

PROPRIETARY RIGHTS OVER CULTURAL OBJECTS IN A GLOBAL WORLD

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I. INTRODUCTION. A DISTINCTIVE CROSSROAD OF INTERESTS

Cultural Heritage Law provides a special perspective for examining the intertwining between private international law and *rights in rem*.

The art market is international by its very nature. It traditionally trades highly collectable goods with almost an eternal market lifespan. A cultural object may have been traded for centuries and may have crossed numerous borders before entering the asset of its current owner. This is why the international restitution of stolen or unlawfully exported cultural objects appears to be one of the most critical and controversial topics in the Art Law field.

If, in theory, it is effortless to reach a universal consensus on the general idea that owners should be granted the right to recover their lost property, at the same time this very idea comes with the awareness that the owners' interest is not the only one at stake. Even when dealing with non-cultural goods, legislators around the globe have developed

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different legal solutions to take into consideration, for instance, the legal position of good-faith purchasers. When the object of the restitution shifts from common tradable goods to cultural objects, the clash of interests is intensified by the specificities of cultural objects themselves and by the numerous interests shaping the art world.

With regards to the former (*i.e.* the specificities of cultural objects), cultural objects are typically non-fungible and non-perishable goods. The cultural component embedded in certain objects has long been recognized as an element worthy of distinctive regulation, able to shape proprietary rights over cultural property in a way that diverges from the ordinary legal regime. It is possible to find the first traces of such a special sensitivity already in ancient times. The Ancient Roman institute of the *dicatio ad patriam*, for example, established a legal bond between a public space and the statutes there located so that their removal was forbidden even if a statute was there placed by a private owner and the very same owner wished to recover it¹.

Even, in modern times, in those socio-cultural contexts where proprietary rights have been seen as absolute rights, a set of duties and limits have been imposed on owners of cultural artefacts, to the point that legal doctrine has referred to ownership over cultural property as a *right that binds*.²

The amount and variety of rules enacted worldwide illustrate the importance of the exceptions to the traditional law of property. Depending on the legal system, such divergent rules have been dealing with restrictions affecting the owner's right to freely dispose of the property for its own interest by, for instance, limiting the export of the goods (e.g., ch. VI, Law of the People's Republic of China on Protection of Cultural Relics³), reserving a right of pre-emption to the State (e.g. art. 38 Spanish Cultural Heritage Law⁴), providing for public access to privately-owned cultural property (e.g. art. 28, Italian Code of Cultural Heritage and Landscape⁵), providing for a public power the power to expropriate a cultural property for the pursuit of the national cultural interest (e.g., art. 4(3) Eritrean Cultural and Natural Heritage Law⁶), prescribing conservative obligations (e.g., arts. 30-32 of the Italian Code of Cultural Heritage and Landscape) or imposing informative duties to owners, thus, granting third parties to intervene and

¹ On the *dicatio ad patriam*, see M. FALCON, «*Dicatio ad Patriam*», *La collocazione in pubblico di beni privati nella riflessione dei giuristi romani*, Naples, Jovene, 2020.

² F. LONGOBUCCO, « Beni culturali e conformazione dei rapporti tra privati: quando la proprietà 'obbliga' », in BATTELLI, E., CORTESE, B., GEMMA, A., MASSARO A. (eds.), *Patrimonio culturale profili giuridici e tecniche di tutela*, Roma, Roma Tre Press, 2017, pp. 211-226.

³ 中华人民共和国文物保护法 (2017年修正本).

⁴ Ley 16/1985 del Patrimonio Histórico Español, 25 June 1985.

⁵ Legislative decree, n. 42/2005.

⁶ Proclamation n. 177/2015.

preserve the integrity of cultural and artistic creations (e.g. California Civil Code, sec. 989, *e*). Moreover, there are also rules that affect the ordinary circulation of property rights by itself, such as rules on State ownership of undiscovered cultural objects (e.g., art. 6 of the Egyptian Law on Antiquities Protection)⁷ or *res extra-commercium* provisions, which void all the contracts for the sale of objects falling within the scope of application of the norm (e.g., L. 451-5 of the French Cultural Heritage Code⁸).

The mentioned rules mirror the existence of heterogeneous interests revolving around the legal circulation and protection of cultural objects.⁹ Owners and possessors of cultural objects share an interest in fully exercising their rights without restrictions and the general interest. Furthermore, the sound and prompt circulation of rights is a general interest of the society itself. But to those interests traditionally lying in the circulation of commonly tradable goods, cultural property raises further distinctive claims. As a way of exemplification, it may be recalled that different categories of people share a unique interest in having free access to cultural heritage. This is the case of the public in general with respect to important cultural property, of the communities of origin of the heritage as part of their «right to enjoy their own culture» (*see* art. 27 United Nations Covenant on Civil and Political Rights)¹⁰, as well as of researchers, for academic and scientific purposes.

Lastly, it should be noted that the international circulation of cultural property plays also a strategic geopolitical role from an international security and stability perspective. In fact, the illicit trafficking of cultural objects has been used as a source of financing not only by mafias around the globe but also by terrorist groups. To weigh the importance of the problem, it suffices to recall the numerous UN Security Council Resolutions dealing with the safeguarding of cultural heritage,¹¹ as

⁷ راتئال اءىامء نوناق راءصاب 1983 ءنسل 117 مءر نوناق (Law n. 117/1983).

