True and subsequent to the bilateral negotiations with Italy about returning several artifacts,<sup>1000</sup> the Getty Trust revised its acquisition policy in 2006.<sup>1001</sup> This new policy established stronger criteria for potential acquisitions – applying equally to purchases, gifts, bequests, exchanges, or any other method by which objects may enter the collection.<sup>1002</sup>

That said, strict acquisition policies and adequate provenance research do have major advantages particularly for art dealers, collectors and auction houses: firstly, cultural artifacts obtained licitly and with sufficient information about their legal provenance do not run the risk of being involved in criminal proceedings; secondly, artifacts of 'clean' provenance are immune to accusations of inauthenticity (an issue of substantial importance to dealers, collectors and auction houses in terms of the object's authenticity and price); thirdly, licitly obtained objects are immune from seizure, which means that the owner of objects with a documented provenance does not have to fear that the object is seized while being on loan.<sup>1003</sup> Fourthly, licitly acquired objects are also of greater value due to the information on context and origin associated with them and, presumably even more important to dealers, collectors

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<sup>998</sup> Giacomo Medici was sentenced in 2004 in Rome to ten years in prison and a fine of 10 million Euro.

<sup>999</sup> For details on the Getty case, see *supra* Chapter Three, Section 2.10.

<sup>1000</sup> For details, see *supra* Chapter Three, Section 2.10.

<sup>1001</sup> Press Release, J. Paul Getty Museum announces revised acquisition policy, 26 October 2006, press release available at: [http://www.getty.edu/news/press/center/revised\\_acquisition\\_policy\\_release\\_102606.html](http://www.getty.edu/news/press/center/revised_acquisition_policy_release_102606.html) (accessed 23 September 2011).

<sup>1002</sup> Point 3 of the conditions of the 'Policy Statement' on the acquisitions by the J. Paul Getty Museum, adopted by the Board of Trustees of the J. Paul Getty Trust on 23 October 2006, states that "no object will be acquired that, to the knowledge of the Museum, has been stolen, removed in contravention of treaties and international conventions of which the United States is a signatory, illegally exported from its country of origin or the country where it was last legally owned, or illegally imported into the United States". Full text version of the policy statement is available at: [http://www.getty.edu/about/governance/pdfs/acquisitions\\_policy.pdf](http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf) (accessed 23 September 2011).

<sup>1003</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 710.

and auction houses, of greater economical value, since they achieve higher prices on the international art and antiquities market. Whereas the economical value of cultural objects might be obvious to art dealers, collectors and auction houses, the cultural value might be of particular importance to private collectors: one could argue that a holder of cultural material who fails to appreciate the object's significance to the culture and the context from which it was taken, who does not understand its continuing relevance to the identity of that (living) culture, and who dismisses as mere sentimentality the affinity between the object and the culture is an inappropriate custodian of that cultural material.<sup>1004</sup>

### 1.3 Public and Private Museums

Although claims for the restitution and return of cultural material are mainly addressed to national governments (e.g. through the 1970 UNESCO Convention), it is primarily public and private museums that must deal with the consequences of restitution disputes. Hence, museums have generally the tendency to be more reluctant to concede to restitution claims, fearing the integrity or even the entire loss of their collections.<sup>1005</sup> Although legal certainty in restitution disputes is far from given (due to the various and frequently not well-known circumstances of purchase, donation, or pillage during war and colonial domination),<sup>1006</sup> museums have made profound changes in the way in which they handle requests for restitution and return in recent years. This is mostly due to new understanding and growing awareness (as well as political pressure) from outside the museum community regarding restitution disputes that have gradually infiltrated the consciousness of museum administrations, rather than a sudden appreciation by trustees or senior staff members of the legal arguments as well as ethical and historical considerations pertaining to restitution and return.<sup>1007</sup> Moreover, museums have increasingly modified their acquisition policies, established their own codes of conduct, and/or join national, regional or international code of ethics, such as the ICOM Code of Ethics for Museums.<sup>1008</sup> The ICOM Code defined

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<sup>1004</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1065.

<sup>1005</sup> Cf. the concerns expressed in the *Declaration on the Importance and Value of Universal Museums* (December 2002), signed by major European and North-American Museums (the British Museum; the Metropolitan Museum of Art, New York; the Louvre, Paris; the State Hermitage Museum, St. Petersburg; State Museums, Berlin; the Prado Museum, Madrid, et al), reprinted in ICOM News No. 1 (2004), available at: [http://icom.museum/fileadmin/user\\_upload/pdf/ICOM\\_News/2004-1/ENG/p4\\_2004-1.pdf](http://icom.museum/fileadmin/user_upload/pdf/ICOM_News/2004-1/ENG/p4_2004-1.pdf) (accessed 23 September 2011).

<sup>1006</sup> For details, see *supra* Chapter Two, Section 4.

<sup>1007</sup> For details, see *supra* Chapter Three, Section 5.

<sup>1008</sup> ICOM Code of Ethics for Museums, 1986, amended 2001, 2004, available at: <http://icom.museum/ethics.html> (accessed 23 September 2011). For details, see *supra* Chapter Three, Section 4.1.

museums as “non-profit, permanent institutions in the service of society and its development, open to the public, which acquire, conserve, research, communicate and exhibit the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.”<sup>1009</sup> Museums, in consequence, must act as safe repositories for the world’s most important cultural objects, and thus should provide access and education for all its visitors.<sup>1010</sup> Along this vein, museums have also been described as ‘universal museums’,<sup>1011</sup> ‘encyclopedic museums’, or even ‘cosmopolitan institutions’.<sup>1012</sup>

Despite these mainly Western attributions, museums have, nevertheless, a certain function within society: namely the collection, preservation, exhibition, and stimulation of appreciation for and knowledge of works of art in the service of the public. These functions, however, transcend the State boundaries within which the museum is located, as museums collect not only objects associated with national heritage, but also collect foreign objects that reflect the culture of different regions and peoples. Hence, museums have a collective responsibility to protect the culture heritage of mankind. However, a clear idea of what this collective responsibility means and requires has not yet been established in legal instruments: museums, surprisingly, still play a minor role as a group of stakeholders in their own right within international cultural heritage law. Nonetheless, museums act in the public interest and therefore have a responsibility to encourage the preservation, study, education and exchange of and access to cultural materials. This is, despite the fact that in most current acquisitions the financial pace of the international art and antiquity market is set by private collectors, rather than public museums. The extent to which this responsibility can be fulfilled depends, on one hand, on the facilities of the State where the museum is located, and, on the other, on the people or ethnic groups whose heritage is being preserved. While the interests of the latter are frequently overlooked, they should be adequately taken into consideration in exhibition practices and museum management. Moreover, the responsibilities of private and public institutions holding cultural objects of ‘significant cultural importance’<sup>1013</sup> should be articulated within the framework of international cultural heritage law, not only in order to promote and ensure the preservation of and access to cultural materials for the sake of

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<sup>1009</sup> See Article 3 Section 1 of the ICOM Statute.

<sup>1010</sup> Cf. Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 700.

<sup>1011</sup> See *Declaration on the Importance and Value of Universal Museums* (December 2002).

<sup>1012</sup> Bennett Drake, “Finders, keepers – As museums ship ancient treasures back to the countries where they were found, some are now saying: Enough”, in: *The Boston Globe*, 10 February 2008.

<sup>1013</sup> See the terminology used in Article 5(3) of the 1995 UNIDROIT Convention.

mankind, but also to allow for adequate supervision and control over the acquisition policies, provenance research, and preservation activities of museums.

Generally, museums share an interest in preservation, as conceived of archaeologists. Whereas most archaeologists place equal if not greater emphasis on the preservation of the archaeological context, many museums tend to be primarily concerned with the preservation of the object itself, and the best way to display in order to attract the public's interest. Although the information supplied by the archaeological context is highly valuable for both archaeologists and museums, the object *qua* object for display is essential for museums, since museums have (in addition to the other interests already mentioned) an economic interest in these objects; after all, both private and public museums are enterprises. This is demonstrated by the increasing importance of bookshops and souvenir merchandising in museums as well as by the general trend in staging "blockbuster" exhibitions for a greater public (depending on the funding of museums).<sup>1014</sup>

Recent years have increased outside scrutiny of museums' acquisitions policies and some museums have agreed to new arrangements with other museums or foreign States, which emphasize reciprocal loans and cooperation over new purchases of material.<sup>1015</sup> While such agreements limit the avenues for continued acquisition and put an end to the colonialism-facilitated era of acquisition,<sup>1016</sup> they open up new avenues for cooperation and exchange, which depend more on maintaining relationships and good will, than on defending traditional collecting patterns.<sup>1017</sup>

#### **1.4 Scientific and Epistemic Communities**

Although the three major groups of stakeholders mentioned above (namely States, art dealers, collectors and auction houses as well as private and public museums) are the main addressees of restitution claims the essential scientific knowledge associated with the object can be primarily found with another group of stakeholders, namely scientific and epistemic communities associated with art and antiquities. Most institutions holding cultural materials

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<sup>1014</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 705.

<sup>1015</sup> For example the agreement between Italy and the Metropolitan Museum of Art, signed on 21 February 2006, reprinted in 13 Int'l J. Cultural Prop. 427-34, 2006; for details, see *supra* Chapter Three, Section 2.10.

<sup>1016</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 718.

<sup>1017</sup> For further discussion, see Chapter Six, Section 2.

do not have sufficient capacity to deal adequately with restitution claims and the parties involved. The most frequent objection made by institutions to restitution claims is that they have neither sufficient financial and technical resources nor the personnel to conduct the requisite and appropriate research necessary to adequately reply to these claims. Moreover, expertise and insight can now be quickly and easily shared within the well connected, specialized international community of scientists. This heterogeneous group of scientists and other experts is comprised of, *inter alia*, curators, archaeologists, anthropologists, practitioners, technical experts, researchers and educators. Along with NGOs, the epistemic communities associated with restitution matters have become increasingly active and important in providing special expertise and data-sharing that no other international actor could possibly compile and disseminate.

Such communities have exercised considerable influence on decision- and policymakers at the national and international level, based on their technical expertise and, moreover, independent status, given that they are insulated from political considerations and dedicated to their work. In comparison, international and intergovernmental organizations, are, above all else, State-oriented and thus must work diplomatically in achieving consensus.<sup>1018</sup> In contrast, special experts and associations of experts, such as for example ICOM (having obtained consultative status with UNESCO), can act within a larger frame of scientific independence.<sup>1019</sup> If, for example, no consensus can be reached at the international inter-State level, an issue might be delegated to a group of experts or specialized associations, which can provide suggestions based on scientific consideration rather than political imperatives. Although it is States that eventually must adopt or dismiss such proposals or draft recommendations, information provided by scientific and epistemic communities can be a crucial factor in such decision-making, especially in terms of identifying alternative mechanisms or policies when no decision on political or judicial grounds might have previously been attainable.

As anthropologists and archaeologists compose a major and essential group within this group of scientists and epistemic communities, it is particularly worthwhile looking at their interests. The professions of anthropology and archaeology are both concerned with culture in its context by preserving and recording it; as a result – public access is not one of their

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<sup>1018</sup> For details, see *supra* Chapter Three, Section 2.2.

<sup>1019</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 150.

primary concerns. Moreover, they usually oppose both illicit and licit trade in excavated material that disturbs its context or otherwise creates risks to knowledge about its place of origin, its content and character.<sup>1020</sup> Since the preservation of context, the relation of objects to other objects *in situ*, as well as the significant features in the earth and the surroundings of the site are essential, these interests have been codified in several archaeological ethics statements.<sup>1021</sup> The World Archaeological Congress, founded in 1985 as an international non-governmental organization, has recently asserted itself with a special commitment to social justice for indigenous peoples as it relates to the practice of archaeology.<sup>1022</sup>

In strong contrast to the principles established by these organizations, clandestine excavations aimed at finding rare and valuable artifacts often leave archeological sites in ruin, moreover, such excavations prevent the creation of the documentation and detailed excavation records that accompany cultural materials unearthed in legal excavations. In these circumstances, contextual information is often intentionally undocumented – or worse destroyed or falsified – in order to minimize the evidence of the clandestine origin of objects and its true provenance. In addition to their interest in preserving the context of excavated objects, many archaeologists strive to support the interests and rights of the local communities in which they work; this interest presumably derives from the general sympathy that any researcher might develop with a host community.<sup>1023</sup> In some extreme cases, archaeologists may advocate for the suspension of all trade in cultural objects.<sup>1024</sup> This is because the key interest for archaeologists is always to avoid the loss of information; as a result, they often care little for the economic value of cultural materials.<sup>1025</sup>

However, this extreme approach fails to take into account the realities of international cultural heritage trade: cultural objects that can move do move, even under the strictest export control bans; cultural objects have always been exchanged among people and across borders.

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<sup>1020</sup> Ibid.

<sup>1021</sup> For example, see the ‘Principles of Archaeological Ethics of the Society for American Archaeology’, available at: <http://www.saa.org/aboutsaa/committees/ethics/principles.html> (accessed 27 August 2011). Other important international associations of archaeologist include, among others: the International Union of Prehistoric and Protohistoric Sciences (IUPPS), founded in 1931 and based in Belgium at the University of Ghent; the Archaeological Institute of America (AIA) based in Boston; the Society for American Archaeology (SAA) in Washington; as well as the Institute of Field Archaeologists (IFA) at the University of Reading, UK.

<sup>1022</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 151.

<sup>1023</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 703.

<sup>1024</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 151.

<sup>1025</sup> Carman, *Against Cultural Property - Archaeology, Heritage, and Ownership*, p. 19.

This is especially true when the objects are prized as having special or unique qualities, such as aesthetic, prestige-oriented, or other value-added characteristics; thus such cultural objects will be desirable for traders, whether that trade is licit or illicit.<sup>1026</sup> Moreover, the ‘commodification of cultural heritage’<sup>1027</sup> does not necessarily contradict the interest in the preservation of cultural heritage. The complementarity of economic and cultural aspects of development has, for example, recently been acknowledged by the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states: “since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy.”<sup>1028</sup>

In sum, scientists and epistemic communities, although not directly addressed within restitution claims, are, nonetheless, an crucial stakeholder in the process, as they have the necessary expertise and political independence in cultural heritage matters needed to resolve key aspects of the dispute between parties; this is particularly true in terms of issues such as the promotion of professional standards and ethics, scientific and technical expertise pertaining to preservation, study, education and international cooperation in cultural heritage.

### **1.5 Indigenous Peoples, Ethnic and Religious Groups**

Whereas the concept of ‘one State – one people – one nation’ is a rather nineteenth century European concept, most (non-European) States are comprised of several peoples and minority communities, whose interests are often not adequately respected (or in some cases even utterly ignored and treated with disdain) by their national State. While modern State borders were often drawn arbitrarily, separating peoples and communities in order to facilitate colonization, State governments, nevertheless, commonly use cultural heritage as a means to integrate disparate ethnic groups into a more cohesive and harmonious national entity.<sup>1029</sup> While from a State’s point of view, this might be understandable, in too many cases governments have used selective versions of the ‘national cultural heritage’ to force indigenous peoples as well as minority groups within their own territory or occupied foreign

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<sup>1026</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 696.

<sup>1027</sup> Commodification refers to the conceptualization of cultural heritage in terms of its economic value.

<sup>1028</sup> Principle 5 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, (adopted 20 October 2005, entering into force 18 March 2007).

<sup>1029</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 7.

territories to adapt to the dominant cultural paradigms, effectively eliminating minority cultural identity through policies of oppression, assimilation and centralization.<sup>1030</sup>

It was not until the mid-twentieth century that indigenous peoples have gained a voice on the national and international level. The traditional assumption that States are the exclusive actors in international law has increasingly been challenged by the claims and assertions made by indigenous peoples for economic, social and cultural development.<sup>1031</sup> The driving force in this development has been the claim for the recognition of the ‘right to self-determination’.<sup>1032</sup> It is this concept of self-determination that “has set in motion a restructuring and redefinition of the world community’s basic ‘rule of the game’.”<sup>1033</sup> As a result, indigenous peoples (as well as ethnic and religious minority groups) have become increasingly active on their own behalf as stakeholders in restitution cases, independent of the State in which they live, in order to make claims for the return of cultural materials appropriated during colonial domination, foreign occupation, or acts of assimilation and oppression. Consequently, it is not only States that are challenged by these restitution claims in legal and ethical terms, but also museums, anthropologists, and archaeologists that are required to reconsider current professional assumptions and positions.<sup>1034</sup> Thus, the protection of and the access to cultural materials have gained a human rights dimension;<sup>1035</sup> however, for many museums and art-holding institutions confronted with restitution claims, the issue remains one of property rights.

The restitution claims brought by indigenous peoples against both their own governments and foreign States are primarily based on three arguments: firstly, that human rights and the right to self-determination entail a ‘right to participation in cultural life’;<sup>1036</sup> secondly, that this, in turn, necessitates the recovery of appropriated cultural materials; and thirdly, that the right to self-determination entails a right to the non-exploitation of cultural

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<sup>1030</sup> William Logan, "Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection," in *Cultural Heritage and Human Rights*, ed. Helaine Silverman and D. Fairchild Ruggles (2007), p. 42.

<sup>1031</sup> Cf. Matthias Ahrén, "Protecting Peoples' Cultural Rights: A Question of Properly Understanding the Notion of States and Nations?," in *Cultural Human Rights*, ed. Francesco Francioni and Martin Scheinin (2008), pp. 102.

<sup>1032</sup> For details on the development of the concept of self-determination, see *supra* Chapter Three, Section 6.3.

<sup>1033</sup> Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), p. 1.

<sup>1034</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 151.

<sup>1035</sup> Derek Gillman, *The Idea of Cultural Heritage* (2006), p. 125.

<sup>1036</sup> The right to free participation in the cultural life has been expressed in Article 27 of the 1948 Universal Declaration of Human Rights, both Covenants (ICESCR and ICCPR), as well as in the 2007 UN Declaration on the Rights of Indigenous Peoples. For details, see *supra* Chapter Three, Section 2.8 and 6.3.

heritage of indigenous peoples for commercial purposes.<sup>1037</sup> In comparison with claims made by States and individual owners, restitution claims by indigenous peoples are almost always linked to questions of cultural identity, collective rights, and ‘cultural heritage rights’ – concepts traditionally not addressed in international law.<sup>1038</sup> Most restitution claims aim at the recovery of paleontological, ethnographic or ritual (spiritual) cultural materials; human remains being a specific category distinct from claims for cultural materials. Cultural materials subject to restitution claims might be associated with several types of claims (of both a separate and/or cumulative nature): for example, an object might be conceptualized as a symbol of collective ideas; a source of identity for its members; a ceremonial object; as focus of historical meaning; an expression of their past achievements; and/or as a cultural link with founders or ancestors.<sup>1039</sup> Against this backdrop, three major rationales for claims brought by indigenous peoples or ethnic groups can be identified: (1) as a means through which to reestablish the cultural identity destroyed or lost over time due to colonialism and appropriation; (2) as a means through which a cultural legacy may be passed on to the descendants or successors of the particular group strengthening the present status of the community; and (3) as a means to eradicate the symbolic defeat of a indigenous people by the former colonial masters responsible for the appropriation of cultural materials.<sup>1040</sup>

Within the context of current politics, restitution claims might not only be motivated by the cultural or religious significance of the requested object, but might also be politically motivated, since restitution claims of indigenous peoples and minority groups are frequently associated with claims for cultural rights.<sup>1041</sup> These claims might therefore provoke national (or even nationalistic) policies by States, especially in multi-ethnic States without democratic minority-participation. In turn, national governments might tend to claim cultural materials that fit their national (or nationalistic) purposes, whereas cultural materials, which would strengthen minority groups through the highly symbolic impact of cultural objects once

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<sup>1037</sup> Article 31 of the 2007 UN Declaration on the Rights of Indigenous Peoples specifically articulates the right “to maintain, control, protect and develop [...] the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. They also have the right to [...] their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”.

<sup>1038</sup> Cf. Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1039.

<sup>1039</sup> Thompson, "Cultural Property, Restitution and Value," p. 252.

<sup>1040</sup> Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, p. 299.

<sup>1041</sup> ———, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 10.

returned, are less likely to be claimed. In many cases, therefore, the interests of minorities may operate in conflict with those of their national government.<sup>1042</sup>

In addition to the disadvantage that indigenous peoples and minority groups are not yet fully recognized as actors in international law, they often have neither the necessary capacities nor the financial resources to address and substantiate their claims. Even if States act as formal claimants on behalf of a people or local community living within their national State borders, these groups are often unable to rely on the support of their national government in two particular aspects of restitution and return cases: firstly, sustaining a restitution claim against a foreign State over the long-term; and secondly, returning the object to the minority group in question, should the State be successful in their suit. The subsequent return of successfully obtained objects is frequently problematic, since the objects in quest may be kept in the capital-based national museum without any connection to the relevant indigenous community. As a consequence, the returned objects might be just as far removed from its cultural creators following a successful return as it was in the museum or institution that held the object before its return. This might even perpetuate previous attempts at assimilation and centralization in line with the national narrative of a State, which may fail to reflect or serve local community interests.<sup>1043</sup> While local communities may share their government's goals to protect archaeological resources and to claim lost cultural objects, they may feel that the relocation of cultural objects after the excavations in a local community's territory or after their restitution to a national museum or repository is unsatisfactory, as it does not allow them to reap neither the economical benefits, through tourism, nor the cultural and symbolic benefits through proximity. Therefore, the foremost interest of indigenous peoples, as well as ethnic and religious groups, is often the actual return of *and* the immediate proximity to the cultural objects in question.

The role of indigenous peoples and ethnic groups is, however, not only important in respect to restitution claims but also in respect to the illicit trafficking in cultural materials. Although one should assume that illicit excavations and illicit trade in cultural objects are actively seeking to undermine the interests of local communities, since they target and endanger their cultural heritage, the lack of economic development among local communities

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<sup>1042</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 712.

<sup>1043</sup> *Ibid.*: p. 713.

often facilitates the illicit trafficking in cultural materials. This is because clandestine excavations and illicit trade in cultural objects can bring a modest measure wealth to the community through the activities of local *chicleros* (Central America) or *tombatori* (Italy).<sup>1044</sup> Sometimes the looting of archaeological artifacts is not only tolerated, but seen as an important subsistence strategy, which is justified by the view that antiquities are gifts in the ground given to the people by their ancestors.<sup>1045</sup> This demonstrates that even local community interests are complex and may sometimes result in contradictory practices. While there is often great desire for archaeological material to reside in or be returned to such communities, local economic needs may prevail even these cultural interests. When cultural heritage does not meet economic needs by staying *in situ*, communities may endeavor to sell them, whether illegally or legally. Any successful strategy for combating illicit trade and avoiding the (re)appearance of returned material on the illicit art and antiquity market must take the economical situation of the respective region into consideration, and must offer solutions in which the benefits of preserving material *in situ* outweigh those of looting and illegal resale.<sup>1046</sup> These latter aspects clearly show that the response to restitution disputes cannot be limited to the simple return of objects.<sup>1047</sup>

Another important aspect of restitution disputes is a temporal one: namely, the amount of time that has elapsed since the appropriation of the requested object. Although the symbolic value of requested cultural materials is frequently asserted by the claiming community, one might question the extent to which the significance of cultural materials might decline over time, or whether the significance of cultural material is fairly persistent, and therefore does not weaken substantially regardless of the amount of time that has elapsed since appropriation.<sup>1048</sup> This question is particularly relevant in those cases in which restitution is claimed on the grounds of self-determination and cultural identity, even though the requested object was inaccessible for decades or centuries and therefore unable to serve its currently claimed function. An answer to this question might be found in the distinction

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<sup>1044</sup> Nafziger, "Cultural Heritage Law: The International Regime," p. 158.

<sup>1045</sup> Elazar Barkan, "Amending Historical Injustices: The Restitution of Cultural Property - an Overview," in *Claiming the Stones, Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity* ed. Elazar Barkan and Ronald Bush (2002), pp. 16.

<sup>1046</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 714.

<sup>1047</sup> This concept will be further discussed in relation to the prevention of the reappearance of returned materials on the illicit art- and antiquity market following the restitution of the object, see Chapter Five, Section 3.7.

<sup>1048</sup> Thompson, "Cultural Property, Restitution and Value," p. 254.

between objects belonging to a living culture and those that belong to a lost culture.<sup>1049</sup> On the one hand, it could be argued that an object is more important to a living (and practicing) community than that of a cultural tradition which has been lost. On the other hand, it could be argued that an object belonging to a lost tradition has an even higher significance, since it might be the only material object remaining to commemorate a lost culture or tradition. While both perspectives are certainly valid, the former might be more important to the group of stakeholder analyzed in this section: namely, indigenous people and ethnic or religious groups claiming for the return of their cultural materials.

However, a third important scenario is also imaginable: there are cases in which the requested material may have gained symbolic importance only during the process of decolonization from the 1950s onwards, even though at the time of appropriation, the object had no symbolic significance or there was no awareness of the potential significance of the object to future generations. This argument is frequently employed by Western museums arguing against returning cultural materials from periods of colonial domination. They point out that certain items would have been irrecoverably lost if the appropriation, the collection and early safekeeping in museums had not taken place; therefore, they argue, that the act of preservation by Western archeologists during the period of colonial domination should be acknowledged rather than undermined by subsequent restitution and return. The question whether the collection and thus the preservation of cultural material, which otherwise might have been lost over time had it remained in its place of origin, justify continued possession by Western museums remains highly controversial: the British Museum, for example, argues that the exposure to the elements and severe pollution in Athens would have heavily damaged the Parthenon Marbles if it had remained in Athens; opponents argue that the British Museum itself damaged the Marbles through inadequate treatment in early years (the Marbles have been on display in the British Museum since 1816).<sup>1050</sup>

Although indigenous people are still among the least empowered actors in restitution disputes, their stake in cultural heritage matters has been increasingly recognized, particular on the national *intra*-State level: States with large indigenous communities (e.g. Australia, Canada, New Zealand and the United States) have made substantial efforts to grant access to

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<sup>1049</sup> Wyss, "Rückgabeansprüche Für Illegal Ausgeführte Kulturgüter," p. 205.

<sup>1050</sup> Cf. William St Clair, *Lord Elgin and the Marbles*, 3 ed. (1998), p. 256.

cultural materials or to facilitate their return.<sup>1051</sup> Specific national legislation, such as the Native American Graves Protection and Repatriation Act (NAGPRA)<sup>1052</sup> in the United States, or the Protected Objects Act<sup>1053</sup> in New Zealand, have strengthened the rights of indigenous peoples. These national acts are, however, the exception rather than the rule. On the international level, international organizations, such as UNESCO, are limited by their State-represented intergovernmental status and must necessarily operate on the *inter*-State level and through State consensus. They often can do little to secure trans-, or sub-national minority rights if the State(s) in which the ethnic group is located is opposed to strengthening the cultural rights of these groups, or demonstrate little political commitment to indigenous peoples and minority groups.

While UNESCO makes efforts to safeguard the cultural heritage of indigenous peoples, as articulated in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,<sup>1054</sup> this convention clearly limits itself to the State level, thereby providing no recognizable legal status for sub-national groups.<sup>1055</sup> The same problem arises, as shown above, with respect to the 1970 UNESCO Convention, since national antiquity laws regularly declare undiscovered cultural material upon its finding to be State property, rather than the property of a specific community that can prove the strongest tie to the object.<sup>1056</sup> Hence trans-national communities frequently lack a voice on both the domestic and the international level; that said, efforts have been made to give them a voice through the creation of non-governmental organizations, such as the World Council of Indigenous Peoples; the International Work Group for Indigenous Affairs, the Survival International, based in London,<sup>1057</sup> and the ILA Committee on the Rights of Indigenous Peoples.<sup>1058</sup> Despite these recent efforts to empower indigenous peoples on the international

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<sup>1051</sup> Paterson, "The "Caring and Sharing" Alternative," p. 65.

<sup>1052</sup> Native American Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601 of 16 November 1990. The Act prescribes the process of returning Native American Indian human remains as well as related cultural objects found on federal land to culturally affiliated tribes. The full text of the act available at: <http://www.nps.gov/history/nagpra/MANDATES/25USC3001etseq.htm> (accessed 23 September 2011).

<sup>1053</sup> Protected Objects Act 1975, 1975 S.R. No. 41.

<sup>1054</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, (adopted 20 October 2005, entering into force 18 March 2007), 2440 UNTS 311.

<sup>1055</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 704.

<sup>1056</sup> See 1970 UNESCO Convention and National Export Provisions, *supra*, Chapter Three, Section 2.2.

<sup>1057</sup> Cf. Nafziger, "Cultural Heritage Law: The International Regime," p. 151.

<sup>1058</sup> The ILA Committee on the Rights of Indigenous Peoples works under its current mandate on the development of an Expert Commentary on the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). For an extensive overview of the rights of indigenous peoples, see the 2010 Conference Report of the ILA Committee on the Rights of Indigenous Peoples (The Hague Conference), available at: <http://www.ila->

level, local communities are often left in a paradoxical situation: since international law does not recognize the collective ownership rights of indigenous peoples or ethnic minority groups, restitution claims can usually only be made through their respective State.<sup>1059</sup> This, however, becomes problematic if peoples and communities are at odds with the agenda of their State; they, nevertheless, are forced to seek mediation and redress from their national government in order to lay claim to their cultural rights or the return of cultural materials.

The problem is only exacerbated in case of foreign occupation. There is, however, a remarkable case in which the return of appropriated cultural material has been facilitated despite opposition from the foreign authority. In the case of the *Autocephalous Greek-Orthodox Church of Cyprus vs. Goldberg & Feldman Fine Arts* (known as *Goldberg case*),<sup>1060</sup> the Greek Orthodox Church of Cyprus requested the return of Byzantine mosaics from an U.S. art dealer. The mosaics were stolen from a Greek Orthodox Church in the Turkish-controlled part of Cyprus. Although the mosaics were the property of the church, the Turkish government had allowed the removal and export of these mosaics, which were (after having been sold in the Freeport of Switzerland) ultimately imported into the United States by the Goldberg & Feldman Fine Arts Inc., in 1988. The Greek Orthodox Church, a legal entity in the Greek part of Cyprus, learned of the presence of the mosaics in the United States and sought the return of the mosaics as their rightful owner. The church argued that Turkey had no right to certify the export of the mosaics. Turkey, however, had no interest in recovering the mosaics on behalf of the church. In early 1989, the church offered Goldberg the reimbursement of the price paid in exchange for the return of the mosaics. Goldberg refused and the church filed a suit in order to recover the mosaics. The U.S. Court of Appeals decided in 1990 on the basis of the substantive law of replevin (i.e. possessory legal action for the recovery of unlawfully detained property) that the mosaics were the property of the Autocephalous Church and had to be returned.<sup>1061</sup>

In sum, the rationale for returning cultural materials to indigenous people, ethnic and religious groups is the link between people, land and cultural heritage. The appropriation of

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hq.org/en/committees/index.cfm/cid/1024 (access 23 September 2011). For details on the right to self-determination, see *supra* Chapter Three, Section 6.3.

<sup>1059</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 10.

<sup>1060</sup> *Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus vs. Goldberg & Feldman Fine Arts, Inc. and Peg Goldberg*, 717 F.Supp.1374 (S.D. Ind. 1989); 917 F2d 278 (7<sup>th</sup> Circuit 1990).

<sup>1061</sup> Cf. Schönenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung*, p. 140.

cultural materials was often the visual representation of the relationship between the occupiers and the occupied during the colonial period and later periods of occupation; the removal of cultural objects often symbolized the dispossession of an indigenous peoples' identity and cultural heritage.<sup>1062</sup> Hence the interests of indigenous peoples, ethnic and religious groups are – next to spatial proximity, integrity, and physical and cultural preservation – the recognition and acknowledgement of cultural rights within the concept of 'self-determination'.<sup>1063</sup> Therefore, it is essential to address these latter aspects in restitution practices, since they clearly extend beyond the simple return of cultural materials.

## 1.6 International Community

With the end of WWII and the creation of the United Nations in 1945, a new stakeholder began to emerge in international law: the international community.<sup>1064</sup> Although the United Nations, as an assembly of States, was divided until 1990 by the Iron Curtain, the international concern for human rights, as expressed in the Universal Declaration of Human Rights of 1948,<sup>1065</sup> gave rise to the recognition that certain threats are a matter of common concern to all States. Over time, several areas of international law have been recognized as being of universal concern, including the prevention of armed conflict; the non-proliferation of weapons of mass destruction; the protection of refugees; environmental protection; and – within the scope of this thesis – the protection of cultural heritage. Consequently, the recognition of common concerns demonstrates an increasing awareness of the fact that the international community as a whole has common interests at stake – interests that go beyond individual States' interests and beyond the individual State's capacity to promote and protect these interests.

Nonetheless, the notion of 'international community' remains rather vague; it has yet to be clearly defined in terms of rights and obligations under international law. The notion of 'international community' can be interpreted in a twofold manner: either restrictively or broadly. The restrictive approach limits the international community to its collectivity of

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<sup>1062</sup> Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, p. 299.

<sup>1063</sup> For details, see *supra* Chapter Three, Section 6.3.

<sup>1064</sup> Cf. Pemmaraju Sreenivasa Rao, "The Concept of International Community in International Law: Theory and Reality," in *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, ed. Isabelle Buffard, et al. (2008), p. 93.

<sup>1065</sup> Universal Declaration of Human Rights (UDHR), adopted by the UNGA, Resolution 217 A (III), 10 December 1948, UN Doc. A/810 (1948), full text available at: <http://www.un.org/en/documents/udhr/> (accessed 23 September 2011).

States, as, for example, expressed in Article 53 of the Vienna Convention<sup>1066</sup> or, within the cultural heritage context, as expressed in UN Security Council Resolution 1483/2003,<sup>1067</sup> which refers to the ‘international community of States’. This assumption corresponds to *jus cogens* that defines the ‘international community’ as ‘States as a whole’ and has as such repeatedly been used in resolutions and recommendations by the UN General Assembly or the UN Security Council as well as in several UNESCO conventions, most eminent in the 1972 World Heritage Convention. Moreover, the ICJ has repeatedly referred in its judgments to the international community in this manner.<sup>1068</sup> In contrast, the broader approach defines the ‘international community’ as a stakeholder beyond the level of States, including both States and non-State entities, such as non-governmental organizations or private actors. Such a broader understanding, however, has not yet found common recognition in international law, due to the wide range of potential actors other than States. Additionally, States have been reluctant to extend the concept of international community in any way that undermines their dominant position within the international system. Consequently, the understanding of the notion ‘international community’ as recognized by current international law allows for the identification of the common concerns and interests of the international community, but not the international community as such. This is also reflected in practical terms of international politics, since the main actors that might intervene for the enforcement of *erga omnes* obligations and *jus cogens* reflecting common interests are States. States, however, are bound by their political and economic interests that motivate decisions in favor of action and non-action.

In line with the explanation above pertaining to the maintenance of sovereign States dominance within the notion of the international community, the legal basis of the concept of the ‘international community’ comprises both universal as well as fragmented (national or regional) legal provisions. The fragmented aspect refers to the State or regional *supra*-State level with, for example, laws controlling national export regulations. The universal aspect, in turn, refers to the ‘common interest’ of the international community embedded in concepts

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<sup>1066</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969; entering into force 27 January 1980), 1155 UNTS 331.

<sup>1067</sup> UNSC Resolution No. 1483/2003, (22 May 2003), UN Doc S/RES/1483, ILM, 2003, p.1016 ff. on the condemnation of the destruction of the Buddhas of Bamiyan, full text version available at: <http://daccess-ods.un.org/TMP/1465505.html> (accessed 27 August 2011).

<sup>1068</sup> See, for example, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, 24 May 1980, ICJ Reports, 1980, p.43 and *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 5 February 1970, ICJ Reports, 1970, p.3.

such as ‘public interest’, ‘common public goods’, ‘common heritage of humankind’, or ‘common concern of humanity’.<sup>1069</sup> However, States often do not favor the expression of common values, since these might conflict with national interests. Nevertheless, within the scope of this thesis, two major interests of the international community can be identified: firstly, the interest in the protection of cultural heritage wherever it may be located; and secondly, the access to cultural heritage as broadly understood. The interest of ‘access to culture’ is, foremost, an individual right as affirmed in Art.15 ICESCR.<sup>1070</sup> It is therefore questionable whether the individual right to access can subsequently evoke a ‘collective right’ applying to the international community.<sup>1071</sup>

The concept of collective rights derives from the right to self-determination and the interest of minorities and communities to enjoy their own culture in community with other members of their group.<sup>1072</sup> While collective rights are highly controversial in the human rights discourse, the area of international environmental law, for example, is more amenable to the concept of collective approaches.<sup>1073</sup> The concept of ‘common concern’ portends “the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people, working towards international agreements which respect the interests of all”.<sup>1074</sup> Consequently, ‘cooperation’ in this context might evoke a common responsibility to respect the interests of all, ultimately constituting an *erga omnes* character, similar to human rights norms, which are owed to the international community as whole, not just to States. With regard to cultural heritage, this might trigger further developments towards ‘qualified ownership’, which is founded on the consideration that some objects are constituent of a community, and that ordinary private dominion over them insufficiently accounts for the community’s rightful sake in them.<sup>1075</sup>

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<sup>1069</sup> For details, see *supra* Chapter Four, Section 2.

<sup>1070</sup> *International Covenant of Economic, Social, and Cultural Rights* (adopted 16 December 1966, entering into force 3 January 1976) 993 UNTS 3.

<sup>1071</sup> Roger O’Keffe, “World Cultural Heritage: Obligations to the International Community as a Whole?,” *International and Comparative Law Quarterly* 53, no. 1 (2004): p. 189.

<sup>1072</sup> Kuitenbrouwer, “The Darker Side of Museum Art: Acquisition and Restitution of Cultural Objects with a Dubious Provenance,” p. 600.

<sup>1073</sup> See International Environmental Law as a Blueprint, *supra*: Chapter Four, Section 2.2.

<sup>1074</sup> Rio Declaration on Environment and Development (pp 2 and 3), launched at the UN Convergence on Environmental and Development (UNCED), also known as the ‘Earth Summit’ in Rio de Janeiro, 3-14 June 1992, full text version available at:

[http://www.unescap.org/esd/environment/rio20/pages/Download/Rio\\_Declaration-E.pdf](http://www.unescap.org/esd/environment/rio20/pages/Download/Rio_Declaration-E.pdf)

<sup>1075</sup> Sax, *Playing Darts with a Rembrandt, Public and Private Rights in Cultural Treasures*, p. 197.

