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LOOKING AT CULTURAL OBJECTS THROUGH A PRIVATE INTERNATIONAL LAW LENS

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SUMMARY: I. BACKGROUND.— II. WHAT'S IN A NAME.— III. THE IMPORTANCE OF APPLICABLE LAW.— IV. POTENTIAL MODELS OF LEGISLATIVE INTERVENTION.— V. BUILDING THE EUROPEAN LEGISLATIVE FRAMEWORK.— VI. DRAFTING A SPECIAL CHOICE OF LAW RULE FOR A SPECIAL CATEGORY OF PROPERTY.— VII. EXISTING MODELS AND ALTERNATIVE SOLUTIONS.— VIII. CONCLUSION.

I. BACKGROUND

Much has been written about the legal dimensions of cultural property[1] and cultural objects[2], about international trade in art[3] and the

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[1] See e.g. J.M. CARRUTHERS (ed), *Transfer of Property and Private International Law* – Vol II, Edward Elgar Publishing (2016); D. FINCHAM, «How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property» [2008], *Columbia Journal of Law and the Arts*: 32, 111 - X.; D. FINCHAM, «Rejecting *Renvoi* for Movable Cultural Property: The Islamic Republic of Iran v Denyse Berend» (2007), 14 *Journal of International Cultural Property*: 111 – 120; J. H. MERRYMAN, «Thinking about the Elgin Marbles», *Michigan Law Review* 83 (1985): 1881; J. H. MERRYMAN, «Cultural Property Internationalism» (2005), 12 *International Journal of Cultural Property*: 11; H. NIEC, «Legislative Models of Protection of Cultural Property» 1976 Vol. 27, *Hastings Law Journal* 1089; G. REICHELT, «International Protection of Cultural Property», *Uniform Law Review* (1985): 43; K., SIEHR, «The Protection of Cultural Property: The 1995 UNIDROIT Convention and the E.E.C. Instruments of 1992/93 Compared», *Uniform Law Review* (1998): 671; K. SIEHR, «The Protection of Cultural Heritage and International Commerce», *International Journal of Cultural Property* 6 (1997): 304; and M. WELLER, «Cultural Objects,

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regulation and governance of the international art market.[4] Sometimes the analysis is situated in the context of stolen[5] or spoliated[6] property and the mechanics of restitution;[7] at other times, the context is the illegal export of such property.[8] Occasionally, the literature has a European focus;[9] at other times, a global perspective is favoured.[10]

Protection of», in Basedow, J; Ruhl, G; Ferrari, F; and Asensio, P de M, *Encyclopaedia of Private International Law* (2017), Edward Elgar Publishing, 498.

[2] See e.g. D. L. Carey-Miller, W. Meyers and A. L. Cowe, «Restitution of Art and Cultural Objects: a Reassessment of the Role of Limitation» (2001), 6(1) *Art, Antiquity & Law* 1; and L. V. Prott, «UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects», *Uniform Law Review* (1996) 59.

[3] See e.g. P. M. Bator, «An Essay on the International Trade in Art», *Stanford Law Review* 34 (1982): 275; and A. Biondi, «The Merchant, the Thief and the Citizen: the Circulation of Works of Art within the European Union», *Common Market Law Review* (1997) 1173.

[4] See e.g. D. Fincham, «How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property» [2008], *Columbia Journal of Law and the Arts*: 32; A. Hawkins, R. A. Rothman and D. B. Goldstein, «A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art» (1995 - 1996), Vol 64(1) *Fordham Law Review*: 49; A. E. Hayworth, «Stolen Artwork: Deciding Ownership is No Pretty Picture», *Duke Law Journal* 43 (1993) 337; L. M. Kaye, «Looted Art: What Can and Should be Done?» (1998), 20 *Cardozo Law Review*: 657; N. Palmer, «Memory and Morality: Museum Policy and Holocaust Cultural Assets» (2001), 6(3) *Art, Antiquity & Law* 259; and C. Roodt, *Private International Law, Art and Cultural Heritage* (2015), Edward Elgar Publishing.