⁸ Code du patrimoine (legislative part enacted by the ordonnance n. 2004-178, 20 February 2004; regulatory part enacted by the decree 2011-573 and the decree 2011-574, 24 May 2011).

⁹ E. JAYME, «Globalization in Art Law: Clash of Interests and International Tendencies», *Vanderbilt Law Review*, vol. 38, 2005, pp. 928-945; M. FRIGO, «Cultural Property v. cultural heritage: A “battle of concepts” in international law», *International Review of Red Cross* vol. 86, 2004, pp. 367-378; J.H. MERRYMAN, A.E. ELSER, S.K. ULRICE, 2007. *Law, Ethics and the Visual Arts*, Alphen aan den Rijn, Kluwer Law International, p. 113 ff.; J.H. MERRYMAN, «Two Ways of Thinking About Cultural Property», *The American Journal of International Law*, vol. 80(4), 1986, pp. 831-853; L.V. PROTT, «The International Movement of Cultural Objects», *International Journal of Cultural Property*, vol. 12(2), 2005, pp. 225-248.

¹⁰ United Nations Covenant on Civil and Political Rights, 16 December 1996, 14668 UNTS 999.

¹¹ United Nations Security Council, Resolution, 24 December 2018, A/RES/73/130 (2018); Resolution, 21 September 2017, S/RES/2379 (2017); Resolution, 24 March 2017, S/RES/2347 (2017); Resolution, 25 April 2013, S/RES/2100 (2013); Resolution, 22 May 2003, S/RES/1483 (2003).

well the European Union's decision to impose restrictions on trade in goods belonging to Iraq's and Syria's cultural heritage by prohibiting the import of such goods, respectively in 2003¹² and 2012¹³, during the emergency situations faced in those countries.

In such a framework, the debate over the opportunity (or the necessity) for rules specifically dedicated to cultural heritage has never stopped. The art market appears to be a field in which it is especially possible to experience how the socio-economic context and the legal framework influence each other. So, it is undisputed that the above-mentioned clashing interests play a role in the formulation, development, and implementation of the regulatory framework, just like the regulatory framework influences the socio-economic context and its practices.

The debate has quite recently reached private international law. Being cultural objects movable properties, rules applicable to movable property apply insofar as no special rules dedicated to cultural movables have been enacted. However, the above-mentioned intertwining of interests and peculiarities raises conflict of laws issues not common in ordinary claims. Thus, for instance, requests for the return of cultural objects based on the violation of public laws (most typically, export limits) stem from the recognition of a special relationship between a nation and cultural heritage manifestations.¹⁴ At the same time, the restitution of cultural objects has to deal not only with differences in national legal regimes but also with the impact of international law on those differences.

Aware of the breadth and complexity of the theme, the following pages address the issue of the law applicable to the merits of the dispute for the restitution of cultural property, trying to offer an overview of the main solutions provided both at the national and international levels.

¹² 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 L*, 169, 08/07/2003, p. 0006 – 0023.

¹³ Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011, *Official Journal L*, 16, 19.1.2012, p. 1–32.

¹⁴ The possessive adjective «its» (*i.e.*, «between a nation and *its* cultural heritage») has been intentionally omitted in consideration of the existence of a school of thought that promotes the idea that the relationship between a country and the cultural objects considered part of that country's cultural patrimony is not exclusively territorial. Such a relationship may also be based on the cultural enrichment of the society. On the topic, see Tar Lazio, sez. II-quater, 24 March 2011, n. 2659 dealing with the exportability of a French *commode*.

II. *LEX REI SITAE* AS A GENERAL PRINCIPLE OF PRIVATE INTERNATIONAL LAW AND THE ISSUE OF FOREIGN PUBLIC LAWS

Whether the restitution is based on the violation of a public law,¹⁵ on ownership,¹⁶ or on proprietary rights established by a public law,¹⁷ conflict-of-laws principles typically come into play to identify the law applicable to the acquisition of the property in cases involving a good-faith purchaser (*a non domino* acquisition).

The topic is traditionally one of the most relevant and debated in the field.¹⁸ As cultural objects are typically passed through centuries from one collector to another (either an heir or a new collector), reconstructing their ownership history could result in a real challenge. Wars, fortuitous events, natural calamities, the demise of families, and the passing of time increase the chance of gaps in provenance documentation.¹⁹

Till now, private international rules have not often been directly reformed to consider cultural objects specifically. Thus, even if national approaches to cultural heritage vary from country to country, the most common attitude towards the issue of the law applicable in art and heritage claims is to resort to the same set of rules provided for ordinary movable property.

¹⁵ Typically, the illicit export of a cultural object.

¹⁶ As in the case of a stolen good.

¹⁷ The case of State ownership of undiscovered cultural objects may be taken as an example.