As a consequence, the concept of collective rights also engaged with the question whether the interest of one local community might prevail over the interest of another local community that also has a stake in the object in question. A former cultural link does not exclude the possibility that, over time, another local community or a nation-State may have adopted a cultural or national site, monument, or object into their cultural heritage – especially as borders, religions, rituals, or identities might have changed over time. In restitution disputes arising from such cases, a stakeholder such as the international community might broaden the perspective on the issue and facilitate the development of additional solutions. Moreover, inclusion of the international community as a stakeholder might permit other stakeholders to focus less on title, ownership and location and more on preservation, access, integrity and cooperation – particularly in those cases, in which the legitimate title cannot be determined or more than one group or community legitimately claims the cultural material in question. Hence, the international community might function as a mediator between claimants, by emphasizing parties' common interest in the protection of cultural heritage for the sake of mankind.

## **2. Assessment of the Motives in Claiming for Restitution and Return**

The previous section dealt with the analysis of the stakeholders involved in restitution disputes. Before scrutinizing the various interests of these stakeholders, it is essential to examine another aspect of restitution disputes. In addition to the stakeholders and their interests, the frame of reference in which a certain claim is made for return and restitution plays an important role in the process – in other words, the cultural perspectives as well as the motives driving restitution disputes, might impact not only the nature of the request and the progression of the negotiations, but also the eventual outcome. Therefore, the subsequent section discusses the motives and perspectives that trigger claims for the restitution and return of cultural materials.

The analysis of restitution disputes made in the previous chapters has shown that such disputes are shaped not only by the question of what substantiates a legal claim but also by the interests at stake. Moreover, the motives behind a claim have a decisive impact on the course of restitution disputes. Interests and motives might overlap and might not always be precisely distinguishable from each other. The analysis undertaken by this thesis would be incomplete without at least briefly touching on the potential motives behind claims. Understanding the rationale behind a claim is essential to the identification of likely avenues

for negotiations and possible outcomes. Being aware of the motives involved might allow negotiations to surpass presumed zero-sum solutions or to avoid exhausting and expensive judicial proceedings. The identification of motives early in the negotiations not only facilitates the negotiations as such, but also assists in identifying claims that might be more amenable or more resistant to alternative solutions.<sup>1076</sup> While making no claim pertaining to the completeness of this list, three categories of motives can be distinguished: (1) the object as such and the value associated with possession; (2) the monetary value and ownership rights; and (3) the symbolic value and the recognition of rights.

### **2.1 The Object as such and the Value associated with Possession**

The first category includes claims that exclusively focus on the actual return of the claimed cultural object. Therefore, the claimant might not insist on receiving title and ownership, if he can obtain the physical return of the object. Thus, the emphasis of such claims lies mainly, if not exclusively, on the re-location and the actual possession of the claimed object – ultimate and only goal of the claim is therefore physical return. The motives for such claim have various foundations. First and foremost, the imbedded symbolic value of the claimed object requires its actual possession, if it is, for example, linked to a personal or collective memory or identity. Moreover, the monetary value of such claims might not be important to the claimant. In other words, claimants might not object to costly proceedings, even if they exceed the monetary value of the claimed object. Claims falling in this first category are likely to be more resistant to (or even reject outright) the alternative solutions proposed by this thesis. The success of such claims, however, often lacks a great deal of certitude, and they are more likely to result in long-lasting proceedings or, in the worst case scenario, ultimately unsuccessful negotiations.

### **2.2 Monetary Value and Ownership Rights**

The second category of motives includes claims that are partially or exclusively initiated because of the monetary value associated with cultural materials. This, however, is by no means an illegitimate concern, since one aspect of cultural property is ownership and thus also the protection of financial interests. Therefore, claims for the return and restitution of cultural materials may involve at – least partially – the protection of financial interests.<sup>1077</sup>

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<sup>1076</sup> Detailed discussion on complementary and alternative solutions, see below, Chapter Five, Section 1.

<sup>1077</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 52.; Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 427

Depending on the object in question, the possible amount obtained through sale or auction on the international art and antiquity market can easily exceed several million dollars. Recent cases of returned objects that were subsequently auctioned, such as the auction of the five Klimt paintings returned from the Belvedere museum in Vienna to the legal heir Maria Altmann in 2005 (*Altmann* case),<sup>1078</sup> demonstrate the high monetary value of cultural materials subject to restitution and return. Both the media and market speculations only exacerbate the inflation of monetary value of such objects in many cases.

In this category, therefore, it is not only the physical return to the claimant that is the essential motive behind the claim. While no claim for the restitution or return is expressly articulated in this manner, it may be possible to substantially ease negotiations towards alternative solutions, if the motives behind the claim in such cases are clearly understood and introduced into the negotiations at an early stage. Such an opportunity, for example, was squandered by the Austrian authorities in the *Altmann* case. The legal heir Maria Altmann was initially most willing to sell the paintings to the Belvedere museum, which had the paintings since 1938 subsequent to Nazi confiscation (one Klimt painting had already been donated to the Belvedere museum in 1936). However, since both the museum and the Austrian government refused Maria Altmann's request, she brought her claim to U.S. courts. Only as a result of subsequent to court litigation (1999-2004) were the parties able to settle the matter through arbitration (2005). The arbitration tribunal ordered the return five of the six paintings to the heir. Altmann again offered the paintings for purchase to the Austrian government; however, due to the lack of funding, the negotiations with the Austrian government failed. In 2006, the Klimt paintings went on auction in New York achieving a record market price.<sup>1079</sup>

By identifying this type of claim at an early stage of the negotiations, the risk of speculation on the art and antiquity market can also substantially be reduced. Therewith, costly auctions or cost- and time-consuming court litigations can be avoided and

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<sup>1078</sup> *Altmann vs. Republic of Austria* 142 F.Supp.2d 1187 (C.D.Cal. 1999), *aff'd*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 US 677 (2004). The *Altmann* case involved six painting of Gustav Klimt held by the Belvedere museum in Vienna, Austria. Subsequent to U.S. court litigation and arbitration five of the six paintings were returned to the heir Maria Altmann. The Klimt paintings went on auction in New York in 2006: 'Adele Bloch-Bauer I' (known as the 'Golden Adele') was bought by Ronald Lauder for the Neue Galerie for \$135 million; 'Adele Bloch-Bauer II' was sold for \$87,9 million; 'Birch Forest' for \$40,3 million; 'Houses at Unterach on the Attersee' for \$31,4 million; 'Apple Tree I' for \$33 million.

<sup>1079</sup> The portrait of Adele Bloch-Bauer I by Gustav Klimt (1907) was purchased by auction for the Neue Galerie in New York by Ronald Lauder for a U.S.\$135 million. See, BBC News, 19 June 2006, available at: <http://news.bbc.co.uk/2/hi/entertainment/5093650.stm> (accessed 23 September 2011).

straightforward negotiations in terms of the partial or entire re-purchase of the object by the currently holding institution can be initiated. Thus, museums, art holding institutions or private collectors that delay, or undertake protracted research on objects of ambiguous provenance in their collections often end up provoking the auctioning of the artifact. This is because after costly research and court litigations, the claimant must often pay the lawyers out of the proceeds of the sale of the object. Therefore, museums and archives that invest in the research of provenance (for example with regard to Nazi-confiscated art) with the aim of being cooperative early in negotiations are much more likely to achieve solutions that are more satisfactory to all parties involved.<sup>1080</sup>

### **2.3 Symbolic Value and the Recognitions of Rights**

Claims falling under the third category of motives might be more amenable to alternative solutions than in the first two categories. This third category, however, is much more complex, since ethical and historical considerations play a much greater role here than in the categories previously discussed. The claimant in this category is typically not the single individual (as in the previous category) but rather an ethnic minority group or indigenous peoples. The motives of this category are mainly based on the fact that the claimants' rights to and perspectives on their cultural heritage have been (or still are) largely ignored by the current possessor.<sup>1081</sup> Such a possessor, be it a private collector or public museum, often discounts the claimants' arguments regarding the cultural significance of the materials, since their appreciation of the object primarily rests on its aesthetic value rather than on its cultural and ethnic provenance.

While this scenario is most likely to play out in relation to museums' collections that benefited from the period of colonial domination, it occurs in other historical contexts as well, albeit to a lesser degree. For example, museums throughout Europe benefited from Nazi-confiscated art and the unclear proveniences of thousands objects. Although many objects were returned to the owners or their heirs, many others were placed into the custody of governments until the rightful owner might be found. Provenance research, however, was often not sufficiently carried out in the past, partly due to the fact that archives in Eastern Europe were not accessible until the 1990s, but also due to the prevalent attitude that unclear provenance might favor the museum commissioned to exercise custody and research.

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<sup>1080</sup> Cf. Regina Mönch, *Beutekunst – Kunst unter Vorbehalt*, FAZ, 12 December 2008.

<sup>1081</sup> Nason, "Beyond Repatriation: Cultural Policy and Practice for the Twenty-First Century," p. 293.

Fortunately, the attitude towards Nazi-confiscated art has gradually changed over past years – especially since the adoption of the 1998 Washington Principles and their affirmation in the 2009 Terezin Declaration on Holocaust Era Assets.<sup>1082</sup>

However, the historical legacy of this mentality, in which the circumstances of acquisitions are disregarded during times of war and occupation, is frequently still evident in the manner in which museums and collectors tend to handle restitution claims. For example, many private museums and collectors still disregard their obligation to provide clear provenience. As a result, alternative solutions to return and restitution – such as loan agreements, the fabrication of replicas, or shared management – are frequently not considered. Claims in this third category often fail to be initiated, not because of the lack of title or ownership, but rather because possessors fail to recognize three aspects of the claims in question: firstly, the cultural and historical context of the object; secondly, the object's cultural or ritual significance; and thirdly, the often tragic circumstances of its removal. Therefore, more than in any of the other categories discussed above, this category of claims deals with values pertaining to the cultural identity and the dignity of those who created the disputed cultural object, and/or those who lost possession of the object due to large-scale human rights violations.

Whereas the second category of this typology is mainly driven by the monetary value of cultural objects, this third category is emotionally driven: the cultural object is both emotionally and symbolically charged. The reaction of the current owner to the claim may also color the nature of the further negotiations between the parties. An evasive and deprecating response, for example, may result in the intensification of the emotional involvement of the claimant. Such an 'emotional escalation' may result in situations in which the withdrawal of the claims or an outcome other than the return to the claimant might be equated with a loss of face. Moreover, a refusal to return a claimed object may be perceived as confirmation of the contempt held by the current possessor for the claimant's cultural or religious identity. At an early stage of negotiations, however, this third category is likely to offer excellent promise in terms of resolution through complementary and alternative means, as the physical return of the object might be only of secondary importance. Recognition and cooperation might eventually attain primary importance in the negotiations, and perhaps even

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<sup>1082</sup> For details on both the 1998 Washington Principles and the 2009 Terezin Declaration, see *supra*, Chapter Three, Section 3.5

in the final outcome. Cooperation in preservation and management, provision of exhibition facilities, access or replicas, as well as the exchange of information might correspond to the interests of the parties involved to a much higher degree.

### 3. Assessment of the Interests at Stake

Analyzing the various stakeholders involved in the restitution debate is the first step in determining the overall interest in cultural heritage matters. The second step, however, is defining the interests that are at stake, since these interests might have a specific impact on the success of the negotiation and the final outcome of restitution disputes. If the involved interests and motives that drive a claim are not properly understood, an appropriate solution to the dispute cannot be found.<sup>1083</sup> Conflict of interests with regard to the same cultural object can be manifold: whereas scientific interests can conflict with the interest of public access, access can conflict with the interest in preservation. Preservation, in turn, can conflict with the interest in displaying the object in its original context, with research matters, as well as with cultural or religious interests. Identifying the various interests involved is not an easy task since cultural materials can be of cultural, historic, artistic, religious, scientific, political, economic or symbolical value – or all of the above.<sup>1084</sup>

Thus, the following section aims at identifying the several interests involved in cultural heritage matters that can have an impact on the resolution of restitution disputes. While it will be demonstrated that different stakeholders might have different interests with regard to the same object, it is also possible to identify common interests which might facilitate alternative solutions to current restitution practices.

#### 3.1 Physical and Cultural Preservation as Linked Components

The core of concern and of common interest to all stakeholders, as this thesis argues, is the interest of preserving cultural heritage. Preventing physical destruction, damage, and deterioration is thus the primary objective when dealing with cultural materials regardless of type.<sup>1085</sup> If cultural materials are partially damaged or completely destroyed, they can be

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<sup>1083</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 46 ff. For details and categories of motives in restitution claims see *supra* Chapter Five, Section 2.

<sup>1084</sup> Cf. Carman, *Against Cultural Property - Archaeology, Heritage, and Ownership*, p. 20.

<sup>1085</sup> Cf. Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 406.; Frank Fechner, "Prinzipien Des Kulturgüterschutzes, Eine Einführung," in *Prinzipien Des Kulturgüterschutzes, Ansätze Im Deutschen, Europäischen Und Internationalen Recht*, ed. Frank Fechner,

neither exhibited, studied, nor enjoyed; more importantly, perhaps in this context – they cannot be returned to the claimant.<sup>1086</sup> Thus, even within the context of restitution disputes, preservation can generally be considered to be ‘common ground’ and is within the zone of agreement between the opposing parties.<sup>1087</sup> Moreover, this is even valid in those cases, in which cultural materials are claimed in order to allow them decay and ‘return to the earth’. Decaying in this context generally does not include the deliberate or negligent damage or destruction by a third party, but rather a ritual act or ceremony performed by a certain people (usually the tribe or indigenous community that created the object in question). Thus preservation can truly be assumed as being the prerequisite and fundamental interest on the basis of which all other interests are constructed.

With regard to restitution disputes, preservation interests have frequently been used in order to deny the return of the objects claimed. Repeatedly, museums and other art holding institutions have argued that returned objects would not be as well protected in the claimant’s possession as it is in its current place of residence. A prominent example is, once again, the case of the Parthenon Marbles: until the completion of the new Acropolis Museum in June 2009, the British Museum has long argued that Greece could not safeguard the artifacts as well as the British Museum. However, as this thesis will argue, preservation interests must go beyond the mere safeguarding of cultural materials from physical destruction or damage to include the following two components: namely both physical preservation of the object’s material substance from deterioration, and cultural preservation. Cultural preservation refers to the recognition of the cultural significance and affiliation of the object with a certain people, group or community. Both components must be considered if the ‘best interest’ of the object is to be identified in restitution disputes.

### 3.1.1 Physical Preservation

Most of the various interests associated with cultural materials are served by its physical preservation.<sup>1088</sup> The physical component of preservation refers to the material safety and integrity of cultural materials. Thus, physical preservation requires that measures are

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Thomas Oppermann, and Lyndel V. Prott (Berlin: 1996), p. 26.; Schönerberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 47.

<sup>1086</sup> Merryman, "The Public Interest in Cultural Property," p. 355.

<sup>1087</sup> Cf. Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1071.

<sup>1088</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 14.

taken against the destruction, mutilation, vandalism, or division of sets and collections;<sup>1089</sup> in addition, measures must be taken to prevent the deterioration of the cultural object resulting from neglect or environmental damage.<sup>1090</sup> However, some cultural materials were never intended to be persevered: many objects were originally devised for the purpose of consumption or to be returned to the earth through a process of deterioration.<sup>1091</sup> Such objects include those often found in graves and tombs; in these cases, physical preservation may stand in stark contrast to the religious beliefs or rituals of a certain group or community within contemporary society.<sup>1092</sup> Consequently, this necessitates an evaluative comparison of the countervailing interests involved.

While it can generally be assumed in most restitution disputes that physical preservation might be a common ground between parties rather than a source of disagreement, conflicts of interests might arise over the protective standards utilized to ensure the physical integrity of the object. Specifically, high standards of care employed by museums or of archeologists may conflict with the interests of the party claiming for return (e.g. in case of a return to indigenous peoples). Therefore, parties involved in restitution disputes must determine whether restitution should be granted, if the claimant is not able to provide sufficient proof that its facilities actually guarantee the preservation and safekeeping of the object to be returned. Particularly in cases in which the claimed object represents a significant piece of the ‘cultural heritage of mankind,’ the capacity to preserve might play a major role in restitution disputes. However, the argument of capacity is not any longer one exclusively favoring Western museums as museums and art-holding institutions in so-called ‘source countries’ continue to become better equipped and organized; this has been facilitated by growing international cooperation between museums and, to a certain degree, by the establishment of museum branches.<sup>1093</sup> Nevertheless, in specific instances, the argument that the receiving institution cannot guarantee the preservation of cultural objects has been used as a justification for not granting their restitution.<sup>1094</sup> The Royal Museum in Tervuren, Belgium, as mentioned above, opposes restitution following its experiences subsequent to the return of ethnographic works into the custody of the Kinshasa Museum in 1976, only to see a large

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<sup>1089</sup> Bator, "An Essay on the International Trade in Art," p. 295, 98.

<sup>1090</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1045.

<sup>1091</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 14.

<sup>1092</sup> Ibid.

<sup>1093</sup> For details on the role of museums, see Chapter Six, Section 4.1.

<sup>1094</sup> Hallman, "Museums and Cultural Property: A Retreat from the Internationalist Approach," p. 215.

number of them stolen amidst subsequent political turmoil in what is now the Democratic Republic of the Congo (between 1971 and 1997 known as Zaire). Such disappointing results convinced the museum that wholesale return of objects collected during the colonial era is not a viable option.<sup>1095</sup> If, however, restitution is denied on the grounds of safekeeping, the holding institution must demonstrate that the artifact in question is best served by keeping it where it is – even if this is far away from the object's place of origin and original context.<sup>1096</sup> In contrast, the question of preservation and safekeeping measures could be actively addressed by the parties involved during their negotiations. As a result, the parties might be able to agree on complementary and alternative solutions to restitution that, for example, might comprise the exchange of expertise, technical assistance and/or shared management.<sup>1097</sup>

The issue of adequate safekeeping is particularly crucial in claims made for the return of ritual objects and sacred artifacts. Such objects were created for specific purposes and were often intended only to be seen by a restricted group of people, at particular times, or exposed only in a specific place. Moreover, some ritual objects are traditionally destroyed after their ceremonial use.<sup>1098</sup> An example of the conflict between physical preservation and destruction upon return is the case of the wooden war gods created by the North-American Zuni tribe.<sup>1099</sup> The Zuni tribe claimed their wooden war gods in order to let them decay and 'return to the earth'. These carved figures (called Ahayu:da or Zuni War Gods) were placed in shrines where their power were invoked to protect the tribe; each war god serves as guardian for the tribe until it was relieved by a new one. According to Zuni custom, the older figures must remain in place, lending their strength to the tribe, until they decay. The war gods are meant to be exposed to the weather so that they can do their work as religious objects; the disintegration under the forces of the elements is necessary to their function. Several of these figures were stolen in the course of the 19<sup>th</sup> and early 20<sup>th</sup> century, and made their way into museums and private collections. For the Zuni, the absence of the Ahayu:da in their shrines may provoke war, violence and natural disasters.<sup>1100</sup> Furthermore, these war gods cannot be

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<sup>1095</sup> Guido Gryseels, "Assuming Our Responsibilities in the Present," *ICOM News* 1(2004): p. 8. Available at: [http://icom.museum/pdf/E\\_news2004/p8\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p8_2004-1.pdf) (accessed 23 September 2011).

<sup>1096</sup> Cf. Thompson, "Cultural Property, Restitution and Value," p. 260.

<sup>1097</sup> For details on complementary and alternative mechanisms, see Chapter Six, Section 3.

<sup>1098</sup> Merryman, "The Public Interest in Cultural Property," p. 356.

<sup>1099</sup> Cf. Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1038.

<sup>1100</sup> Cf. T.J. Ferguson, Roger Anyon, and Edmund J. Ladd, "Repatriation at the Pueblo of Zuni: Diverse Solutions to Complex Problems," in *Repatriation Reader: Who Owns American Indian Remains?*, ed. Devon A. Mihesuah (Lincoln/London: 2000), p. 240 ff.

treated as property in the usual sense as, according to the Zuni, nobody, not even a Zuni, has the right to own them individually. Despite their inevitable destruction through decaying, around eighty of these carved figures were returned to the Zuni tribe between 1978 and 1995.<sup>1101</sup> Thus, in the case of ritual artifacts, the return might prevail over other relevant interests if that culture is still alive and practiced in contemporary society – even if this includes the physical destruction of the object.<sup>1102</sup> In practical terms, this is justified when the physical preservation of the object in question is diametrically opposed to its cultural (ritual) function. In a sense, one could say that restitution and return facilitates the preservation of the culture at the expense of the physical preservation of the object.<sup>1103</sup>

In summarizing, it can be said that the physical preservation is an overall concern in the protection of cultural heritage and is essential to both parties in restitution disputes: the current holding institution that is generally reluctant to return cultural materials, as well as the claimant arguing for the return. Destruction of or damage to cultural artifacts diminishes property rights and the economical value intrinsic to cultural materials. Moreover, destruction also diminishes the cultural value of the object in terms of its affiliation with a particular group or community.<sup>1104</sup> That said, significant cultural and ritual affiliation might not only conflict with the common interest of physical preservation but might override it,<sup>1105</sup> as shown in the Zuni War Gods case. As a percentage of the overall number of restitution disputes initiated since 1945, those in which the intended destruction and ritual decaying constitute a conflict of interest between parties represents a very small minority, since, in most cases, claimants generally do not intend destroying the cultural objects they claim.<sup>1106</sup>

### 3.1.2 Cultural Preservation

The issue of cultural preservation attempts to address the fact that cultural materials are not merely property, but rather material witnesses of a particular cultural heritage of humankind.<sup>1107</sup> The denial or distortion of ‘cultural preservation’ have been a contributing

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<sup>1101</sup> Cf. *Ibid.*, p. 242.

<sup>1102</sup> Moore, "Enforcing Foreign Ownership Claims in the Antiquities Market," p. 467. Alike: Merryman, "The Public Interest in Cultural Property," p. 356.

<sup>1103</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1038.

<sup>1104</sup> *Ibid.*: p. 1064.

<sup>1105</sup> Wyss, "Rückgabeansprüche Für Illegal Ausgeführte Kulturgüter," p. 205.

<sup>1106</sup> Cf. Thompson, "Cultural Property, Restitution and Value," p. 260.

<sup>1107</sup> Cultural materials comprise objects of unique and irreplaceable value, which distinguishes the field of international cultural heritage law from other legal fields, such as commercial law. For details, see *supra* Chapter Three, Section 1. For details on the shift of notion from ‘cultural property’ to ‘cultural heritage’, see *supra*

factor in genocide, in ethnic cleansing, and in instances of extreme oppression and forced assimilation.<sup>1108</sup> Consequently, cultural preservation refers to the cultural context of a particular object in view of cultural and human rights principles – namely, a collective right to cultural participation and self-determination.<sup>1109</sup> Therefore, cultural affiliation and the recognition of the contextual importance of cultural objects play an important role in restitution disputes and therefore must be included in the search for alternatives to the barren return of cultural materials.

In brief, cultural preservation refers to the affiliation of a particular people, group of peoples, or communities with a certain object. Whereas property rights reinforce an individual's affiliation to a certain cultural object, the affiliation of a people or group to cultural materials is generally not protected by property rights. Although they are much less developed than property rights, the concept of collective rights attempts to include within its scope the collective interests and cultural affiliation of a group. The assertion of collective rights, however, requires collective manifestation by a certain collectivity of individuals. Whereas international law aims at embracing collective rights (e.g. in the right of self-determination<sup>1110</sup> or the concept of common heritage of humankind<sup>1111</sup>) some national law provisions also work with the notion of 'cultural affiliation'. One such example is the 1990 U.S. Protection and Repatriation Act (NAGPRA)<sup>1112</sup>. This act regulates the return of Native American cultural materials, including human remains, funerary objects, sacred objects, or objects of cultural patrimony. In order for a restitution request to be submitted under the act, the claim must be made by the "competent representatives" of the community with a "sufficiently close cultural affiliation to the object". In section 1(2), the act defines "cultural affiliation" as the "relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day group and an identifiable earlier group".<sup>1113</sup> A "competent representative" refers to either "lineal descendants" or "any

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Chapter Two, Section 5.1. For further information see, among many others, Prott and O'Keefe, "'Cultural Heritage' or 'Cultural Property'?", pp. 307-20. and Francioni, "A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage."

<sup>1108</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 7.

<sup>1109</sup> For details on the right to self-determination, see *supra* Chapter Three, Section 6.3.

<sup>1110</sup> For details, see *supra* Chapter Three, Section 6.3.

<sup>1111</sup> For details, see *supra* Chapter Four, Section 2.1.

<sup>1112</sup> Native American Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601 of Nov 16, 1990, full text of the Act available at: <http://www.nps.gov/history/nagpra/MANDATES/25USC3001etseq.htm> (accessed 23 September 2011).

<sup>1113</sup> See NAGPRA, U.S. Code, Title 25, Chapter 32, 3001, Section 2.

organization which [...] serves and represents the interests of that people, has as a primary and stated purpose the provision of services to that group, and has expertise in the group affairs”.<sup>1114</sup> Consequently, the claimant must provide evidence of close demonstrable affiliation or, among multiple requesting parties, the closest demonstrable affiliation with the object in question.

The significance of a provision requiring proof of affiliation for claims made for the return of cultural materials calls into question the supposition that affiliation in a permanent state of being. It might be argued that affiliation can change over time and that possession of heritage may be the result of many factors, including physical residency, blood genealogy, memory, or perhaps the simple desire to link an ancient culture with a current one.<sup>1115</sup> History provides several examples of how cultural affiliation might be modified and manipulated; not only have governments and political leaders frequently refused to acknowledge cultural heritage that does not accord with the official political and ideological understandings. Similarly, evidence has also been deliberately emphasized or downplayed in restitution disputes in order to reinforce a particular claim to cultural heritage. It is this idea of selecting a certain heritage that, in its extremes, lead to the destruction of the Buddhas of Bamiyan by the Taliban – in order to erase the Buddhist past of Afghan history in favor of an Islamic one.

Although cultural affiliation might be difficult to substantiate in claims for return, it is – nevertheless – an essential interest that must be considered in restitution disputes. The implementation of a cultural affiliation requirement in restitution claims – as was done in the United States (NAGPRA) – demonstrates the effectiveness of this Act: several cultural and ritual objects have been returned to Native American tribes by U.S. museums in the past decades. What works on the national *intra*-State level should also work on the international level between States.<sup>1116</sup> Thus, if cultural affiliation can be demonstrated, the interest in the cultural preservation must be evaluated in light of the other interests; moreover, it might, as was shown in the Zuni case, even prevail over the physical preservation of a particular cultural object. As mentioned above, in such instances, one could say that restitution and

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<sup>1114</sup> This definition refers to “Native Hawaiian Organization” and “Indian tribes” in the NAGPRA Act, U.S. Code, Title 25, Chapter 32, 3001, Section 11 A and B. In detail: Cf. Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1074.

<sup>1115</sup> Helaine Silverman and D. Fairchild Ruggles, *Cultural Heritage and Human Rights* (2007), p. 8.

<sup>1116</sup> For the distinction between the *inter*-State and *intra*-State level, see *supra* Chapter Three, Section 2.9.1.

return facilitates the preservation of the culture at the expense of the physical preservation of the object.<sup>1117</sup>

To conclude, although a certain cultural object might appear to be complete in its physical substance and appearance, it inherently remains incomplete if the cultural context of the object is disregarded. Thus, both physical and cultural preservation are essential to cultural materials. In terms of the employed analogy to child custody law,<sup>1118</sup> cultural context represents the maternal providence; without this maternal link the child, as well as the object, remains incomplete. Should the cultural context and hence the provenience of a cultural object partially or completely unknown, the problem of ‘cultural preservation’ is further exacerbated. The particular problems associated with so-called ‘orphaned objects’ resulting from illicit excavations will be discussed separately.<sup>1119</sup> The desire to preserve the integrity of the cultural context of cultural materials is deeply rooted in the nature of cultural heritage politics, since it is this context in particular that transforms property into cultural property.

### 3.2 Public Access and Civil Society

Access by the general public as such does neither contribute to the physical preservation nor to the cultural preservation of cultural materials. On the contrary, one could argue that general public access might jeopardize cultural objects by increasing exposure of the object to daylight and human perspiration. Access, however, is of essential importance to the cultural impact and relevance that a cultural object has among a certain people, group or nation – even more than availability of objects for research and scientific inquiry.<sup>1120</sup> Granting access to cultural sites and objects shapes the cultural, ritual or religious importance of the particular site or object and contributes to the longevity of cultural heritage.<sup>1121</sup> Access in its general terms includes both the provision of general access to the public through physical admission and publication, as well as to the continued ability of museums, private dealers and collectors to enrich collections through purchase, bequest, and long- or short-term loans.<sup>1122</sup>

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<sup>1117</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1038 and 46.

<sup>1118</sup> For details on the legal analogy to child custody law, see *supra* Chapter Four, Section 1.2.

<sup>1119</sup> For the discussion on ‘orphaned objects’ see Chapter Five, Section 3.8.

<sup>1120</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 424.

<sup>1121</sup> Patrick J O’Keefe, "Formulating General Principles by Reference to International Standards," in *Prinzipien Des Kulturgüterschutzes, Ansätze Im Deutschen, Europäischen Und Internationalen Recht*, ed. Frank Fechner, Thomas Oppermann, and Lyndel V. Prott (1996), p. 292.

<sup>1122</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 706.

This ability, however, might be limited by export and import restrictions for certain objects or all archeological items, as foreseen in several national antiquity acts. Access – both unconditional and limited – has not only been a common practice amongst many tribes and religious groups throughout history; nowadays access has become the general policy of all public and private museums. Some museums support the concept of public access to such an extent that they do not even charge admission fees.<sup>1123</sup> Simply said, access is about “not closing off” cultural materials from the general public.<sup>1124</sup> This is in particular true if the museum or art holding institution is entirely or partially publicly funded.

Since cultural heritage can be conceptualized as a medium through which humanity may gain intellectual and cultural exchange, in some ways, all peoples also should have a right to claim access to it.<sup>1125</sup> In legal terms, access to cultural heritage is provided as a fundamental principle as, for example, included in the 1972 UNESCO World Heritage Convention (Art. 5a), the Granada Convention of 1985 (Art. 12, 15), and the 2001 UNESCO-Underwater Cultural Heritage Convention (paragraph 6 of the preamble, Art. 2 No. 10, Art. 20). Access to cultural heritage is also an aspect within the framework of human rights, cultural rights, and cultural diversity as, for example, highlighted by the Human Rights Council of the United Nations, which stresses the importance of participation, access and contribution of cultural life.<sup>1126</sup>

Despite the fact that granting access to cultural heritage is common practice, public access in particular is frequently discussed in the context of restitution disputes. The matter often arises if restitution claims concern objects that are currently on public display, but, either directly or through subsequent auction or sale, would be in the hands of a private collector or a private institution that might limit public access to the object in question. Thus, discussions are often colored by public sentiment that has frequently been uneasy with the return of cultural objects on public display.<sup>1127</sup> Examples include: the *Altmann* case, in which

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<sup>1123</sup> For example, admission to the British Museum is free of charge to all visitors, see: [http://www.britishmuseum.org/visiting/admission\\_and\\_opening\\_times.aspx](http://www.britishmuseum.org/visiting/admission_and_opening_times.aspx) (accessed 23 September 2011).

<sup>1124</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 424.

<sup>1125</sup> Sharon A. Williams, *The International and National Protection of Movable Cultural Property a Comparative Study* (1978), p. 53.

<sup>1126</sup> Human Rights Council of the United Nations, Report of the independent expert in the field of cultural rights submitted pursuant to resolution 10/23 of the Human Rights Council, 22 March 2010, A/HRC/14/36.

<sup>1127</sup> Schönenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung*, p. 54.

five Klimt paintings were returned to the legal heir Maria Altmann by the Austrian Belvedere museum, and subsequently auctioned in New York in 2006;<sup>1128</sup> the return and subsequent auction of the Kirchner painting entitled ‘Berliner Strassenszene’ (‘Berlin Street Scene’) by the Brücke Museum in Berlin in 2006; and discussions in the Netherlands over the return of paintings from the Goudstikker collection. Within the public debate, the main proponents for access by the general public are naturally the museums.<sup>1129</sup>

In the same way that physical and cultural preservation concerns might conflict with other interests in restitution disputes, concerns over public access might also conflict with the interest of the parties involved. First of all, public access might conflict with the conditions required for the proper preservation of cultural materials. In addition to preservation, the ritual or religious purpose of a certain object might require that the object is hidden from the general public, or only displayed on specific occasions. Furthermore, public access might conflict with the privacy and/or rights of the artist or owner of cultural materials.<sup>1130</sup> Unrestricted public access cannot be the primary interest, and it certainly must be counterbalanced with the other interests involved; it should therefore only be guaranteed to the extent to which it does not substantially harm the cultural material. That said, regulating public access has always been part of general preservation and safekeeping provisions. Although public access should therefore be a secondary consideration among the interests related to cultural heritage<sup>1131</sup>, it is nevertheless a legitimate factor that should be taken into account in restitution negotiations. This is because access is a public interest aspect that might be placed at risk in restitution disputes: in the majority of restitution disputes, cultural objects generally tend to be less accessible to the general public after their return. The reason is that (in cases of Nazi-confiscated art, for example) only public museums are forced to comply with the requirements of provenance research (as established by the 1998 Washington Principles) that eventually might lead to the return of cultural artifacts from public collections.<sup>1132</sup> Private collectors and art holding institutions are much less frequently the focus of restitution claims,

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<sup>1128</sup> The Belvedere museum in Vienna, Austria, returned five of the six disputed paintings to Maria Altmann, including Adele Bloch-Bauer I (known as the Golden Adele, 1907), Adele Bloch-Bauer II (1912), Apple Tree I (1912), Birch Forest (1913), Houses at Unterach on the Attersee (1916).

<sup>1129</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 49.

<sup>1130</sup> Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 424.

<sup>1131</sup> Fechner, "Prinzipien Des Kulturgüterschutzes, Eine Einführung," p. 28. In the same vein: Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 424.

<sup>1132</sup> For details on the 1998 Washington Principles, see *supra* Chapter Three, Section 3.5.

for two reasons: firstly, as mentioned above, private parties are not bound by the 1998 Washington Principles, and, secondly, the exact contents of private collections are frequently simply not known.

Furthermore, while the return of cultural materials to their places of origin (for example the return of carvings and reliefs to a remote temple or church from which they were appropriated) would enhance their integrated character and aesthetic value, the return would simultaneously make them much less accessible to scholars and the general public. This does not mean that public access trumps concerns regarding context and integrity,<sup>1133</sup> which will be discussed in the following section. It simply means that the access to cultural materials by the general public is an essential aspect of cultural heritage. Whenever the return of a certain cultural object would restrict or end public access to the object in question, and should there be no other concerns (such as preservation, property rights, contrary ritual usage) to take into consideration, the general interest in the public access to cultural heritage should prevail.

### **3.3 Integrity and Context – Unity of Finds, Collections and Dispersed Fragments**

In addition to the interest in the physical preservation and safety from the object's deterioration, the interest of preserving its integrity and context is an essential concern, since cultural materials possess not only an aesthetic value, but also impart several other values, such as being a pivotal bearer of cultural and historical information. The integrity of a cultural object means, first of all, that it should not be dismembered: fragments of an object or a set of objects composed of pieces should be kept together. The object's integrity might have been dismembered by acts of destruction, such as the beheading of sculptures, removal of facades (in their entirety or in parts), dispersion of frescoes, division of triptychs, or stripping interiors from historic buildings.<sup>1134</sup> If dismemberment has occurred, efforts should be made – if feasible – to reverse such acts of destruction by reassembling dispersed materials. This might be pursued through (re-)purchase, temporary or long-term loan, as well as through the voluntary return of dispersed pieces of cultural materials.<sup>1135</sup>

As has been indicated above, a simple concept such as that of physical integrity might be complicated by historical circumstances. However, issues pertaining to physical integrity are incredibly straight-forward in comparison with the issues associated with the cultural and

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<sup>1133</sup> Cf. Thompson, "Cultural Property, Restitution and Value," p. 261.

<sup>1134</sup> Cf. Prott, *Commentary on the Unidroit Convention*, to Art. 5(3)(b), p. 57.

<sup>1135</sup> For details on such options, see Chapter Six, Section 3.

historical context of cultural materials. First of all, ascertaining context requires scientific information about the age, origin, purpose and function of the objects in question. This information might be revealed by the objects itself or, in case of archeological finds, by the soil or location in which it had been found. Too often, such information is partly or completely lost through unprofessional or clandestine excavations. Thus, preserving an object *in situ* – as stipulated, for example, by the 2001 UNESCO Underwater Convention – can contribute to the preservation of associated scientific information about the object for future generations.

More broadly understood, however, the context of a cultural object does not merely refer to scientific information associated with it, but also to the location of its creation, erection, or discovery: namely its so-called ‘place of origin’. The concept of ‘place of origin’ goes beyond the archeological information and refers to the object’s cultural significance as a record of civilization within a certain culture or region. This is also the reason why it is sometimes easier to orient a cultural object within a locality rather than a nation State.<sup>1136</sup> The cultural and regional aspect might be more strongly linked, if the particular group or community that created the object in question still continues to exist in contemporary society. In turn, cultural context may be weakened if the peoples or communities associated with the object no longer exist or the specific background of an object simply cannot be identified. In cases of underwater cultural heritage (namely ship wrecks of war, commerce or slavery), the preservation *in situ* does not refer to the ‘place of origin,’ which – literally – could only be the place of departure; rather, in such cases, *in situ* is defined as the place of a vessel’s destruction and/or final resting place.<sup>1137</sup>

Whereas generally ‘context’ in terms of preserving scientific information is a commonly shared interest among professionals in the field of cultural heritage, concepts such as ‘country of origin’ or ‘re-contextualization through restitution and return’ remain highly controversial. The interest in the ‘re-contextualization’ of cultural materials has emerged over the last decades and can mainly be found in the argumentations associated with claims for the return of cultural materials appropriated during the period of colonial domination. Terms like ‘place of origin’ or ‘country of origin’ are employed by the UNESCO Intergovernmental

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<sup>1136</sup> Siehr, "International Art Trade and the Law," p. 147.

<sup>1137</sup> For details on the 2001 UNESCO Underwater Cultural Heritage Convention, see *supra* Chapter Three, Section 2.5.

Committee<sup>1138</sup> as well as by several UN declarations and UNESCO recommendations, thus promoting the idea of ‘re-contextualization’. Whereas preservation *in situ* and thus ‘re-contextualization’ *in situ* is often not feasible due to reasons of safety, research or access, preservation *ex situ* in a museum close to the area of the findings is quite common: the movable finds of Pompeii, for example, are not kept *in situ* but in the *Museo Archeologico Nazionale* in Naples. Along the same vein, the original statue of Michelangelo’s David in Florence had already been removed from its original place in *Piazza della Signoria* by 1882; and since then, it has been kept in the *Galleria dell’ Accademia*, which is in walking distance to its original location (a replica has been placed in the *Piazza della Signoria* at its original location).