[5] See e.g. N. Palmer, «Recovering Stolen Art», *Current Legal Problems* 47 (1994): 215; C. Roodt and D. L. Carey-Miller, «Stolen Cultural Property: Implications of *Vitium Reale* in Private Law and Private International Law» (2013), *Transnational Dispute Management*: 5; and S. C. Symeonides, «A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property» (2005), 1 *Vanderbilt Journal of Transnational Law*: 1177.

[6] See e.g. D. L. Carey-Miller, D.W. Meyers. and A. L. Cowe, «Restitution of Art and Cultural Objects: a Reassessment of the Role of Limitation'», *Art, Antiquity and Law* 6, no. 1 (2001) 1; E. Pocock, «Spoliation of Works of Art during the Holocaust and World War II Period - A Commentary», *Art, Antiquity and Law* 5, no. 1 (2000) 81; and C. Woodhead, «Nazi-Era Spoliation: Establishing Procedural and Substantive Principles» (2013), 18 *Art, Antiquity & Law* 167.

[7] See e.g. P. Gerstenblith, «The Public Interest in the Restitution of Cultural Objects» (2000 – 2001) 16 *Connecticut Journal of International Law* 197; and C. Roodt, «State Courts or ADR in Nazi-Era Art Disputes: A Choice "More Apparent than Real"?» (2012 – 2013), 14 *Cardozo Journal of Conflict Resolution* 421.

[8] See e.g. K. A. Short, «Preventing the Theft and Illegal Export of Art in a Europe Without Borders», *Vanderbilt Journal of Transnational Law* 26 (1993) 633; and E. Campfens, «Cross-border claims to looted art» (Study commissioned by European Parliament, JURI Committee: PE754.126) (October 2023),

[9] See e.g. A. Biondi, «The Merchant, the Thief and the Citizen: the Circulation of Works of Art within the European Union», *Common Market Law Review* (1997) 1173; L. E. Gillies, «The contribution of jurisdiction as a technique of demand side regulation in claims for the recovery of cultural objects» (2015), *Journal of Private International Law*, Vol. 11.2, 295; M. Weller, *Rethinking EU Cultural Property Law: Towards Private Enforcement*, Baden-Baden (2018) 36; and M. Weller, Article 7(4) Brüssel Ia-VO, in: Wieczorek/Schütze, *Zivilprozessordnung und Nebengesetze, Großkommentar*, Vol. XIII/2, Berlin 4th ed. (2019).

[10] See e.g. 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 Journal of International Law and Policy* 9 (1993): 225; L. V. Prott, «UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects», *Uniform Law Review* (1996) 59; and A. F. Vrdoljak, A. Jakubowski and A. Chechi, *The 1970 UNESCO and 1995 UNIDROIT Conventions on Stolen or Illegally Transferred Cultural Property: A Commentary*, Oxford University Press (2024).

Cultural property and the traffic thereof, both licit and illicit, are of considerable importance to the international community.[11] The art and antiquities market is an international one, and theft and illicit trafficking are lucrative industries, raising global security issues.[12] There is a global supply network in stolen and unlawfully removed cultural property, and illicit trade in cultural property covers a wide range of activities, from the failure by an owner to secure proper export documentation to the clandestine smuggling of looted property.[13]

There are many ways in which to regulate trade in cultural objects. As observed by Matthias Weller,

> Cultural property law is a multilayer and multi-disciplinary subject … The relevant sources of cultural property law include private and administrative law internationally unified by treaties, soft law and international codes of conduct, European primary and secondary law as well as national law. Often penal and customs law are involved.[14]

The focus of this chapter is the role played by private international law in the regulation of trade in cultural objects. At present, there is a lacuna insofar as private international law pertaining to property remains largely untouched by any major harmonisation instrument, on either a global or a regional level.[15]

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[11] See European Parliament Report, «Cross-border restitution claims of looted works of art and cultural goods», Rapporteur: P. Svoboda (PE 610:988) (November 2017) ("Svoboda Report"), Annex I, p 31, para 2: «It is commonly accepted that there is —naturally— no reliable data on the scale and volume of illicit trade in art and cultural property. Older estimations range from 6 billion to 8 billion USD per annum, but these estimations are partly contested as exaggerated, or at least unsubstantiated».