¹⁸ *Ex plurimis*, F. FIORENTINI, «Good Faith Purchase of Movables in the Art Market. Comparative observations», *Pravni život*, vol. 11, 2014, pp. 249-266; G. MAGRI, «Buona fede, clandestinità del possesso e opere d'arte rubate: riflessioni a margine di una recente pronuncia della Cassazione – Nota a Cassazione civile, sez. II, 14/06/2019 (ud. 22/01/2019, dep. 14/06/2019), n. 16059», *Aedon*, issue 1, 2020, <http://www.aedon.mulino.it>; J.H. MERRYMAN, «The Good Faith Acquisition of Stolen Art», *Stanford Law School Research Paper*, n. 1025515, 2008, <https://law.stanford.edu/publications/the-good-faith-acquisition-of-stolen-art/>; A. MONTAGU, «Recent Cases on the Recovery of Stolen Art – The Tug of War Between Owners and Good Faith Purchasers Continues», *Columbia-VLA Journal of Law & the Arts*, vol. 18, 1993, pp. 75-101; P. REYHAN, «A Chaotic Palette: Conflict of Laws in Litigation between Original Owners and Good-Faith Purchasers of Stolen Art», *Duke Law Journal*, vol. 50(4), 2001, pp. 955-1043; S.G. ROSS, «Res Extra commercium and the Barriers Faced When Seeking the Repatriation and Return of Potent Cultural Objects», *American Indian Law Journal*, vol. 4, 2016, pp. 297-389; A. SCHWARTZ, R. SCOTT, «Rethinking the Laws of Good Faith Purchase», *Columbia Law Review*, vol. 111, 2011, pp. 1332-1383.

¹⁹ J. LEVINE, «The Importance of Provenance Documentations in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past», *DePaul Journal of Art, Technology & Intellectual Property Law*, vol. 19(2), 2009, pp. 219-233; P. O'KEEFE, «Provenance and Trade in Cultural Heritage», *University of British Columbia Law Review*, 1995, pp. 259-272.

One of the most notorious cases that applied ordinary conflict of laws rules is *Winkworth vs Christie, Manson & Woods Ltd.*²⁰ The case involved some sculptures stolen in England from the lawful possession of the owner and subsequently taken to Italy, where they were sold to a good-faith purchaser. The purchaser was in such good faith that he decided to entrust the objects to the London branch of Christie's to sell them by auction. The original owner recognized the goods in the auction house's catalogue and brought an action for their recovery in England. The core issue concerned whether the plaintiff or the defendant had title to the goods. In addressing the question, the court had to determine if the sale that took place in Italy had the effect of conferring a title to ownership, which was valid against the original owner.

The identification of which law to apply between English domestic law and Italian domestic law was crucial for the result of the dispute. In fact, while under Italian law, the title would have been conferred on the basis of the principle of «*possession vaut titre*» (art. 1153 Italian civil code), under English law, the good-faith purchaser would not have a claim, not having raised the market overt exception provided for by the Sale of Goods Act 1893.²¹

The connecting factors were abundant but conflicting. England was the place where the original owner was domiciled at the time of the theft, where the action was brought, and where the goods were physically located at the time of the theft and at the time the court was seised. Italy, instead, was the place where the defendant was domiciled, where the challenged sale took place, and where the goods were physically located at the time both of the sale and of the delivery of the goods under the contract.

Failing an *ad hoc* private international law rule for cultural objects, the court resorted to the traditional conflict of laws principle, stating that the validity of the transfer and its effect was governed by the *lex*

²⁰ *Winkworth vs Christie, Manson & Woods Ltd* [1980] Ch. 496, [1980] 1 All E.R. 1121. See, L. NICOLAZZI, A. CHECHI, M.-A. RENOLD, «Affaire Collection japonaise de Netsuke – Winkworth c. Christie's», *Plateforme ArThemis* (<http://unige.ch/art-adr>), Centre du droit de l'art, Université de Genève, 2014; D.W. ROWE, «Stolen Property in the Conflict of Laws», *Canterbury Law Review*, vol. 1, 1980, pp. 71-82.

²¹ The rule —originated in the Middle Ages— used to apply to goods sold in an «open market», according to the usage of the market. It provided for the acquisition of good title by the good-faith purchaser. The exception is no longer available in the current legislative framework, having been abolished by the Sale of Goods (Amendment) Act 1994. On the market overt, see, G. BATTERSBY, «The Sale of Stolen Goods: A Dilemma for the Law», *The Modern Law Review*, vol. 54, 1991, pp. 752-757; J.L. LAP, «Appraising the Market Overt Exception», *Journal of International Commercial Law and Technology*, issue 3, 2008, pp. 254-258; D.E. MURRAY, «Sale in Market Overt», *The International and Comparative Law Quarterly*, vol. 9(1), 1960, pp. 24-52; J.G. PEASE, «The Change of the Property in Goods by Sale in Market Overt», *Columbia Law Review*, vol. 8(5), 1908, pp. 375-383.

rei sitae/lex loci rei (i.e. the law of the country where the movables were located at the time of the transfer).²²

The *lex rei sitae* is a traditional widespread criterion in private international law, whose use was already attested in the Middle Ages.²³ However, its suitability as a connecting factor was debated in the past and part of the legal doctrine favored the *lex domicilii* or the *lex loci actus*.²⁴ In the English legal system, for instance, judicial opinions were still conflicting at the end of the 19th century. It is only since *Cammell v Sewell* (1858) that the *lex situs* theory seems to have been accepted as a general principle.²⁵

With time, the *lex rei sitae* has become the chosen criterion by national legislators and private international law theorists for its ability to safeguard the interests of buyers in relation to third parties.²⁶ Furthermore, since it has become a widespread solution, its adoption offers the advantage of guaranteeing a certain level of harmonization at the global level.²⁷

In confronting hypotheses of acquisition of title by uninterrupted possession under good faith, however, the criterion by itself may lead to uncertainty. This is the case when the goods are moved from one country to another pending the possession *ad usucapendi* (adverse possession), therefore, causing a s.-c. *conflit mobile*.²⁸ To avoid any

²² Dicey Rule 124, para. 24R-001.