The preservation *ex situ*, close to the original place of erection or discovery, is however the exception. Most archeological findings, such as those preserved by the British Museum, the Louvre, the Metropolitan Museum, or the Museum Island Berlin, are far removed from the ‘place of origin’ for purposes of collection, preservation, and public access. Since ‘re-contextualization’ is a phenomena of recent decades, the question arises whether and to what extent this concept should and/or could apply retroactively to collections established in the nineteenth and early twentieth centuries, and whether or not such collections might have established a ‘new context of its own’ over time. The British Museum has made such a ‘new context’ argument for its collection, by claiming the universal character of its collections as “an encyclopedia of knowledge and a material record of human history”.<sup>1139</sup>

Despite the associated controversy, the interest in the integrity and the context of cultural materials is an essential one. Thus, integrity and context become the third element in restitution matters – in addition to the elements of preservation and access. Whereas preservation and access are often used to argue against restitution, especially by holding museum or art institution, arguments pertaining to integrity and context might be used by both sides (although they tend to favor restitution and return based on the idea of ‘country of origin’ and ‘re-contextualization’). That said, returning cultural materials to their ‘place of origin’ or ‘country of origin’ does not necessarily reconstitute its former spatial integrity,

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<sup>1138</sup> For details on the UNESCO Intergovernmental Committee, see *supra* Chapter Three, Section 3.2.

<sup>1139</sup> Cf. the Director’s foreword by Nel Mac Gregor, Director of the British Museum, in: Ian Jenkins, *The Parthenon Sculptures in the British Museum* (The British Museum Press, 2007), p. 7.

since the site of origin might have been destroyed, cannot be concretely identified, or is simply not feasible as place of safekeeping. Contrary, ‘re-contextualization’ might dismember a established unity, if the object in question is part of a collection that has created a ‘new context’ of its own by being a resource for comparing world cultures, as the British Museum, founded in 1753, has done since for over two hundred years.

In fact, one of the restitution disputes par excellence is the case of the Parthenon Marbles, displayed in the British Museum since 1816. This case illustrates the complexity of dispersed cultural materials: since 1983, Greek authorities have submitted claims to three sets of sculptures (the metopes, the frieze, and the pediments) from the British Museum. Since 1984, the request has been pending with the UNESCO Committee and remains unresolved.<sup>1140</sup> The British Museum refuses to return these sculptures, and several British governments have been unwilling to pass the necessary legislation that would force the trustees of the British Museum to relinquish these objects (since an Act of Parliament could allow for the de-accession of works to British museums).<sup>1141</sup> At the same time, the trustees of the British Museum would also need to amend the statute of the museum, since the current British Museum Act tightly constrains de-accessioning of its collections.<sup>1142</sup> To support its request, Athens has even expressly built a new Acropolis Museum, completed in June 2009, in order to house all of the remaining Parthenon sculptures in a way that allows the public to simultaneously view the remains of the Parthenon.<sup>1143</sup>

An examination of the case of the Parthenon Marbles within the context of concern over integrity and context illustrates the complexity inherent within the concept of ‘re-contextualization’. The fate of the Parthenon Marbles will not be decided based merely on the resolution of the dispute between London and Athens; other fragments of the Parthenon are located at the Louvre in Paris; two heads from a metope in the British Museum are currently in Copenhagen; further fragments of the frieze are located in Palermo and the Vatican (although they were temporarily on loan in Athens in 2009 and 2010), the Kunsthistorisches Museum Vienna, the Glyptothek in Munich, the University of Würzburg (Germany), and the Strasbourg University. The dispersion of the Parthenon Marbles across Europe demonstrates

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<sup>1140</sup> For details, see *supra* Chapter Three, Section 3.2.

<sup>1141</sup> Fitz Gibbon, "The Elgin Marbles – a Summary," pp. 109.

<sup>1142</sup> With further details: Gillman, *The Idea of Cultural Heritage*, p. 127.

<sup>1143</sup> See for example: <http://www.parthenonuk.com/DynaLink/ID/206/newsdetail.php> (accessed 23 September 2011).

that the resolution of matters pertaining to ‘re-contextualization’ and return might involve several places and collections. Whereas in some cases, location seems to make no difference at all to the aesthetical and cultural value of certain objects, in other cases, the value of an object is inextricably linked to its spatial integrity – that is its ‘place of origin’ and integrity of its dismembered pieces. With regard to the Parthenon Marbles, the interest of integrity clearly calls for the reassembly of the entire collection in Athens – not only the fragments from the British Museum, but all dispersed fragments in Europe. A first step was taken by the Heidelberg University’s Museum of Antiquities, which returned its piece of the Parthenon to Athens in 2006, in recognition of the significance of the Parthenon as part of the world’s cultural heritage.<sup>1144</sup> In exchange, the German university received another work of art from the Greek authorities as a donation. On the occasion of the return in January 2006, the university’s vice rector Angelos Chaniotis (German professor of Greek origin) stated that the return of the piece had been “guided by the scholarly aim of promoting the unification of the Parthenon as a unique moment of world culture.”<sup>1145</sup>

### 3.4 Access for Scientific Research

While in the case of public access, some might argue that common access is best assured by the great museums of New York, London, Paris, Rome or Berlin, and by internationally touring exhibitions. Generally speaking, however, access to cultural heritage for scientists and researcher remains independent of common access considerations. For the scientific community (including, historians, art historians, archaeologists, anthropologists or paleontologists),<sup>1146</sup> it is utterly irrelevant to whom the title of ownership is assigned, or where the cultural materials are located, so long as access to and exchange of information about the cultural materials is guaranteed. In particular, new methods of access, including online publication and online provisions of museum catalogs, foster data exchange within the scientific community. With regard to restitution and return of Nazi looted art, for example, the use of internet databases has been deployed as a tool to allow individuals and institutions to search internationally for the provenance and the rightful owners of cultural artifacts.<sup>1147</sup> Nevertheless, in certain cases, scientific research still requires direct and physical access to the cultural object itself. Although the great Western museums often have the financial and

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<sup>1144</sup> For details, see *supra* Chapter Three, 2.10.

<sup>1145</sup> Martin Bailey, Parthenon fragment returned to Greece, *The Art Newspaper*, 20 February 2006.

<sup>1146</sup> For details on the scientific community as stakeholder, see *supra* Chapter Five, Section 1.4.

<sup>1147</sup> For example, the privately run database on looted cultural property 1933-45, available at: <http://www.lootedart.com/>; or the official ‘Lost Art Internet Database’ of the German government, available at: <http://www.lostart.de/Webs/EN/Start/Index.html> (accessed 23 September 2011).

technical facilities to provide such access, large parts of their collections are kept in storage. Consequently, access not only for the public but also for scientific purposes is often not (or not adequately) guaranteed. While there might be cases in which the interest of scientific access might interfere with other interests, as a general rule, one can say that there is normally no clash between scientific interests and preservation interests.<sup>1148</sup> Moreover, scientific interests often go hand in hand with the interest of public access for research purposes, since scientific research usually results in publication and thus public access to information regarding the object in question.

### 3.5 Economic Interests in Cultural Objects

The value of cultural objects is not determined merely by cultural, historical, or aesthetic qualities; rather, most cultural objects are also associated with an economic value. This is simply due to the fact that many cultural objects are made from materials that in themselves are highly valuable, such as gold, silver, or precious stones.<sup>1149</sup> Even in cases where the material value of the object is of little account, the value of a cultural object may be derived from the rarity of the object, its aesthetic qualities, as well as its historical or archaeological importance. Thus, the material value of cultural artifacts is usually only a fraction of what determines the object's market value;<sup>1150</sup> it is the intrinsic value of the object's cultural and historical authenticity that makes it valuable, in terms of economic interests. These economic interests are clearly indicated by the steadily growing art and antiquity market, as well as by the fact that the purchase of cultural artifacts is frequently considered to be a firm capital investment. Therefore, the protection of economic interests might, among others, be one rationale behind restitution claims.<sup>1151</sup> Economic interests should not be considered within this context as reprehensible, nor should they be neglected or ignored as a motive for restitution disputes; rather, economic interests should be taken into account as a matter of fact in the analysis of the interests involved.

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<sup>1148</sup> Likewise: Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 48. and: Odendahl, *Kulturgüterschutz, Entwicklung, Struktur Und Dogmatik Eines Ebenenübergreifenden Normensystems* p. 424.

<sup>1149</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 5.

<sup>1150</sup> *Ibid.*

<sup>1151</sup> For details, see *supra* Chapter Five, Section 2.2.

Although property rights are usually claimed by individuals, property is also a matter of public interest.<sup>1152</sup> This is, for example, demonstrated by the fact that theft is prohibited anywhere in the world, and that property rights are guaranteed as fundamental rights by most legal regimes – either directly in national constitutions or through civil and penal law provisions. In turn, other rights pertaining to private owners (such as the right of free disposition) might conflict with public interests. Such public interests include, among others, the interest in preservation and public access. Whereas most national legal regimes impose specific legislation on the import and export of cultural objects, thus limiting the owner's right to disposition,<sup>1153</sup> national legislation regulating preservation and access is notable by its general absence.<sup>1154</sup> In addition to legislation that restricts the export of certain cultural objects (mainly defined through minimum age and/or economic value),<sup>1155</sup> some national legal regimes, particularly many States rich in archeological materials, declare certain categories of cultural objects, regardless whether privately or publicly owned, as *res extra commercium* – being inalienable and un-merchantable.<sup>1156</sup> Consequently, these national regulations undermine the economic interests usually associated with property.

However, economic interests in cultural objects are not limited to property rights and the right of disposition: within the scope of economic interest, a broader public dimension of economic benefit associated with the larger cultural heritage industry, particularly as a tourist resource, must also be taken into account. Tourist attractions, such as historic monuments and sites (for example, the Inca site of Machu Picchu in Peru), or single artifacts in museums (for example, the Mona Lisa at the Louvre in Paris), are linked to an entire industry, which benefits from the marketing of cultural heritage materials. Thus, cultural heritage is, in many cases, no longer a burden to national budgets, but rather an essential industry both in itself and to other industries, such as product merchandising, tourism, sustainable agriculture, and even

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<sup>1152</sup> Cf. Schöenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 53.

<sup>1153</sup> For details on limitations on property rights, see *supra* Chapter Four, Section 2.4.

<sup>1154</sup> Cf. Sax, *Playing Darts with a Rembrandt, Public and Private Rights in Cultural Treasures*, p. 9.

<sup>1155</sup> See, for example, Annex I (Categories of cultural objects covered by Article 1) of Council Regulation (EC) No. 116/2009 of 18 December 2008 on the export of cultural goods (codified version), (Official Journal L 39/1, 10 February 2009).

<sup>1156</sup> Cultural materials of specified categories fall under specific export restrictions and can neither be acquired in good faith nor be acquired by adverse possession. See, for example, the legislation in France with regard to cultural materials classified as “trésors nationaux” or “monuments historiques mobiliers”, Art. L 111-1 Code du patrimoine, available at: [www.legifrance.gov.fr](http://www.legifrance.gov.fr); or in Italy, with regard to “dominio culturale”, Art. 54 Legge No. 42 of 22 January 2004 (Code of the Cultural and Landscape Heritage), available at: [http://www.unesco.org/culture/natlaws/media/pdf/italy/it\\_cult\\_landscaperheritge2004\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/italy/it_cult_landscaperheritge2004_engtof.pdf) (accessed 23 September 2011).

biomedicine (in case of using certain plants that are part of a cultural tradition).<sup>1157</sup> In this regard, it is possible to refer to “the re-interpretation and packaging of existing heritage resources as new heritage products to be used by contemporary society.”<sup>1158</sup> If managed properly, this can have a major positive impact, particularly on the economies of less developed regions or developing States. Thus, the economic interest in cultural heritage (and its intangible value) may have a considerable impact on the efforts of States and local authorities to preserve and manage cultural heritage sites. For example, it is the economic interest that explains the overall success of the 1972 UNESCO World Heritage Convention: the right to label a site designated as UNESCO World Heritage has a direct marketing impact. Consequently, the economic value in cultural heritage is far from an unwanted side effect; rather, it represents an important part of the management planning required as a condition for the inscription of a site in the World Heritage list. Nonetheless, the economic aspects of cultural heritage sites – and their movable attachments – are frequently prioritized at the expense of the integrity of the site and/or the well-being of the communities in which these sites are situated. Bauer, for example,<sup>1159</sup> distinguishes between “commodification” (wanted) and “commercialization” (not wanted) and refers to UNESCO instruments that seem to distinguish between these notions as well: on the one hand, the 2001 Underwater Convention expressly forbids “commercial” activities regarding underwater heritage, whereas, on the other, the notion “commodification” of culture for the economic development is at the heart of the 1972 World Heritage Convention as well as of the 2005 Diversity Convention.<sup>1160</sup>

In summarizing this section, it should be emphasized that the economic interests in cultural materials are twofold: on the one hand, there is the economic value of the cultural object as such (in terms of its ‘intrinsic value’ on an open or, due to export restrictions, on the more limited domestic market); and, on the other hand, there is the economic value of the object in terms of its ‘extrinsic value’, which refers to the revenues generated by the presence of cultural heritage (monuments, museums and archeological sites).<sup>1161</sup> Although this

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<sup>1157</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 7.

<sup>1158</sup> Ibid.

<sup>1159</sup> Bauer, "New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates," p. 697.

<sup>1160</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entering into force 18 March 2007), full text available at:

<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (accessed 23 September 2011).

<sup>1161</sup> Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1044.; for the danger of mass tourism, see: Sabine Von Schorlemer, *Internationaler Kulturgüterschutz - Ansätze Zur Prävention Im Frieden Sowie Im Bewaffneten Konflikt* (1992), p. 110 ff.

distinction is quite reasonable in theory, it might be difficult to distinguish in practical terms. The same problem exists when assessing the impact of economic interests in restitution disputes: the interests in preserving ‘national patrimony’ as a matter of national pride and identity – reasons on which restitution claims are often made – can frequently not be clearly distinguished from the economic interests of the State, region, as well as the respective ethnic or religious community that submit claims for restitution and return.<sup>1162</sup> Since, however, the economic interests in cultural objects – be it in terms of protection, management, or the claim for an object’s return – play an important role in cultural heritage matters, they may have a critical impact on the outcome of restitution disputes. This may result in creative problem-solving in terms of loan agreements or shared management agreements that could be in the mutual economic interest of both parties involved.<sup>1163</sup>

### 3.6 Political Interests, Affiliation and the Symbolic Value of Cultural Objects

Throughout history, cultural objects have been instrumental in the exercise of power of all kinds, including economic, cultural and political power. The creation of cultural artifacts, the erection of monuments, and the preservation (as well as destruction) of cultural sites, all involve political interests in the object as such, and its cultural and historical interpretation, (i.e. the symbolic value of cultural heritage). Albeit to a different degree, both preservation and destruction of cultural materials make the same assumption about the danger of rival interpretations and thus of the political dimension of cultural heritage – as does the question of restitution and return.<sup>1164</sup>

Unsettled restitution disputes, like the ongoing claim regarding the return of the Parthenon Marbles;<sup>1165</sup> the dispute between Germany and Russia with regard to war-spoilation during and shortly after WWII;<sup>1166</sup> or the border disputes between Thailand and Cambodia with regard to the UNESCO World Heritage site of Preah Vihear;<sup>1167</sup> illustrate the

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<sup>1162</sup> For details of monetary value in restitution disputes, see *supra* Chapter Five, Section 2.2.

<sup>1163</sup> For detailed discussion on alternative solutions, see Chapter Six, Section 1.

<sup>1164</sup> Cf. Sarah Harding, "Cultural Property and the Limitations of Preservation," *Law and Policy* 25, no. 1 (2003): p. 30.

<sup>1165</sup> See *supra* Chapter Five, Section 3.3.

<sup>1166</sup> See *supra* Chapter Two, Sections 2 and 4.1.

<sup>1167</sup> The Temple of Preah Vihear was inscribed on the request of Cambodia as UNESCO World Heritage in 2008. The site, however, is located in the borderland between Cambodia and Thailand still creating conflicts regarding access and the management of the site. For details on the border conflict see: *Modern conflict near ancient ruins*, 15 October 2008, by Jonathan Head, available at: <http://news.bbc.co.uk/2/hi/7672506.stm> (accessed 23 September 2011).

high controversial nature and the political dimension of cultural heritage.<sup>1168</sup> Efforts to control cultural heritage are often undertaken on the basis of disputes regarding property rights (who can tell the story); historical and cultural considerations (whose and what story is told); considerations pertaining to location (where is the story told); and economic considerations (who gets the profit from telling the story). Although there might be restitution disputes in which these considerations can be well distinguished from one another, in most restitution disputes, however, they are intertwined.

Most cultural materials have an intrinsic symbolic value and therefore function as a source of identity or pride. With regard to States, this intrinsic symbolic value is described as ‘national heritage’ by a particular people or State – or by more than one people or State. If a cultural object with a strong symbolic value and thus of identity is in the possession of another State or regional community – as a legacy of war, occupation, or colonial domination, for example – it is frequently considered as a perpetual symbol of defeat and humiliation. It is, however, especially States that may seek to retain certain cultural objects in order to control the discourse about history and to suppress objectionable narratives. This might particularly be the case in which human rights violations and suppressed minorities are involved. The simple fact that history requires symbols and tangible narratives is materially illustrated by memorials and monuments erected to celebrate victory or freedom.

With regarding to restitution and return of cultural materials, the symbolic value and the political importance of claimed objects should not be underestimated by the parties attempting to solve restitution disputes. Entering into negotiations pertaining to restitution disputes without pre-defined goals, acknowledging the cultural, historical and political function of cultural heritage, and taking into consideration the motives and interests involved in the dispute can have a positive effect on negotiations by the opportunity for an overall satisfying solution between the parties that facilitates reconciliation that goes beyond the mere return of cultural materials.<sup>1169</sup>

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<sup>1168</sup> See also *Temple of Preah Vihear (Cambodia vs. Thailand)*, Judgment of 15 June 1962, ICJ Reports, 1962, p. 6.

<sup>1169</sup> In the same vein also: Daniel Shapiro, "Repatriation: A Modest Proposal," *New York University Journal for International Law and Politics*, no. 31 (1998): p. 105-07.

### 3.7 Preventing the Reappearance of Returned Objects on the Illicit Market

It has been argued that there is no merit in returning cultural materials if they are subsequently likely to be destroyed or deteriorate irreparably.<sup>1170</sup> The same reasoning applies if the object returned (re)-appears on the illicit art and antiquities market and finds its way into a private collection. The interest to prevent the recurrence of cultural materials on the illicit market gains even further importance in cases in which the object was returned based on careful ethical and historical considerations,<sup>1171</sup> rather than because it had been the object of theft (i.e. return based on property rights). Under such circumstances, the intention to return and thus to ‘remedy historical injustice’ would be heavily impeded by the object’s recurrence on the illicit market. Moreover, such incidents would have a negative impact on the resolution of other restitution disputes. Consequently, preventing the recurrence of returned objects on the illicit art and antiquities market is in the interest of both the requesting and the requested party in restitution disputes – and, as such, it is a matter of common interest.

Whereas in most cases of restitution and return the recurrence on the illicit market is not at risk, other cases raise concerns regarding whether immediate return or return without additional safekeeping conditions is inopportune. The return of cultural materials from the Royal Museum of Central Africa in Tervuren (Belgium), to the Museum of Kinshasa (Democratic Republic of the Congo, back in the 1970s Zaire), and their subsequent loss is an example of one such case. In the early 1970s, and again in 1977, both museums agreed on the return of over one hundred ethnographic works and several thousand additional cultural objects, which were removed by Belgian troops during the colonial period. Subsequent to the return of these objects to Kinshasa, a large number were stolen amid political turmoil during this period. These objects are reported to have reappeared on the international antiquity market.<sup>1172</sup> As a result, the Belgian Royal Museum has since opposed any further restitution to the DRC given their conviction that the wholesale return of cultural objects is not a viable option.<sup>1173</sup>

Although the 1970 Belgian-Congolese agreement is remarkable long-sighted in its formal terms – it was concluded directly between the museums without governmental

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<sup>1170</sup> This is true unless the ritual decaying of the objects returned is part of the agreement, as in the case of the Zuni war gods; for details on the Zuni case, see *supra* Chapter Five, Section 3.1.1.

<sup>1171</sup> For details on ethical and historical consideration, see *supra* Chapter Three, Section 5.

<sup>1172</sup> Cf. Greenfield, *The Return of Cultural Treasures*, p. 371.

<sup>1173</sup> Gryseels, "Assuming Our Responsibilities in the Present," p. 8. also available at: [http://icom.museum/pdf/E\\_news2004/p8\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p8_2004-1.pdf) (accessed 23 September 2011).

involvement from the Belgian side and therefore far ahead of its time<sup>1174</sup> – it failed in practical terms. This negative outcome can only be avoided if the return of objects is embedded in a broader frame of safety considerations. This concern links directly the interests discussed in the previous sections, namely that of preservation and access. Generally, safety considerations include the following: sufficient precautionary measures against theft and fraud within museums; the existence of inventories that provide sufficient documentation should an object be stolen; and the presence of technical preservation equipment as well as alarm devices. Possible strategies to prevent the recurrence of returned cultural objects on the illicit market must take into consideration the more general question of how cultural artifacts are to be protected and preserved when institutions face financial and technical shortcomings. The problem of protection is only multiplied when it comes to the difficulty associated with effective surveillance of archeological sites and the prevention of clandestine excavations. As long as the illicit market is fueled with newly excavated materials, illicit trafficking in cultural materials will continue.<sup>1175</sup> The problem of illicit trafficking in cultural materials and its possible prevention is its own subject matter and well beyond the scope of this thesis. However, it is important to mention here that preventing the recurrence of illicit sale of a returned object is a pertinent concern that should be addressed by the parties negotiating a restitution dispute.

A legal provision that specifically addresses the aspect of safe return is the Swiss legislation implementing the 1970 UNESCO Convention: Article 9(2) of the 2003 Swiss Cultural Property Transfer Act' (CPTA)<sup>1176</sup> states that the court can suspend the execution of the return until such time as the cultural object in question is no longer in jeopardy. It seems likely that the following incident acted as a role model for the Swiss legislation: under the *aegis* of UNESCO, the 'Afghanistan Museum-in-Exile' was established in 1999 at the Swiss Afghanistan Institute in Bubendorf, which served as a repository for 1,400 Afghan artifacts between 1999 and 2007.<sup>1177</sup> Following civil riots and the plundering of the National Museum of Afghanistan in Kabul in 1996, the conflicting parties (including the Taliban) agreed in 1999 to the exile repository in Switzerland; major parts of the artifacts were on display at the

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<sup>1174</sup> For details on agreements between States and non-State actors, see *supra* Chapter Three, Section 2.10.

<sup>1175</sup> Cf. Bator, "An Essay on the International Trade in Art," p. 317.

<sup>1176</sup> Swiss Federal Act on the International Transfer of Cultural Property, issued 20 June 2003, available at: [http://www.unesco.org/culture/natlaws/media/pdf/switzerland/ch\\_actintaltrsfertcultproties2005\\_engtno.pdf](http://www.unesco.org/culture/natlaws/media/pdf/switzerland/ch_actintaltrsfertcultproties2005_engtno.pdf) (accessed 23 September 2011).

<sup>1177</sup> See UNESCO overview of "Recent examples of successful operations of cultural property restitutions", available at: <http://www.unesco.org/en/movable-heritage-and-museums/features/recent-examples-of-successful-operations-of-cultural-property-restitutions-in-the-world/> (accessed 23 September 2011).

exile museum. In March 2007, the artifacts were returned to Kabul. The establishment of a temporary museum for safekeeping the cultural goods of another State by agreement of the conflicting parties is possibly one of the most unique project worldwide in preserving cultural heritage.

Similarly to the 2003 Swiss legislation, the German ‘Act on the Return of Cultural Property’ of 2007<sup>1178</sup> provides for in Article 6, paragraph 2(a) that “if, due to civil commotion, armed conflict or comparable circumstance, the requesting State is prevented from initiating the classification or designation or publishing notice of such initiation within the period specified<sup>1179</sup> [...], the period shall not begin to run until these circumstances have ceased to exist.” Although the Swiss legislation does not define the “jeopardy” to which it refers, the provision in the German implementing Act names the circumstances that warrant that the requesting State be granted an exception: civil commotion, armed conflict and comparable circumstances. Comparable circumstances might include condition such as natural catastrophes. Whereas the German provision only postpones the time limit for fulfilling the preconditions for bringing a claim to court, the Swiss Act goes further by giving the court the option of suspending the execution of the return as such.

Both the Swiss and German national cultural property laws demonstrate that the particular circumstances of the requesting State, the safety of the cultural materials to be returned, as well as the safety of those materials after their return must be taken into account into a court’s decision to return requested cultural materials. The considerations pertaining to the timing of the return should be supplemented by further considerations of the technical assistance needed to protect the returned objects and possibly joint management of the objects to be returned; such considerations could be set out as conditions in the agreement settling the restitution dispute. In this way, dispute resolving could be accompanied by a wider frame of protective measures, including the interest of preventing the recurrence of cultural materials on the illicit market subsequent to their return.

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<sup>1178</sup> German Act implementing the UNESCO Convention of 14 November 1970 and implementing Council Directive 93/7/EEC of 15 March 1993, issued 18 May 2007, available at: [http://www.unesco.org/culture/natlaws/media/pdf/germany/germany\\_actconv1970\\_2007\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/germany/germany_actconv1970_2007_engtof.pdf). (accessed 23 September 2011).

<sup>1179</sup> Article 6 of the German Act provides for a period of one year.

### 3.8 Excursus: Orphaned Objects – Cultural Materials of Uncertain Provenance

Cultural materials of uncertain provenance might be complete in terms of their physical integrity; however, they remain incomplete if they lack a cultural context and identity. In terms of the applied analogy to child custody law, orphaned objects are missing the ‘maternal component’.<sup>1180</sup> Many archaeological finds as well as antiquities are sold without a proper certificate of provenance, which means that illegally and legally obtained material becomes mixed on the international market. Many archaeologists today take the pragmatic stance that if an artifact has no provenance, it is probably looted.<sup>1181</sup> Illicit excavations of archaeological items are, however, not merely a violation of national export laws, but also a violation of the common interest of protecting cultural heritage, since as a result of such excavations, important information about the object and its context is inevitably and irretrievably lost.

Therefore, stolen or illicitly exported items are similar to ‘orphans’ without verifiable provenance. If the place of origin can be traced, the looted objects may be returned. Thus, cultural materials without documented provenance are a potential risk in particular to public museums, since such undocumented objects might eventually generate restitution disputes. Nevertheless, the object remains orphaned; moreover, looters often destroy or disguise evidence of objects’ background. Cultural materials retrieved through clandestine excavations presented as coming from a region other than that where they were found, or may be ascribed to a much earlier collection of similar objects in order to obliterate their illicit source. Archeological finds illicitly exported from Iraq are – as in the case of a miniature golden vessel seized in Germany in 2004 – offered as being of ‘Mediterranean origin’ in order to evade the strict import, export and trade restrictions for Iraqi artifacts.<sup>1182</sup> Specific provisions on Iraqi cultural artifacts have even been passed by the Security Council<sup>1183</sup> and the European Community<sup>1184</sup> in reaction to the massive looting subsequent to the Iraq War in 2003. Moreover, objects deprived of their true cultural and historical context may enter the market as replicas, only to be ‘recognized’ as genuine later. It even may serve the interests of

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<sup>1180</sup> For details on the analogy to child custody law, see *supra* Chapter Four, Section 1.2.

<sup>1181</sup> Brodie, "An Archaeologist's View of the Trade in Unprovenanced Antiquities," p. 53.

<sup>1182</sup> Lucian Harris, German court orders return of ancient vessel to Iraq, *The Art Newspaper*, published online 18 November 2009, available at: <http://www.theartnewspaper.com/articles/German-court-orders-return-of-ancient-vessel-to-Iraq/19796> (accessed 23 September 2011).

<sup>1183</sup> Security Council Resolution 1483/2003 of 22 May 2003, see: paragraph 7; full text version: <http://daccess-ods.un.org/TMP/1465505.html> (accessed 23 September 2011).

<sup>1184</sup> Council Regulation No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq, See full text version: Official Journal 2003, L 169/6.

antiquity dealers to flood the market with fakes and replicas so that illicit originals may be ‘lost in the crowd’ and thereby gain a false provenance.<sup>1185</sup>

Even if restitution were granted, it will never be possible to place illicitly excavated cultural materials back into their original context. They can be returned to their assumed place of origin, but, as objects without provenance, they are usually as meaningless there as they would be in any foreign country.<sup>1186</sup> In these cases, restitution claims can either not be made at all, or if made, the claim can generally not be adequately proven by the potential claimant. Furthermore, it is questionable whether such ‘orphans’ should be ignored (i.e. neither studied nor exhibited) in an effort to limit further pillage, or if these objects should, nevertheless, be subject to sale, exhibition and research. On the one hand, simply keeping these objects and displaying them within collections would not be a stimulus to reduce illicit excavations and illicit trafficking. On the other hand, however, the exclusion of these materials from the licit international art market and exhibition practices does not make sense either. Looted artifacts are perhaps not as useful as artifacts recovered by scientifically guided and monitored excavations. However, these items are still objects of cultural heritage and thus valuable as such,<sup>1187</sup> even if they can only be displayed as ‘art objects’ with little or no scientific data about the history, function, or significance linked to them. Aesthetically speaking, these cultural materials are left to speak for themselves without revealing their past. Nevertheless, these objects should not be neglected; rather, they should be displayed, and their ‘non-identity’ and tragic past as a victim of illicit trade should be publicized. Furthermore, these objects could serve the international exchange in cultural artifacts; while restitution to the rightful owner is mostly not possible, loans and shared ownership are viable alternatives.

### ***Summary of the Chapter:***

This chapter provided an analysis of the relevant stakeholders in restitution disputes, namely: (1) States; (2) private entities, such as art dealers, collectors, and auction houses; (3) public and private museums; (4) scientific and epistemic communities; (5) indigenous peoples, ethnic and religious groups; and (6) the international community. It was shown that – despite the predominance of States in international law – other non-State actors play an increasingly important role in the matter of restitution and return.

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<sup>1185</sup> Cf. Carman, *Against Cultural Property - Archaeology, Heritage, and Ownership*, p. 20.

<sup>1186</sup> Coggins, "A Proposal for Museum Acquisition Policies in the Future," p. 434.

<sup>1187</sup> Brodie, "An Archaeologist's View of the Trade in Unprovenanced Antiquities," p. 59.

While, as a matter of fact, conflicting interests of these stakeholders exists, due to divergent and potentially incompatible assumptions, other interests do not have to be mutually exclusive and might actually be the sources of common ground between stakeholders. In particular, interests in preservation, access, integrity and cooperation can serve as common ground between the parties involved in a restitution dispute. These common interests – or common concerns – of all stakeholders involved are the basis of the interest-oriented approach of this thesis. A cooperative approach, balancing these interests for both the physical and cultural components of cultural objects, is what broadens the possible ‘win-set’ in the resolution of restitution disputes. Taking this into account, the second part of this chapter assessed not only the relevant cultural, economic and political interests, but also the potential motives for bringing a restitution claim. The understanding of the motives behind a claim is essential as motives, which might differ from interests as shown, shape not only the nature of the claim, but also serve as an early indicator of the character of the restitution negotiations, and thus the likelihood of parties reaching alternative solutions. These alternative solutions in resolving restitution disputes will be discussed in terms of both mechanisms and consequences in the following chapter.



## **CHAPTER VI: Implementing the Interest-oriented Approach – Law and Policy Issues**

### *Overview of the Chapter*

Thus far, this thesis has completed the following tasks: firstly, it outlined the current dilemmas in restitution disputes and demonstrated on the basis of three rationales that an alternative approach to current restitution practices is required (Chapter Two); secondly, it analyzed the international legal regime and highlighted in particular the shortcomings of current legal instruments in international law (Chapter Three); thirdly, it introduced the conceptual and legal foundations of the proposed interest-oriented approach (Chapter Four); and, fourthly, explored the various stakeholders in restitution disputes and discussed their interests (Chapter Five). This chapter explores law and policy issues associated with the interest-oriented approach taken by this thesis. As seen in the previous chapters, the necessary legal components for a new approach – an interest-oriented approach – are at hand. It is now the task of this chapter to integrate these components in light of the relevant law and policy considerations in order to illustrate the means through which the interest approach can be implemented in international cultural heritage law.

This chapter will begin by summarizing – on the basis of the legal analysis in Chapter Three – the major obstacles that generally preclude claimants from taking legal action in restitution disputes. The following three major obstacles in legal proceedings can be identified: firstly, the non-retroactivity of international treaty law; secondly, the protection of the *bona fide* purchaser and the burden of proof; and thirdly, the lapse of time and general time limits. Because of these obstacles, the purely legal approach is not a viable option in many restitution disputes. As a result, the development of complementary and alternative mechanisms that are primarily focused on the interests of the parties involved might facilitate the resolution of restitution disputes – in spite of these legal obstacles.

The chapter continues by illustrating a variety of alternative solutions that aim at going beyond the simple or ‘barren’ return. It is important to note that in some cases, the application of just one of the solutions presented below might provide a feasible solution; in

others, however, a combination of various complementary options might be called for, in order to appease all the parties involved. With no claim to completeness, six major categories of complementary and alternative mechanisms are identified: (1) voluntary returns; (2) temporary loan agreements, the fabrication of replicas, and the exchange of cultural objects; (3) permanent loan agreements and the return of cultural artifacts without transfer of ownership; (4) joint custody and shared management, as well as transfer of expertise; (5) the re-purchase of objects claimed for return and the establishment of compensation funds in order to do so; and (6) mechanisms concerned with the international reputation of museums and other art holding institutions. As indicated above, these six categories do not form an exhaustive list of options; nonetheless, they encapsulate the overall set of currently available alternative solutions in restitution disputes.

In addition to the discussion of the complementary and alternative mechanisms that might be available in the resolution of restitution disputes, policy considerations with some proposals for institutional improvements on both the international and national level will be discussed. These include: (1) the role of museums and the general function of stewardship; (2) amendment of the current mandate of the UNESCO Intergovernmental Committee; (3) the establishment and strengthening of national advisory committees; and (4) the role of World Heritage sites in the context of the restitution debate. It will be demonstrated that, although the interest-oriented approach proposed by this thesis does not approximate legally binding provisions, it can, nonetheless, facilitate the development of general principles in a broader legal framework, thus allowing parties to avoid formal litigation and to be more flexible in resolving restitution disputes.

### **1. Legal Obstacles impeding the Resolution of Restitution Disputes**

The legal analysis in Chapter Three has shown that several multi-lateral conventions and bilateral agreements have been established in order to provide legal grounds for dealing with the matter of restitution and return. In many restitution disputes, however, major obstacles frequently preclude the claimant from taking effective legal action. One of the major reasons is that many restitution disputes now surfacing regard incidents of appropriation that occurred before national and international instruments prohibiting such appropriation were established during the course of the second half of the twentieth century.<sup>1188</sup> Despite the general principle of non-retroactivity of international treaty law, States are legally bound by

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<sup>1188</sup> For the historical background of international cultural heritage law, see *supra* Chapter Two, Section 2.

the obligations pursuant to such instruments only upon their ratification – a process that might take years or decades following the adoption of a particular treaty.<sup>1189</sup> Moreover, the exact circumstances of the appropriation of cultural materials are frequently unclear and thus the interpretation of these circumstances is also frequently disputed, since they often occurred during periods of war, foreign or colonial occupation, or other periods of political unrest. Clandestine excavations, which continually occur, only exacerbate the problem. In addition to these factual uncertainties, the perception and valuation of not only one's own cultural heritage, but also the culture of others has changed tremendously over time. Whereas most cultures have produced cultural materials since the existence of humankind, archeology and the idea of conservation is a rather recent approach to cultural heritage. Thus, the following question arises: how far back in time should one extend efforts to reverse former removals of cultural materials. The following section attempts to structure this debate by discussing the three major legal obstacles in restitution disputes.

### **1.1 The Principle of Non-retroactivity in International Treaty Law**

The debate on restitution and return of cultural materials is inseparably from the question of whether current legal standards could or should be retroactively applied to incidents of prior removal.<sup>1190</sup> This question arose particularly in the context of decolonization and the attempt of the newly independent States in the 1950s and 1960s to claim cultural materials removed during the period of colonial domination.<sup>1191</sup> Although, international treaty law clearly states that a convention's provision will not apply to any facts, acts or situations that arose prior to the coming into force of the convention for that State,<sup>1192</sup> the question of retroactivity was a major point of debate during the negotiations pursuant to the 1970 UNESCO Convention.<sup>1193</sup> A number of newly independent States considered that the Convention would be of no use if not applied retroactively, since the vast majority of their cultural heritage had already left the State. Nevertheless, the retroactive application of the conventions would have had profound implications on the rights of property holders in several States, giving rise to numerous insurmountable constitutional and human rights issues,

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<sup>1189</sup> A good example is the ratification process for the 1970 UNESCO Convention. For details see, *supra* Chapter Three, Section 2.2.

<sup>1190</sup> See the debate on ethical and historical considerations, *supra* Chapter Two, Section 5.

<sup>1191</sup> See *supra* Chapter One, Section 4.3.

<sup>1192</sup> See Article 28 of the *Vienna Convention on the Law of Treaties*, (adopted 23 May 1969; entering into force 27 January 1980); 1155 UNTS 331; Malcolm N. Shaw, *International Law*, 6 ed. (2008), p. 926.