[12] It is acknowledged in EU legislation that, «Illicit trade in pillaged cultural goods has been identified as a possible source of terrorist financing and money laundering activities in the context of the supranational risk assessment on money laundering and terrorist financing risks affecting the internal market» (Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods (OJ L 151, 7.6.2019, pp 1–14), recital (11)). In November 2023, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") and the United Nations Office on Drugs and Crime urged the recognition and addressing of illicit trafficking of cultural goods as a global security issue through the campaign: *Protege tu legado* (Protect your legacy) (https://www.unesco.org/en/articles/illicit-trafficking-cultural-goods-shall-be-recognized-security-issue).

[13] See UK House of Commons Select Committee on Culture, Media and Sport, "Seventh Report" (18 July 2000) (HC 371-I), para [14]. See also Report of UK Government Advisory Panel on Illicit Trade (appointed to consider, first, the nature and extent of the illicit international trade in art and antiquities, and the extent to which the UK is involved in this practice; and, secondly, to consider how most effectively the UK can play its part in preventing and prohibiting the illicit trade, and to advise the UK Government accordingly) (December 2000) (https://www.gov.uk/government/publications/report-of-advisory-panel-on-illicit-trade).

[14] M. Weller, «Cultural Objects, Protection of», in Basedow, Ruhl, Ferrari and Asensio (n 1) 498.

[15] See J. M. Carruthers and M. Weller, «Property» in Beaumont, P. and Holliday, J., *A Guide to Global Private International Law*, Hart Publishing (2022), Ch 21, 304, 307.

Globally, this is not for the want of trying, but, regrettably, past attempts to reform applicable law rules concerning property have been largely unsuccessful. Aside from the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (article 6 of which regulates exclusive, indirect jurisdiction for recognition and enforcement of judgments in relation to rights *in rem* in immovable property), instruments concerning property that have emanated from the Hague Conference on Private International Law are not renowned for their success. The 1955 Hague Convention on the Law Applicable to International Sales of Goods entered into force in only eight States. The 1958 Hague Convention on the Law Governing Transfer of Title in International Sales of Goods, though signed by Greece and ratified by Italy, never entered into force. Likewise, the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods did not enter into force.[16]

On a regional level, EU private international law, to date, has not tackled the subject of international property law in any focused, holistic manner. Rather, EU intervention has been fragmented.[17] There has been direct intervention by way of the rule on exclusive jurisdiction in respect of proceedings which have as their object rights *in rem* in immovable property or certain tenancies of immovable property,[18] and also in terms of the rule on the law applicable to contracts concerning immovable property.[19] More tangentially, there has been intervention in the form of regulations on family property,[20] succession[21] and insolvency.[22]

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[16] For discussion of the reasons for the failure of these instruments, see CARRUTHERS and WELLER (n 15), 298 – 299.

[17] See CARRUTHERS and WELLER (n 15), 300-303.

[18] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20.12.2012, pp 1–32) ("Brussels I Recast Regulation"), art 24(1). See also art 45(1)(e)(ii) on refusal of recognition of judgments.

[19] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) (OJ L 177, 4.7.2008, pp 6–16), art 4(1)(c) and (d). See also, regarding formal validity, art 11(5).

[20] Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of matrimonial property regimes (OJ L 183, 8.7.2016, pp 1–29), e.g. art 29; and Council Regulation 2016/1104 implementing enhanced cooperation in the area of registered partnerships (OJ L 183, 8.7.2016, pp 30–56), e.g. art 29.

[21] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27.7.2012, pp. 107–134), e.g. art 31.

[22] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (OJ L 141, 5.6.2015, pp. 19–72), e.g. art 8.

It is not the aim of this chapter to examine, in an all-encompassing manner, the applicable law rules concerning property generally,[23] but rather to concentrate on the specific case of cultural objects.