It is worth noting that the court acknowledged the existence of numerous connecting factors with the English territory, addressing their relevance in determining the law applicable. In refusing English domestic law, the court declared that «[i]ntolerable uncertainty in the law would result if the court were to permit the introduction of a wholly fictional English situs, when applying the principle to any particular case, merely because the case happened to have a number of other English connecting factors».

²³ B. AKKERMANS, E. RAMAEKERS, «Lex Rei Sitae in Perspective: National Developments of a Common Rule?», *Maastricht European Private Law Institute Working Paper*, n. 14, 2012, <https://ssrn.com/abstract=2063494> or <http://dx.doi.org/10.2139/ssrn.2063494>, §2; H. YNTEMA, «The Historic Basis of Private International Law», *American Journal of Comparative Law*, vol. 2(3), 1953, pp. 297-317.

²⁴ Ernst Wolff, in: K. LIPSTEIN, «Conflict of Laws before International Tribunals (A Study in the Relation between International Law and Conflict of Laws)», *Transactions of the Grotius Society*, vol. 27 (Problems of Peace and War), 1941, p. 177.

²⁵ *Cammell v. Sewell* (1858) 3 H. & N. 617; on appeal (1860) 5 H. & N. 728.

²⁶ J.P. NIBOYET, *Des conflits de lois relatifs à l'acquisition de la propriété et des droits*, Paris, R. Sirey, 1912, pp. 14 et 20 ff. (cited by A. BAGGE, *Les conflits de lois en matière de contrats de vente de biens meubles corporels*, Recueil des cours, vol. 125, 1928, p. 209, fn 1) highlights the *situs rei* as a connecting factor for proprietary rights also with regard to the formalities that may be imposed for the transfer of property.

²⁷ Such an advantage has been expressly taken into consideration by the Italian legislators in reforming the national system of Private International Law (see Preparatory Works of the 1995 Reform of Italian Private International Law, *sub art.* 49).

²⁸ F. RIGAUX, «Espace et temps en droit international privé», *Revue interdisciplinaire d'études juridiques*, vol. 22, 1989, pp. 107-123; F. RIGAUX, *Le Conflit Mobile En Droit International Privé*, Recueil des cours, vol. 117, 1966; F.C. SAVIGNY, *Private International Law and*

uncertainties, the *lex rei sitae* need to be integrated with a further element able to stabilize the law: a time indication to use as a reference point. As a result, to solve the *conflit mobile*, the general rule currently combines a territorial element (the location of the good) with a time element (the moment in which all the conditions for the conferral of ownership are satisfied under the *lex rei sitae*). Accordingly, the definitive connecting factor is the *loci situs* at the time of the acquisition of the title.²⁹

When cultural property comes into play, further issues arise. In particular, the *lex rei sitae* creates potential uncertainties in consideration of the influence of public interests. As above-mentioned, in the clashing of art market interests, inherent public interests in cultural heritage especially affect the regulatory framework to the point of excluding from trade certain cultural goods as *res extra commercium*, or of granting the actionability of restitution claims in contrast with and overcoming the ordinary legal regime.³⁰ Whenever the cultural property is subjected to public limits, a court may be asked to decide over the contrast of the title with a foreign public law or over the violation of foreign public laws by the possessor or the owner of the good.³¹ The very same foreign State may initiate an action on the basis of the violation of its own public laws.

the Retrospective Operation of Statues – A Treaties on Conflict of Laws, and the Limit of Their Operation in Respect of Place and Time [translated by William Guthrie], Edinburgh, T&T Clark, 1880, § 383.

²⁹ See, for instance, art. 53 of the Italian Private International Law Act (Legge n. 218, 31/05/1995 di riforma del sistema italiano di diritto internazionale privato): «[l]’usucapione di beni mobili è regolata dalla legge dello Stato in cui il bene si trova al compimento del termine prescritto».

³⁰ This is the case, for instance, of the United States *Holocaust Expropriated Art Recovery Act* enacted in 2016 with the aim of offering a possibility to claim the restitution of Nazi-looted art, despite all the years passed since the events. Specifically, the norm provides a limited-time exception on the statute of limitations for claims aiming at recovering property lost between 1933 and 1945.

³¹ Two cases may serve as an example. The first —*Governo di Francia vs Pilone e Ministero dei beni culturali*— deals with the request for the recovery of cultural objects *extra commercium* under French law, in front of Italian tribunals [Tribunale di Roma 27 giugno 1987; Corte d’Appello di Roma n. 2107/1992; Cass. Civ., n. 12166/1995, *Foro Italiano*, vol. 119(3), 1996, 907 (commented by S. Benini)]. The second —*Government of Islamic Republic of Iran vs The Barakat Galleries Limited*— addresses the issue of the applicability of state ownership law over undiscovered cultural objects [Court of Appeal, 21-12-2007, *Government of Islamic Republic of Iran vs The Barakat Galleries Limited*, [2007] EWCA Civ. 1374.]