<sup>1193</sup> Cf. Edouard Planche, "Die Unesco-Konvention Von 1970: Anwendung Auf Internationaler Ebene," *Kunst und Recht*, no. 5 (2010): p. 146.

which would have effectively rendered it impossible for the relevant States (namely the former colonial powers) to ratify the 1970 UNESCO Convention.<sup>1194</sup>

It was therefore clear that, due to the common rules relating to treaty interpretation, any legal instrument adopted by the State community would have no retroactive effect. The principle of non-retroactivity originates from the Roman principle which states that there is no punishment except in accordance with the law (*nulla poena sine lege*). It incorporates the idea that the law cannot retroactively change the legal consequences (or status) of actions committed prior to the enactment of that law. The principle of prohibition of retrospective (penal) laws has found wide acceptance, for example in the French Declaration of the Rights of Man and of the Citizen of 1789<sup>1195</sup> and the Universal Declaration of Human Rights of 1948<sup>1196</sup> and is considered one of the fundamental principles of customary international law.<sup>1197</sup> With respect to treaty law, Article 28 of the Vienna Convention on the Laws of Treaties<sup>1198</sup> establishes that the provisions of an international treaty “do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

Consequently, the legal provisions found in international treaties only apply upon the ratification of the treaty by the signatory States. The same principle applies if States decide to revise the provisions of a convention. In this regard, Article 25 of the 1970 UNESCO Convention states that “any revision shall bind only the States which shall become Parties to the revising convention”.<sup>1199</sup> Within the context of submitting a claim for the restitution and return of cultural objects on the basis of the 1970 UNESCO Convention (respectively the 1995 UNIDROIT Convention), such a claim would only fall under the terms of the conventions if the removal of the object occurred after the date of ratification (and entry into force) of the treaty in both the requesting and requested State. Thus, the principle of non-retroactivity is twofold: on the one hand, it guarantees the predictability of legal decisions and

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<sup>1194</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 41.

<sup>1195</sup> See Article 8 of the *Déclaration des droits de l'Homme et du Citoyen*, approved by the National Assembly of France, August 26, 1789, available at : [http://www.constitution.org/fr/fr\\_drm.htm](http://www.constitution.org/fr/fr_drm.htm) (accessed 23 September 2011).

<sup>1196</sup> See Article 11, para. 2 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948 available at: <http://www.un.org/en/documents/udhr/index.shtml> (accessed 23 September 2011).

<sup>1197</sup> See *supra*, Chapter Three, Section 6.

<sup>1198</sup> *Vienna Convention on the Law of Treaties*, (adopted 23 May 1969, entering into force 27 January 1980), 1155 UNTS 331.

<sup>1199</sup> See Article 25 of the 1970 UNESCO Convention, in detail *supra*, Chapter Three, Section 2.2.

sound legal protection (e.g. for the possessor of cultural artifacts), on the other hand, it constitutes a major obstacle in restitution matters pertaining to cultural objects stolen or illicitly exported prior to the ratification of States. This is also why the Preamble and Article 10 (3) of the 1995 UNIDROIT Convention provides that the principle of non-retroactivity does not – in any way – legitimize past wrongs. Moreover, Article 10 (3) invites States Parties to make use of remedies available outside the framework of the Convention. However, it must be noted that ratification is generally only the first of two steps, since most international treaties (like the 1970 UNESCO Convention) have to be implemented into national law in order to enforce the rights and obligations designated in the international treaty.<sup>1200</sup> One of the few exceptions to this general mechanism is the 1995 UNIDROIT Convention,<sup>1201</sup> which is self-executing and thus has immediate impact on national law.

## 1.2 Bona fide purchase and Burden of Proof

Most civil law regimes protect the *bona fide* purchaser. Generally, it is the claimant, who has to prove that the current possessor acted without due care and attention in purchasing the object in question, regardless if that object is a bicycle or ancient pottery. However, while it may be just for ownership rights to favor the possessor,<sup>1202</sup> these civil law regimes create a significant barrier for the claimant who wishes to refute the *bona fide* assumption.<sup>1203</sup> Whereas the possessor is usually well aware of the circumstance surrounding the purchase of the object, the requesting party usually is not. This, however, can become even more complicated if the current possessor acquired the cultural object through inheritance, donation, or public auction. Frequently, the clear presentation of the circumstances of removal simply is not possible, due to the passage of time or the conditions of removal, especially if removal took place during war or as part of a clandestine excavation.

Even the question of who is entitled to bring a claim for restitution and return can be quite problematic, especially if the origin of a cultural object is not or only vaguely known. This is particular the cases in archeological finds that can frequently only be identified as

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<sup>1200</sup> See for further details, *supra*: Chapter Six, Section 1.2. *The Federal Republic of Nigeria vs. Alain de Montbrison*, Paris Court of Appeal, judgment of 5 April 2004, upheld by the Court of Cassation, judgment of 20 September 2006; cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 2.

<sup>1201</sup> See *supra* Chapter Three, Section 2.4.

<sup>1202</sup> See, for example, civil law provisions in: France (Article 2276, Section 1 *Code Civil*); Germany (§ 1006 BGB); Switzerland (Art. 930 ZGB); Austria (§ 323 ABGB).

<sup>1203</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 99.

being of ancient origin (e.g. ‘Mesopotamian’ or ‘Pre-Columbian’) and therefore do not correspond with current State borders. Without any further designation of origin, however, the claimant’s attempts will be unsuccessful. Thus, the protection of the *bona fide* purchaser and the burden of proof constitute major obstacles in making claims for the restitution and return of cultural materials.

This type of obstacle can, however, be corrected either through the issuance of legislation modifying current civil law provisions or through legally non-binding declarations.<sup>1204</sup> In terms of the first option, this might be accomplished in three ways: firstly, through the introduction of specific civil law provisions declaring particular cultural objects to be *res extra commercium* and thus precluding them from any *bona fide* purchase.<sup>1205</sup> Secondly, provisions pertaining to *bona fide* purchases might be limited by increasing the requirements for exercising due diligence when purchasing cultural materials. Thus, the purchaser of a cultural object would be responsible for proving that he exercised due care when acquiring the object (thus, having the effect of shifting of the burden of proof onto the purchaser).<sup>1206</sup> Thirdly, and most far reaching, *bona fide* purchase provisions could simply be eliminated and/or revised to require simple compensation, as provided for in the 1995 UNIDROIT Convention, which states that “the possessor of a cultural object which has been stolen shall return it”.<sup>1207</sup> Under the provisions of this convention, if the purchaser can prove due diligence, he is entitled to compensation, even though he still must return the claimed object. If he cannot demonstrate due diligence, he forgoes his entitlement to compensation (Article 4 of the 1995 UNIDROIT Convention).

While the first option of modifying current civil law provisions might be highly desirable, it would be difficult to achieve. States generally tend to be reluctant to make such modifications – as is illustrated by the small number of States which have as yet ratified the

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<sup>1204</sup> Cf. *Ibid.*, p. 236.

<sup>1205</sup> Cultural materials of specified categories fall under specific export restrictions and can neither be acquired in good faith nor be acquired through adverse possession. See, for example, the legislation in France with regard to cultural materials classified as “trésors nationaux” or “monuments historiques mobiliers”, Art. L 111-1 Code du patrimoine, available at: [www.legifrance.gov.fr](http://www.legifrance.gov.fr); or in Italy with regard to “dominio culturale”, Art. 54 Legge No. 42 of January 22, 2004 (Code of the Cultural and Landscape Heritage), available at: [http://www.unesco.org/culture/natlaws/media/pdf/italy/it\\_cult\\_landscapeheritage2004\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/italy/it_cult_landscapeheritage2004_engtof.pdf) (accessed 23 September 2011).

<sup>1206</sup> A good definition of due diligence is provided by the 1995 UNIDROIT Convention in Art. 4, section 4 in reference to “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”.

<sup>1207</sup> UNIDROIT Convention with regard to stolen cultural objects in Article 3, section 1.

1995 UNIDROIT Convention (although the convention itself is self-implementing, national civil law provisions have to be amended accordingly in order to avoid incompatible legal provisions that might result from the direct impact of the convention on national law). Moreover, such modifications have the disadvantage of being non-retroactive, and thus not applicable to current restitution disputes. Therefore, the second option of introducing legally non-binding instruments (e.g. recommendations, principles, codes of conduct, guidelines, etc.) might be more feasible and easier to achieve, at least to some degree. Moreover, legally non-binding instruments address the problem of the burden of proof differently and, more importantly, open the scope of negotiations to ethical and historical considerations as well as the interests of the parties involved.

The legally non-binding 1998 Washington Principles, for example, do not shift the burden of proof onto the current possessor of a disputed item (as this would conflict with existing civil law provisions in many States); rather, they address the problem in a twofold manner. Firstly, they require research into provenance and access to research results (Principle 1-3).<sup>1208</sup> Along the same vein, the U.S. Native American Graves Protection and Repatriation Act (NAGPRA)<sup>1209</sup> oblige museums and federal agencies to inventory their collections (e.g. the cataloging of unassociated funerary objects, sacred objects and objects of cultural patrimony).<sup>1210</sup> Thus, research into provenance and access to the results of this research results constitute an important part of practical support for restitution and return.<sup>1211</sup> Secondly, they require that the general problem of proof be taken into account particularly with regards to the requirements pertaining to the evaluation of evidence. This commitment is expressly contained in Principle Four of the Washington Principles, which states that “considerations should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.” Interestingly, NAGPRA takes a similar approach, as it does not require the proof of legal title, but links the return of human remains and burial offerings to evidence of a specific cultural affiliation between the claimant and the requested cultural object.<sup>1212</sup> In this way, at least a theoretical attempt is

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<sup>1208</sup> See *supra* in detail, Chapter Three Section 3.5.

<sup>1209</sup> Native American Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601 of 16 November 1990. The Act prescribes the process of returning Native American Indian human remains as well as related cultural objects found on federal land to culturally affiliated tribes, full text of the Act available at: <http://www.nps.gov/history/nagpra/MANDATES/25USC3001etseq.htm> (accessed 23 September 2011).

<sup>1210</sup> See section 6 NAGPRA.

<sup>1211</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 236.

<sup>1212</sup> See section 3 NAGPRA.

made to confront the difficulties associated with evidence, which is partially caused by the clash between Western and indigenous ways of thinking.<sup>1213</sup>

These latter examples have demonstrated that several different means can be employed to overcome the legal obstacles associated with a *bona fide* purchase and the burden of proof. This is very important, particularly in those cases in which instruments allowing for legal proceedings are not available, and yet ethical and historical considerations call for appropriate solutions.<sup>1214</sup> Mitigating the *bona fide* objection and easing the burden of proof are important options in defining appropriate solutions. Since, however, the current possessor of the cultural object in question (e.g. a public museums – since the provisions of both the 1998 Washington Principles and NAGPRA do not apply to private entities) might be deprived of its possession if the return of the object is recommended, corrective measures are needed to mitigate the effects this has on the rights associated with *bona fide* protection under national law. Whereas the 1998 Washington Principles do not automatically grant restitution, but rather demand “just and fair” solutions in consideration of the particular circumstances of the confiscation, the provisions of NAGPRA require the evidence of a specific “cultural affiliation”. Both regulations, however, apply exclusively, on the one hand, to Nazi-confiscated art, and on the other, to human remains and sacred objects. In arguing for a broader framework for resolving restitution disputes, the interest-oriented approach taken by this thesis requires that corrective measures take into account the common interests of all parties in preservation, access, integrity and cooperation. Although common State practice might still be lacking in this respect, similar attempts to take the interests involved into account are mirrored in the provisions of both the 1995 UNIDROIT Convention<sup>1215</sup> as well as the 2006 ILA Principles.<sup>1216</sup>

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<sup>1213</sup> Cf. Schöenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 237.

<sup>1214</sup> See *supra*, Chapter Three, Section 5.

<sup>1215</sup> See Article 5, Section 3 of the 1995 UNIDROIT Convention that states: “The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:

(a) the physical preservation of the object or of its context;  
(b) the integrity of a complex object;  
(c) the preservation of information of, for example, a scientific or historical character;  
(d) the traditional or ritual use of the object by a tribal or indigenous community,  
or establishes that the object is of significant cultural importance for the requesting State.” For further details on the UNIDROIT Convention, see *supra*, Chapter Three, Section 2.4.

<sup>1216</sup> See *supra* Chapter Three, Section 4.2.

### 1.3 Lapse of Time and General Time Limits

In addition to the issues pertaining to *bona fide* purchase and the burden of proof, questions pertaining to the passage of time in terms of the validity of potential claims are of great importance, and form the third significant obstacle to restitution matters.<sup>1217</sup> Two different aspects of this problem can be identified: firstly, the legal issues pertaining to statutes of limitations as provided for in legal provisions; and secondly, the moral issues pertaining to the development of a general time limit that can be utilized as an absolute benchmark for restitution claims. While the legal issues associated with national statutes of limitations are more straightforwardly related to the application of the law, the moral issues are more complex. When it comes to the question of how to deal with the removal of cultural materials during periods of colonization and belligerent occupation, the issue of time limits is not just a matter of applying the law; it is rather a question of how far back in time it is necessary to extend the application of remedies to historical injustices through restitution and return. In short, this amounts to the question of whether there might be a feasible absolute benchmark for restitution claims. The subsequent section attempts to address both the legal and the moral aspects of time limits.

Legally, provisions on statute of limitations serve the general need for legal security between parties; simply speaking, each party must be certain of whether its current legal position might be contested by others. Thus, provisions that enact statutes of limitations exist in all legal systems. With regard to property rights, such limitations are usually developed in conjunction with regulations pertaining to *bona fide* acquisition and adverse possession – both of which usually have the effect of altering the status of ownership.<sup>1218</sup> German civil law, for example, provides that legal action pertaining to the recovery of property (*actio in rem*) may be undertaken within thirty years of the loss of that property; after this period, the original owner cannot initiate any legal action for the recovery of his property, regardless of the type of property in question. Whereas the 1970 UNESCO Convention does not provide any specific provisions on the nature of statute of limitations pertaining to the return of cultural objects, national legislations implementing the Convention (the Swiss and German implementation Acts, for example) establish an absolute time limit of thirty years, in order to

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<sup>1217</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 222.

<sup>1218</sup> Cf. *Ibid.*

harmonize the provisions of the 1970 UNESCO Convention with their national provisions.<sup>1219</sup> Similarly, Directive 93/7/EEC<sup>1220</sup> of the European Community establishes an absolute time limit of thirty years. In comparison, the relatively short time limit of one year for the collection of sufficient evidence in claims pertaining to the return of illicitly exported cultural objects in front of a foreign court seems rather inadequate.

The more generous provisions of the 1995 UNIDROIT Convention extend the relative time limit for the collection of evidence and bringing a claim to three years, starting from the time when the claimant knew about the location of the cultural object and the identity of its possessor; however the absolute time limit on placing claims is limited to fifty years from the time of the theft or the date of the illegal export.<sup>1221</sup> Interestingly, for stolen cultural objects that form “an integral part of an identified monument or archaeological site, or belonging to a public collection”, there is no absolute time limit.<sup>1222</sup> Since this obligation to return – as mentioned above – cannot be denied on the basis of either acquisition in good faith or adverse possession, this represents a major time extension, in comparison with the traditional regulations of many continental legal systems;<sup>1223</sup> as such, it has become one of the reasons that States oppose the ratification of the 1995 UNIDROIT Convention.<sup>1224</sup> Despite the relatively short time limit for bringing a claim (either one or three years), the restitution and return of cultural materials appear to be subject to a kind of general benchmark among national legal systems in the form of the thirty-year absolute limit, with UNIDROIT being an exception with its fifty-year time limit.<sup>1225</sup> In cases of stolen and illegally export cultural objects such clear statute of limitations are quite reasonable, and serve to balance the rights of the requesting party and the general need for legal security with respect to property rights. However, such time limits fail in cases when the removal of cultural materials occurs in

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<sup>1219</sup> Cf. provisions in the implementation Acts of Germany: Section 11 para 1 of the Federal Act on the Return of Cultural Property (German: Kulturgüterrückgabegesetz); and Switzerland: Art. 9 section 4 of the Federal Act on the International Transfer of Cultural Property (German: Kulturgütertransfergesetz), both available at: <http://www.unesco.org/culture/natlaws/index.php?&lng=en> (accessed 23 September 2011).

<sup>1220</sup> Council Directive 93/7/EEC of March 15, 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0007:EN:HTML> (accessed 23 September 2011).

<sup>1221</sup> See 1995 UNIDROIT Convention, Article 3, para. 3 on stolen cultural objects; Article 5, para. 5 on illegally exported cultural objects. For details on the UNIDROIT Convention, see *supra* Chapter Three, Section 4.

<sup>1222</sup> See 1995 UNIDROIT Convention, Article 3, para. 4.

<sup>1223</sup> Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 222.

<sup>1224</sup> See *supra* Chapter Three, Section 4.

<sup>1225</sup> In the same vein, Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 222.

conjunction with massive human rights violations. For this reason, the 1998 Washington Principles does not impose any time limits.

Turning now to the question of setting an absolute benchmark time limit for restitution and return, it is important to recall that the looting and plundering of cultural materials have taken place throughout history, and were originally assumed to be the privilege of the victorious party.<sup>1226</sup> Thus, any absolute benchmark of fifty, hundred or five hundred years might be challenged as being random. The following case illustrates the dilemma in attempting to establish a time limit benchmark for restitution. The four bronze Horses of Saint Mark in Venice were originally part of a monument depicting a *quadriga* (a four-horse carriage). Although their exact origin cannot clearly be traced, they are thought to have been made in Greece and brought to Rome at some point in antiquity and placed on the triumph arc of Trajan. In the early Byzantine period, they were taken to Constantinople and were displayed, along with the *quadriga*, at the Hippodrome of Constantinople for several centuries. In 1204, they were looted by Venetian forces in conjunction with the sacking of the capital of the Byzantine Empire during the Fourth Crusade. The fate of the rest of the *quadriga* is unknown. The horses were sent to Venice, where they were installed on the terrace of the facade of St Mark's Basilica in 1254. In 1797, they were removed to Paris by Napoleon, where they were used in the design of the *Arc de Triomphe du Carrousel* together with another *quadriga*. The justification for the removal offered by the French was that the horses had been looted from Constantinople by the Venetians, and therefore Venice was not their proper home. In 1815, however, the horses returned to Venice under terms set out at the treaty signed at the Congress of Vienna<sup>1227</sup>; they were subsequently removed again to Rome for safeguarding during WWI.<sup>1228</sup> While today they still stand – albeit for the sake of preservation as bronze replicas – over the entrance to the Basilica San Marco (the original statues are on display in the St Mark's Museum inside the basilica since the early 1980s). Against the backdrop of this case, no one would presumably be able to lay a serious claim for the return of the horses. However, if, the question were to arise, where would they go: to Greece, presumed the place of origin; to Rome, as the place of residence prior to Venice; or to Istanbul, from whence the Venetian looted the horses more than seven hundred years ago?

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<sup>1226</sup> Siehr, "International Art Trade and the Law," p. 109.

<sup>1227</sup> See *supra* Chapter Two, Section 2.

<sup>1228</sup> For further information, see Marilyn Perry, "Saint Mark's Trophies: Legend, Superstition, and Archaeology in Renaissance Venice," *Journal of the Warburg and Courtauld Institutes* 40(1977): pp. 27-49.

The case of the Horses of Saint Mark, like many others, demonstrates that a discussion centered on the unlawfulness of such removals usually leads nowhere.<sup>1229</sup> Either the removal of the cultural objects in question was lawful or at least not prohibited under the law applicable at the time, or – quite arguably – any wrongfulness has been obliterated by the passage of time. Therefore, an absolute benchmark for restitution claims would be counterproductive in addressing the question of ‘remedying historical injustice’. Nevertheless, if current possession is challenged by a claim for return, adequate reasoning pertaining to the injustice to be remedied must be taken into consideration, in order to substantiate the claim. Since such a claim would be made beyond any legal statute of limitations, a corrective measure is needed. A benchmark of an absolute time limit is – as illustrated – neither adequate nor feasible. However, such a corrective measure – once again – could be instigated through application of the approach taken by this thesis, which requires that the interests of the stakeholders involved are taken into account. Of equal importance to the obstacles discussed above,<sup>1230</sup> consideration of the interests at stake is much more solution-oriented than the establishment of any absolute time limit in restitution matters.

## **2. Soft Law Mechanisms: between Law and Policy**

The previous section has demonstrated that claimants in restitution disputes are frequently exposed to major obstacles that preclude any legal action. In the awareness of the non-applicability of legal instruments, States and international bodies have set out several legally non-binding instruments, such as recommendations, declarations and general principles in recent years.<sup>1231</sup> These soft law instruments have the advantage of being flexible by providing general grounds and conditions for negotiations under which a solution might be reached. Yet, the major disadvantage of soft law instruments is self-evident: they function on a non-legally binding basis; they do not contain directly enforceable rights; nor do they create a basis for criminal prosecution.<sup>1232</sup> Therefore, by definition, soft law instruments do not provide any provisions allowing for legal entitlement to claim for restitution and return. The following section will discuss the relationship between law and policy in restitution disputes on the basis of two different case scenarios: firstly, national legislation passed in order to resolve a particular restitution dispute that would have been more effectively embedded in a

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<sup>1229</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 15.

<sup>1230</sup> See *supra* Chapter Six, Section 1.

<sup>1231</sup> For details on soft law provisions, see *supra* Chapter Three, Sections 3.

<sup>1232</sup> Schönemberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 229.

broader policy framework; and, secondly, bilateral agreements that utilize general policy considerations pertaining to return, exchange and cooperation, which, in turn, circumvent the application of legal instruments that might have been available in legal proceedings.

The first scenario can be illustrated through the example of the French legislation passed in May 2010 ordering the return of sixteen tattooed and mummified Maori heads from the Natural History Museum of Rouen, France to New Zealand.<sup>1233</sup> As the Maori-heads had been classified as ‘French national patrimony’ and were therefore considered inalienable (*res extra commercium*), the City Council’s decision to return the Maori heads was blocked by the French Ministry of Culture and subsequently challenged by French courts. In the end, the return was only made possible because the French parliament passed a specific law overruling the court’s decision and ordering restitution to New Zealand.<sup>1234</sup> Although the legal term employed by the French Maori law was ‘restitution’, the legally correct term would have been ‘return’, since no legal obligation pertaining to restitution was given in that case. It is, however, questionable as to whether it is the role of the legislative body (the parliament) to resolve specific restitution disputes. This method obviates the need to debate the general merits of cultural heritage disputes and to strike a balance between competing interests, when, as is most often the case, there are admittedly legitimate arguments on both sides.<sup>1235</sup> One might argue that it is the task of a generalized piece of legislation to cover a variety of restitution cases, or at least a limited set of similar cases, rather legislation on a case-by-case basis. Alternatively, the task could have been achieved by a law amending the provisions regarding the inalienability of French patrimony. Such a law might have been more appropriate insofar as it would have provide a general (policy) framework that could deal either with all cultural materials, with the specific category of human remains, or the specific issue of Maori heads (including ones outside of Rouen).

The second scenario includes restitution disputes in which legal instruments might have been available, but are intentionally not deployed by the parties – either because both

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<sup>1233</sup> Law No. 2010-501 of 18 May 2010: “Loi visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections”, NOR: MCCX0914997L, legislation available at: <http://www.legifrance.gouv.fr> (accessed 23 September 2011).

<sup>1234</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 9. For more details on the case see also: BBC News, “France votes to return Maori heads to New Zealand”, 5 May 2010, available at: <http://news.bbc.co.uk/2/hi/8661231.stm> (accessed 23. September 2011).

<sup>1235</sup> *Ibid.*: p. 11.

parties actively chose to forgo the use of legal instruments, or because one party insisted that legal instruments not be utilized. Although legal proceedings – either on grounds of international treaty law and their national implementing acts or national criminal and civil grounds – might be applicable, parties are rather reluctant to use them in the resolution of restitution disputes for a variety of reasons. Primarily, the burden of costly and long-lasting court litigations with uncertain outcomes generally deters parties from taking legal action. While this might account for many international disputes in various areas of the law, the reluctance of claimants to engage in legal proceedings in restitution disputes is generally much greater, since the circumstances of the appropriation often remain rather unclear, and the legal obstacles of non-retroactivity and lapse of time only add to this reluctance. Moreover, political and diplomatic issues might deter national governments from taking risky legal actions with uncertain outcomes. Thus, the advantage of avoiding the length and the excessive expenses associated with court trials are readily apparent. Prominent examples are the bilateral agreements between Italy and the major U.S. museums.<sup>1236</sup> As previously mentioned, Italy had acquired compelling evidence that several of the objects held by the U.S. museums were of quite dubious provenance – most likely obtained from illegal excavations in Southern Italy in the 1970s and 1980s. Furthermore, civil and criminal charges were initially made against the former curator of the Getty Museum (Marion True) in order to place political pressure on the Getty Trust. Whereas the civil charges against Marion True were later dropped as part of the bilateral agreement, the criminal charges against her were dismissed – officially due to lapse of time.<sup>1237</sup> It is, however, likely that dropping the criminal charges was informally agreed upon in the bilateral agreement. Quite surprisingly, the U.S.-Italian agreements did not refer to any legal instruments and thus contained no ‘choice of law’: the lack of such a clause seems unusual in such rather sophisticated international agreements.<sup>1238</sup> As posited by Cornu and Renold, the deliberate silence most likely indicates the failure by the parties to agree on that legal point.<sup>1239</sup>

In summarizing, it can be noted that although legal instruments were at hand in the example of the U.S.-Italian agreements, legal proceedings were not utilized in making this

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<sup>1236</sup> For details on the bilateral agreements, see *supra* Chapter Three, Section 2.10.

<sup>1237</sup> For details see CBC News, “Antiquities case vs. ex-Getty curator dismissed”, 13 October 2010, available at: <http://www.cbc.ca/arts/artdesign/story/2010/10/13/antiquities-looted-getty-true-marion.html> (accessed 23 September 2011).

<sup>1238</sup> Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 20.

<sup>1239</sup> *Ibid.*

claim, nor were any reference made in the bilateral agreements with regard to the legal classification of the removals, which had most likely been exported illicitly and purchased under dubious circumstances. In these particular cases, Italy abstained from legal action and relied, quite successfully, on its diplomatic channels and the political pressure used.<sup>1240</sup> In contrast, case-by-case legislation (as illustrated through the example of the return of the Maori heads held by the city of Rouen) might resolve individual cases, but similar cases remain unaffected and unresolved. More importantly, the case-by-case approach fails to contribute to the merits of the overall debate on restitution and return, and fails to provide a broader framework of legal instruments.<sup>1241</sup> Nevertheless, both contribute to the total number of restitution disputes resolved; more important in this context, both illustrate the need for a combination of law and policy issues in the realm of soft law mechanisms: that is general principles that incorporate the common interests of all parties in preservation, access, integrity and cooperation. Despite the fact that it is neither beneficial in political terms to pass legislative acts for the resolution of individual restitution disputes (as in the French Maori case), nor beneficial in legal terms to omit any legal reference in the solution reached (as in the case of the U.S.-Italian agreements), both cases provide examples of problem-solving mechanisms in restitution disputes.

### **3. Complementary and Alternative Mechanisms beyond Restitution**

The previous chapters have shown that the current context of the restitution debate is changing in terms of legal and moral grounds, in terms of the recognition of various stakeholders and their interests, and in terms of the recognition of common interests in cultural heritage. The question now is how these recent developments in international law might impact the resolution of restitution dispute. Thus, this section will illustrate that – despite all obstacles that might impede alternative solutions in restitution disputes – various complementary and alternative mechanisms to the simple (barren) return of cultural objects are at hand. It will be demonstrated that through alternative mechanisms aimed at resolving restitution disputes in a non-adversarial and cooperative manner, the ‘common interests’ in cultural heritage can be best served. There is a great need for such alternative mechanisms, since simply saying that a certain object is of ‘importance for mankind’ and thus does not exclusively belong to a State or one nation, leaves the question of custody unanswered. While

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<sup>1240</sup> For details on the analysis of unequal bargaining power, see *supra* Chapter Four, Section 1.3.

<sup>1241</sup> In the same vein, Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 11.

the return of cultural materials might satisfy a set of interests in some cases, in others, complementary and alternative mechanisms might foster a whole new set of interests.

Moreover, alternative mechanisms might avoid long-lasting judicial proceedings and excessive expenses caused thereby.<sup>1242</sup> It will be shown that there are various solutions in a wide range of alternative solutions. Within this win-set, the question of whether the object is returned or not loses importance, since reflections on the interests of the parties involved as well as on the possible conditions of alternative arrangements outweigh the question of return. Thus, returns might be made on a voluntary basis, associated with additional considerations, such as transport, reconstruction and restoration costs<sup>1243</sup>, or might be subject to certain conditions with regard to exclusive or shared ownership rights, the exchange of other cultural materials, the fabrication of replicas, and/or further scientific or technical cooperation between the parties involved.

### 3.1 Voluntary Return

The term ‘voluntary return’ or ‘informal return’ indicates that the restoration of cultural materials takes place under three premises: firstly, the return is made without the request of financial compensation (as provided for example in the case of *bona fide* purchase); secondly, the return is conducted without any formal (legal) procedure; and thirdly, the return was not facilitated by the mediation of a third party.<sup>1244</sup> Therefore, voluntary return takes place most often when the parties involved in a dispute deal directly with each other.<sup>1245</sup> However, voluntary returns are still controversial, since some fear these initiatives may create legal precedence and would empty museums’ collections.<sup>1246</sup> Despite these concerns, several cases, in which the voluntary return of cultural objects has been undertaken, have occurred in recent years.<sup>1247</sup>

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<sup>1242</sup> In the same vein, *Ibid.*: p. 13.

<sup>1243</sup> See *supra* Chapter Three, Section 2.9.1: In the case of the return of the Axum obelisk to Ethiopia, Italy covered the expenses of the return, restoration and erection of the obelisk.

<sup>1244</sup> Cf. Schönenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung*, p. 275.

<sup>1245</sup> ———, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 249.

<sup>1246</sup> Such concerns, for example, have been expressed in the 2002 *Declaration on the Importance and Value of Universal Museums*, signed by major European and North-American Museums, stating: “We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era.”; reprinted in ICOM News No. 1 (2004), available at: [http://icom.museum/pdf/E\\_news2004/p4\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p4_2004-1.pdf) (accessed 23 September 2011).

<sup>1247</sup> Cf. Siehr, “Vereinheitlichung Des Rechts Der Kulturgüter in Europa?,” p. 816.

The return of the ‘Lakota Ghost Dance Shirt’ is an example of such voluntary returns.<sup>1248</sup> In 1999, the Kelvingrove Museum in Glasgow, Scotland, returned a shirt to the Wounded Knee Survivors’ Association (hereinafter: WKSA) in South Dakota (U.S.) that is thought to have been taken from a warrior’s corpse after the U.S. Army massacre of two Lakota tribes of the Sioux Nation at Wounded Knee in 1890. The ‘Ghost Dance Movement’, which preceded the massacre, was based on the belief that the ritual use of these shirts would result in the invulnerability of the Lakota Indians.<sup>1249</sup> Only thirteen months after the massacre of Wounded Knee, the Glasgow Museum purchased some items from the Buffalo Bill’s Wild West Show that are thought to have been obtained after the massacre (the traveling production has displayed these items as articles of virtue). Other items, such as the ‘Ghost Dance Shirt,’ had been given as bonus items as part of the original purchase. Since 1892, the ‘Ghost Dance Shirt’ had been on display in the Glasgow museum. In 1995, however, the WKSA learned about the shirt and requested its return based on the argument that the removal of the shirt from the warrior’s corpse contradicted the traditions and rituals of the Lakota, as traditional burial rites require a warrior to be fully dressed. The Glasgow Museum refused the request, arguing that it has received the shirt in good faith and that the ‘Ghost Dance Shirt’ is the sole example of its kind in Great Britain or even in Europe.<sup>1250</sup> Rejecting this argument, the WKSA filed an objection with the Glasgow City Council. Even though subsequent research by the ‘Repatriation Working Group’ of the Council demonstrated that the museum had acted in good faith, the Glasgow City Council decided to solicit the opinion of the city taxpayers and to debate the return of the requested shirt at a public hearing held in November 1998. Following the hearing, during which public opinion strongly supported the return of the shirt, the City Council voted to return the object to the WKSA. As part of the decision, the Council emphasized the fact that it did not act out of legal obligation, but rather on the basis of ethical and humanitarian considerations.<sup>1251</sup>

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<sup>1248</sup> Memorandum regarding the return of the Lakota Ghost Dance Shirt, submitted by Glasgow City Council to the Select Committee on Culture, Media and Sport, reprinted in *Art, Antiquity and Law*, vol. 15 (2000), p.371.

<sup>1249</sup> Over two-hundred Lakota warriors died at the 1890 massacre at Wounded Knee.

<sup>1250</sup> For the detailed argumentation, see the Memorandum submitted by the Glasgow City Council (above n. 1248) and the general Memorandum submitted by the Museums Standing Advisory Group on Repatriation and Related Cultural Property Issues to the Select Committee on Culture, Media and Sport, Minutes of Evidence, June 6, 2000, available at: <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmcmums/371/0051007.htm> (accessed 23 September 2011).

<sup>1251</sup> Schönenberger, *Restitution Von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse - Entwicklung*, p. 16.

Following the Council's decision, the return process took almost a year, during which time international export licenses were approved and arrangements were made for the transport and associated ceremonies. The WKSA Association made a commitment to guarantee the preservation of and the access to the 'Ghost Dance Shirt' in a museum commemorating the 'Ghost Dance Movement'.<sup>1252</sup> The nature of the return facilitated the development of an ongoing relationship between the WKSA and the museum in Glasgow: the museum was recently given a replica of the 'Ghost Dance Shirt' made by a Lakota descendant.<sup>1253</sup> As a consequence of the return process, the Glasgow City Council developed their own 'return policy' in 2000, which takes three key elements into account: firstly, whether the requesters truly represent their group; secondly, the cultural and religious importance of the objects for their community; and, thirdly, the conditions for conservation in the case of return.<sup>1254</sup> Applying those criteria, the Glasgow City Council has denied the return in other cases, including a later claim made by the WKSA, and a claim made by Benin for bronzes and ivories held in Glasgow. In both cases, the Council argued that the value of the requested items to the museums outweighed the importance of their return.

As demonstrated in the case of the 'Lakota Ghost Dance Shirt', voluntary return can result in a commitment by the acquiring party to guarantee the preservation of and access to cultural materials. Moreover, returns of this type can facilitate the establishment of cooperation and exchange between previously antagonistic parties – such as by through the creation of replicas for the returning party in exchange for the original. Within the last years, claims for restitution and return made by indigenous peoples have been addressed in various ways; however, cooperative solutions – similar to the one in the 'Lakota Ghost Dance Shirt' case – are preferred by States with large indigenous populations, as illustrated by the outcomes of *intra*-State agreements on the return of cultural materials (and human remains) to indigenous peoples in Canada, Australia, New Zealand, and the United States.<sup>1255</sup> The cooperative solution approach has often fostered fundamental change in the policies of museums and art-holding institutions, resulting even in the reorganization of museum management and policies in order to include indigenous peoples in museum activities, such as

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<sup>1252</sup> Ibid.

<sup>1253</sup> Cf. Memorandum submitted by the Museums Standing Advisory Group on Repatriation and Related Cultural Property Issues (March 2000); available at: [www.publication.parliament.uk](http://www.publication.parliament.uk) (accessed 23 September 2011).

<sup>1254</sup> Memorandum submitted by Glasgow City Council to the Select Committee on Culture, Media and Sport, reprinted in 5(4) *Art, Antiquity and Law (AAL)*, 15 (2000), p.371.

<sup>1255</sup> For details on intra-and inter-State agreements, see *supra* Chapter Three, Section 2.9.1.

the presentation of displays, access and conservation of cultural items, and general museum policy matters.

Moreover, the recognition of ethical and historical considerations in restitution matters might broaden the scope of solutions, in a way that frequently satisfies the interests of the parties involved to a much higher degree than could be achieved through simple return.<sup>1256</sup> Such cooperative solutions have sometimes even boosted tribal morale and a strengthened cultural identity in requesting indigenous communities which had previously begun to wane.<sup>1257</sup> In other cases, a cooperative solution approach might lead to the outcome, in which the requesting party even consents to the disposition of the item in question by the holding museum, because of common concerns regarding preservation. Since claims for restitution of cultural materials are repeatedly based on the fact that the cultural rights of the claiming party have been largely ignored (either in the past or present),<sup>1258</sup> the acknowledgment of these rights through a cooperative solution approach is an essential element in the resolution of restitution disputes, given the nature of the interests involved.

### **3.2 Temporary Loan Agreements, Replicas and the Exchange of Objects**

A viable and attractive alternative to the return of cultural materials is the endorsement of loan agreements of either a long-term or short term nature, depending on the preferences of the parties. Such agreements – involving loan, barter, simple exchange or the fabrication of replicas – might cooperatively solve restitution claims while fostering two of the general interests discussed in Chapter Five: access and preservation. The interest of access is served because public display is one of the main purposes of loan agreements; the interest in preservation is served because loan agreements frequently include arrangements concerning the physical preservation and restoration of the object in exchange for the loan. Such arrangements have the advantage of being flexible, as they can be adjusted in terms of both duration and supplementary provisions, depending on the parties' capacities, interests and needs.

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<sup>1256</sup> Cf. Maier, "Overcoming the Past? Narrative and Negotiation, Remembering, and Reparation: Issues at the Interface of History and the Law," p. 297.

<sup>1257</sup> Cf. with reference to the return of objects to the North-American Zuni tribe: Mastalir, "A Proposal for Protecting The "Cultural" And "Property" Aspects of Cultural Property under International Law," p. 1039.

<sup>1258</sup> Nason, "Beyond Repatriation: Cultural Policy and Practice for the Twenty-First Century," p. 28.

When considering complementary and alternative solutions, the question of when it is justifiable to retain a certain object should constantly be reconsidered. Whereas certain unique objects should be preserved for future generations, other items that might have an emotional or a ritual importance to a living tribe or minority should certainly be returned and left to them. This is in particular the case when a plausible claim has been made, several dozen similar objects are known to be in existence, and the object has been carefully and extensively studied, registered, and photographed. Under these (or similar) conditions, a replica might prove adequate in fulfilling the same function as the original in ‘telling the story’ of the culture and/or peoples it represents. An example in which the historical significance of the object was complemented by a new chapter in that history is the case of the ‘Lakota Ghost Dance Shirt’: the original was returned to the claimant – on the basis of a voluntary return – but a replica was given in exchange as an act of gratitude, which provided the foundation for an ongoing relation between the museum and the Indian tribe.<sup>1259</sup> In a similar case in 2006, the Stockholm Ethnographic Museum required the requesting Haisla Frist Nation in British Columbia (Canada) to make a copy of the requested totem pole as part of the terms of the return; the tribe agreed, and the Swedish museum now exhibits the replica in place of the original.<sup>1260</sup>

In a different scenario, a restitution dispute was not solved through return but through the arrangement of a loan agreement between the two parties involved. In 2004 Nigeria claimed the return of three Nok and Sokoto statuettes, which had been illegally exported from Nigeria and acquired by the French State from a Belgian dealer in 1998. Nigeria based its claim for return on the 1970 UNESCO Convention, ratified by France in 1997. The acquisition of the statuettes is not unlawful under French law if the possessor has acted in good faith;<sup>1261</sup> Nigeria, however, argued that under Nigerian law no antiquities may be exported from the country without the permission of the ‘National Commission for Museums and Monuments’ and that the three objects were on the ICOM Red List of African Cultural Objects at Risk. The claim by the Nigeria government, however, was rejected by the French Court of Appeal because the 1970 UNESCO Convention<sup>1262</sup> is non-self-executing and therefore not directly applicable, since no implementing legislation had been enacted by the

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<sup>1259</sup> See case study on voluntary return, *supra* Chapter Six, Section 3.1.

<sup>1260</sup> Paterson, "Resolving Material Culture Disputes: Human Rights, Property Rights, and Crimes against Humanity," p. 381.

<sup>1261</sup> Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 14.

<sup>1262</sup> For details on the 1970 UNESCO Convention, see *supra* Chapter Three, Section 2.2.

French parliament.<sup>1263</sup> Since this outcome was unsatisfying, both parties entered into negotiations upon the intervention of ICOM;<sup>1264</sup> these negotiations precluded recourse to litigation. As a result, France and Nigeria completed in 2006 a joint agreement that both acknowledged Nigeria's ownership of the objects, but simultaneously granted a renewable twenty-five year loan to the Quai Branly Museum in Paris.<sup>1265</sup> This pragmatic approach might be unsatisfying in legal terms; however, it still guarantees, on the one hand, preservation, access and research in a public museum in France for a period of twenty-five years and, on the other, Nigeria's legal title to its cultural property.

With regard to the international exchange of cultural objects, UNESCO contemplated in its *Recommendation Concerning the International Exchange of Cultural Property*<sup>1266</sup> the inclusion of provisions to encourage the temporary exchange and barter of cultural objects as early as 1976. Over the past thirty years, however, barter has not played a significant role in restitution cases, mainly due to legal or political constraints, or simply the lack of interest among museums. Long-term loans, in turn, have quite frequently been negotiated and set out in joint agreements. Examples of successfully negotiated restitution disputes that provide for temporary loan provisions include the bilateral agreement between the National Library of France and the Republic of Korea reached in May 2011 pertaining to historic manuscripts,<sup>1267</sup> and the bilateral agreements between Italy and major U.S. museums concluded in 2006-2008, discussed above.<sup>1268</sup> The latter agreements are particularly remarkable because of their twofold nature: they resulted in the return of most of the requested artifacts to Italy – but only in exchange for temporary and periodic loans to the U.S. museums. The agreement with the Metropolitan Museum of Art, for example, outlines the return of the famous Euphronios Krater to Italy, but also provides that “cultural materials of equal beauty and historical and

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<sup>1263</sup> The Federal Republic of Nigeria vs. Alain de Montbrison, Paris Court of Appeal, judgment of 5 April 2004, upheld by the Court of Cassation, judgment of 20 September 2006; cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 2.

<sup>1264</sup> Kwame Opoku, Revisiting Looted Nigerian Terracotta Sculptures in Louvre/Musée du Quai Branly, Paris, 14 July 2011, available at: <http://www.myweku.com/2011/07/revisiting-looted-nigerian-nok-terracotta-sculptures-in-louvre-musee-du-quai-branly-paris/> (accessed 23 September 2011).

<sup>1265</sup> Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 3.

<sup>1266</sup> UNESCO Recommendation Concerning the International Exchange of Cultural Property, 26 November 1976, See; [http://www.unesco.org/culture/laws/exchange/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/exchange/html_eng/page1.shtml) (accessed 23 September 2011).

<sup>1267</sup> The so-called 'Korean manuscripts' include 75 volumes of illustrated manuals on royal protocol written during the Chosun dynasty (1392-1910). French troops appropriated the manuscripts in 1866, which subsequently were held by the National Library of France in Paris. The legal term of the bilateral loan agreement is five years and is renewable indefinitely, see: Secretariat Report (April 2011) to the 17th session of the Committee (ICPRCP), held on 30 June-1 July 2011 in Paris, CLT-2011/CONF.208/COM.17/2, p. 1, available at: <http://unesdoc.unesco.org/images/0019/001927/192728e.pdf> (accessed 23 September 2011).

<sup>1268</sup> For details, see *supra* Chapter Three, Section 2.10.

cultural significance to that of the Euphronios Krater” will be made available to the Metropolitan Museum for a four-year loan.<sup>1269</sup> The agreement goes on to list in detail specific objects that are to be lent to the Metropolitan Museum as part of the bilateral arrangements. Furthermore, the Italian authorities promise future loans, in particular of archeological objects found during missions financed by the museum.<sup>1270</sup> The term of the agreement is long – it is scheduled to remain in force for forty years.<sup>1271</sup> Although the agreements with the other U.S. museums have not been made public, it can be assumed that the agreements with the other U.S. museums contain similar provisions.<sup>1272</sup>

Frequently the practice of barter, loan and exchange of cultural objects is hampered by national cultural patrimony laws, which may prevent loans that last longer than a few months or years. In contrast to the minimal international impact of barter and long-term exchange, short-term loans on the occasion of special exhibitions have proven to be an immensely popular forum for international exchange of cultural objects. However, loaned works come with substantial limitations in terms of legal provisions, costs, concerns by curators and sponsors, international politics which can restrict loan availability, and, of course, the condition of a work of art (which may preclude any or frequent travel).<sup>1273</sup> In addition, States and museums are often reluctant to engage in loan programs, fearing the non-return of the loaned objects resulting from legal and political uncertainties. In order to address this concern, legal provisions on the immunity from seizure of cultural objects are often provided in order to legally enforce guarantees for the return of loaned objects to the lender. Such provisions are increasingly introduced into national laws, although the specific provisions vary from State to State.<sup>1274</sup> On the international level, the UN-Convention on Jurisdictional Immunities of States and Their Property<sup>1275</sup> provides in Article 21, Section 1(e) that “no post-judgment measures of constraint, such as attachment, arrest or execution may be taken against property of a State” if that property, among others, forms “part of an exhibition of objects of scientific,

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<sup>1269</sup> The Agreement between Italy and the New York Metropolitan Museum of Art, concluded 21 February 2006, has been reprinted in: *International Journal of Cultural Property* (2006) 13, p. 427-434; See there Article 4 (1).

<sup>1270</sup> See Article 7 of the agreement.

<sup>1271</sup> See Article 8 (1) of the agreement.

<sup>1272</sup> For details on bilateral agreements between States and non-State-actors, see *supra* Chapter Three, Section 2.10.

<sup>1273</sup> Cf. Hallman, "Museums and Cultural Property: A Retreat from the Internationalist Approach," p. 214.

<sup>1274</sup> Overview of national provisions on the immunity from seizure: cf. Kerstin Asmuss and Robert Peters, "Freies Geleit Von Kulturgut Im Internationalen Leihverkehr - Rechtsvergleichende Und Völkerrechtliche Überlegungen," in *Kulturgüterschutz, Kunstrecht, Kulturrecht - Festschrift Für Kurt Siehr Zum 75. Geburtstag*, ed. Kerstin Odendahl and Peter Johannes Weber (2010), pp. 101.

<sup>1275</sup> UNGA Resolution A/RES/59/38, adopted 2 December 2004.

cultural or historical interest and is not placed or intended to be placed on sale”. This Convention could help ease the discomfort of States in making use of international loan agreements, out of fear of seizure of the cultural objects while on temporary loan abroad; however, this Convention has not yet entered into force, due to failure to meet ratification thresholds.<sup>1276</sup>

### 3.3 Permanent Loan Agreements and Return without Transfer of Ownership

Despite the variety of possible alternative solutions that might be available in resolving restitution disputes, some parties claiming for restitution and return might not be satisfied without the actual return of the object in question. In certain cases, the ‘physical presence’ of the object claimed for might be desired for ritual purposes, or because of the ascetic value of viewing the original (rather than a replica) in a certain context or location. Moreover, the physical presence of the claimed object might be desired in order to reunite the original component parts of an artifact; to demonstrate a certain cultural identity linked to the object; or for the purposes of training and inspiration of artists and craftsmen in the cultural context, in which the object in question was created. These needs, however, do not necessarily involve the transfer of the title of ownership.<sup>1277</sup>

Therefore, separating the question of return from the question of title and ownership might provide a practical solution in several restitution disputes. Such a pragmatic approach has proven to be quite an effective tool in resolving these disputes and is frequently used by parties involved in negotiations pertaining the restitution and return.<sup>1278</sup> Examples of the use of this ‘pragmatic solution’ include, among many others, the “donation” of the *Makondé mask* from the Barbier-Müller Museum of Geneva to Tanzania in 2010,<sup>1279</sup> or the “permanent loan” of a fragment of the *Great Zimbabwe bird* from the Ethnological Museum in Berlin to Zimbabwe in 2003.<sup>1280</sup> The situation involving the permanent loan of the stone-carved *Great*

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<sup>1276</sup> Article 30 of the Convention requires thirty States Parties, currently eleven States Parties; see for status of ratifications: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-13&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en). (accessed 23 September 2011).

<sup>1277</sup> Cf. Prott and O’Keefe, *Law and the Cultural Heritage*, p. 877.

<sup>1278</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 3.

<sup>1279</sup> See *supra* Chapter Three, Section 3.2. The case of the *Makondé mask* was brought before the UNESCO Intergovernmental Committee (ICPRCP) in 2006 and resolved through a bilateral agreement in May 2010, see for further information: Press File of ICOM, Paris, 10 May 2010 on the Agreement for the donation of the Makonde Mask from the Barbier-Müller Museum of Geneva to the National Museum of Tanzania, [http://icom.museum/press/MM\\_PressFile\\_eng.pdf](http://icom.museum/press/MM_PressFile_eng.pdf) (accessed 23 September 2011).

<sup>1280</sup> Cf. with details: Dawson Munjeri, "The Reunification of a National Symbol," *UNESCO Museum International* 61, no. No. 241-242 (2009): p. 16.

*Zimbabwe bird* is particularly interesting, because the returned fragment of the bird (namely the pedestal of the sculpture) has been returned twice: taken in 1906 by the British colonizer Cecil Rhodes, the pedestal made its way into the hands of a German missionary who sold it to the Ethnological Museum in Berlin in 1907. In 1945, the fragment was taken by the Russian army as spoils of war<sup>1281</sup> and deposited in the Museum of Ethnography and Anthropology in St. Petersburg. Even though an agreement was reached between the Soviet Union and Eastern Germany for returning the fragment in the 1970s, the pedestal was not returned to Berlin until 1992. In 1999, however, the Berlin Museum agreed to restore the fragment to Zimbabwe on the condition that it is given “on permanent loan” in order to avoid establishing a precedence that would indicate an obligation to return such artifacts. Zimbabwe agreed, and the fragment returned in 2002. The fragment was officially re-united with the upper part of the bird sculpture in May 2003. Other stone-carved birds remain at Cecil Rhodes’s former home in Cape Town, South Africa and negotiations pertaining to their eventual fate have yet to be undertaken.<sup>1282</sup>

Such practical solutions, which leave the question of property and ownership aside, may solve several difficulties of both legal and political nature. First of all, the legal transfer of ownership might conflict with domestic law provisions of the State in which the object claimed for is located. Transfer of ownership may require official authorization and is sometimes simply prohibited.<sup>1283</sup> Generally, the power to dispose of property lies with the owner. If, for example, the object in question is in private hands, *bona fide* purchase provisions or the statute of limitations might inhibit any action against the current possessor.<sup>1284</sup> Moreover, constitutional guarantees pertaining to private property rights prohibit States from simply expropriate the current possessor. If, in turn, the object is in the hands of a private or public museum due to donation or purchase, any removal from the current collection is subject to the statutes of that institution, which grants few if any rights of disposition to the board of trustees. This is, for example, the case as regards the statutes of the British Museum,<sup>1285</sup> and other national museums in the United Kingdom. If, however, the object in question is classified as public domain or ‘national patrimony’ and thus inalienable

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<sup>1281</sup> For further details on so-called ‘trophy art’, see *supra* Chapter Two, Section 2.

<sup>1282</sup> See: BBC news, “Zimbabwe bird ‘flies’ home”, 14 May 2003, available at: <http://news.bbc.co.uk/2/hi/africa/3028589.stm> (accessed 23 September 2011).

<sup>1283</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 8.

<sup>1284</sup> The problem of *bona fide* purchase provisions was addressed by the 1995 UNIDROIT Convention; for details on the 1995 UNIDROIT Convention, see *supra* Chapter Three, Section 2.4.

<sup>1285</sup> British Museum Act of 1963.

by national law, transfer of ownership may not be possible or only by a decision granting an exception to the inalienability of that particular object.<sup>1286</sup> Such an exception was made in France in May 2010 in the case of the return of sixteen Maori heads through the passage of legislation specific to that particular case.<sup>1287</sup> The tattooed and mummified Maori warrior heads had become part of the collection of the Natural History Museum in Rouen in 1875 by private donation during the trade boom in the late 19th century. The decision of the Rouen Museum and the Rouen City Council to return the Maori heads to New Zealand was dismissed by the Administrative Tribunal of Rouen in October 2007 as it was challenged by the French Ministry of Culture. The tribunal argued that the return would be an “unjustified damage to French national heritage”. In May 2010, however, the tribunal’s decision was overruled by the French National Assembly passing a specific law to return the sixteen Maori heads from Rouen to New Zealand.<sup>1288</sup>

In addition, States and museums do not want to take the risk of establishing precedents that might indicate a legal obligation to the restitution and return of cultural material, as shown in the case of the Zimbabwe bird. If, however, the question of legal ownership is excluded by returning the requested objects through ‘donations’ or ‘permanent loans’, the issue of legal precedence – a grave concern of most States when they are confronted with restitution claims – can be circumvented. Moreover, such agreements do not interfere – or interfere less – with the private domestic as well as constitutional provisions of the holding State.

In contrast to the difficult question of legal title and ownership, the Western concept of “ownership” simply does not exist in several non-Western cultures. Indigenous people, like the Australian Aboriginals, to give only one example, regard themselves as having been entrusted with the land by their spirit ancestors – they belong to the land and the culture, rather than the land and culture to them. Thus, the right to exploit, the right to alienate, and the right to exclude others – the three cardinal aspects of Common Law ownership in Western

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<sup>1286</sup> Cf. Cornu and Renold, "New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution," p. 9.

<sup>1287</sup> See for further information: BBC News, “France votes to return Maori heads to New Zealand”, 5 May 2010, available at: <http://news.bbc.co.uk/2/hi/8661231.stm> (accessed 23 September 2011).

<sup>1288</sup> Law No. 2010-501 of 18 May 2010: “Loi visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections”, NOR: MCCX0914997L, legislation available at: <http://www.legifrance.gouv.fr> (accessed 23 September 2011).

law – do not exist in other legal traditions.<sup>1289</sup> In the same vein, cultural materials are regarded as belonging to the tribe, community, or people, given by the ancestors – cannot belong to an individual within the framework of property rights. This understanding, however, is at least partially recognized by Western legal traditions as well, since certain objects are classified as national patrimony or ‘*trésors nationaux*’ – thus being inalienable and associated with ‘joint ownership’ in its broadest sense of a (Western) nation State.<sup>1290</sup>

The polar opposite option of transferring not the object but the legal title is yet another possible solution that might be acceptable in other cases of claimed cultural materials. In this situation, the cultural object in question remains where it has been for a certain period of time – for the sake of preservation, scientific research, public access, or other interests of the parties involved. In turn, title of ownership is transferred to the claiming party. Thus, the both parties recognize the legal title of the claimant. Although the legal title without the actual possession of the object might be of less importance to some claimants or cultures, as presumably in the case of the Aborigines, transfer of ownership functions as legal recognition of the “rightful owners” who were deprived of their property through inappropriate removal. This approach, for example, was taken in the abovementioned case between Nigeria and France, in which France recognized Nigeria’s ownership of three Nok and Sokoto terracotta statuettes.<sup>1291</sup> Recalling the legal categorization of claims for restitution and return defined in the beginning of this work,<sup>1292</sup> the latter solution might particularly work in those cases in which the claimant – States, individuals, indigenous or ethnic minority groups – request restitution based on the fact that their rights to and perspectives on their cultural heritage have been largely ignored in the initial removal of the object.<sup>1293</sup> Moreover, this type of solution might be especially attractive to indigenous and ethnic minority groups that might struggle with providing appropriate preservation facilities. If legal property rights are recognized, the institution currently holding the object in question can do a great deal of good, in terms of recognition of rights, physical and cultural preservation, as well as returning the ‘control’ over the historic narrative to the creators of the particular cultural object. If the people, group, or community believe that the recognition of their cultural rights is sufficient, the participation in the fate of the object (e.g. guaranteeing privileged access or specific rights by shared

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<sup>1289</sup> Cf. Prott and O’Keefe, *Law and the Cultural Heritage*, p. 877.

<sup>1290</sup> Cf. for example the French *Code du patrimoine*, L 1 CP, available at: [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr) (accessed 23 September 2011).

<sup>1291</sup> For details, see *supra* Chapter Six, Section 3.2.

<sup>1292</sup> For legal categorization of claims, see *supra* Chapter Two, Section 4.

<sup>1293</sup> For details on the symbolic value and the recognition of rights, see *supra* Chapter Five, Section 2.3.

management, shareholding in financial profits etc.), decision to leave the object in the physical possession of its currently holding institution might be in the interest of all parties.

### **3.4 Joint Custody and Shared Management, Transfer of Expertise**

The previous sections of this chapter have demonstrated that several alternative mechanisms to resolve restitution disputes are at hand: they include voluntary return, temporary or permanent loans, the fabrication of replicas or the exchange of cultural materials. Excluding the question of ownership (as discussed in the *Makondé mask* and the *Great Zimbabwe bird* case) can also assist the parties in reaching a mutual agreement. However, in cases in which the concept of separating the question of return from the question of ownership rights is not a viable option, joint custody through shared or fractional ownership might provide a feasible solution. The option of joint custody might be particularly interesting in those cases in which the question of ‘rightful ownership’ cannot be answered for various reasons. The reason for this legal uncertainty may be unclear provenance, or lack of legal evidence on the side of the claiming party. In terms of the analogy to child-custody determination made earlier in this thesis,<sup>1294</sup> joint custody of cultural objects may also prove mutually beneficial in some circumstances.

The advantages of joint custody include benefits gained through mutual cooperation and exchange of preservative and cultural expertise. This is especially true, if expertise concerning the physical preservation (coming from the ‘father’, namely the Western museum) and the cultural preservation (coming from the ‘mother’, namely the source country) of a cultural object can be synchronized. In practical terms: upon the consent of the parties involved, the claiming party could have the right to determine the ritually appropriate safekeeping as well as the care and use of the particular object, should the claimed object remain in its current location.<sup>1295</sup> Special conditions, such as preferential access, prior consent regarding changes to preservation techniques deployed by holding institutions, or consent to the marketing strategies pertaining to the cultural object in question, could accompany the bilateral agreement in such cases.

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<sup>1294</sup> For details, see *supra* Chapter Four, Section 1.2

<sup>1295</sup> Cf. Memorandum submitted by the Museums Standing Advisory Group on Repatriation and Related Cultural Property Issues in the United Kingdom (March 2000), available at: [www.publication.parliament.uk](http://www.publication.parliament.uk) (accessed 21 September 2011).

Depending on the particular circumstances of a claim, joint custody or shared ownership might satisfy the claimant as an act of partial compensation and recognition; additional monetary compensations may also be considered as part of the solution. It is important to note that the concept of shared ownership is not a recent phenomenon: Roman law established the equal division of ownership pertaining to findings, namely objects that have lain hidden for so long that the owner can no longer be established. The so-called Hadrian rule pertaining to ‘treasure troves’, introduced by the Roman Emperor Hadrian in the *Corpus iuris civilis* in 533, and is still today considered a valid principle of civil law in several States.<sup>1296</sup> This principle grants equal ownership rights to both finder of the treasure and the owner of the land in which the treasure was discovered. Whereas the Hadrian rule applies to goods in general terms, many States passed specific legislation in order to exempt archaeological finds from this Roman rule. Thus, with regard to archeological finds, most national antiquity laws provide that it is the State who has an immediate right to possession. Even though the Hadrian rule is at this time generally obsolete with regard to archeological finds in most States, it, nevertheless, articulates the fundamental idea of sharing in cases of unknown or uncertain ownership.

Shared management, in turn, refers to the international cooperation between museums and other art-holding institutions, including the exchange of expertise and technology, data-exchange, joint research, and the exchange of cultural materials. It has been argued that temporary exchanges should replace the acquisition of antiquities, and that much more effort should be spent on exchanges between collections and meaningful loan programs.<sup>1297</sup> An example of international cooperation, in which the question of ownership has been set aside in order to develop an exhibition of dispersed cultural materials, is an exhibition on the Merovingian dynasty, jointly organized between Russia and Germany in 2007.<sup>1298</sup> This joint-exhibition between the *Prehistoric Museum* in Berlin, the *Pushkin Museum* in Moscow and the *Eremitage* in St. Petersburg temporarily reunited the former Berlin collection of Merovingian antiquities. Large parts of the collection were taken by the Soviet army in 1945,

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<sup>1296</sup> For example in France: Art. 716 Code Civil; Germany: § 984 Bürgerliches Gesetzbuch (Civil Code); and Spain: Art. 351 Código Civil Espanol.

<sup>1297</sup> Hallman, "Museums and Cultural Property: A Retreat from the Internationalist Approach," p. 214.

<sup>1298</sup> See: Press release No. 90 of the Federal German Government: "The Merovingian dynasty – Europe with frontiers" – exhibition inaugurated in Moscow, 9 March 2007, available at: [http://www.bundesregierung.de/Content/DE/Archiv16/Pressemitteilungen/BPA/2007/03/2007-03-09-merowingerzeit-europa-ohne-grenzen-ausstellung-in-moskau-er\\_C3\\_B6ffnet.html](http://www.bundesregierung.de/Content/DE/Archiv16/Pressemitteilungen/BPA/2007/03/2007-03-09-merowingerzeit-europa-ohne-grenzen-ausstellung-in-moskau-er_C3_B6ffnet.html) (accessed 23 September 2011).

and restitution disputes regarding the removed objects remain unresolved.<sup>1299</sup> While the temporarily reunited collection was on display to the general public in Moscow and St. Petersburg, it was not possible to send the exhibition to Germany, however, because of the legal position of the German government, which legally entitles the State to seize the part of the collection held by Russia, should they reappear on German soil, since these objects were removed from Germany in violation of customary international law.<sup>1300</sup> Despite the unsolved question of ownership, joint cooperation rendered possible the temporary unification of a collection that had been dispersed for more than seventy years. In addition to granting public access, both parties agreed on preservative measurements, documentation as well as references in the catalogue and on the labels next to the displayed objects explaining the historical controversy. Similar exhibitions are planned for 2012/2013.<sup>1301</sup>

### 3.5 Re-Purchase of Objects, Compensation Funds

In addition to the previous options, the purchase of the claimed object by a public institution or the re-purchase by the holding museum or institution might provide yet another type of solution in the resolution of restitution disputes. If feasible, this option is ideally introduced in an early stage of negotiations, well before the option of auctioning is put forward by the claimant. Re-purchase is an interesting option in particular in such cases in which, firstly, the object is currently on display in a public museum, and return would eliminate or minimize public access to the object; secondly, in cases in which the physical return of an object would result in the dismemberment of a collection; or, thirdly, in cases in which the current possessor has the legal title, for example due to *bona fide* provisions, but is willing to sell at a reasonable price. If sensible negotiations had happened at an early stage of the negotiations, for example, in the *Altmann* case, the five Klimt paintings might still be on display in the Belvedere Museum in Vienna, since the heir to the paintings (Maria Altmann) was initially very willing to sell the paintings to the Belvedere. However, since both the museum and the Austrian government initially refused to negotiate with Altmann with regard to her claim, she later brought her claim before a U.S. court.<sup>1302</sup> The parties only agreed to

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<sup>1299</sup> Out of the 1.300 objects on display, 700 belong to the part removed by the Soviet Army in 1945.

<sup>1300</sup> See *supra*, Chapter Three, Section 6.1.

<sup>1301</sup> See: Press release No. 263 of the Federal German Government: “Federal Government Commissioner for Culture and the Media signs agreement for the German-Russian exhibition: Bronze Age – Europe without frontiers”, 15 July 2010, available at:

[http://www.bundesregierung.de/nn\\_774/Content/DE/Pressemitteilungen/BPA/2010/07/2010-07-15-bkm-europa.html](http://www.bundesregierung.de/nn_774/Content/DE/Pressemitteilungen/BPA/2010/07/2010-07-15-bkm-europa.html) (accessed 23 September 2011).

<sup>1302</sup> *Altmann vs. Republic of Austria*, 142 F.Supp.2d 1187 (C.D.Cal. 1999), *aff’d*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 US 677 (2004).

settle the matter through arbitration in 2005, subsequent to five years of court litigation (from 1999 to 2004). The arbitration tribunal required the Belvedere to return five of the six disputed Klimt paintings to Maria Altmann. Subsequent this final settlement Altmann again offered the paintings for purchase to the Austrian government; however, due to the lack of funding, the negotiations with the Austrian government pertaining to repurchase failed. In 2006, the Klimt paintings went on auction in New York in 2006 attaining a price of several million dollars each.<sup>1303</sup>

A different example illustrates that the re-purchase of restituted works of art by the holding institution can be successfully negotiated between parties. In May 2010, the painting “Sleeping Diana” (1877) by Swiss artist Arnold Böcklin (1827-1901) was jointly purchased by the City of Düsseldorf, the region, and the federal German government – thus ensuring continued public display.<sup>1304</sup> Until his emigration in 1939, the painting belonged to George Eduard Behrens, son of the Jewish banker and art-collector Eduard Ludwig Behrens. Through forced sale by the Nazi, the painting became part of the collection for the “Führermuseum” in Linz. During WWII, evidence affirming ownership was lost. After spending some time in one of the so-called “Central Collecting Points” established by the Allies for Nazi-looted art of unknown provenance, the painting was given into the custody of the German government. In 1966, the government lent the painting to the *Museum Kunst Palast Düsseldorf* for public display. In 2006, the rightful heirs submitted a claim for the return of the painting. The German government decided to return the painting on grounds of the Washington Principles of 1998,<sup>1305</sup> and started negotiations with the Behrens family on the re-purchase of the returned work of art. While the return of this particular object represents a great success in the resolution of a claim for Nazi-looted art, the subsequent exhibition of the painting tainted this process: the museum celebrated the joint re-purchase of the painting “Sleeping Diana” with a

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<sup>1303</sup> Prices achieved through auction: the painting ‘Adele Bloch-Bauer I’ (known as the ‘Golden Adele’) was auctioned for U.S. \$ 135 million – in 2006 the highest reported price ever paid for a painting; Adele Bloch-Bauer II for U.S.\$87,9 million; Birch Forest for U.S.\$40,3 million; Houses at Unterach on the Attersee for U.S.\$31,4 million; Apple Tree I for U.S.\$33 million. The portrait of Adele Bloch-Bauer I by Gustav Klimt (1907) was purchased by auction for the Neue Galerie in New York by Ronald Lauder for a US \$135 million. See, BBC News, 19 June 2006, available at: <http://news.bbc.co.uk/2/hi/entertainment/5093650.stm> (accessed 23 September 2011).

<sup>1304</sup> See: Helga Meister, Ankauf: Bleiberecht für “Diana” von Arnold Böcklin, in Westdeutsche Zeitung newslines, Mai 5, 2010, available at: <http://www.wz-newsline.de/?redid=824268> (accessed 23 September 2011).

<sup>1305</sup> For details on the Washington Principles, see *supra*, Chapter Three, Section 3.5.

special exhibition entitled: “Purchase: the right to stay for Diana”<sup>1306</sup>. The title’s awkward phrasing left a bitter taste in the mouth of those who were familiar with the case, as it disregarded the simple but important fact that the museum had never legal title to the painting since: firstly, the painting was looted by the Nazi; secondly, the German government only had temporary custody over the object; and thirdly, it was only on loan to the Düsseldorf museum waiting to be claimed by its rightful owner.

The re-purchase of claimed works of art is not only a viable solution in cases in which the parties wish to guarantee public display; it can also be an option in cases in which the parties are concerned with the physical integrity of the cultural object. This might be best illustrated with the following example: In 1996, the painting “The wedding night of Tobias and Sarah” (c. 1660) by Jan Steen was reunited by restorers after the discovery that – for still unknown reasons – it was cut into two pieces in the nineteenth century.<sup>1307</sup> The smaller right half of the painting (which depicts the Archangel Raphael) belongs to the Bredius Museum of the city of The Hague, and the left half to the Centraal Museum of Utrecht.<sup>1308</sup> The left half of the restored painting was part of the Jacques Goudstikker collection, which had been seized by the Nazi for Goering’s private collection. After WWII, this part of the painting was returned by the Allies to the Dutch government in order to pass it on to the rightful owners. Those paintings not returned immediately after WWII, as for example most parts of the Goudstikker collection, became part of the Dutch national collection.<sup>1309</sup> It was not until 2006, that the Dutch government decided to return 202 paintings to Goudstikker’s sole heir (his daughter-in-law Marei von Saher), the Jan Steen painting among them.<sup>1310</sup> Since the Bredius Museum of The Hague that holds the restored and reunited painting, is neither entitled to sell the right half of the painting, nor does it intend to cut the restored painting in

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<sup>1306</sup> Title in German: „Ankauf. Bleiberecht für Diana von Böcklin“, information on the exhibition available at: <http://www.museum-kunst-palast.de/UNI128194965331494/doc3681A-page2.html> (accessed 23 September 2011).

<sup>1307</sup> Art historians in The Hague noticed that on the left side of the Steen painting, which belonged to Goudstikker, the tips of the archangel’s wings are visible in the top right corner. This proved that the two fragments belonged to the same painting. It is assumed that both pieces are probably still only the center of a much larger painting.

<sup>1308</sup> Details on the restoration of the reunited painting available at: <http://www.museumbredius.nl/reconstr.htm> (accessed 23 September 2011).

<sup>1309</sup> Catherine Hickley „Heir Awarded \$ 1.43 Million by Hague for Goering-Looted Part of Old Master”, 15 August 2011, available at: <http://www.bloomberg.com/news/2011-08-15/heir-awarded-1-43-million-by-hague-for-goering-looted-part-of-old-master.html> (accessed 23 September 2011).

<sup>1310</sup> The restitution has been carried out on the recommendation of the ‘Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War’ (Restitutions Committee), Cf. Sandholtz, *Prohibiting Plunder: How Norms Change*, pp. 227. For details on the Dutch Restitutions Committee, see [http://www.restitutiecommissie.nl/en/rc\\_1.15/samenvatting\\_rc\\_1.15.html](http://www.restitutiecommissie.nl/en/rc_1.15/samenvatting_rc_1.15.html) (accessed 23 September 2011); see also and Chapter Six, Section 4.3.

half again, it is required to purchase the left side from the Goudstikker heirs; negotiations were reported to be discussing a purchase price of up to two million Euros for the left side of the painting.<sup>1311</sup> Since both parties had agreed that they did not want to see the painting divided again, the city of The Hague agreed in August 2011 to pay 1 million Euros (U.S. \$ 1.43 million)<sup>1312</sup> to the Goudstikker heir in order to keep the reunited painting in the Bredius Museum of The Hague.<sup>1313</sup>

The cases mentioned in this section have illustrated that the purchase or re-purchase of the object to be returned to rightful owners can be a successful alternative to the physical return, if the parties involved agree to pursue this option. Such a solution, however, requires that: firstly, restitution and return is to be made, for example on the basis of the 1998 Washington Principles; and secondly, that the concept of re-purchase is introduced at an early stage in the negotiations, and conceived of as a part of the process of achieving a ‘just and fair solution’.<sup>1314</sup> Thirdly, this option presupposes that museums and national authorities have financial resources readily available. With particular reference to the common interests identified in Chapter Five, the option of re-purchase and compensation funds serves not only to guarantee preservation and public access, but also to maintain the physical integrity of the object, as in the case of the Bredius Museum of The Hague. Both governmental funding and private sponsorship are necessary in such circumstances. As restitution disputes are generally of great public interest, public awareness should strongly be utilized in raising necessary funds in order to resolve restitution disputes for the public benefit.

### **3.6 International Reputation of Museums as an Effective Mechanism in Disputes**

Although the act of taking into account the reputation of museums and other art holding institutions is not an alternative mechanism as such, public reputation does play a substantial role in determining viable alternative means for the resolution of restitution. This section explores the impact international reputation has on both parties in restitution disputes, and demonstrates the extent to which public reputation has become an issue of increasing importance to both States and museums within the wider frame of restitution mechanisms.

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<sup>1311</sup> Art Magazine (German edition), No. 6, August 2010, p. 130.

<sup>1312</sup> The Dutch government and the Mondrian Foundation contribute 400,000 Euros toward the settlement, the Rembrandt Association pays 200,000 Euros, the city of The Hague funds 92,000 Euros and 308,000 Euros comes from insurance money for the loss of two other paintings.

<sup>1313</sup> Catherine Hickley „Heir Awarded \$ 1.43 Million by Hague for Goering-Looted Part of Old Master”, 15 August 2011, available at: <http://www.bloomberg.com/news/2011-08-15/heir-awarded-1-43-million-by-hague-for-goering-looted-part-of-old-master.html> (accessed 23 September 2011).

<sup>1314</sup> Cf. Washington Principles, principle No. 8; for details, see *supra* Chapter Three, Section 3.5.

One recent example is the impact that media coverage had on the U.S.-Italian agreements.<sup>1315</sup> The bilateral negotiations between Italy and the Getty Museum in particular were bolstered by an international media campaign, including interviews with the Italian Minister of Culture in both the U.S. and Italian media. While media attention in restitution disputes is certainly not in the interest of the museum or institution holding the object in question, it can bolster the claimant's position. That said, the importance of international reputation to entities involved in restitution disputes is often neglected in current legal and scholarly appraisals of restitution, even though it certainly affects the attitudes of museums involved in such disputes, given their fear of bad publicity; therefore, it should also have an effect on the likelihood of fruitful negotiations.

Depending on one's perspective, the fact that restitution matters are of high interest to the media in most States can be either advantageous or disadvantageous. In the case of the bilateral U.S.-Italian agreements, some of the world's most famous museums were involved; the Getty's reputation in particular was highly threatened during the dispute. Even governments use wide media attention in order to increase the pressure on other States and individuals for the return of certain items. More than any other, Zahi Hawass, Egyptian archaeologist, former Vice Minister of Culture and, at last, Minister of the Antiquities in Egypt, draws high media attention by interviews, books and articles, and by appearance on television. He even participated in several episodes of the U.S. television show "Digging for the Truth" in order to fortify his mission to return cultural materials to Egypt.<sup>1316</sup> In July 2003, Hawass, in his role as Secretary General of the Supreme Council of Antiquities in Cairo, told the press with regard to the Rosetta Stone in the British Museum: "If the British want to be remembered, if they want to restore their reputation, they should volunteer to return the Rosetta Stone because it is the icon of our Egyptian identity."<sup>1317</sup> Notwithstanding the intense media coverage of this story, Egypt has not yet made an official claim for the return of the Rosetta Stone, nor did it make an official claim in the case of the Nefertiti in Berlin. Moreover, making a claim for return unofficially (and not official via a *note verbal* between State governments) appears to be a strategy employed at least by some States, namely Egypt. Similarly, at a Conference in Cairo in April 2010, Egypt suggested that

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<sup>1315</sup> For details, see *supra* Chapter Three, Section 2.10.

<sup>1316</sup> See the personal homepage of Zahi Hawass, available at: <http://www.drhawass.com/> (accessed 23 September 2011).

<sup>1317</sup> Charlotte Edwardes and Catherine Milner, *Egypt demand return of the Rosetta Stone*, The Telegraph, 20 July 2003, available at: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/1436606/Egypt-demands-return-of-the-Rosetta-Stone.html> (accessed 23 September 2011).

requesting States should establish a “wish list” of objects of particular importance that they wished to be returned. Among other considerations, the 2010 ‘Cairo Communiqué on International Cooperation for the Protection and Repatriation of Cultural Heritage’ approved by the conference declares: “Ownership of cultural heritage by the country of origin does not expire, nor does it face prescription,” and that “Cultural property is irrevocably identified with the cultural context in which it was created. It is this original context that gives it its authenticity and unique value”.<sup>1318</sup>

The days in which museums could purchase artifacts on the illicit art-and-antiquities market regardless of their provenance have fortunately passed. Such purchasing practices were, however, common amongst even major museums until only a few years ago. This is illustrated by the recent criminal trial against the former curator of the J. Paul Getty Museum, Marion True, and the subsequent return of several objects owned by the Getty Foundation to Italy.<sup>1319</sup> Nowadays, major museums at least must abstain from dubious acquisitions in order to protect their reputation. Within this context reputation is not only a matter of how a museum is perceived by the public, but also a matter of professionalism in terms of international loan agreements, exchange of information and research, and general cooperation. In other words, only reliable and professionally run museums are trusted to partake in international loan agreements. Furthermore, it is the right of interested members of the public and the tax payer to be informed about the provenance of collections in public museums. Art holding institutions and museums have an obligation to inform the public about the historical and cultural background of their collections, since museums fulfill not only an aesthetic but an educational function through the preservation and display of cultural heritage. Part of the story of an artifact is not only its original purpose and context, but also the story of how it made its way into the museum. As in the case of the “Glasgow Ghost-Shirt”, an entirely new story has become part of the history of the museum with regard to this object, and this in itself enhances the narrative associated with it. One could hone this contention even further by arguing that in the particular case of the Glasgow Shirt, the display of the replica enhances the narrative and adds to the history of the object due to the story of return, more than the original Ghost Shirt ever could have, had it remained in Glasgow.

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<sup>1318</sup> Cairo Communiqué on International Cooperation for the Protection and Repatriation of Cultural Heritage’ of 30 June 2010, released in connection with the Cairo Conference (7-8 April 2010), p. 1 (general principles); full text available at: [http://www.sca-egypt.org/eng/pdfs/RST\\_ICHC\\_SA%20Communique\\_2010-08-20.pdf](http://www.sca-egypt.org/eng/pdfs/RST_ICHC_SA%20Communique_2010-08-20.pdf) (accessed 23 September 2011).

<sup>1319</sup> For details on the Getty case, see *supra* Chapter Three, Section 2.10.