For a comment, see A. CHECHI, R. CONTEL, M.-A. RENOLD, «Case Jiroft Collection – Iran v. The Barakat Galleries Ltd.», *Platform ArThemis* (<http://unige.ch/art-adr>), Centre du droit de l’art, Université de Genève, 2011; S. FERRAZZI, *Riflessioni sul genus “bene culturale” in prospettiva comparata e internazionale*, Naples, ESI, 2023, p. 194 ff. and 213; M. WELLER, «Iran v. Barakat: Some Observations on the Application of Foreign Public Law by Domestic Courts from a Comparative Perspective», *Art Antiquity and Law*, vol. 12(3), 2007, pp. 279-295; M. WANTUCH-THOLE, *Cultural Property in Cross-Border Litigation – Turning Rights into Claims*, Berlin, de Gruyter, 2015, 13 ff.

For a long time, national practices have tended towards the non-applicability *a priori* of foreign public laws that are part of the foreign law designated by the rules of private international law.³² The legal doctrine has challenged this principle.³³ In particular, the *Institute de Droit International* has addressed the topic in two resolutions of the 70s: the 1975 Wiesbaden Resolution³⁴ and the 1977 Oslo Resolution³⁵.

The Wiesbaden Resolution declares that it has «*no cogent theoretical or practical reason*» and it often results in a mere duplication of public policy. It also highlights that an *a priori* veto towards public laws may lead to undesirable results, inconsistent with international cooperation values. Thus, the only ground for refusing the applicability of a foreign public law should be the public policy exception.

Focusing on claims made by foreign public bodies on provisions of their own public law, the Oslo Resolution draws the distinction between *acta jure imperii* and *acta jure gestionis*, depending on whether the subject-matter of the claim is related to the exercise of Governmental powers or to private law claims. Only the first ones should, in principle, be considered inadmissible, but exclusively insofar they are not justified in view of the needs of the principle of international cooperation or of the interests of the States concerned.³⁶ With respect to this latter point, it should be taken into consideration that, over the years, the international community's role in the field of cultural heritage law has been progressively expanding to the point that international cooperation can now be considered a pillar of cultural heritage protection.

III. THE INTERNATIONAL LAW APPROACH

For addressing the topic from an international law perspective, two are the main conventions to examine: the 1970 UNESCO Convention³⁷

³² M. FRIGO, *La circolazione internazionale dei beni culturali. Diritto internazionale, diritto comunitario e diritto interno*, Milan, Giuffrè, 2001, p. 32.

³³ M. FRIGO, *Circulation des biens culturels, détermination de la loi applicable et méthodes de règlement des litiges*, The Hague, Académie de Droit International de La Haye, 2016, pp. 145 ff.; C. ROODT, *Private International Law, Art and Cultural Heritage*, Cheltenham, Edward Elgar Publishing, 2015, p. 312 ff.

³⁴ Institut de Droit International, L'application du droit public étranger – Session of Wiesbaden-1975, XX Commission (Rapporteur: M. Pierre Lalive), http://www.idi-iil.org/app/uploads/2017/06/1975_wies_04_fr.pdf.

³⁵ Institut de Droit International, Les demandes fondées par une autorité étrangère ou par un organisme public étranger sur des dispositions de son droit public —Session of Oslo—1977, XX Commission (Rapporteur: M. Pierre Lalive), http://www.idi-iil.org/app/uploads/2017/06/1977_oslo_01_fr.pdf.

³⁶ The assessment is made «from the viewpoint of the State of the forum and taking account of the right of the defendant to equitable treatment in his relations with the authority or body in question».

³⁷ UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, 14 November 1970, United Nations Treaty

and the 1995 UNIDROIT Convention³⁸. Although to a different extent, they both deal with the issue of the international restitution of cultural property and, thus, with claims on proprietary rights over cultural objects.

As known, the restitution of cultural objects illicitly removed from their territory of origin was established for the first time as a general principle at the international level by the 1970 UNESCO Convention. However, it does not create a discipline of uniform law nor establishes a conflict of laws rule. Instead, it addresses the matter in two different ways.

The first way is the creation of a non-judiciary request for restitution. The request needs to be made through diplomatic offices, submitting documents and evidence necessary to prove the claim. At the request of a foreign authority, art. 13 requires the country where the cultural goods are located to «*take appropriate steps to recover and return*» the property. Two conditions need to be satisfied. First, the cultural property must have been stolen from a museum, a religious or secular public monument, or a similar institution (after the entry into force of the Convention). Second, the inventory of the institution must include that property. The interpretation of this rule is debated.³⁹ What should be remarked here is that —within the operative framework of art. 7— the conflict of laws issue on the validity of the title is circumvented. In fact, the Convention imposes a duty of restitution even if a valid legal title exists under domestic law, making the matter irrelevant.