In summarizing, awareness of the importance of public reputation and public interest cannot be neglected by museums and institutions confronted with restitution claims. It can be argued that public reputation is both a critical and most effective mechanism in shaping the way in which museums conduct their acquisitions as well as the way in which they approach claims for restitution and return. Public and private museums are highly dependent on their international reputation, because of their public and collective function. This is also true for private collectors to some extent, albeit to a lesser degree. Therefore, it can be said that public reputation is an effective and comparably inexpensive mechanism to counter illicit trade in cultural materials. International reputation as a side-effect of a globalized world has an impact on the protection of cultural heritage, and more specifically, on the development of means through which museums confront restitution claims. The true success of museums is not measured by the tangible quantity of objects that they store, but rather by hard-to-quantify intangibles like the quality of research and education, the study, care and maintenance of collections, and – last but not least – the level of public reliance and trust.

#### **4. Institutional and Policy Considerations**

In addition to the legal obstacles discussed in the previous section, it is also necessary to explore the means through which the interest-oriented approach can be implemented in terms of policy matters. On the basis of complementary and alternative mechanisms explored in the previous sections,<sup>1320</sup> the following section: (1) focuses on the role of museums and the general function of stewardship; (2) discusses possible amendments to the mandate of UNESCO's intergovernmental committee on restitution and return, and (3) analyses the possible role of national advisory commissions in resolving restitution disputes. As a last step, the role of World Heritage sites in the context of the restitution debate will be discussed.

##### **4.1 The Role of Museums and the Function of Stewardship**

The great tangible cultural treasures of mankind are primarily held by museums. It is for this reason that publicly or privately owned museums and other art-holding institutions fulfill a particular social function: they not only preserve, research, and safeguard cultural objects, but also educate the public and pass on materials and information to future generations. Since museums function as the guardians of the cultural heritage of humankind, one can speak of a common responsibility of stewardship, which is independent of a

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<sup>1320</sup> See *supra* Chapter Six, Section 3.

museum's location, legal status, or international importance. However, a clear idea of what this common responsibility means and might require has not yet been articulated, since museums still appear to be dominated by national concerns. Attempts to articulate these responsibilities by international bodies have, in turn, ended up defending current positions of property rights; this is evident in the concept of 'universal museums' supported by several Western museums.<sup>1321</sup>

Museums face a difficult quandary: on the one hand, they have to act accordingly to the needs and interests of the State in which they are located, and – depending on their legal status – the dictates of their board of trustees (or any other type of governing body); on the other hand, they should be scientifically and morally obliged to respect the culture or religion of the community whose heritage they preserve. It is, however, particularly the latter obligation that often fails to receive sufficient prioritization when it comes to cultural objects of minority groups or indigenous peoples. Moreover, legal requirements pertaining to national export and loan requirements have to be met, and this adds to the difficulty museums have in developing common exchange and exhibition policies. Therefore, codes of conducts and similar standards for museums should be actively incorporated into the framework of international law; this would not only promote and improve the preservation of and access to cultural materials, but also provide assistance as well as means to monitor museums, given that they have a fundamentally crucial role as cultural stewards of objects that act as material witnesses of the development of mankind.

With regard to the matter of restitution and return, identifying alternative solutions to current restitution practices goes hand in hand with rethinking the traditional collection and ownership paradigm of museums and other art-holding institutions.<sup>1322</sup> As mentioned earlier, museums are interested in preservation, research and public access to cultural materials, whereas ownership and title are generally not of fundamental importance.<sup>1323</sup> With regard to museums and their general function in terms of stewardship, three main issues must be

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<sup>1321</sup> See the *Declaration on the Importance and Value of Universal Museums* (December 2002), signed by major European and North-American Museums (the British Museum; the Metropolitan Museum of Art, New York; the Louvre, Paris; the State Hermitage Museum, St. Petersburg; State Museums, Berlin; the Prado Museum, Madrid, et al), reprinted in ICOM News No. 1 (2004), available at: [http://icom.museum/pdf/E\\_news2004/p4\\_2004-1.pdf](http://icom.museum/pdf/E_news2004/p4_2004-1.pdf) (accessed 23 September 2011).

<sup>1322</sup> Cf. Maxwell Anderson, *Ownership isn't everything*, in: The Art Newspaper, issue 216, September, 2010, published online 15 September 2010, available at: <http://www.theartnewspaper.com/articles/Ownership-isn-t-everything-The-future-will-be-shared/21425> (accessed 23 September 2011).

<sup>1323</sup> See *supra* Chapter Five, Section 1.3.

considered: firstly, the legal aspects of purchasing cultural artifacts; secondly, the financial aspects of steadily increasing prices on the international art and antiquity market; and thirdly, the practical aspects of exacerbating the general shortage in cultural objects available licitly.

With regard to the first issue pertaining to legal matters, it can be said that nowadays museums are required to carefully scrutinize their acquisitions, donations, or bequest in order to ensure the object's provenance. If museums fail to do so, they risk civil and criminal proceedings, as well as the possibility of being obliged to return the object in question with or without compensation. In this respect, the Getty case once again provides a good illustration of the consequences of dubious acquisition practices.<sup>1324</sup> Within recent decades, the obligation to conduct research into the provenance of an object has been codified in both national and international instruments,<sup>1325</sup> as well as national and international self-obligating codes of conducts.<sup>1326</sup> Moreover, within recent years, the media and the general public have increasingly become interested in the provenance research of public collections pertaining to Nazi-looted art and other types of illicit appropriation.<sup>1327</sup> Although both public and private museums can no longer risk purchasing black market art and antiquities, there remains a gray zone in which private museums and collectors in particular operate, since, for example, the legally non-binding 1998 Washington Principles apply only to publicly owned museums and other art-holding institutions.

Secondly, with regard to financial costs, the escalation of private collecting – particularly in emerging markets such as China, Russia and Arab States – has increased international market prices to such an extent that (Western) public museums are effectively excluded from the art and antiquities market.<sup>1328</sup> It is only a small proportion of the museum community that consists of actual purchasers and institutions that are still actively able to collect cultural artifacts from beyond the borders of their home country. For the rest of the museum community, including smaller national, local or poorly funded museums,

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<sup>1324</sup> For details, see *supra* Chapter Three, Section 2.10.

<sup>1325</sup> See, for example Article 7 (a) of the 1970 UNESCO Convention that states: “*To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported*”; for details on the 1970 Convention, see *supra* Chapter Three, Section 2.2.

<sup>1326</sup> See *supra* Chapter Three, Section 4.

<sup>1327</sup> See *supra* Chapter Six, Section 3.6.

<sup>1328</sup> Cf. Anderson, *Ownership isn't everything*, in The Art Newspaper, issue 216, September, 2010, published online 15 September 2010, available at: <http://www.theartnewspaper.com/articles/Ownership-isn-t-everything-The-future-will-be-shared/21425> (accessed 23 September 2011).

international acquisitions are a non-issue.<sup>1329</sup> Thirdly, import and export constraints as well as improved security facilities of archeological sites limit the availability of cultural materials on the licit international art and antiquities market. Thus, the growing scarcity of cultural artifacts on the licit market puts an end to the idea of perpetual acquisition activities by museums.<sup>1330</sup>

Traditionally, museum's collections were based on artifacts that had been removed and alienated from their historic site; the concept of placing museums next to archeological sites is rather recent. Besides archeological excavations, which often resulted in the partition of excavation finds (*partage*),<sup>1331</sup> the disentanglement of cultural objects from their original context and their eventual appearance in a museum had been justified based on one of the following reasons: armed conflict and occupation, colonial domination, secularization, and compulsory auctioning of private property.<sup>1332</sup> The great museums in Paris (Louvre), London (British Museum), Berlin (Museumsinsel), and New York (Metropolitan Museum) established in the eighteenth, nineteenth and early twentieth century, emphasized colonial power and cultural curiosity of the unknown, either through the collection of artifacts of ancient powers such as ancient Greece, the Roman Empire, and Egypt, or through the collection of objects from conquered cultures in the Americas, Asia, Africa and the Pacific islands. In particular, ritual items and human remains from the latter regions were often collected out of semi-scientific curiosity. It was only later, mainly in the late nineteenth the twentieth century, that it became important to collect one's own national cultural heritage. Traditional concepts, such as the idea of removing cultural objects from their original context and the idea associated with the establishment of universal collections, have fundamentally changed.

Nowadays, major museums are part of a global network of loans and exchanges. Museums expand by creating local and satellite branches. At the beginning of the twenty-first century, several museums have established branches all around the globe: The *Solomon R. Guggenheim Foundation*, for example, has had its headquarters in New York since 1959, but has external branches in Venice (since 1976), Bilbao and Berlin (both since 1997). A further branch, offshore to the city of Abu Dhabi, United Arab Emirates, is scheduled to be

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<sup>1329</sup> Hallman, "Museums and Cultural Property: A Retreat from the Internationalist Approach," p. 203.

<sup>1330</sup> Cf. Anderson, *Ownership isn't everything*, in *The Art Newspaper*, issue 216, September, 2010, published online 15 September 2010, available at: <http://www.theartnewspaper.com/articles/Ownership-isn-t-everything-The-future-will-be-shared/21425> (accessed 23 September 2011).

<sup>1331</sup> See *supra* Chapter Two, Section 2.

<sup>1332</sup> Beat Wyss, *Ein Leitbild überwundener Macht*, in: *Süddeutsche Zeitung*, 13 April 2007, p. 13.

completed in 2013.<sup>1333</sup> Other Guggenheim branches, however, like Las Vegas in cooperation with the Hermitage of St. Petersburg have been closed (2000-2008),<sup>1334</sup> or have not yet been realized (including those planned for in Hong Kong or Guadalajara, Mexico) due to financial constraints.<sup>1335</sup> Similarly, the *Centre Pompidou* (Paris) has opened a branch (*Centre Pompidou-Metz* in 2010)<sup>1336</sup> and organizes special exhibitions abroad in Shanghai, Tokyo and Hong Kong. On a much larger scale, *The Hermitage* (St. Petersburg) has established branches in London (Hermitage Rooms in London's Somerset House since 2000); the Netherlands (Hermitage Amsterdam since 2004);<sup>1337</sup> in Russia (Hermitage-Kazan Exhibition Center since 2005); and in Italy (*Ermitage Italia* in Ferrara since 2007).<sup>1338</sup>

As these examples illustrate, the establishment of branches and joint projects allow both private and public museums to position themselves internationally, to cooperate joint exhibitions, and, of course, to make profit from these exchanges. Along a similar vein, the French government signed a thirty-year agreement with the authorities of Abu Dhabi in 2007, providing \$747 million in exchange for temporary art loans, special exhibitions and management advice, and an additional \$520 million exclusively for the concession of the name '*Louvre Abu Dhabi*'. The museum is scheduled to be opened in 2012 on the man-made island of Saadiyat, offshore to the city of Abu Dhabi.<sup>1339</sup> The bilateral agreement, which was approved by the French Parliament in 2007,<sup>1340</sup> also provides for the creation of the 'International Agency for French Museums' in order to facilitate the international art exchanges and transactions such as the one with Abu Dhabi. This deal, however, is not uncontroversial, and critics charge that the French government is "selling" its museums.<sup>1341</sup> Museum experts, archeologists and art historians have objected to the agreement, claiming not only that this is a sell-out of 'national cultural heritage', but also that the new museum would

<sup>1333</sup> Further details available at: <http://www.guggenheim.org/abu-dhabi/> (accessed 23 September 2011).

<sup>1334</sup> Kristen Peterson, *Vegas, say goodbye to Guggenheim*, in *Las Vegas Sun*, 10 April 2008, available at: <http://www.lasvegassun.com/news/2008/apr/10/vegas-say-goodbye-guggenheim/> (accessed 23 September 2011).

<sup>1335</sup> Jason Edward Kaufman, *Why the Guggenheim won't open a branch in Guadalajara*, *The Art Newspaper*, 1 June 2008, available at: <http://www.theartnewspaper.com/articles/Why-the-Guggenheim-won-t-open-a-branch-in-Guadalajara%20/8576> (accessed 23 September 2011).

<sup>1336</sup> Further details available at: <http://www.centrepompidou-metz.fr/> (accessed 23 September 2011).

<sup>1337</sup> Further details available at: <http://www.hermitage.nl/en/> (accessed 23 September 2011).

<sup>1338</sup> See the list of external branches of the Hermitage at: [http://www.hermitagemuseum.org/html\\_En/13/hm13\\_1.html](http://www.hermitagemuseum.org/html_En/13/hm13_1.html) (accessed 23 September 2011).

<sup>1339</sup> Alan Riding, *The Louvre's Art: Priceless. The Louvre's Name: Expensive*, in: *New York Times*, 7 March 2007, available at: [http://www.nytimes.com/2007/03/07/arts/design/07louv.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/03/07/arts/design/07louv.html?_r=1&oref=slogin) (accessed 23 September 2011).

<sup>1340</sup> AFP, *Feu vert du parlement français au futur musée "Louvre Abou Dhabi"*, 8 October 2007, available at: [http://afp.google.com/article/ALeqM5i5X29Np917I-YpiaA\\_XWq8oiGDZg](http://afp.google.com/article/ALeqM5i5X29Np917I-YpiaA_XWq8oiGDZg) (accessed 23 September 2011).

<sup>1341</sup> Beat Wyss, *Ein Leitbild überwundener Macht*, in: *SZ*, 13 April 2007, p. 13.

reject loans or exhibitions from France including Christian religious art or art depicting nudity. Others pragmatically argue that if the Louvre had not made the deal, other museums would have certainly done so.<sup>1342</sup>

Despite financial profits, many museums simply need more storage and exhibiting space. As a matter of fact, the Centre Pompidou in Paris exhibits barely 0.5 per cent of the 58,000 pieces it has in storage;<sup>1343</sup> the British Museum in London displays only 75,000 of the seven million items in collection each year.<sup>1344</sup> Thus, one could almost argue that the large un-displayed portions of these collections constitute a ‘hidden cultural heritage’. Museums generally only exhibit a small percentage of their holdings, and preserve the major part of their collections in storage (partly even in unopened packages with unregistered contents).<sup>1345</sup> Despite such incidents of unregistered contents, large portions of registered objects are kept by museums in order to preserve them; a display of all of these objects would simply have no value for the public: a museum exhibition is always the selection of small parts out of a much larger collection. Nevertheless, several artifacts may not be shown to the public for the simple reason that museums lack funding, personnel, and exhibition space. It is, however, also the lack of international cooperation in the exchange of cultural artifacts that contributes to this problematic state of affairs.<sup>1346</sup> Moreover, this reference to a ‘hidden cultural heritage’ also reflects the fact that the hidden parts of these collections may be of unclear or dubious provenance. Museums continue to fail to invest enough financial resources and are still not sufficiently committed to the examination of the provenance of works of art in their collections in order to determine whether or not they may have been subject to looting or other improper transactions prior to their acquisition by the museum. In recent years, however, many public museums have voluntarily – or under pressure from their national governments – begun to engage in more active provenance research. Particularly in cases of Nazi-confiscated art, public museums are obliged by the 1998 Washington Principles to conduct provenance research (Principles 1-3).<sup>1347</sup> Nonetheless, requirements pertaining to

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<sup>1342</sup> Alan Riding, *The Louvre's Art: Priceless. The Louvre's Name: Expensive*, in: New York Times, 7 March 2007, available at: [http://www.nytimes.com/2007/03/07/arts/design/07louv.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/03/07/arts/design/07louv.html?_r=1&oref=slogin) (accessed 23 September 2011).

<sup>1343</sup> Liebs, *Aus dem Depot nach Tokio*, Süddeutsche Zeitung, 17 January 2007, p. 11.

<sup>1344</sup> Alberge, *Curators rubbish minister's vision of 'hidden heritage'*, in: The Times, 27 January 2005, p. 1.

<sup>1345</sup> Alberge, *Curators rubbish minister's vision of 'hidden heritage'*, in: The Times, 27 January 2005, p. 1.

<sup>1346</sup> Siehr, "Globalization and National Culture: Recent Trends toward a Liberal Exchange of Cultural Objects," p. 1091.

<sup>1347</sup> For details on the 1998 Washington Principles, see *supra* Chapter Three, Section 3.5.

provenance research should apply to all kinds of cultural materials, not only to Nazi-confiscated art.

Highlighting the problems associated with the notion of ‘hidden cultural heritage’ and endorsing the importance of public access, the 2006 Principles of the International Law Association (ILA) make a distinctive proposal in the light of restitution matters: among other provisions, the principles state that cultural objects “seldom or never on public display or otherwise inaccessible should be lent or otherwise made available to the requesting party, particularly to a party at the place of origin”.<sup>1348</sup> Though this proposal might sound simple and self-evident, it is, nevertheless, groundbreaking in view of current restitution practices in which such considerations do not play any role whatsoever.

In summarizing this section on the role of museums, it can be said that the role of museums has fundamentally changed in the last several decades. Museums are not any longer a mere cabinet of curiosities dedicated to preserving cultural, natural and human rarities. This characterization of museums belongs to past centuries – even if some museums still believe themselves to be compelled to engage in this type of preservation and ownership.<sup>1349</sup> As ‘telling the story’ and putting artifacts in their historical and cultural context becomes more important, the single ‘beautiful’ piece partially loses its pride of place as a prominent singularity. The idea that museums must own cultural artifacts and that they must constantly collect new pieces is more than outdated.<sup>1350</sup> In terms of training and educational purposes, replicas may be both a more efficient and effective means of fulfilling a museum’s mission, since preservation and security measures are not – or at least not to the same extent – needed when replicas (rather than originals) are on display. Moreover, replicas made of plaster or other suitable material (leather, fabrics etc.) can perhaps better demonstrate the historical use, original coloring, and significance of an object through the addition of parts which have been lost in the originals.

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<sup>1348</sup> Section Three (iii) of the 2006 ILA Principles. For details on the ILA Principles, see *supra* Chapter Three, Section 4.2.

<sup>1349</sup> Anderson, *Ownership isn’t everything*, in *The Art Newspaper*, issue 216, September, 2010, published online 15 September 2010, available at: <http://www.theartnewspaper.com/articles/Ownership-isn-t-everything-The-future-will-be-shared/21425> (accessed 23 September 2011).

<sup>1350</sup> Cf. Anderson, *Ownership isn’t everything*, in *The Art Newspaper*, issue 216 (September 2010), published online 15 September 2010, available at: <http://www.theartnewspaper.com/articles/Ownership-isn-t-everything-The-future-will-be-shared/21425> (accessed 23 September 2011).

#### 4.2 Amending the Mandate of the UNESCO Intergovernmental Committee

The establishment of the *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation* (ICPRCP) by the General Conference of UNESCO in 1978 was primarily initiated in order to fulfill two objectives: firstly, to fill some of the gaps left by the 1970 UNESCO Convention (in particular with regard to the non-retroactivity of the Convention);<sup>1351</sup> secondly, to complement the process of decolonization with regard to the removal of cultural objects from formerly colonized territories.<sup>1352</sup> The intention of the UNESCO General Conference in creating this intergovernmental body was to establish a forum for the discussion of restitution matters. However, it was clear that this intergovernmental body would be established without any binding decision-making capabilities.<sup>1353</sup> Thus, the Committee's mandate is to seek "ways and means of facilitating bilateral negotiations" between States and to take an advisory role in restitution disputes.<sup>1354</sup> However, since its establishment in 1978, no more than eight cases have been submitted to the Committee.<sup>1355</sup> Out of these, only six have been resolved – the latest resolved in May 2011 through bilateral negotiations is the case of the *Sphinx of Bogazköy* between Turkey and Germany (which had been submitted to the Committee in 1987).<sup>1356</sup> Currently only one request remains pending before the Committee: the case of the *Parthenon Marbles* between Greece and the United Kingdom,<sup>1357</sup> and another case is suspended due to national court litigations: namely, the case of the *archaeological objects from the Necropolis of Khorvin* between Iran and Belgium (submitted to the Committee in 1985, suspended in 1987).<sup>1358</sup>

The small number of pending cases seems to indicate that States are rather reluctant to engage the services of an intergovernmental body in restitution matters and prefer instead to engage in bilateral negotiations, if they engage at all, without consultation of the UNESCO

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<sup>1351</sup> For details on the 1970 UNESCO Convention, see *supra* Chapter Three, Section 2.2.

<sup>1352</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 11.

<sup>1353</sup> Cf. O'Keefe, *Commentary on the 1970 Unesco Convention*, p. 9.

<sup>1354</sup> See Article 4 of the Committee's Statute.

<sup>1355</sup> For details on the establishment of the UNESCO Committee, see *supra* Chapter Three, Section 3.2.

<sup>1356</sup> See Recommendation No. 3, adopted at the 17th session of the UNESCO-Committee (ICPRCP), held on 30 June-1 July 2011 in Paris, CLT-2011/CONF. 208/COM.17/5, available at:

<http://unesdoc.unesco.org/images/0019/001937/193720E.pdf> (accessed 23 September 2011).

<sup>1357</sup> See Recommendation No. 2 (above n.1356).

<sup>1358</sup> See Secretariat Report (April 2011) to the 17th session of the Committee (ICPRCP), held on 30 June-1 July 2011 in Paris, CLT-2011/CONF.208/COM.17/2, p. 1, available at:

<http://unesdoc.unesco.org/images/0019/001927/192728e.pdf> (accessed 23 September 2011).

Committee.<sup>1359</sup> Strangely enough, the Committee itself has requested the UNESCO-Secretariat to prepare an Annex to its report entitled: “Examples of cultural property returned or restituted without action by the Committee”.<sup>1360</sup> This illustrates the extent to which an insufficient amount of work has been delegated to the UNESCO Committee, since all cases listed by the Secretariat have been resolved bilaterally between the States involved, without any action on the part of the Committee.<sup>1361</sup> Even the cases under the *aegis* of the UNESCO Committee have often been resolved without the further assistance of the Committee or the UNESCO Secretariat, such as the case of the *Sphinx of Bogazköy*, which was settled through bilateral negotiations between Turkey and Germany.<sup>1362</sup>

Recalling the small number of requests submitted to the Committee and the increasing numbers of cases resolved outside the Committee through bilateral and often informal negotiations between States (and non-State actors),<sup>1363</sup> the Committee’s mandate has been broadened in 2005 by the UNESCO General Conference. The new mandate includes additional mechanisms, such as mediation and conciliation, which can now be employed to facilitate the work of the Committee.<sup>1364</sup> Mediation involves a third party that seeks to assist the disputing States in their negotiations. Although mediation falls short of adjudication, it involves the generation of suggestions, alternative proposals and attempts at reconciling the conflicting positions, with the objective of assisting the parties in coming to an agreed settlement. Conciliation, in contrast, is more formalized and often involves the appointment of a conciliation commission by the disputing parties. Although this might resemble an arbitral or judicial proceeding, the outcome of the mediation and conciliation is not binding on the parties involved (Article 4.1. of the Statutes) and therefore takes the form of recommendations or opinions rather than of a binding determination.<sup>1365</sup> If, however, no solution can be found in the mediation and conciliation proceedings, the request remains before the Committee,

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<sup>1359</sup> As, for example, in the cases discussed above between Ethiopia and Italy regarding the return of the Axum obelisk; for details, see *supra* Chapter Three, Section 2.9.1. For details on the case of the U.S.-Italy agreements, see *supra* Chapter Three, Section 2.10.

<sup>1360</sup> See Recommendation No. 6 op. 4 (above n. 1356).

<sup>1361</sup> See Annex entitled “Examples of cultural property returned or restituted without action by the Committee”. Annex to the Secretariat Report (April 2011) to the Committee (above n. 1358)

<sup>1362</sup> See list of cases of return and restitution under the *aegis* of the UNESCO Intergovernmental Committee, available at: <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/return-of-cultural-property/committees-successful-restitutions/> (accessed 23 September 2011).

<sup>1363</sup> *Ibid.*

<sup>1364</sup> See: Article 4 (1) of the Statutes of the Intergovernmental Committee, CLT/CH/INS-2005/21, adopted by the General Conference of UNESCO at its 20th session (1978), last amended in October 2005, available at: <http://unesdoc.unesco.org/images/0014/001459/145960e.pdf> (accessed 23 September 2011).

<sup>1365</sup> Vrdoljak, "History and Evolution of International Cultural Heritage Law - through the Question of the Removal and Return of Cultural Objects," p. 15.

similar to other unresolved question submitted to the Committee (Article 4.1. of the Statutes). The rules of procedure on mediation and conciliation were finalized and adopted by the UNESCO Committee in September 2010.<sup>1366</sup> Nevertheless, it is questionable as to whether these procedural measures alone will increase the numbers of cases lodged with the Committee.

Considering what can be done in order to improve the function of the UNESCO Committee, some areas for possible modifications can be identified. The two objectives that led to the establishment of the Committee provide a starting point for such an analysis. Whereas the first objective – to fill the gaps of the 1970 UNESCO Convention – remains valid as the convention in its existing form will never have retroactive effect;<sup>1367</sup> the second objective seems to have altered since the Committee's establishment in 1978. This is mainly due to the fact that the second objective (namely accompanying the process of decolonization) lost its immediacy over the last thirty years. Although many cases of appropriation of cultural materials during the period of colonial domination have neither been brought to the Committee, nor have otherwise been resolved, the emphasis in the debate has shifted both substantively and geographically over the past several years, from a focus on decolonization in Africa to trafficking in Latin America.

In the 1960s and 1970s, the restitution debate surrounding cultural objects appropriated during the period of colonization had mainly been initiated by the newly independent African States (a famous 1978 plea for return was made by the Director-General of UNESCO M'Bow,<sup>1368</sup> a Senegal national); today, however, Latin American States have now taken the lead in the restitution debate. This trend is also illustrated by the number of ratifications of the 1970 UNESCO Convention: while most Latin American States have ratified the UNESCO Convention, many African and Asian Pacific States have yet to do so.<sup>1369</sup> This geographical shift has also led to a shift in the debate: namely, away from the

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<sup>1366</sup> Rules of Procedure for Mediation and Conciliation in accordance with Article 4, paragraph 1 of the Statutes of the Intergovernmental Committee, CLT-2010/CONF.203/COM.16/7, adopted at the 16th session of the Committee (21-23 September 2010), full text available at: <http://unesdoc.unesco.org/images/0019/001925/192534E.pdf> (accessed 23 September 2011).

<sup>1367</sup> Amending the convention, e.g. by creating a protocol to the convention that introduces a provision on the convention's retroactivity, would require the (unlikely) ratification of all States Parties of such a protocol.

<sup>1368</sup> A Plea for the Return of an Irreplaceable Cultural Heritage to those who Created It, 7 June 1978, by Director-General of UNESCO Amadou-Mahtar M'Bow; See: UNESCO Doc. SHC-76/CONF.615.5,3.

<sup>1369</sup> Cf. Planche, "Die Unesco-Konvention Von 1970: Anwendung Auf Internationaler Ebene," p. 145. See the number of ratifications and list of States Parties to the convention: <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (accessed 23 September 2011).

colonial appropriation of cultural materials, and more towards the illicit trafficking in cultural artifacts, particularly in view of the illicit trafficking in archeological objects. Although archeological objects are explicitly mentioned in Article 1 (c) and (e) of the 1970 UNESCO Convention, the major problem associated with archeological artifacts – namely that of clandestine excavation – was not addressed at all by the Convention, since the provision on the return of cultural objects (Article 7 b ii) applies only to inventoried cultural property.<sup>1370</sup> Archeological objects stemming from clandestine excavations are by definition not inventoried, and as such not covered by the return provisions of the convention.<sup>1371</sup>

Consequently, States which are frequently confronted with the problem of illicit trafficking in archeological objects have called for international action in this matter. In this respect, such action encounters two specific legal obstacles related to the provisions of the 1970 UNESCO Convention, since the convention covers neither the matter of illicit excavations, nor does it have – like many other international conventions – a States Parties conference as a permanent forum of discussion. Therefore, States may only lodge complaints regarding specific problems in implementing the 1970 UNESCO Convention by lobbying for their discussion as a part of the agenda of the General Conference of UNESCO, or by addressing these problems in front of the UNESCO Intergovernmental Committee, which as, of late, seemed to be filling the gap left in the convention by the absence of a proper States Parties conference. As a third option, States might address the topic of illicit trafficking in cultural objects in international fora other than UNESCO. This trend has lately given rise to an increase in the activities of ECOSOC as well as UNODC in Vienna as they pertain to the trafficking in human beings, drugs and weapons.<sup>1372</sup> Although the UNESCO Committee was initially established for other purposes, namely dealing with the non-retroactivity of the 1970 Convention (first objective) and the process of decolonization (second objective), it now might gain a third objective: namely, as a body dealing with aspects of restitution and return not covered by the 1970 UNESCO Convention, such as the matter of trafficking in archeological objects obtained through illicit excavation. The small number of cases lodged with the Committee and the lack of a proper States Parties conference to the Convention seem to have fostered the necessity of this development.

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<sup>1370</sup> For details on the 1970 UNESCO Convention, see *supra* Chapter Three, Section 2.2.

<sup>1371</sup> Cf. O'Keefe, *Commentary on the 1970 Unesco Convention*, p. 59.

<sup>1372</sup> For details on ECOSOC Resolutions and the work of UNODC, see *supra* Chapter Three, Section 3.4.

Along this vein, the recommendations adopted by the UNESCO Committee in September 2010 underline the importance of reflecting on “the effectiveness of the current international legal framework, taking into account that it might be insufficient in the fight against illicit trafficking in cultural property [...], in particular to archaeological and paleontological objects coming from illicit excavations and looting of archaeological and paleontological sites”.<sup>1373</sup> Although whether this kind of reflection falls within the mandate of the UNESCO Committee may be questionable, it, nevertheless, has become an issue in the Committee’s discussions. Moreover, the recommendations of the Committee emphasize, amongst other issues, the importance of “the consideration of basic principles in the field of restitution and return of cultural objects which could enrich the work of the Committee as well as the function of the 1970 UNESCO Convention”.<sup>1374</sup> It is this latter objective, in particular, for which this thesis is arguing: namely, the necessity of identifying principles in restitution matters. While, generally speaking, such principles might take into account a variety of possible considerations, this thesis argues that any set of basic principles must incorporate the common interests of all parties in preservation, access, integrity and cooperation as the fundamental basis for restitution and return. Thus, considering these interests in combination with the complementary and alternative mechanisms could decisively improve the work of the UNESCO Committee and its newly established proceedings, which allow for mediation and conciliation.

In addition to these general considerations on how to improve the work of the UNESCO Committee, some technical amendments should also be made, in order to improve the functioning of the Committee and to increase the number of cases brought before it. It is notable that the current requirements for bringing a case to the UNESCO Committee do not provide claimants with a clear procedure, nor do they clearly define the steps to be taking by the requesting State. Article 3 of the Statute of the Committee very broadly states that “a request for restitution and return” can be brought “by any Member State or Associate Member of UNESCO” if the cultural object in question has a “fundamental significance from the point of view of the spiritual values and cultural heritage of the people” of that State and the object “has been lost as a result of colonial or foreign occupation or as a result of illicit

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<sup>1373</sup> See Recommendation No. 7 (para. 3 a) adopted by the Intergovernmental Committee (ICPRCP) in its 16th session in Paris, 21-23 September 2010, CLT-2010/CONF.203/COM.16/5, available at: <http://unesdoc.unesco.org/images/0018/001896/189639E.pdf> (accessed 23 September 2011).

<sup>1374</sup> Ibid, Recommendation No 7 (para. 3 c).

appropriation”.<sup>1375</sup> Article 4 of the Statute continues by saying that “the Committee shall be responsible for seeking ways and means of facilitating bilateral negotiations for the restitution and return.” Therefore, it can be assumed that bilateral negotiations should have already been initiated by the respective parties prior to engaging the services of the Committee. Although it is aware of the shortcoming in the instructions pertaining to both the requirements and the procedure associated with restitution cases, the UNESCO Committee did not amend its statute; rather it developed a so-called ‘Standard Form concerning Requests for Return or Restitution’,<sup>1376</sup> in 1986 outlining how States should submit requests for return and restitution to the UNESCO Committee.<sup>1377</sup> However, even this standard request form remains rather unclear since it requires that “the form is to be used only in cases where negotiations already have made unsatisfactory progress”.<sup>1378</sup> Whether this “unsatisfactory progress” has to be confirmed by one or all parties involved in the negotiations, or whether the bilateral negotiations have to be completely failed or suspended before engaging the Committee remains unclear, however.

Therefore, the statute of the Committee should be amended in order to clearly specify the requirements for lodging a request before the UNESCO Committee, and this amendment should focus on two particular issues: firstly, the evidence required for a comprehensive request to be dealt with by the Committee;<sup>1379</sup> and secondly, the appropriate stage of the bilateral negotiations at which the parties can engage the Committee. Generally, it can be assumed that it is preferable for the Committee to become involved earlier rather than later, since previously abortive negotiations between the parties essentially reduce the likelihood of rapid and/or mutually satisfactory outcomes. In this way, the Committee could also have a positive impact on the unequal bargaining power between the respective parties, which frequently exists between parties, and has been identified as a major obstacle in bilateral negotiations.<sup>1380</sup> Thus, instead of requiring “unsatisfactory progress” in the bilateral negotiations, the Committee could simply opt for a fixed-term solution: a request for

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<sup>1375</sup> See: Article 3 (2) of the Statutes of the Intergovernmental Committee, CLT/CH/INS-2005/21, adopted by the General Conference of UNESCO at its 20th session (1978), last amended in October 2005, available at: <http://unesdoc.unesco.org/images/0014/001459/145960e.pdf> (accessed 23 September 2011).

<sup>1376</sup> ICPRCP Standard Form concerning Requests of Return or Restitution (January 1986), available at: [http://www.unesco.org/culture/laws/pdf/formulario\\_retorno.pdf](http://www.unesco.org/culture/laws/pdf/formulario_retorno.pdf) (accessed 23 September 2011).

<sup>1377</sup> Prott, "The History and Development of Processes for the Recovery of Cultural Heritage," p. 191.

<sup>1378</sup> ICPRCP Standard Form (1986), see: Notes on completing the form, p. 1.

<sup>1379</sup> Article 3 (3) of the Committee's statute only states that “cultural property restituted or returned shall be accompanied by the relevant scientific documentation”, CLT/CH/INS-2005/21.

<sup>1380</sup> For details on unequal bargaining power, see *supra* Chapter Four, Section 1.3.

restitution and return can be lodged with the UNESCO Committee upon the condition that bilateral negotiations have not made substantial progress within a year.

Moreover, the question of who can lodge requests for restitution and return before the Committee is quite essential. Although stakeholders other than States (namely private entities, museums, and indigenous people) have recently gained important standing in international cultural matters,<sup>1381</sup> the UNESCO Intergovernmental Committee remains by definition a forum of States. In the course of drafting the new rules of procedure for mediation and conciliation (adopted by the Committee in September 2010),<sup>1382</sup> proposals were made to expand the procedure to stakeholders other than States (e.g. private and public institutions).<sup>1383</sup> However, the member States of the Committee refused to approve these proposals. Thus, Article 4 of the rules now reads: “only UNESCO Member States and Associate Members of UNESCO may have recourse to a mediation or conciliation procedure pursuant to these rules of procedure”; it continues by saying that “States may represent the interests of public or private institutions located in their territory or the interests of their nationals”.<sup>1384</sup> The latter aspect, however, is nothing new and has been possible ever since.<sup>1385</sup> Consequently, the Committee persists in using its traditional formula: namely only engaging in cases where cultural material is requested by one State from another State.

In sum, further improvements in the way in which the Committee functions can certainly be made. Despite the shortcomings mentioned, it might even be reasonable to expand the overall role and mandate of the UNESCO Committee: the mandate of the Committee could extend beyond that of facilitator during bilateral negotiations between States (since other parties are currently not admitted to mediation and conciliation), to that of general supervisor of restitution proceedings and the eventual outcome of bilateral negotiations. Specifically, the Committee could supervise the course of return – or any other possible

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<sup>1381</sup> For detailed discussion, see *supra* Chapter Five, Section 1.

<sup>1382</sup> Rules of Procedure for Mediation and Conciliation in accordance with Article 4, paragraph 1 of the Statutes of the Intergovernmental Committee, CLT-2010/CONF.203/COM.16/7, adopted at the 16th session of the Committee (21-23 September 2010), full text available at: <http://unesdoc.unesco.org/images/0019/001925/192534E.pdf> (accessed 23 September 2011).

<sup>1383</sup> For example, proposals made, among others, by Canada, Italy and the United Kingdom (opposing to such proposals Japan). See for discussion on the proposals made: Article 4 of the Draft Rules of Procedure on Mediation and Conciliation (May 2009), available at: <http://unesdoc.unesco.org/images/0018/001825/182569E.pdf> (accessed 23 September 2011).

<sup>1384</sup> Article 4 (1) and (2) of the Rules of Procedure for Mediation and Conciliation of the UNESCO Committee.

<sup>1385</sup> The case of the *Makondé mask* lodged with the Committee in 2006, involved not Switzerland as State but the private Barbier-Müller Museum at Geneva and Tanzania. The case was solved in May 2010 through a bilateral agreement donating the mask to Tanzania. For details, see *supra* Chapter Three, Section 3.2.

solution found in a particular case. In this manner, the Committee could ensure the execution and adequate performance of the agreement reached by the parties, including the monitoring of whether the preservation of and access to the cultural material returned is adequately managed.

#### 4.3 National Advisory Committees on Restitution and Return

Whereas the Intergovernmental Committee of UNESCO takes an advisory role providing a forum of discussion on the international level, there is no such equivalent on the national level in most States. One might say that in view of the small number of cases lodged with the UNESCO Committee, there is no need for having such a body at the national State level. Interestingly, however, the national advisory committees that have been established in recent years work quite successfully. National advisory committees have been established in order to deal with specific cases or a set of cases. One example is the establishment of the NAGPRA Review Committee in the U.S. in 1991. The purpose of this committee is to deal with disputes pertaining to human remains and related cultural materials in the framework of the Native American Graves Protection and Repatriation Act (NAGPRA).<sup>1386</sup> Another example is the establishment of national committees and commissions in order to deal with restitution disputes pertaining to Nazi-looted art. The starting point for the establishment of such administrative bodies in several States was the adoption of the Washington Principles in 1998.<sup>1387</sup> These principles expressly provide for the establishment of “commissions or other bodies to identify art that was confiscated by the Nazis and to assist in addressing ownership issues”.<sup>1388</sup>

The following section will demonstrate that such national advisory committees (such as those established in Germany, the United Kingdom and the Netherlands) could be utilized not only for the resolution of disputes related to Nazi-looted art, but also with regard to other categories of restitution disputes.<sup>1389</sup> As provided by the 1998 Washington Principles, the aim of such commissions is twofold: identifying lost cultural materials and resolving ownership disputes. The first aim is particularly important, as research on provenance is often missing,

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<sup>1386</sup> See section 8 of the U.S. Native American Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601 of 16 November 1990. For details on the regulations of the act, see *supra* Chapter Five, Section 3.1.2.

<sup>1387</sup> See *supra* Chapter Three, Section 3.5.