The second way in which the Convention deals with the issue is a norm even more enigmatic, art. 13.⁴⁰ Its scope of application embraces privately owned property, without any further condition. The norm does not offer a specific procedure, but it simply requires States Member to undertake, «*consistent with the laws of each State, [...] to admit actions for recovery of lost or stolen items of cultural property*». Without going into details of its interpretation and its efficacy, it is worth noting that there is no reference nor any indirect effect on the law applicable to the merits of the dispute. Any claims on the title will be solved by the court in conformity with the law applicable to the merits, as identified under the *lex fori* conflict of laws rules.

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³⁸ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, United Nations Treaty Series 2421:457-484.

³⁹ P. O'KEEFE, *Commentary on the 1970 Unesco Convention*, Leicester, Institute of Art & Law, 2007, sub art. 7; O'KEEFE, P., *Commentaire relatif à la Convention de l'Unesco de 1970 sur le trafic illicite des biens culturels*, Paris, UNESCO, 2014, sub art. 7.

⁴⁰ P. O'KEEFE, *Commentary on the 1970 Unesco Convention ... op.cit.*, sub art. 13; P. O'KEEFE, *Commentaire relatif à la Convention de l'Unesco de 1970 ... op.cit.*, sub art. 13; S. FERRAZZI, *Riflessioni sul genus "bene culturale"*..., *op. cit.*, p.129 ff.

The 1995 UNIDROIT Convention creates two different actions for the recovery, respectively, for stolen («restitution») and illicitly exported («return») cultural objects.⁴¹ Even this Convention does not establish a conflict of laws rule. However, its indirect impact is wider.

It creates a uniform *minimum* regime for a *non domino* acquisitions. Of pertinence here, the restitution is *per se* compulsory. However, the possessor may be entitled to the payment of a «*fair and reasonable compensation*», subject to proof that the possessor did not know nor ought reasonably to have known the illegal provenance of the object and that it exercised due diligence in acquiring the object.

The law applicable to the merits may still influence the content of the final decision since, in the case of stolen property, the compensation is due only if consistent with the *lex fori* (art. 4(2)). Furthermore, art. 9 identifies the principles of the Conventions as a minimum level of protection, establishing a *favor restitutionis*. Under such premises, the law applicable will not interfere with the outcome (the object should be restituted), but with its conditions.

The UNIDROIT Convention also tackles the issues of foreign public laws with respect to State ownership of undiscovered cultural objects, by equating theft and unlawful excavation (or unlawful retention of lawfully excavated finds), provided that the law of the State where the excavation took place says so (art. 3).⁴² Thus, all the antiquities illegally removed from the State of origin will fall under the scope of application of the Convention. In this way, the Convention solves any possible legal restraints against the recognition of *iure publico* ownership at the national level⁴³.

⁴¹ G.A.L. DROZ, «La convention d'UNIDROIT sur le retour international des biens culturels volés ou illicitement exportés», *Revue critique de droit international privé*, 1997, pp. 239-281; C. FOX, «The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property», *American University International Law Review*, vol. 9(1), 1993, pp. 225-267; M. FRIGO, «La Convenzione dell'UNIDROIT sui beni culturali rubati o illecitamente esportati», *Rivista di diritto internazionale privato e processuale*, 1996, pp. 435-468; A. GARDELLA, «Nuove prospettive per la protezione internazionale dei beni culturali: la Convenzione dell'Unidroit del 24 giugno 1995», *Diritto del Commercio Internazionale*, vol. 12(4), 1998, pp. 997-1030; P. LAGARDE, «La restitution internationale des biens culturels en dehors de la Convention de l'UNESCO de 1970 et de la Convention d'UNIDROIT de 1995», *Revue de droit uniforme*, 2006, pp. 83-92.

⁴² A.L. CALVO CARAVACA, «Private International law and the Unidroit convention of 24th June 1995 on stolen or illegally exported cultural objects», in: MANSEL, H.P., PFEIFFER, T., KRONKE, H., KOHLER, C., and HAUSMANN, R. (eds), *Festschrift für Erik Jayme*, Munich, Sellier, 2004, p. 93 ff.

⁴³ See, in the case law, *United States v. McClain*, 545 F.2d 988, 996 (5th Cir. 1979). S. JANEVICIUS, A. CHECHI, M.-A. RENOLD, «Case Pre-Columbian Archaeological Objects – United States v. McClain», *Platform ArThemis* (<http://unige.ch/art-adr>), Centre du droit de l'art, Université de Genève; S. FERRAZZI, *Riflessioni sul genus "bene culturale"...*, *op. cit.*, p. 211 ff.

The analysis of the conventions shows that even without providing any uniform choice of law criteria, international law nevertheless demonstrates special sensitivity to problems arising from the application of traditional conflict of laws principles, addressing them through other legal tools.

IV. THE EMERGENCE OF “CULTURAL” CONFLICT OF LAWS RULES

The idea of addressing the problem from a private international law prospect has long been considered.⁴⁴ In 1991, the *Institut de Droit International*'s Basilea Resolution⁴⁵ has recommended the *lex originis* as the law to apply both to the transfer of ownership of property belonging to the cultural heritage of a State (art. 2) and to provisions governing the export of cultural objects (art. 3).⁴⁶

In recent years, the *lex originis* has been enacted at the national level by several States.

In the 2004 *Code de droit international privé*, the Belgian legislator—inspired by the evolution of International Cultural Heritage Law—has inserted a conflict of laws provision dedicated to cultural property: art. 90.⁴⁷ The rule regulates claims based on an illegal export of objects part of the cultural heritage of that State. According to art. 90,

⁴⁴ Z. CRESPI REGHIZZI, «Profili di diritto internazionale privato del commercio dei beni culturali», in CATANI, E., CONTALDI, G., and MARONGIU BUONAIUTI, F. (eds), *La tutela dei beni culturali nell'ordinamento internazionale e nell'Unione europea*, Macerata, eum, 2020, p. 167 ff.; D. FINCHAM, «How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property», *Columbia Journal of Law & the Arts*, vol. 32(1), 2008, pp. 111-150; M. FRIGO, *Circulation des biens culturels, détermination de la loi applicable...* op. cit., p. 409 ff.; E. JAYME, «Internationaler Kulturgüterschutz: Lex originis oder lex rei sitae. Tagung in Heidelberg», *Praxis des Internationalen Privat und Verfahrensrechts*, vol. 10, 1990, pp. 347 ff.; M.-A. RENOLD, «Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations – Study for the Juri Committee» [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU\(2016\)556947_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf), 2016; S. SYMEONIDES, *Choice of Law*, New York, Oxford University Press, 2009, p. 586 ff.; K. SIEHR, «The lex originis for cultural objects in European Private International Law», in VENTURINI, G., BARIATTI, S. (eds), *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Milan, Giuffrè, 2009, p. 889 ff.

⁴⁵ Institut de Droit International, La vente internationale d'objets d'art sous l'angle de la protection du patrimoine culturel —Session of Basilea—1991, XXII Commission (Rapporteur: Antonio de Arruda Ferrer-Correia), https://www.idi-iil.org/app/uploads/2017/06/1991_bal_04_fr.pdf.

⁴⁶ M. FRIGO, *La circolazione internazionale dei beni culturali ...*, op.cit., pp. 17-18; E. JAYME, «Protection of Cultural Property and Conflict of Laws: The Basel Resolution of the Institute of International Law», *International Journal of Cultural Property*, vol. 6, 1997, pp. 376-378.

⁴⁷ Loi portant le Code de droit international privé, 16 July 2004, art. 90 - Droit applicable au bien culturel: «Lorsqu'un bien qu'un Etat inclut dans son patrimoine culturel a quitté le territoire de cet Etat de manière illicite au regard du droit de cet Etat au moment de son exportation, sa revendication par cet Etat est régie par le droit dudit Etat en vigueur à ce moment ou,

in bringing the action, the State is granted the choice between the *lex originis* and the *lex rei sitae*. Furthermore, special attention is paid to a *non domino* acquisitions, providing that if the *lex originis* does not guarantee any legal protection to the good faith purchaser, the latter has the right to ask for the protection granted by the *lex rei sitae*.

In 2011, Albania implemented an identical provision.⁴⁸ The 2005 Bulgarian Private International Law Code too contains the right to choose between the *lex originis* and the *lex rei sitae*, in State claims⁴⁹. However, it does not grant any special right to the good faith purchaser. The State whose export laws have been violated has the final say on the choice of law.

It should be noted that the very notion of *country of origin* in the Basilea Resolution seems to be different from the one adopted at the national level. While the former refers to the country of origin as «*the country with which the property concerned is most closely linked from the cultural point of view*» (art. 1(b)), the just mentioned national laws refer to export State. The difference may be considered not as striking once taken into consideration that each of the three norms requires the export State to be also culturally connected with the object («*good being part of the cultural heritage of a State*»).

Nevertheless, the difference should not be underestimated. The concept of country of origin is by itself ambiguous. Cultural objects may relate to more than one State, both from a legal and a cultural point of view. The inclusion of an object into the cultural heritage of one State may depend on several factors as, for instance, the nationality of the author, the nationality of the scientific group that discovered it,

au choix de celui-ci, par le droit de l'Etat sur le territoire duquel le bien est situé au moment de sa revendication.

Toutefois, si le droit de l'Etat qui inclut le bien dans son patrimoine culturel ignore toute protection du possesseur de bonne foi, celui-ci peut invoquer la protection que lui assure le droit de l'Etat sur le territoire duquel le bien est situé au moment de sa revendication».

See, K. SIEHR, «The *lex originis* for cultural objects...», *op.cit.*, p. 889 ff.

⁴⁸ LIGJ Nr.10 428, datë 2.6.2011 për të drejtën ndërkombëtare private, art. 40 – Mbrojtja e trashëgimisë kulturore: «1. Kur sendet, që përfshihen në trashëgiminë kulturore të një shteti, dalin jashtë territorit të tij në mënyrë të paligjshme, rivendikimi i tyre rregullohet nga ligji i shtetit nga ku ka dalë sendi, në fuqi në kohën e daljes së sendit. Shteti, nga i cili ka dalë sendi, mund të zgjedhë të zbatojë ligjin e shtetit, në territorin e të cilit gjendet sendi në kohën e rivendikimit të tij.