<sup>1388</sup> See Principle number 10 of the Principles of the Washington Conference with Respect to Nazi-Confiscated Art, passed on 3 December 1998, full text available at: <http://www.state.gov/p/eur/rt/hlcst/122038.htm> (accessed 23 September 2011).

<sup>1389</sup> For details on the legal categorization of claims, see *supra* Chapter Two, Section 4.

and at least part of the difficulty of dealing with disputes stems from the uncertainty of what constitutes a looted object.<sup>1390</sup> It is, however, important to note that the nature of a decision produced by committees such as these are generally only recommendation. This is because the 1998 Washington Principles *per se* are legally non-binding, and civil law would fail to be applicable due to the statute of limitations.

On the basis of the 1998 Washington Principles, Germany set up an office in 2001, whose main purpose is to receive and document research results pertaining to cultural materials removed because of Nazi persecution or relocated because of war.<sup>1391</sup> The office also functions as the secretariat of the German Advisory Commission (GAC)<sup>1392</sup> and hosts the ‘lostart.de’ database, which provides an open-access search tool for those seeking information on cultural materials lost because of Nazi persecution or WWII, be they museums, potential private claimants, or the general public. The Advisory Commission, composed of well-known German public figures, acts as a mediator in restitution disputes over cultural materials located in museums, libraries, archives or other public institutions in Germany. The Advisory Commission can only act on request by both parties to the dispute; a request by only one party is not sufficient nor can the commission act *ex officio*.<sup>1393</sup> Due to these limitations on the ability of the commission to take action and the fact that private claimants often prefer discrete bilateral negotiations with the respective museum or public institution, it is not surprising that only four recommendations have been issued thus far.<sup>1394</sup> The recommendations made by the Commission represent three types of possible solution: firstly, return of the requested object; secondly, retention of the object by the respective institution without compensation; and thirdly, retention of the object by the institution with compensation to be paid to the legitimate owner or heir.<sup>1395</sup>

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<sup>1390</sup> Cf. Robin Cembalest, *Tensions are rising between the restitution community and U.S. museums over the proper way to handle Holocaust art claims*, in: Art News, 18 October 2010, [http://artnews.com/issues/article.asp?art\\_id=3073](http://artnews.com/issues/article.asp?art_id=3073) (accessed 23 September 2011).

<sup>1391</sup> Koordinierungsstelle Magdeburg (Coordination Office for Lost Cultural Materials), homepage and database available at: <http://www.lostart.de/Webs/EN/Start/Index.html> (accessed 23 September 2011).

<sup>1392</sup> Full title of the Advisory Commission: „Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz“, in English: “Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property”.

<sup>1393</sup> Cf. critical Schnabel and Tatzkow, *Nazi Looted Art, Handbuch Kunstrestitution Weltweit*, p. 201.

<sup>1394</sup> The recommendations made in 2005, 2007, 2008 and 2009 by the advisory commission as of September 2011 can be found at: <http://www.lostart.de/Webs/EN/Kommission/Index.html> (accessed 23 September 2011).

<sup>1395</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 241.

These three types of solution can also be found within the recommendations made by the British Spoliation Advisory Panel (SAP).<sup>1396</sup> The panel, appointed by the Secretary of State in 2001, resolves claims by the original owners or their heirs pertaining to cultural property lost during the Nazi era (1933-45), and now held in national collections in the United Kingdom. The panel considers “both legal and non-legal aspects, such as the moral strength of the claimant’s case, and whether any moral obligation rests on the holding institution”.<sup>1397</sup> In contrast to the German Advisory Commission, the request for mediation by only one party of the dispute is sufficient; as a result, public museums and collections are under the obligation to take part in the respective proceedings. Moreover, if the parties involved agree, the panel can also judge requests concerning objects in private collections.<sup>1398</sup> The panel is an alternative to formal litigation but, similarly to the situation in Germany, the recommendations made are not legally binding on any party. If, however, a claimant accepts the recommendation made by the panel, and the recommendation is implemented, the claimant is expected to accept this as full and final settlement of the claim. Since the establishment of the panel in 2001, eleven recommendations have been issued.<sup>1399</sup> Interestingly, the panel’s recommendations included, for example, the recommendation to return three drawings to a claimant that had been previously held by the British Museum – one of the reasons to return was the defective quality of the artwork (2007)<sup>1400</sup>. In another case, the panel recommended the permanent loan of a twelfth century manuscript from the British Museum to a monastery in Benevento, Italy, which had requested the return of the manuscript (2005).<sup>1401</sup> Full return – which would include both physical relocation and the transfer of title of ownership – could not be recommended, because both British law and the statute of the British Museum prohibit the de-accession of objects from collections held by the museum. The panel clearly stated in its recommendation that legislation should be introduced to amend the British Museum Act of 1963, the British Library Act of 1972, and the Museums

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<sup>1396</sup> The reports of the British Spoliation Advisory Panel are published online, and are available at: [http://www.culture.gov.uk/what\\_we\\_do/cultural\\_property/3296.aspx](http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx) (accessed 23 September 2011).

<sup>1397</sup> Cf. introduction on the work of the Spoliation Advisory Panel, available at:

[http://www.culture.gov.uk/what\\_we\\_do/cultural\\_property/3296.aspx](http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx) (accessed 23 September 2011).

<sup>1398</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 242.

<sup>1399</sup> The reports of the British Spoliation Advisory Panel are published online, and are available at:

[http://www.culture.gov.uk/what\\_we\\_do/cultural\\_property/3296.aspx](http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx) (accessed 23 September 2011).

<sup>1400</sup> See panel recommendation of January 24, 2007, available at:

<http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/SixthReportSAPHC200.pdf> (accessed 23 September 2011).

<sup>1401</sup> See panel recommendation of 23 March 2005, available at:

[http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/spreport\\_hc406.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/spreport_hc406.pdf) (accessed 23 September 2011).

and Galleries Act of 1992 in order to permit restitution of objects in particular categories falling under the de-accessioning rule.<sup>1402</sup> So far, however, no such amendments have been made.

Similarly to the German Advisory Commission (GAC) and the British Spoliation Advisory Panel (SAP), the Restitution Committee in the Netherlands, established in 2002, also issues legally non-binding recommendations.<sup>1403</sup> The Restitution Committee investigates and assesses claims to items of cultural value in State museums and other public institutions, which were involuntarily lost by their owners due to circumstances directly related to the Nazi regime. However, unlike the previous examples, this Committee may issue binding recommendations in restitution disputes should the parties involved agree this process in writing, and if the requested object is not held by a public institution but rather by a private person. As a result, the Dutch Committee is in these circumstances able to act as an arbitration panel.<sup>1404</sup> The regulations on the recommendation procedure for the Committee, which are set out in Article 4, indicate that the Committee makes a recommendation “in accordance with the requirements of reasonableness and fairness” and “may take the following in consideration: (a) the government’s line of policy concerning the restitution of stolen works of art in so far as they apply by analogy; (b) the circumstances in which possession of the work was lost; (c) the extent to which the applicant has endeavored to trace the work; (d) the circumstances in which the owner acquired the work and the inquiries the owner made when acquiring it; (e) the significance of the work for the applicant; (f) the significance of the work for the owner; and (g) the significance for the public art collection.”<sup>1405</sup> In particular, the last three considerations taken by the Dutch Committee demonstrate the equal importance of the interests of the respective parties, namely the claimant, the current owner, as well as the public.

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<sup>1402</sup> Ibid, p. 25, para. 77 of the recommendation (accessed 23 September 2011).

<sup>1403</sup> Full title of the Restitution Committee: „The Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War“, homepage of the committee available at: <http://www.restitutiecommissie.nl/en> (accessed 23 September 2011).

<sup>1404</sup> Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 244.

<sup>1405</sup> See Article 4 of the “Regulations on binding recommendation procedure” establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War”, available at: <http://www.restitutiecommissie.nl/images/stories/regulations%20art2lid2.pdf> (accessed 23 September 2011).

Initially, the Dutch Committee established a deadline of April 2007 for the submission of claims, but this deadline was eliminated in 2009, as applications for requests to the Committee continued.<sup>1406</sup> Since its establishment in 2002, approximately hundred recommendations have been made by the Dutch Committee.<sup>1407</sup> The majority of requests concern objects, which belong to the so-called ‘Netherlands Art Property Collection’. The collection still comprises around 3,800 works of art, mostly of which were confiscated or sold during the period during which the Nazi regime controlled the Netherlands.<sup>1408</sup> Most of these cultural objects were taken to Germany, where they were seized by the Allies in 1945 and returned to their presumed State of original location (namely the Netherlands) in order to be returned to their owners or respective heirs. The delay in returning the objects has to do, in part, with difficulty in identifying the original owners during the 1950s and 1960s; moreover, an insufficient amount of provenance research on these objects had been conducted until the 1998 Washington Principles were established. In autumn of 2012, the Dutch government expects to be able to present a report determining a feasible date for terminating the restitution policy and the activities of the Restitution Committee.<sup>1409</sup>

In summarizing this short comparative appraisal of national advisory committees, it can be said that the achievements of special committees responsible for restitution disputes in the context of Nazi-looted art have major practical importance, even though their recommendations based on the 1998 Washington Principles are legally non-binding. First of all, these committees have stipulated that provenance research must be conducted, and have made specific recommendations on how to resolve restitution disputes. Within their recommendations, they have provided claimants with solutions in accordance with traditional private law, including return as well as retention with and without financial compensation.<sup>1410</sup> Secondly, in cases in which legal provisions prevent the full return of the requested object, the committees have provided alternative solutions, as in the case of the twelfth century manuscript given on permanent loan to the monastery of Benevento in Italy.<sup>1411</sup> In this

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<sup>1406</sup> See. Annual Report 2009 of the Restitution Committee, p. 15, available at: <http://www.restitutiecommissie.nl/en/publicaties.html> (accessed 23 September 2011).

<sup>1407</sup> See. Annual Report 2009 of the Restitution Committee, p. 87, available at: <http://www.restitutiecommissie.nl/en/publicaties.html> (accessed 23 September 2011).

<sup>1408</sup> Ibid, p. 8.

<sup>1409</sup> Ibid, p. 16 and p. 81.

<sup>1410</sup> Cf. Schönberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 244.

<sup>1411</sup> Cf. the recommendation made by the British Advisory Panel of 23 March 2005, available at: [http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/spreport\\_hc406.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/spreport_hc406.pdf) (accessed 23 September 2011).

particular case, the British Advisory Panel went even further by making specific proposals that would amend current legal provisions on restitution in the United Kingdom, in order to resolve similar cases differently in the future. Thirdly, the national committees integrate both legal and ethical considerations, and reflect whether any moral obligation rests on the holding institution.<sup>1412</sup> In addition, the committees can weigh the significance of various issues in evaluating the facts of the claim, particularly the circumstances of the loss of the object and the amount of effort made by the current owner in acquiring the object in question. Moreover, as explicitly provided for in the Netherlands, the committees can reflect on the interests of the respective parties, namely the claimant, the current owner, and the public in the construction of their recommendations. Thus, this informal approach of involving committees in resolving restitution disputes provides an opportunity for various issues and interests in restitution disputes to be taken into consideration in a way that is not usually possible in legal proceedings.<sup>1413</sup> Nevertheless, issues of interests that must be considered within purely legal rules can still be taken into account, such as due diligence and, as seen above, restrictions that prohibit the de-accession of objects from collections.

With regard to advisory committees, proposals have been made for the establishment of an international committee in order to resolve cases of Nazi-looted art.<sup>1414</sup> The advantage of this approach would be that an international body would preclude different national decision-making practices. Given that rationale, the question must be raised as to why this type of special committee should be restricted to the category of Nazi-looted art, since the appropriation of cultural materials has occurred in many incidents of genocide and war.<sup>1415</sup> However, since no such international body has been established so far, this issue remains speculative at this point.

That said, a similar type of advisory committee that deals with a category of cases not related to Nazi-looted art is the committee created under the U.S. Native American Graves

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<sup>1412</sup> Cf. introduction on the work and function of the Spoliation Advisory Panel, available at: [http://www.culture.gov.uk/what\\_we\\_do/cultural\\_property/3296.aspx](http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx) (accessed 23 September 2011).

<sup>1413</sup> Cf. Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 245.

<sup>1414</sup> Jennifer Anglim Kreder, "Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal," *Brooklyn Law Review* (2007): p. 179.

<sup>1415</sup> Norman Palmer, "Should the Principles Underlying the Spoliation Advisory Panel Be Applied to Other Types of Repatriation Claim?," *The Art Newspaper* (2004): p. 26. And Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 245.

Protection and Repatriation Act (NAGPRA).<sup>1416</sup> The NAGPRA Review Committee was established in order “to monitor and review the implementation of the inventory and identification process and repatriation activities” and “to facilitate the resolution of any disputes among tribes, federal agencies, and museums” through non-binding recommendations.<sup>1417</sup> Moreover, it is meant to facilitate the exchange of information between the various tribes, museums and federal authorities, as well as advising the Secretary of State in cases involving culturally unidentifiable human remains. Since its establishment in 1991, the Committee has made several dispute findings and recommendations.<sup>1418</sup> The composition of the Committee is itself remarkable, as its members are appointed by the Secretary of the Interior based on nominations by Indian tribes, Native organizations, traditional Native American religious leaders, national museum organizations, and scientific organizations.<sup>1419</sup> It is most likely this diverse composition – as well as the overall procedural structure – of the Review Committee that has resulted in relatively few disputes being taken to court. It appears that NAGPRA has been able to smooth the way of amicable dispute resolution in lieu of formal procedure and court litigation.<sup>1420</sup>

#### 4.4 Restitution and Return in the Context of World Heritage Sites

The concept of common cultural heritage is materialized in the designation of cultural and natural sites as being one of ‘outstanding universal value’ for humankind. In order to be included in the UNESCO World Heritage List, sites nominated by States have to meet at least one out of ten selection criteria established in the ‘Operational Guidelines’.<sup>1421</sup> Next to the 1972 UNESCO Convention, these ‘Guidelines’ are the main working tool of the World Heritage Committee (which is currently comprised of 21 States elected by the General Conference of UNESCO). The criteria for determining the ‘outstanding universal value’ of a candidate World Heritage site are regularly revised by the World Heritage Committee (similarly to the Guidelines) in order to reflect the evolution of the World Heritage concept.

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<sup>1416</sup> See section 8 of the U.S. Native American Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601 of 16 November 1990. For details on the regulations of the Act, see *supra* Chapter Five, Section 3.1.2.

<sup>1417</sup> *Ibid*, section 8 NAGPRA.

<sup>1418</sup> List and full text of findings and recommendations available at:

[http://www.nps.gov/nagpra/REVIEW/Find\\_and\\_Rec.htm](http://www.nps.gov/nagpra/REVIEW/Find_and_Rec.htm) (accessed 23 September 2011).

<sup>1419</sup> For details, see the information available at: <http://www.nps.gov/nagpra/REVIEW/INDEX.HTM> (accessed 23 September 2011).

<sup>1420</sup> Schönenberger, *The Restitution of Cultural Assets: Causes of Action - Obstacles to Restitution - Developments*, p. 247.

<sup>1421</sup> Operational Guidelines for the Implementation of the World Heritage Convention (initially issued in 1977, current version issued in January 2008, WHC 08/01), available at: <http://whc.unesco.org/en/guidelines> (accessed 29 August 2011). The criteria for the assessment of outstanding universal value can be found in the guidelines, section II.D. No. 77 (p. 20-21), reprinted as Annex IV to this thesis.

This has not only allowed for changes in the universal perception of value over time, but has also allowed the Committee to address shortcomings in the actual definition of cultural heritage as set out in article 1 of the Convention.<sup>1422</sup> Although the 1972 UNESCO Convention does not specifically encompass movable cultural heritage,<sup>1423</sup> listed heritage sites naturally also include movable objects that form an integral part of these sites.

The importance of the World Heritage site program to restitution disputes is twofold: firstly, the decision to return cultural objects would perhaps be more forthcoming if the claimed object were to be returned to a designated World Heritage site. This might occur in three specific types of circumstances: (1) an object was stolen or otherwise illicitly removed from a World Heritage site; (2) an object was appropriated from a site only subsequently designated as a World Heritage site (e.g. removal occurring before the 1972 UNESCO Convention came into force in 1975); and (3) an object is considered for return to a World Heritage site, since this site would establish a cultural or historical link that previously did not exist between the object and that site (e.g. if the original site of the object is unknown, destroyed, or simply not adequate for housing the claimed object). Therefore, cultural materials of uncertain provenance, as for example in the case of so-called orphaned objects,<sup>1424</sup> would benefit from the depository within the auspices of a World Heritage site. The benefits of associating orphaned objects (as well as others) with World Heritage sites are further supported by the fact that these sites must meet specific management conditions in terms of preservation and access.

Secondly, World Heritage sites have the capacity to demonstrate the contiguity between past and present aspect of cultural heritage: the history behind a certain appropriation during war, foreign or colonial occupation, or illicit trafficking would only add to the rich historical context of these sites. Although they are located in the territory of one State, World Heritage sites are especially well-suited to serve as depositories for certain disputed cultural material, since World Heritage sites form part of the common heritage of humankind. Along this vein, the possibility to designate both natural and cultural heritage sites as ‘trans-boundary property’ jointly through the nomination of more than one State,<sup>1425</sup> might facilitate

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<sup>1422</sup> Forrest, *International Law and the Protection of Cultural Heritage*, p. 233.

<sup>1423</sup> For details, see *supra* Chapter Three, Section 2.3.

<sup>1424</sup> For details, see *supra* Chapter Five, Section 3.8.

<sup>1425</sup> Examples of cultural property inscribed as ‘trans-boundary property’ include, among others, the following: ‘Frontiers of the Roman Empire’ (Germany and United Kingdom, inscribed in 1987); the ‘Muskauer Park/Park

not only the solution of restitution disputes between neighboring States, but also the settlement of territorial conflicts, as in the case of the Temple of Preah Vihear whose designation within the territory of Cambodia in 2008 has sparked the borderland conflict between Cambodia and Thailand.<sup>1426</sup>

That said, restitution disputes might also degrade the integrity of World Heritage sites, if, for example, cultural material that is currently part of a World Heritage site is subsequently claimed for restitution and return. Whereas many cultural sites designated as World Heritage sites are not associated with a significant number of movable cultural objects (e.g. collections), some are, as for example the Museumsinsel (Museum Island) in Berlin, which was as designated as World Heritage site in 1999.<sup>1427</sup> It could be argued that the ‘outstanding universal value’, thus the World Heritage status, might be degraded if certain outstanding objects or a significance number of objects should be subject to claims for restitution and return. Within the context of the State Museums of the Berlin Museumsinsel, the loss of the ‘Pergamon Altar’ or the ‘Ishtar Gate of Babylon’ would undoubtedly diminish the cultural-historical importance of the Berlin site – similarly to any other loss caused by, for example, theft or destruction. Similar institutions, such as the British Museum in London or the Louvre in Paris are not (yet) included in the World Heritage list. However, as an independent site of its own, the banks of the Seine in Paris have been designated as a World Heritage site; however, it remains questionable as to whether the Louvre as such (particularly with the collections that belong to it) constitutes a part of that site, since the focus of the inscription of the banks of the Seine pertains to their urban setting and the riverside aspects of Paris.<sup>1428</sup>

The situation pertaining to the Museumsinsel in Berlin raises the question of whether or not movable cultural material forms a significant and essential part of World Heritage site, whose loss would endanger its status as a World Heritage site. The 2008 ‘Operational Guidelines’ do not elaborate on the movable aspect of cultural heritage. The only reference

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Muzakowski’ (Germany and Poland, inscribed in 2004); ‘Rhaetian Railway’ (Italy and Switzerland, inscribed in 2008); the ‘Prehistoric Rock Art Sites in the Coa Valley and Siega Verde’ (Portugal and Spain, inscribed in 1998); and the ‘Stone Circles of Senegambia’ (Gambia and Senegal, inscribed in 2006). The World Heritage List is available at: <http://whc.unesco.org/en/list> (accessed 23 September 2011).

<sup>1426</sup> For details on the case, see *supra* Chapter Five, Section 3.6.

<sup>1427</sup> See World Heritage List, Germany, Museumsinsel (Museum Island), Berlin, inscribed as cultural property in 1999, further information on the inscription available at: <http://whc.unesco.org/en/list/896> (accessed 23 September 2011).

<sup>1428</sup> See World Heritage List, France, Paris, banks of the Seine, inscribed as cultural property in 1991, information on the inscription of this site is available at: <http://whc.unesco.org/en/list/600> (accessed 23 September 2011).

made to movable heritage can be found in paragraph 48 of the guidelines that read: “nominations of immovable heritage which are likely to become movable will not be considered.”<sup>1429</sup> This reference, however, refers to the nomination of potential sites to be designated, but not to scenarios in which a World Heritage site already designated might be deprived of its movable components. A World Heritage site, such as the Museumsinsel in Berlin, might certainly not be deprived by its integrity through the loss or return of single objects – as for example through the return of the ‘Sphinx of Bogazköy’ to Turkey, as agreed to in May 2011 – but its significance might certainly be lessened if larger parts of its collections would be subject to restitution claims. Examples of exhibits not officially claimed, but from time to time discussed within the restitution debate, include: the Pergamon Altar, originating from the ancient city of Pergamon in Asia Minor (nowadays Turkey); the ‘Ishtar Gate’, originating from the ancient city of Babylon (nowadays Iraq); and the bust of Nefertiti (Nofretete), originating from Egypt – one of the highlights and most-known trademark of the Museumsinsel.

The justification for the inscription of the Berlin Museumsinsel as a World Heritage site in 1999 was based on the criteria (ii) and (iv) of the Guidelines; these criteria focus on the museum’s uniqueness, which extends beyond being a mere complex of buildings.<sup>1430</sup> Thus, the justification given by the World Heritage Committee reads as follows: “Criterion (ii): The Berlin Museumsinsel is a unique ensemble of museum buildings, which illustrates the evolution of modern museum design over more than a century. Criterion (iv): The art museum is a social phenomenon that owes its origins to the Age of Enlightenment and its extension to all people to the French Revolution. The Museumsinsel is the most outstanding example of this concept given material form and a symbolic central urban setting.”<sup>1431</sup> Moreover, the report of the 23rd session of the World Heritage Committee (1999), during which the Museumsinsel was inscribed, states that: “the observer of Poland emphasized that in this type of properties it was essential to maintain not only the values of the monumental buildings, but also to maintain the integrity of the museum collections.”<sup>1432</sup> Consequently, both the

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<sup>1429</sup> See para. 48 of the Operational Guidelines for the Implementation of the World Heritage Convention, issued in January 2008, available at: <http://whc.unesco.org/pg.cfm?cid=57> (accessed 23 September 2011).

<sup>1430</sup> The criteria for the assessment of outstanding universal value can be found in the Operational Guidelines, section II.D. No. 77 (p. 20-21), reprinted as Annex III to this thesis.

<sup>1431</sup> See Museumsinsel (Museum Island) Berlin, ‘Justification for Inscription’, full text available at: <http://whc.unesco.org/en/list/896> (accessed 23 September 2011).

<sup>1432</sup> See Report of the 23rd session of the World Heritage Committee (29 November-4 December 1999), WHC-99/CONF.209/22, full text available at: <http://whc.unesco.org/archive/repcom99.htm#896> (accessed 23 September 2011).

justification for inscription and the observer statement demonstrate that the Museumsinsel has not been designated as a World Heritage site merely because of its structural casing, but rather because of its unique ensemble of museums, and the nineteenth century museum concept for which it stands. Along the same vein, the ‘brief description’ provided by the World Heritage Committee clearly highlights the significance of the movable elements of the Museumsinsel by stating: “each museum was designed so as to establish an organic connection with the art it houses. The importance of the museum’s collections – which trace the development of civilizations throughout the ages – is enhanced by the urban and architectural quality of the buildings.” Thus, the interplay between the museums buildings and their collections form part of the ‘outstanding universal value’ of the Museumsinsel.

A recent example that illustrates the interplay between the protection of World Heritage sites and restitution claims is the case of the *Sphinx of Bogazköy* (also sphinx of Hattusha). Uncovered by German archeologists amidst a number of other ruins in 1907, the sphinx was once attached to a large city gate and formed part of an imposing welcome to the ancient Hittite capital Hattusha in central Anatolia between 1600 B.C. and 1200 B.C (at the time of the discovery located in the Ottoman Empire, which is now part of modern-day Turkey). The pair of sphinxes that flanked the Hattusha city gate was brought to Berlin in 1915-17 as incomplete fragments. Both were restored by the Berlin Museum. The better preserved of the two sculptures was returned to Turkey in 1924, while the other sphinx – consisting of ninety per cent of plaster replacement and only ten per cent original – was incorporated into the collection of the Berlin Museum (Museumsinsel) and put on display at the museum in 1934. Since 1938, Turkey – having become a sovereign State in 1923 – has demanded the return of the second sphinx.<sup>1433</sup> While 7,400 cuneiform tablets, which were part of the original package containing the sphinxes brought to Berlin in 1915-17 were return by the German Democratic Republic (the Museumsinsel was located in former East-Berlin) in 1987, the sphinx was not returned. Thus, Turkey lodged its request with the UNESCO Intergovernmental Committee after bilateral negotiations had failed in 1986/1987.<sup>1434</sup>

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<sup>1433</sup> See: Official Press release of the Berlin Museum, Stiftung Preußischer Kulturbesitz, Pressemitteilung “Einigung zur Sphinx von Hattusha”, published 13 May 13 2011, available at: [http://hv.spk-berlin.de/deutsch/presse/pdf/110513\\_Sphinx\\_von\\_Hattuscha.pdf](http://hv.spk-berlin.de/deutsch/presse/pdf/110513_Sphinx_von_Hattuscha.pdf) (accessed 23 September 2011).

<sup>1434</sup> For details on the case in front of the UNESCO Committee, see *supra* Chapter Three, Section 3.2 and Chapter Six, Section 4.3.

Legally speaking, it could not truly be verified by either party whether or not the second sphinx was part of an agreement by the Ottoman Empire to reward Germany for restoring the sphinxes and financing the excavation in 1907 (many documents at the Berlin Museum were lost due to the bombing in WWII). The return of the first sphinx in 1924 could actually be used as evidence in favor of both parties: the 1924 return may have concluded an agreement that had transferred the sphinxes only temporarily to Germany for restoration purposes; alternatively, the return in 1924 may have been part of an agreement dividing the two sphinxes.<sup>1435</sup> The lack of clear evidence as well as the course of time (namely WWII, the subsequent Cold War, and the German unification in 1990) resulted in a delay of resolving the matter for decades. Media campaigns and political pressure from Turkey, which included the threat of placing a ban on involvement of German archeologists in excavations in Turkey and a suspension in exhibition cooperation helped fuel the dispute in early 2011.<sup>1436</sup> The German side, in turn, feared (as most governments do) establishing a precedent for other restitution claims. Thus, it was not before May 2011, that a bilateral agreement was reached between Germany and Turkey providing for the return of the sphinx. The agreement was reached “in a spirit of friendship between Turkey and Germany”<sup>1437</sup> underlining that the case is a case *sui generis* “not comparable with other cases”.<sup>1438</sup> Subsequently, the resolution was presented at the 17th session of the UNESCO Committee in Paris in July 2011, thereby resolving one of the two remaining cases lodged with the Committee.<sup>1439</sup> Notably, it has been agreed that the sphinx will return by the latest on 28 November 2011 – it is this very date that marks the 25th anniversary of the inscription of the site of Hattusha in the UNESCO World Heritage List.<sup>1440</sup> The archaeological site of Hattusha, where the sphinx was uncovered in 1907, was designated in the World Heritage List in 1986 for its “urban organization and the notable types of

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<sup>1435</sup> See above n. 1433.

<sup>1436</sup> See: Susanne Güsten, *Turkey Presses Harder for the Return of Antiquities*, in: The New York Times, May 25, 2011; available at: [http://www.nytimes.com/2011/05/26/world/europe/26iht-M26C-TURKEY-RETURN.html?pagewanted=1&\\_r=2](http://www.nytimes.com/2011/05/26/world/europe/26iht-M26C-TURKEY-RETURN.html?pagewanted=1&_r=2) (accessed 23 September 2011).

<sup>1437</sup> Recommendation No. 3, adopted at the 17th session of the UNESCO-Committee (ICPRCP), held on 30 June-1 July 2011 in Paris, CLT-2011/CONF. 208/COM.17/5; available at: <http://unesdoc.unesco.org/images/0019/001937/193720E.pdf> (accessed 23 September 2011).

<sup>1438</sup> Official Press release of the German government: Presse-und Informationsamt der Bundesregierung, Pressemitteilung Nr. 171, “Hethitische Sphinx wird der Türkei übergeben”, published 13 May 2011; available at: <http://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2011/05/2011-05-13-bkm-hethitische-sphinx.html> (accessed 23 September 2011).

<sup>1439</sup> See: Recommendation No. 3, adopted at the 17th session of the UNESCO-Committee (ICPRCP), held on 30 June-1 July 2011 in Paris, CLT-2011/CONF. 208/COM.17/5; available at: <http://unesdoc.unesco.org/images/0019/001937/193720E.pdf> (accessed 23 September 2011).

<sup>1440</sup> See World Heritage List, Turkey, the site of Hattusha – Hittite Capital; available at: <http://whc.unesco.org/en/list/377> (accessed 23 September 2011).

construction that have been preserved”.<sup>1441</sup> Interesting, both sites –the Museumsinsel in Berlin (1999) and the site of Hattusha in Turkey (1986) – are World Heritage sites. Thus, the return of the Sphinx from Berlin to Hattusha also marks a rare case in which an object is returned from one World Heritage site to another.

Although this case certainly represents an anomaly, the case is also highly relevant in terms of alternative solutions. The bilateral agreement resolving this case contained several provisions on future cooperation: the return of the sphinx is intended to initiate a series of measures designed to promote German-Turkish cooperation, mainly in terms of museum and archaeological cooperation with regard to excavations, exhibitions, and loan agreements.<sup>1442</sup> Moreover, it was agreed that plaster copies should be made – one for the Museumsinsel to be displayed in Berlin, and a second one as a model for use by the Turkish authorities in their efforts to restore the sphinx at its original site in Hattusha. Upon its return, the sphinx is slated to be on display in a newly built museum at the site of Hattusha, close to its original place of excavation. The first sphinx, which was returned to Turkey in 1924 and is currently on display at the Istanbul Archaeology Museum,<sup>1443</sup> is also scheduled to be transferred to the newly built museum at the Hattusha site so that it may be displayed with its partner sphinx.<sup>1444</sup> This should be an important step in terms of re-uniting the former ensemble and to re-establish the unity of the sphinxes at its former site, since integrity and context of cultural materials are fundamental principles and of common interest to all parties.<sup>1445</sup> Whether or not the issue of returning the sphinx to a World Heritage site had a major impact in the resolution of the dispute is not available in the public record. However, the fact that the twenty-fifth anniversary of the inscription of Hattusha was mentioned in the connection with the return of the sphinx gives support to this assumption.<sup>1446</sup>

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<sup>1441</sup> Ibid.

<sup>1442</sup> See above n. 1438.

<sup>1443</sup> Cf. Official Press release of the Berlin Museum, Stiftung Preußischer Kulturbesitz, Pressemitteilung “Einigung zur Sphinx von Hattusha”, published May 13, 2011, available at: [http://hv.spk-berlin.de/deutsch/presse/pdf/110513\\_Sphinx\\_von\\_Hattuscha.pdf](http://hv.spk-berlin.de/deutsch/presse/pdf/110513_Sphinx_von_Hattuscha.pdf) (accessed 23 September 2011).

<sup>1444</sup> “Bogazköy Sphinx finally returns to Turkey after decades in Germany”, *Hürriyet Daily News*, 28 July 2011, available at: <http://www.hurriyetdailynews.com/n.php?n=bogazkoy-sphinx-finally-returns-to-turkey-after-decades-in-germany-2011-07-28> (accessed 23 September 2011).

<sup>1445</sup> For details on the interests in integrity and context, see *supra* Chapter Five, Section 3.3.

<sup>1446</sup> Recommendation No. 3, adopted at the 17th session of the UNESCO-Committee (ICPRCP), held on 30 June-1 July 2011 in Paris, CLT-2011/CONF. 208/COM.17/5, available at: <http://unesdoc.unesco.org/images/0019/001937/193720E.pdf> (accessed 23 September 2011).

The return of the Axum obelisk from Italy to Ethiopia in 2005 represents a similar example of return involving a World Heritage site.<sup>1447</sup> In this case, the World Heritage Committee welcomed “the cooperation between the States parties Ethiopia and Italy, leading to the return of the obelisk, which could enhance the value of Axum” and supported “the tripartite cooperation between UNESCO and the States parties of Ethiopia and Italy in the preparation of the re-erection of the obelisk.”<sup>1448</sup>

The appraisal of this section of Chapter Six can be summarized by highlighting the following three issues: firstly, although the 1972 UNESCO Convention does not provide provisions on restitution and return primarily because of its focus on immovable cultural and natural heritage, it clearly provides provisions indicating a common responsibility to protect the ‘outstanding universal value’ of cultural and natural heritage. Since movable cultural materials are integral parts of many cultural sites designated as World Heritage sites, the responsibility to protect inevitably extends to the movable elements at such sites. An emptied Palace of Versailles,<sup>1449</sup> a cleared Museumsinsel in Berlin,<sup>1450</sup> or a Taj Mahal bereft of its interior decorations,<sup>1451</sup> would only be empty shells. Secondly, due to the wide acceptance of the 1972 UNESCO Convention (188 States out of a total of 194 existing States have ratified the 1972 Convention),<sup>1452</sup> it can be argued that the convention’s provisions have become customary international law,<sup>1453</sup> and, for this very reason, are binding for both States parties and non-States parties to the convention.<sup>1454</sup> Thirdly, although the inscription of a site as World Heritage sites does not exclude the subsequent exercise of restitution and return of cultural material from that site, the status as being of ‘outstanding universal value’ must be taken into account in the identification of possible options for the resolution of restitution disputes. As shown in the case of the Sphinx of *Bogazköy*, this can influence the position of both parties in the dispute, since the Berlin museum and the Turkish site from which the

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<sup>1447</sup> For details on the case of the return of the Axum obelisk, see *supra* Chapter Three, Section 2.9.1.

<sup>1448</sup> Decision of the World Heritage Committee (2005) 29COM 7B.34 – Aksum (Ethiopia), available at: <http://whc.unesco.org/en/decisions/390> (accessed 23 September 2011). See in this regard also Scovazzi, "Diviser C'est Détruire: Ethical Principles and Legal Rules in the Field of Return of Cultural Property," p. 359.

<sup>1449</sup> See Palace and Park of Versailles, designated as a world heritage site in 1979; available at: <http://whc.unesco.org/en/list/83> (accessed 23 September 2011).

<sup>1450</sup> See Museumsinsel (Museum Island) in Berlin, designated as a world heritage site in 1999; available at: <http://whc.unesco.org/en/list/896> (accessed 23 September 2011).

<sup>1451</sup> See Taj Mahal, designated as a world heritage site in 1983; available at: <http://whc.unesco.org/en/list/252> (accessed 23 September 2011).

<sup>1452</sup> See above n. 362.

<sup>1453</sup> For details on customary international law, see *supra* Chapter Three, Section 6.

<sup>1454</sup> Francioni, "Thirty Years On: Is the World Heritage Convention Ready for the 21st Century?," p. 22. Cf. Bandeira Galindo, "The Unesco Declaration Concerning the Intentional Destruction of Cultural Heritage," p. 428.

sphinx originated are both World Heritage sites. In order to take all relevant issues into account – namely the protection of the integrity of World Heritage sites and the necessity of providing an adequate reply to claims for restitution and return – requires alternative solutions. In the case of the sphinx this was done through a combination of various mechanisms: firstly, the return of the requested object; secondly, the fabrication of replicas for both the Berlin and Turkish museums; thirdly, the establishment of ground for future bilateral cooperation; and fourthly, the re-uniting of both sphinxes (from the Berlin and the Istanbul museum) at the original World Heritage site.

### *Summary of the Chapter*

This chapter began by discussing the legal and policy issues involved in implementing the interest-oriented approach into the current legal regime of international law. While formal legal procedures and court litigations face three major obstacles, namely (1) the non-retroactivity of international law treaties; (2) the protection of the *bona fide* purchaser and the problem of burden of proof; and (3) lapse of time, complementary and alternative mechanisms that go beyond the mere legal approach might be used to overcome these obstacles. Since it is neither beneficial in policy terms to pass legislative acts for the resolution of single restitution disputes (as in the French Maori case), nor is it helpful in legal terms to omit any legal reference in the solution reached (as in the case of the U.S.-Italian agreements), the need for a combination of legal and policy provisions in terms of soft law mechanisms for restitution and return was discussed. As this thesis argues, this need can be best served by the development and international endorsement of general principles that incorporate the common interests of all stakeholders in preservation, access, integrity and cooperation.

Since the purely legal approach is not a viable option in many restitution disputes (due to the three major legal obstacles discussed), alternative mechanisms to current restitution practices are needed. Therefore, the chapter continued by giving a detailed analysis of complementary and alternative mechanisms. These include: (1) voluntary returns; (2) temporary loan agreements, the fabrication of replicas, and the mutual exchange of cultural objects; (3) permanent loan agreements and the return of cultural artifacts without transfer of ownership; (4) joint custody and shared management as well as transfer of expertise; (5) the re-purchase of objects claimed for return and the establishment of compensation funds in order to undertaking such purchases; and (6) considerations on the international reputation of

museums and other art holding institutions as an effective leverage mechanism in restitution disputes. Although these mechanisms do not form a conclusive enumeration of options, they, nevertheless, illustrate the breadth of possible solutions. Several examples have shown that there is no single solution through which all restitution disputes can or should be resolved – rather, it is the range of alternatives at hand and their possible combination that provide the most equitable solution, depending on the merits of the case and the interests of the parties involved.

Moreover, complementary and alternative mechanisms must be accompanied by policy considerations, and to date, some proposals for institutional improvements on both the international and national level have been made. Firstly, it was illustrated that determine complementary and alternative mechanisms to current restitution practices goes hand in hand with rethinking the traditional collecting and ownership paradigm of museums and the general function of stewardship. Secondly, proposals have been made to improve the functioning of the UNESCO Intergovernmental Committee through a clarification of its mandate and its possible role as a competent body to facilitate the resolution of restitution disputes and to supervise the completion of bilateral agreements negotiated in conjunction with restitution disputes. Thirdly, proposals have been made in terms of the establishment and the strengthening of national advisory committees that aim at identifying solutions on the basis of legally non-binding recommendations and informal procedures. Furthermore, the fact that these bodies do not work exclusively within a legal context but also incorporate legal, ethical and historical considerations was demonstrated to be highly advantageous. Fourthly, the role of World Heritage sites in the context of the restitution debate has been discussed. Against the backdrop of recently resolved cases, in which requested cultural material was return to but also from World Heritage sites, the fact that World Heritage sites play an important role in the restitution debate, both pro and contra the return of cultural objects, was also demonstrated.

## **CHAPTER VII: Conclusions and Future Prospects**

Traditionally, international cultural heritage law has been perceived as a dualistic conflict of interests between so-called ‘source countries’ and ‘art-market countries’. Since most States rich in archeological artifacts have enacted national export regulations and antiquity laws, the ‘source’ of newly excavated archeological artifacts available on the international art and antiquities market should have certainly run dry by now. However, the opposite is true. Together with the trafficking in drugs and arms, the illicit trafficking in cultural artifacts constitutes one of the most persistent illicit trades worldwide.<sup>1455</sup> Nor are the clandestine excavations of archaeological objects exclusively a problem for the so-called of ‘source countries’: illicit digging can occur in any region of the world. Even in so-called ‘art-market countries’, the enforcement system in place may fail to adequately protect against clandestine excavation and illicit export. Therefore, the destruction of sites, clandestine excavation, and illicit trafficking in cultural materials violate not only national export laws, but also the ‘common interest’ in protecting cultural heritage, since these activities inevitably result in the loss of unique and irreplaceable information that constitutes a valuable part of the history of humanity. Consequently, theories that postulate a traditional ‘conflict of interest’ approach are based on an outdated assumption, since several ‘common interests’ can be identified in cultural heritage matters.

Surprisingly, however, it is this traditional assumption that is repetitively used particularly in the field of restitution and return. Moreover, the existing legal provisions in international law as well as current State practices used to resolve restitution disputes primarily focus on States’ interests. Although the consolidation of the nation State concept only occurred relatively late in the nineteenth and early twentieth century – thus calling into question the concepts of ‘national patrimony’ and ‘national identity’ as they relate to cultural objects that often date back to ancient times – States still remain the primary actors in international law. Yet, the analysis undertaken by this thesis has demonstrated that new actors have come to the fore; moreover, these actors have had a major impact, since they have

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<sup>1455</sup> Cf. UNESCO information kit issued on the occasion of the 40th anniversary of the 1970 UNESCO Convention, 15-16 March 2011 held in Paris, the kit is available at: <http://unesdoc.unesco.org/images/0019/001916/191606E.pdf> (accessed 23 September 2011).

become essential stakeholders in issues pertaining to cultural heritage. These new actors include many non-State actors, such as museums and private entities, scientific and epistemic communities, indigenous peoples and ethnic minority groups, as well as the international community as a whole. Therefore, this thesis makes the case for the reconsideration of current restitution practices and proposes an alternative approach that takes into account the interests of the various stakeholders involved in restitution disputes. In addition to the necessity of taking the relevant stakeholders into account, the legal analysis undertaken by this thesis has demonstrated that a purely legal approach is often insufficient in resolving international cultural heritage disputes, since the major legal instruments of international treaty law (such as the 1954 Hague Convention, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention) are unable to adequately address the complexity of many restitution claims as well as the question of past removal due to the principle of non-retroactivity.<sup>1456</sup> Other legal obstacles linked to formal legal proceedings (namely the protection of the rights of the *bona fide* purchaser as well as provisions relating to statutes of limitation) add to the difficulties claimants frequently face in restitution disputes. Moreover, the existing international treaty law pertaining to restitution and return does not correspond with the multifaceted issues associated with the preservation of and the access to cultural heritage. It is this unsatisfying state of affairs that created the impetus for the development of the interest-oriented approach introduced by this thesis, as an alternative to current restitution practices.

The interest-oriented approach is based on three rationales: firstly, the conceptual shift in international law from the notion of ‘cultural property’ towards the notion of ‘cultural heritage’. The notion of ‘cultural property’ as such is limited in its scope, since it does not incorporate the social value associated with cultural materials – also referred to as its ‘intangible cultural heritage’. Moreover, the notion ‘cultural property’ emphasizes either the aspect of ownership and the exclusive sovereign interests of the territorial State in which the ‘property’ is located, or the interests of the private owner in reference to his exclusive right of disposition. Generally speaking, property rights entail the exclusion of other (public) interests, which are not linked to ownership rights. Given the conceptual connotations associated with ‘cultural property’, the semantic shift from ‘property’ to ‘heritage’ that took place within the last forty years in international treaty law necessitates a corresponding shift in the provisions

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<sup>1456</sup> Article 28 of the *Vienna Convention on the Law of Treaties*, (adopted 23 May 1969; entering into force 27 January 1980, 1155 UNTS 331) states that the provisions of an international treaty “do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

available for the resolution of restitution disputes. This shift, however, has not yet occurred, and States and their national property interests remain the primary concern of international cultural heritage law.

Secondly, both bilateral agreements among States and agreements between private actors and States are contractual in nature. Contracts, however, suffer from a major shortcoming in that their terms depend, in part, on the bargaining powers of the negotiating parties. Although this is an accepted reality in bilateral or multilateral negotiations, unequal bargaining power becomes particularly problematic in restitution disputes, since these disputes frequently reflect difficult issues associated with war, foreign or colonial occupation, or significant human rights violations. As this thesis has demonstrated, attempts made to ‘remedy historical injustices’ by addressing the question of restitution and return are often hampered by unequal bargaining power, since hegemony and dependence tend to persist in international relations – traditionally dividing parties into so-called ‘source countries’ and ‘art-market countries’. As a result, nearly all bilateral agreements concluded in order to settle restitution disputes explicitly exclude any legal reference to both the circumstances of the former appropriation, as well as the terms of the agreed upon solution. As the multiple examples provided in this thesis demonstrated, successful outcomes in restitution disputes often depend to a significant extent on the political and diplomatic commitment of the respective States as well as their bargaining power, rather than on general principles of law. This naturally affects the final outcome of negotiations in terms of the recognition of rights as well as practical aspects in terms of mutual gain and cooperation; however, it also inhibits the development and application of a consistent legal framework in the resolution of international cultural heritage disputes.

Thirdly, since both legal concepts of ‘property’ and ‘contract’ fail to take into account the different interests of the various stakeholders involved, and fail to provide a consistent legal framework for the resolution of restitution disputes, an alternative approach that aims at resolving restitution disputes in a sustainable and cooperative manner is needed. Recently developed concepts in international law, such as the ‘common heritage of humankind’, ‘common concern’, and ‘common but differentiated responsibility’ promote the idea that there is a common interest in the protection of cultural heritage, and indicate that there is a legal basis for interest-oriented considerations. The analysis of the interests involved in cultural heritage matters provided in this dissertation has demonstrated that the core concern and

common interest of all stakeholders is the interest of protecting and preserving cultural heritage. Preventing physical destruction, damage, and deterioration is thus the primary objective when dealing with cultural materials of whatever kind. If cultural materials are partially damaged or completely destroyed, they can neither be exhibited, nor studied, nor enjoyed; more importantly within the context of this thesis – they cannot be returned to the requesting party. Thus, even in highly controversial restitution disputes, the interest in preservation generally constitutes common ground between the opposing parties. This is even valid in those cases, in which cultural materials are requested in order to allow them decay and ‘return to the earth’, as illustrated by the example of the wooden Zuni War Gods.<sup>1457</sup> Decaying in this context generally does not include the deliberate or negligent damage or destruction by a third party, but instead refers to a ritual act or ceremony performed by a certain people (usually the tribe or indigenous community that created the object in question). Therefore, even in cases that result in ritual decay of a cultural object, it can still be assumed that the destruction of or damage to cultural artifacts not only diminishes property rights and the economical value intrinsic to cultural materials, but also the cultural significance of that artifact to a particular individual, group or community. Consequently, the protection and preservation of cultural heritage can truly be assumed as being the prerequisite and fundamental interest in international cultural heritage law upon whose basis all other interests may be constructed. These other interests include: the integrity of cultural material and the reunification of dispersed fragments; public and scientific access to cultural artifacts; the exchange of research information; and general cooperation in cultural heritage matters.

Based on these three rationales, this dissertation posits that the legal conceptualization of international cultural heritage disputes must go ‘beyond restitution’: in other words, legal conceptualizations must be developed that exceed the exclusive interests of States and transcending the idea of property rights as currently conceived. Despite the shortcomings of a purely legal approach, the analysis of the existing legal framework of international law has demonstrated that most legal instruments contain terms that describe cultural heritage as belonging to or being protected in the interest of all humankind.<sup>1458</sup> Consequently, this thesis has argued that the concept of ‘protection’ is common ground in international cultural heritage law and establishes a general responsibility of States (and, within a broader legal understanding, of other stakeholders as well) to protect cultural heritage during times of both

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<sup>1457</sup> For details on the case of the Zuni War Gods, see *supra* Chapter Five, Section 3.1.1.

<sup>1458</sup> Cf. Forrest, *International Law and the Protection of Cultural Heritage*, p. 405.

war and peace. Within the scope of the ‘common interest’ in the protection of cultural heritage, certain other interests associated with physical integrity, access and cooperation can be identified. Since these interests form part of the ‘common interest’, they are valid not only for general cultural heritage issues in war and peace, but must also be taken into account in the resolution of disputes over the restitution and return of cultural material.

Against the backdrop of these ‘common interests’, this thesis has demonstrated a wide range of complementary and alternative mechanisms – ranging from the voluntary return of the requested object and the fabrication of replicas to joint custody agreements and temporary or permanent loan agreements. The analysis of these mechanisms has emphasized both the tangible and intangible characteristics of cultural heritage. Whereas the tangible (property) aspect includes the elements of physical preservation, integrity, and access; the intangible (cultural) aspect consists of the elements of cultural preservation, affiliation, reconciliation, and the recognition of rights. The latter element, in particular, is essential, given that the need of addressing restitution matters often originates from the infringement of rights, including property rights, the right to self-determination, the right to cultural and religious participation, or the right to cultural diversity and development.

Furthermore, this thesis has demonstrated that, despite the number of restitution claims made over the past years and the attempts by courts, governments, administrations, policy makers, and academics to structure the debate, most claims for restitution and return are dealt with – if they are dealt with at all – using an *ad hoc* approach. In addition to the legal obstacles mentioned above, this is due to the fact that international treaty law lacks both sufficient instruments to provide effective mechanisms regarding restitution and return,<sup>1459</sup> and the broad acceptance of States.<sup>1460</sup> Moreover, international treaty law does not work retroactively and thus fails to deal with cases of removal prior to the ratification and entry into force of the respective convention for both the requesting and the requested State.<sup>1461</sup> Despite these shortcomings and all the controversies regarding the application of international treaty law at the national level, multilateral treaties pertaining to cultural heritage have had a major impact on the development of international cultural heritage law within the last decades;

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<sup>1459</sup> Like the 1970 UNESCO Convention, for details, see *supra* Chapter Three, Section 2.2.

<sup>1460</sup> Like the 1995 UNIDROIT Convention, for details, see *supra* Chapter Three, Section 2.4.

<sup>1461</sup> Cf. Planche, "Die Unesco-Konvention Von 1970: Anwendung Auf Internationaler Ebene," p. 146.

moreover, the three major UNESCO conventions on tangible cultural heritage<sup>1462</sup> indicate a universal recognition among the international community of the importance of this issue. As a result, they have strengthened the formation of customary international law by creating a general obligation to protect cultural heritage, and have shaped the recognition of rights, including material redress through restitution and return. Other more recent multilateral treaties pertaining to the protection of cultural heritage have not yet universally recognized.<sup>1463</sup> Moreover, UN declarations, such as the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage (in response to the destruction of the Buddhas of Bamiyan in 2001),<sup>1464</sup> and the UN Security Council Resolution 1483/2003 (in reaction to the looting in the aftermath of the Iraq war in 2003)<sup>1465</sup> indicate that the protection of cultural heritage and the prevention of illicit trafficking in cultural materials is a common concern of the international community as a whole.

Since the principle of non-retroactivity as well as other legal obstacles frequently impede the resolution of restitution disputes, and ethical and historical considerations call for the ‘remedying historical injustices’, several attempts have been made in recent years to provide consistent legally non-binding guidelines or general principles in order to resolve such disputes. Examples include: the 1998 Washington Principles that call for the determination of ‘just and fair solutions’ in cases of Nazi-confiscated art;<sup>1466</sup> and the 2006 Principles of the International Law Association that advocate for, among other proposals, loan agreements and the production of replicas.<sup>1467</sup> Although these attempts have been proven to be successful to several cases, they, nevertheless, either apply only to a specific set of incidents (e.g. Nazi-confiscated art in public collections), or have not yet found international recognition (as in the case of the 2006 Principles of the International Law Association). The analysis of current State practice in dealing with restitution disputes has shown that most solutions agreed to by the parties on a case-by-case basis are concluded in individually negotiated (often not published) bilateral agreements, or – less frequently – through the

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<sup>1462</sup> See the 1954 Hague Convention, the 1970 UNESCO Convention and the 1972 UNESCO Convention.

<sup>1463</sup> See the 1995 UNIDROIT Convention and the 2001 Underwater Cultural Heritage Convention.

<sup>1464</sup> UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, adopted by the UNESCO General Conference, 17 October 2003; available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=17718&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 23 September 2011).

<sup>1465</sup> United Nations Security Council Resolution No. 1483/2003, adopted 22 May 2003, UN Doc S/RES/1483, ILM, 2003, p.1016 ff; See: paragraph 7; the full text version is available at: <http://daccess-ods.un.org/TMP/1465505.html> (accessed 23 September 2011).

<sup>1466</sup> For the full text of the Principles see Annex I; for further details, see *supra* Chapter Three, Section 3.5.

<sup>1467</sup> For detailed analysis of the 2006 ILA Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, see *supra* Chapter Three, Section 4.2.

passage of legislation specific to a particular case.<sup>1468</sup> However, solutions that are exclusively negotiated by a limited number of parties over a particular object or a limited set of objects do not affect other restitution disputes with similar circumstances, nor do they promote the further development of international cultural heritage law. In other words, bilateral agreements – as successful as they may be within their particular case setting – explicitly exclude any legal reference to both the circumstances of the former appropriation as well as the terms of the solution found, and thus have only a marginal impact on the future development of international law.<sup>1469</sup> Moreover, as highlighted above, bilateral agreements have the major disadvantage that they and their specific terms depend, in part, on the bargaining powers of the respective parties involved.

Therefore, this thesis proposes a new method for the resolution of restitution disputes grounded in general principles based on the common interests previously identified: namely, preservation, access, integrity and cooperation. Deployment of soft law mechanisms and general principles might be of interest to parties not only in restitution disputes in which legal proceedings are not available (which is frequently the case), but also in disputes in which the parties cannot agree on a legal regime, or simply do not wish to employ legal action. This might be due to political or other policy constraints, or the fear of costly and unpredictable litigations in domestic or foreign courts. Soft law mechanisms and general principles are by their nature legally non-binding; however, they are, in turn, much more flexible and more appropriate in terms of incorporating the ethical and historical considerations as well as the common interests inherent to many restitution cases. As such, they may also contribute to the further development of international cultural heritage law. It has been demonstrated that common interests (namely preservation, integrity, access and cooperation) do exist in international cultural heritage law, but are not yet sufficiently employed in the field of restitution and return.

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<sup>1468</sup> See, for example, the case of the law passed by the French National Assembly in May 2010 ordering the return to New Zealand of the sixteen tattooed and mummified Maori warrior heads held by the city of Rouen; Law No. 2010-501 of 18 May 2010: “Loi visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections”, NOR: MCCX0914997L; this legislation is available at: <http://www.legifrance.gouv.fr> (accessed 23 September 2011). For further details on the Maori case, see *supra* Chapter Six, Section 3.3.

<sup>1469</sup> For an analysis of bilateral agreements, including the recent agreements with Italy and several U.S. museums, see *supra* Chapter Three, Section 2.10.

The necessity of taking these interests into account in an ‘interest-oriented’ approach has been illustrated through the use of a legal analogy to child custody determination.<sup>1470</sup> While a ‘best interest doctrine’ was introduced into child custody determinations more than thirty years ago, and into international children’s rights more than twenty years ago, it has yet to find acceptance in the field of restitution and return. However, an approach limited to ‘object-oriented’ considerations would be short-sighted, since it would be unable to encompass the intangible characteristics of cultural materials associated with the aspects of cultural preservation, the affiliation of a people, group or community, and the recognition of cultural rights.

In recalling what has been argued so far, the demand for general principles in the field of restitution and return can be summarized by the following three considerations: firstly, international treaty law does not adequately recognize the interests of the various stakeholders involved (including the ‘common interest’ in the protection of cultural heritage); secondly, although bilateral agreements may generally be better at recognizing the interests of the particular parties involved, they are frequently unable to actualize these interests evenly due to unequal bargaining power; and thirdly, these bilateral agreements do not provide grounds for the resolution of similar cases. In contrast, general principles may facilitate the resolution of restitution disputes regardless the lack of applicable legal instruments and the bargaining powers of the parties involved.

In practical terms, it has been demonstrated that the resolution of restitution disputes on the basis of common interests may facilitate the development of sustainable and cooperative solutions. Depending on the needs of the parties involved, a variety of complementary and alternative solutions are at hand. These include: temporary or permanent loan agreements and/or the exchange of cultural materials; the fabrication of replicas; the physical return of the requested object without transfer of title; as well as joint custody and/or shared management. If exercised adequately and in the mutual recognition of the respective motives and interests of the parties involved, restitution disputes must not inevitably result in zero-sum outcomes (retention vs. return); instead, they may be used to foster both the protection of cultural heritage and the exchange of cultural artifacts in a manner that is more equitable than would otherwise be possible using a purely legal approach based on the *de lege*

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<sup>1470</sup> For details, see *supra* Chapter Four, Section 1.2.

*lata* domination of State interests. Yet, the interest-oriented approach proposed by this thesis does not exclude these common interests from being further implemented into restitution policies and existing legal provisions. Moreover, it is highly desirable that the common interests – namely preservation, integrity, access and cooperation – may shape the interpretation of current legal provisions in both international treaty law and national legal systems. In the long run, this may even lead to new legally non-binding general principles in international cultural heritage law that – similar to the 1998 Washington Principles – impose moral obligations on both parties in restitution disputes, and may even lead to the development of new legislation (*de lege ferenda*).

In conclusion, it can be said that the interest-oriented approach introduced by this thesis aims at providing at least four additional contributions to the debate on the restitution and return of cultural materials. Firstly, it provides an analysis of the shortcomings of the existing legal regime of international cultural heritage law and current State practice in resolving restitution disputes. Secondly, this thesis provides an analysis of the different stakeholders involved in restitution disputes and their respective motives and interests. Thirdly, it identifies the common interests in cultural heritage matters based on recently developed legal concepts of international law, namely the ‘common heritage of humankind’, ‘common concern’, ‘common but differentiated responsibility’ and ‘international cooperation’. Last but not least, this thesis provides a detailed analysis – in terms of both legal and policy issues – of the wide range of complementary and alternative mechanisms to current restitution practices. It is the understanding of this thesis that the application of these complementary and alternative mechanisms can produce results that are more fruitful for all parties involved in international cultural heritage disputes.



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## **Table of Treaties and other International Instruments**

### **1. Pre-WWII Instruments pertaining to Cultural Heritage**

- Instructions for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land, General Orders No.100 of 24 April 1863 (also known as Lieber Code).
- Hague Convention (II) with respect to the Laws and Customs of War on Land, 29 July 1899, AJIL, 1907, 66.
- Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, AJIL, 1908, 165.
- Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907), 1 Bevans 631.
- Treaty on the Protection of Artistic and Scientific Institutions and Monuments, 15 April 1935, 167 LNTS 279 (also known as Roerich Act).
- Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, 5 January 1943 (8, Department of State Bulletin 21) (also known as 1943 London Declaration).

### **2. Post-WWII Instruments pertaining to Cultural Heritage**

- Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 215 (also known as 1954 Hague Convention).
- Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 358, 144.
- Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 38 ILM 769, 149.
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 17 November 1970, 823 UNTS 231 (also known as 1970 UNESCO Convention).
- Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, ILM, 1972, 1358 (also known as World Heritage Convention).

- Convention on Stolen or Illegally Exported of Cultural Objects, 24 June 1995, ILM, pp.1322 (also known as 1995 UNIDROIT Convention).
- Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 2002, 21 ILM 37 (also known as 2001 Underwater Cultural Heritage Convention).
- Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 1.
- Convention on the Protection and Promotion of the Diversity of Cultural Expression, 20 October 2005, 2440 UNTS 311.

### **3. Post-WWII Instruments relevant to the Field of International Cultural Heritage Law**

- Charter of the United Nations, 26 June 1945, 59 Stat 1031.
- Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/810 (1948).
- Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.
- Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (AJIL, 1969, p. 875).
- United Nations Convention on the Law of the Sea, 10 December 1982, 1982, 21 ILM 1261.
- United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.
- United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.
- United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, A/RES/59/38.
- United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209 (also known as Palermo Convention).
- Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 UNTS 319.
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2241 UNTS 507.

- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, 31 May 2011, 2326 UNTS 208.
- International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 1967, 6 ILM 368.
- International Covenant on Civil and Political Rights, 16 December 1966, 1967, 6 ILM 360.
- United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, 2007, 46 ILM 1013.
- UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, Doc. 32C/Resolution 39, 271, 301.
- UNESCO Draft of the Declaration of Principles relating to Cultural Objects Displaced in Connection with the Second World War, 31 July 2009, Doc. 35 C/24.

#### **4. Instruments of the Council of Europe pertaining to Cultural Heritage**

- European Cultural Convention, 19 December 1954, CETS No.18.
- European Convention for the Protection of the Architectural Heritage of Europe, 3 October 1985, CETS No.121 (also known as Granada Convention).
- European Convention on Offences relating to Cultural Property, 23 June 1985, CETS No.119 (also known as Delphi Convention).
- European Convention on the Protection of the Archaeological Heritage, 16 January 1992, CETS No.143 (also known as Valetta Convention).
- European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, CETS No. 005.
- Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, CETS No.199.

#### **5. Instruments of the European Union pertaining to Cultural Heritage**

- Directive 93/7/EEC on the Return of Cultural Objects Illegally Exported from the Territory of a Member State, 27 March 1993, OJ L74/74.
- Treaty on the Functioning of the European Union, 9 May 2008, OJ C 115/47.
- Regulation 116/2009 on the Export of Cultural Goods, 10 February 2009, OJ L 39.



## **Table of Cases Settled by Bilateral Agreements, Decisions of National Advisory Committees, or Out-of-Court Settlements**

### **Belgium**

- 144 Ethnographic works and several thousand additional cultural items (Royal Museum of Central Africa, Tervuren and the National Museum of Kinshasa, Zaire, now Democratic Republic of the Congo, 1970 and 1977).

### **France**

- Three Nok and Sokoto terracotta statuettes (France and Nigeria, 2006).
- Sixteen tattooed and mummified Maori warrior heads (Natural History Museum of Rouen, France and New Zealand, May 2011).
- Korean manuscripts (France and Republic of Korea, May 2011).

### **Germany**

- 7,000 *Bogazköy cuneiform tablets* (Democratic Republic of Germany and Turkey, 1987).
- Fragment of the *Great Zimbabwe bird* (Ethnological Museum Berlin, Germany and Zimbabwe, 2003).
- Fragment of the Parthenon frieze (University of Heidelberg, Germany and Greece, 2006).
- Painting by Ernst Ludwig Kirchner “Berlin Street Scene” (Brücke Museum Berlin, Germany and the heirs of Hans Hess, 2006).
- Painting by Arnold Böcklin “Sleeping Diana” (Museum Kunst Palast, Düsseldorf, Germany and Jewish heirs, May 2010).
- *Sphinx of Bogazköy* (Germany and Turkey, May 2011).

### **Italy**

- 12,000 pre-Columbian objects (Italy and Ecuador, 1983).
- Obelisk of Axum (Italy and Ethiopia, 2005).
- Archeological artifacts (Boston Museum of Fine Arts and Italy, 2006).
- Archeological artifacts, including the ‘Euphronios Krater’ (Metropolitan Museum of Art in New York and Italy, 2006).

- Forty archeological artifacts, including vases, amphora fragments, frescos, and the ‘Morgantiana Venus’ statue (J. Paul Getty Museum in Los Angeles and Italy, 2007).
- Archeological (artifacts Princeton University Art Museum and Italy, 2007).
- Archeological artifacts Cleveland Museum of Art and Italy, 2008).

### **Russia**

- Stained-glass windows (Russia and Germany, Cathedral of Frankfurt/Oder, 2008).

### **The Netherlands**

- Several Buddhist and Hindu statues (The Netherlands and Indonesia, 1977).
- 202 paintings of the *Goudstikker* collection (The Netherlands and the Goudstikker heir Marei von Saher, 2006).
- Painting by Jan Steen “The wedding night of Tobias and Sarah” (c. 1660), (city of The Hague and the Goudstikker heir Marei von Saher, August 2011).

### **Switzerland**

- Painting by Max Liebermann “Sewing School - The Workroom of the Amsterdam Orphanage” (Bündner Foundation of the Art Museum Chur and the heirs of Max Silberberg, 1999).
- *Makondé mask* (Barbier-Müller Museum of Geneva, Switzerland and Tanzania, May 2010).

### **Sweden**

- Totem pole (Stockholm Ethnographic Museum and Haisla Frist Nation, British Columbia, Canada, 2006).

### **South Africa**

- Carved birds (South Africa and Zimbabwe, 1981).

### **United Kingdom**

- *Lakota Ghost Dance Shirt* (Kelvingrove Museum in Glasgow, Scotland and the Wounded Knee Survivors’ Association (WKSA) in South Dakota, USA, 1999).
- Some twelfth century manuscripts (British Library and the Monastery of Benevento, Italy, 2005).

### **United States**

- Eighty wooden carved figures, called Zuni War Gods (USA and North-American Zuni tribe, between 1978 and 1995).
- Case of the Panel of Tyche (Cincinnati Art Museum, United States and Jordan, 1986).
- Case of the Phra Narai lintel (United States and Thailand, 1988).
- Some 400 archaeological items from Machu Picchu (Yale University, United States and Peru, 2007, 2010).



## **Table of Cases Settled by Court Litigation and Decisions relevant in the context of International Cultural Heritage**

### **1. Decisions by International and Regional Courts**

#### **1.1 International Court of Justice**

- *Temple of Preah Vihear (Cambodia vs. Thailand)*, Judgment of 15 June 1962, ICJ Reports, 1962, p. 6.
- *Barcelona Traction, Light and Power Company, Limited (Belgium vs. Spain)*, Judgment of 5 February 1970, ICJ Reports, 1970, p. 3.
- *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua vs. United States of America). Merits, Judgment of 26 June 1986, ICJ Reports 1986, p. 14.

#### **1.2 International Criminal Tribunal for the former Yugoslavia**

- *Prosecutor vs. Hadžihasanovic & Kubura*, ICTY, case no. IT-01-47, Judgment of 15 March 2006.
- *Prosecutor vs. Strugar*, ICTY, case no. IT-01-42-PT, Judgment of 31 January 2005.
- *Prosecutor vs. Krstic*, ICTY, case no. IT-98-33-T, Judgment of 2 August 2001.
- *Prosecutor vs. Kordic & Cerkez*, ICTY, case no. IT-95-14/2-T, Judgment of 26 February 2001.
- *Prosecutor v. Tadic*, Case No. IT-94-1, Judgment of 2 October 1995.

#### **1.3 European Court of Human Rights**

- *Beyeler vs. Italy*, Application No. 33202/1996, European Court of Human Rights, Judgment of 5 January 2000.

### **2. National Court**

#### **2.1 France**

- *République fédérale du Nigeria c. Alain de Montbrison*, Court of Appeal, Paris Judgment of 5 April 2004 (2002/09897).
- *République fédérale du Nigeria c. Alain de Montbrison*, Court of Cassation, Judgment of 20 September 2006 (JCP 2006, IV, 3005, pp. 1917).

## 2.2 Germany

- ‘Nigeria Masks’, Bundesgerichtshof, 22 June 1972, BGHZ 59, 14.

## 2.3 Italy

- *Associazione nazionale Italia Nostra Onlus c. Ministero per i beni e le attività culturali et al.*, Italian Supreme Administrative Tribunal (*Consiglio di Stato*), 23 June 2008, No. 3154.
- *Associazione nazionale Italia Nostra Onlus c. Ministero per i beni e le attività culturali et al.*, Regional Administrative Tribunal (*Tribunale Amministrativo Regionale del Lazio*), No.3518, 28 February 2007.

## 2.4 United Kingdom

- *Government of the Islamic Republic of Iran vs. The Barakat Galleries Ltd.* (2007), EWCA Civ. 1374; Court of Appeal, 21 December 2007.
- *Government of the Islamic Republic of Iran vs. The Barakat Galleries Ltd.* (2007) EWHC 705 QB; Queen’s Bench Division, 29 March 2007.

## 2.5 United States

- *Republic of Peru vs. Yale University*, Case No.1:2008cv02109, 5 December 2008.
- *Odyssey Marine Exploration, Inc. vs. The Unidentified, Shipwrecked Vessel or Vessels*, No.8, 2006 cv01685, 13 September 2006.
- *Altmann vs. Republic of Austria*, 142 F.Supp.2d 1187 (C.D.Cal. 1999), *aff’d*, 317 F.3d 954 (9th Cir. 2002), as amended, 327 F.3d 1246 (9th Cir. 2003), 541 US 677 (2004).
- *United States vs. Frederick Schultz*, 178 F. Supp. 2d445 (S.D.N.Y. 3 January 2002), affirmed 333 F.2d 393 (2d Cir. 10 June 2003).
- *Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus vs. Goldberg & Feldman Fine Arts, Inc. and Peg Goldberg*, 717 F.Supp.1374 (S.D. Ind. 1989); 917 F2d 278 (7<sup>th</sup> Circuit 1990).
- *United States vs. McClain*, 545 F.2d 988 (5th Cir. 1977); 593 F.2d (5th Cir. 1979).

## Annex I

### 1998 Washington Conference Principles on Nazi-Confiscated Art

On 3 December 1998 the forty-four governments participating in the Washington Conference on Holocaust-Era Assets endorsed the following principles for dealing with Nazi-looted art:

*Released in connection with the Washington Conference on Holocaust-Era Assets,  
Washington, DC, December 3, 1998*

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.



## Annex II

### International Law Association (ILA)

#### 2006 Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material

##### Resolution No. 4/2006

*Adopted at the 72nd Conference of the International Law Association, held in Toronto, Canada, 4-8 June 2006*

##### **Preamble**

*Conscious* that cultural material forms a part of the world heritage and should be cherished and preserved for the benefit of all;

*Taking into account* the significance of cultural material for cultural identity and diversity as well as of territorial affiliation;

*Reaffirming* the link between culture and sustainable development;

*Being aware* of the significant moral, legal, and practical issues concerning requests for the international transfer of cultural material;

*Convinced* of the need for a collaborative approach to requests for transfer of cultural material, in order to establish a more productive relationship between and among parties;

*Emphasizing* the need for a spirit of partnership among private and public actors through international cooperation;

*Also emphasizing* the need for a cooperative approach to caring for cultural material;

*Expressing* the hope that these Principles will provide an incentive for improving collaboration in the mutual protection and transfer of cultural material;

*Recognizing as well* the need to develop a more collaborative framework for avoiding and settling disputes concerning cultural material;

*Building on* current practice when articulating the following Principles to facilitate non-confrontational agreements:

##### **1. Definitions**

(i) “Requesting party” or “requesting parties” refers to persons; groups of persons; museums and other institutions, however legally constituted; and governments or other public authorities that request the transfer of cultural material.

(ii) “Recipient” or “recipients” refers to states, museums, and other institutions that receive a request for the transfer of cultural material.

##### **2. Requests and Responses to Requests for the Transfer of Cultural Material**

(i) A requesting party should make its request in writing, addressed to the recipient, with a detailed description of the material whose transfer is requested, including detailed information and reasons sufficient to substantiate the request.

(ii) A recipient shall respond in good faith and in writing to a request within a reasonable time, either agreeing with it or setting out reasons for disagreement with it and, in any event, proposing a timeframe for implementation or negotiations.

(iii) In the event of disagreement, the requesting party and recipient shall enter into good-faith negotiations concerning the cultural material at issue in accordance with principle 8.

### **3. Alternatives to the Transfer of Cultural Material**

(i) Museums and other institutions shall develop guidelines consistent with those of the International Council of Museums (ICOM) for responding to requests for the transfer of cultural material. These guidelines may include alternatives to outright transfer such as loans, production of copies, and shared management and control.

(ii) Museums and other institutions shall prepare and publish detailed inventories of their collections, with the assistance of ICOM and other sources when they lack sufficient resources of their own to do so.

(iii) Whenever a substantial portion of the collection of a museum or other institution is seldom or never on public display or is otherwise inaccessible, that museum or other institution should agree to lend or otherwise make available cultural material not on display to a requesting party, particularly a party at the place of origin, in the absence of compelling reasons to the contrary.

### **4. Cultural Material of Indigenous Peoples and Cultural Minorities**

Consistent with the rights of indigenous peoples under the *United Nations Draft Declaration on the Rights of Indigenous Peoples* and cultural minorities, recipients recognize an obligation to respond in good faith to a request for the transfer of cultural material originating with indigenous peoples and cultural minorities. This obligation applies even when such a request is not supported by the government of the state in whose territory the indigenous peoples or cultural minorities are principally domiciled or organized.

### **5. Human Remains**

Museums and other institutions possessing human remains affirm their recognition of the sanctity of such material and agree to transfer such material upon request to any requesting party who provides evidence of a close demonstrable affiliation with the remains or, among multiple requesting parties, the closest demonstrable affiliation with the remains.

### **6. Registers of Cultural Material**

(i) All state museums and other institutions that hold or control holdings or collections of cultural material shall take steps to establish inventories and a register of such material. The register may take the form of a database of information that is available to interested parties.

(ii) Museums and other institutions should submit annual reports of the information recorded in these registers for general publication to any national services that are established to manage and protect cultural material.

(iii) A national service responsible for the maintenance of a state register, in a separate section of such register, shall record all inquiries by identifying the name of the party making the inquiry, the cultural material involved, and the response of the museum or institution concerned. Every three years each such national service shall submit up-to-date copies of registered items to the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in order to facilitate accessibility.

(iv) Each register shall be made available to any requesting party that is interested in the transfer of cultural material, so as to help identify the location and provenance of such material and to facilitate claims.

### **7. Notification of Newly Found Cultural Material**

Persons, groups of persons, museums, and other institutions possessing significant, newly-found cultural material should promptly notify appropriate government authorities,

communities, and international institutions of their finds, together with as complete as possible a description of the material, including its provenance.

### **8. Considerations for Negotiations Concerning Requests**

Good-faith negotiations concerning requests for transfer of cultural material should consider, *inter alia*, the significance of the requested material for the requesting party, the reunification of dispersed cultural material, accessibility to the cultural material in the requesting state, and protection of the cultural material.

### **9. Dispute Settlement**

If a requesting party and a recipient are unable to reach a mutually satisfactory settlement of a dispute related to a request within a period of four years from the time of the request, upon a request of either party, both parties should submit the dispute to good offices, consultation, mediation, conciliation, *ad hoc* arbitration, or institutional arbitration.

### **10. Other Rights and Obligations**

Nothing in these Principles should be interpreted to affect rights enjoyed by the parties or obligations otherwise binding on them.



## **Annex III**

### **The Principles of the ICOM Code of Ethics for Museums**

*Compiled by the International Council of Museums (ICOM) and  
the Koordinierungsstelle Magdeburg, Germany  
Paris, May 2011*

#### **1. Museums preserve, interpret and promote the natural and cultural inheritance of humanity**

Museums are responsible for the tangible and intangible natural and cultural heritage. Governing bodies and those concerned with the strategic direction and oversight of museums have a primary responsibility to protect and promote this heritage as well as the human, physical and financial resources made available for that purpose.

#### **2. Museums that maintain collections hold them in trust for the benefit of society and its development**

Museums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage. Their collections are a significant public inheritance, have a special position in law and are protected by international legislation. Inherent in this public trust is the notion of stewardship that includes rightful ownership, provenance, permanence, documentation, accessibility and responsible disposal.

#### **3. Museums hold primary evidence for establishing and furthering knowledge**

Museums have particular responsibilities to all for the care, accessibility and interpretation of primary evidence collected and held in their collections.

#### **4. Museums provide opportunities for the appreciation, understanding and promotion of the natural and cultural heritage**

Museums have an important duty to develop their educational role and attract wider audiences from the community, locality, or group they serve. Interaction with the constituent community and promotion of their heritage is an integral part of the educational role of the museum.

#### **5. Museums hold resources that provide opportunities for other public services and benefits**

Museums utilize a wide variety of specialisms, skills and physical resources that have a far broader application than in the museum. This may lead to shared resources or the provision of services as an extension of the museum's activities. These should be organized in such a way that they do not compromise the museum's stated mission.

#### **6. Museums work in close collaboration with the communities from which their collections originate as well as those they serve**

Museum collections reflect the cultural and natural heritage of the communities from which they have been derived. As such they have a character beyond that of ordinary property which may include strong affinities with national, regional, local, ethnic, religious or political identity. It is important therefore that museum policy is responsive to this possibility.

**7. Museums operate in a legal manner**

Museums must conform fully to international, regional, national, or local legislation and treaty obligations. In addition, the governing body should comply with any legally binding trusts or conditions relating to any aspect of the museum, its collections and operations.

**8. Museums operate in a professional manner**

Members of the museum profession should observe accepted standards and laws and uphold the dignity and honor of their profession. They should safeguard the public against illegal or unethical professional conduct. Every opportunity should be used to inform and educate the public about the aims, purposes, and aspirations of the profession to develop a better public understanding of the contributions of museums to society.

## Annex IV

### **Criteria for the assessment of ‘outstanding universal value’ for the inscription of cultural and natural sites in the UNESCO World Heritage List<sup>1471</sup>:**

- i. to represent a masterpiece of human creative genius;
- ii. to exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;
- iii. to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
- iv. to be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;
- v. to be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;
- vi. to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria);
- vii. to contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;
- viii. to be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;
- ix. to be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;
- x. to contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

The protection, management, authenticity and integrity of properties are also important considerations.

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<sup>1471</sup> The Operational Guidelines for the Implementation of the World Heritage Convention, issued in January 2008 (WHC 08/01), Criteria for the assessment of outstanding universal value, section II.D. No. 77 (p. 20-21), full text available at: <http://whc.unesco.org/en/guidelines> (accessed 23 September 2011).