2. Megjithatë, nëse ligji i shtetit, ku sendi përfshihet në trashëgiminë e tij, nuk merr parasysh mbrojtjen e poseduesit në mirëbesim, ky i fundit mund të kërkojë mbrojtjen që i siguron ligji i shtetit, në territorin e të cilit gjendet sendi në kohën e rivendikimit të tij».

⁴⁹ Кодекс на международното частно право, DV, n.42 of 17 May 2005, art. 70 – Културни ценности: «Когато дадена вещь, включена в културното наследство на една държава, е неправомерно изнесена от нейната територия, искането на тази държава за връщане на вещица се урежда от нейното право, освен ако тя е избрала да се прилага правото на държавата, на чиято територия вещица се намира към момента на предявяване на искането за връщане».

the length of time the object has been in a country, the nationality of the patron, the influence exercised on the national culture, the change in national borders.⁵⁰

This is why using «origin» as a connecting factor may raise issues of unpredictability. In addressing the problem, the Basilea Resolution provides an autonomous definition, still —however— subjective. The phrase «*most closely linked*» requires further elaboration on which kind of links to ponder and how to assess the closeness. However, elements to reduce the uncertainty can be found in the definition of works of art as good «*identified as belonging to the cultural heritage of a country by registration, classification or by any relevant internationally accepted method of publicity*» (art 1(1)a). Thus, under the Resolution, the State of origin needs also to have had legally included the object in its cultural patrimony through an explicit measure.

The solution implemented by Belgian, Albanian, and Bulgarian legislators is objective. The combination of what we can name as «*patria originis*» with the *situs rei* results in identifying the State of origin as the place where the goods were located at the time of the illicit export. The additional references to national cultural heritage, while raising a certain degree of uncertainty, aim at better implementing the underlying rationale. That is to say, the aim of special criteria is related only to the protection of national cultural heritage. Ordinary cases of violation of export limits not related to the protection of national cultural patrimony *per se* fall outside the scope of this special discipline, even if they concern cultural good.

V. CONCLUSIONS

The introduction of *ad hoc* criteria of international private law has been perceived as a paradigm shift.⁵¹ The studies over the illicit trafficking of cultural objects has shown how the legal framework plays a crucial role in facilitating the trafficking.⁵² Goods are usually moved

⁵⁰ See also Art. 4 of the 1970 UNESCO Convention.

⁵¹ Centre d'Etude sur la Coopération Juridique Internationale. 2011. Étude sur la prévention et la lutte contre le trafic illicite des biens culturels dans l'Union européenne —Rapport final. CECOJI-CNRS— UMR 6224 (France), p. 118.

⁵² D. CHAPPELL, K. POLK, «Unraveling the “Cordata”: Just How Organized is the International Traffic in Cultural Objects?», in MANACORDA and S. CHAPPELL D. (eds), *Crime in the Art and Antiquities World - Illegal Trafficking in Cultural Property*, New York, Springer, 2011, pp. 99-113; M. M. KERSEL, «From the Ground to the Buyer: A Market Analysis of the Illegal Trade in Antiquities», in BRODIE, N., KERSEL, M.M., LUKE, C., and TUBB, K.W. (eds), *Archaeology, Cultural Heritage and the Antiquities Trade*, Gainesville, University Press of Florida, 2006, pp. 188-205; P. B. CAMPBELL, «The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage», *International Journal of Cultural Property*, 2013, vol. 20(2), pp. 113-153; S. MACKENZIE, *Going, going, gone: Regula-*

through countries or to countries whose legal system may help in title washing or in legalizing the title. This is why, by inhibiting the rewarding relocation of cultural goods made with the purpose of having a more favorable *lex rei sitae* applicable, the adoption of the *lex originis* may help in tackling the illicit trafficking of cultural objects. At the same time, it limits the protection of cultural heritage to the level ensured by the State of origin, creating a virtuous mechanism in which the State has the responsibility to adapt national legislation to its scope without making use of more favorable foreign laws. However, this is true only insofar as the *lex originis* is not provided as an alternative, as currently is.

Furthermore, it should be noted that the advantages of the *lex originis* are exploited exclusively by States and not by private parties. First of all, under such rule, the claimant must be a State, not a private party. With respect to this, the main scope of the provision appears actually to be the protection of national cultural treasures, not of original owners in general. Secondly, the private party involved in the claim, may not have been able to predict the law applicable at the time of the acquisition of its title over the object. However, a certain extent of unpredictability can not be avoided. The adoption of the *lex rei sitae* simply shifts the burden coming from the unpredictability to States instead, relieving private parties.

In conclusion, the *lex originis* appears to be an alternative criterion only for restitution claims submitted by national entities. Up-to-day, no general conflict of law rule applicable to all cultural restitution claims has been enacted. What appears undeniable is that the international character of the circulation of cultural heritage deriving from the global soul of art-collecting makes private international law pivotal in addressing legal claims in the field. Thus, the future development of cultural heritage law both at the national and international levels will probably lead to the further expansion of the debate over the intertwining between private international law area and cultural heritage.

ting the Market in Illicit Antiquities, Leicester, Institute of Art and Law, 2005; S. MACKENZIE, N. BRODIE, D. YATES, *Trafficking Culture: New Directions in Researching the Global Market in Illicit Antiquities*, London, Routledge, 2019.