II. WHAT'S IN A NAME?

When considering the possibility of formulating a special choice of law rule for cultural objects, debate starts at the very beginning for there is no universally accepted definition of the type or class of property with which this area of law is concerned. Special rules have been devised within numerous treaties and other legislation to deal with property having «cultural» characteristics —that is, broadly speaking, attributes of an archaeological, historical, literary, artistic, scientific, spiritual, or other cultural significance— but uniform terminology and definitions are lacking. Each instrument, therefore, sets its own contours and parameters.

The term «cultural property» is utilised in various measures, notably, in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[24] and its accompanying protocols,[25] and in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[26] Article 1 of the 1970 UNESCO Convention[27] states that

> For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
>
> (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
>
> (b) Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
>
> (c) Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

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[23] On working towards the progressive unification of private international law in relation to property generally, see Carruthers and Weller (n. 15), 304-307.

[24] Adopted in 1954 under the auspices of UNESCO.

[25] See *https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf*.

[26] See *https://en.unesco.org/about-us/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and*.

[27] In respect of which, see J. Blake, «Article 1 of the 1970 UNESCO Convention: Definition of "Cultural Property"» in Vrdoljak, Jakubowski and Chechi (n 10).

(d) Elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) Antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) Objects of ethnological interest;

(g) Property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manu-factured [sic] articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) Rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) Postage, revenue and similar stamps, singly or in collections;

(j) Archives, including sound, photographic and cinematographic archives;

(k) Articles of furniture more than one hundred years old and old musical instruments.

By contrast, the 1995 UNIDROIT[28] Convention on Stolen or Illegally Exported Cultural Objects,[29] employs the term «cultural objects», which are defined in article 2 (for the purposes of that instrument)[30] as objects «which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention». However, the difference in terminology between the UNESCO and UNIDROIT instruments is semantic rather than substantive for the categories enumerated within the UNESCO definition are set out in an Annex to the 1995 UNIDROIT Convention, albeit without explicit reference to the 1970 instrument.

Occasionally, UNESCO and UNIDROIT have collaborated on specific, sectoral topics, such as the publication, in 2011, of Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects, «which are intended to assist domestic legislative bodies in the establishment of a legislative framework for heritage protection, to adopt effective legislation for the establishment and recognition of the State's ownership of undiscovered cultural objects with a view, inter alia, to facilitating restitution in case of unlawful removal».[31] Provision 2 defines «undiscovered cultural objects» as including «objects which,

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[28] «International Institute for the Unification of Private Law».

[29] See *www.unidroit.org/instruments/cultural-property/1995-convention*.

[30] In respect of which, see J. Blake, «Article 2 of the 1995 Unidroit Convention: Definition of "Cultural Objects"» in Vrdoljak, Jakubowski and Chechi (n 10).

[31] See UNESCO – UNIDROIT Expert Committee on State Ownership of Cultural Heritage, "Explanatory Report with model provisions and explanatory guidelines" (2011) *https://en.unesco.org/sites/default/files/unesco-unidroit_model_provisions_en_0.pdf*.

consistently with national law, are of importance for archaeology, prehistory, history, literature, art or science and are located in the soil or underwater». This definition is said to be based on the general definition given by article 1 of the 1970 UNESCO Convention and article 2 of the 1995 UNIDROIT Convention and is intended to «facilitate the implementation of the two instruments».[32]

Turning to the European legislative landscape, the preferred terminology is «cultural objects».[33]. As narrated in recital (4) of Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast),[34] the European focus is on cultural objects which are classified as national treasures possessing artistic, historic or archaeological value:

> Directive 93/7/EEC introduced arrangements enabling Member States to secure the return to their territory of cultural objects which are classified as national treasures within the meaning of Article 36 TFEU,[35] which fall within the common categories of cultural objects referred to in the Annex to that Directive,[36] and which have been removed from their territory in breach of the national measures or of Council Regulation (EC) No 116/2009.[37] That Directive also covered cultural objects classified as national treasures and forming an integral part of public collections or inventories of ecclesiastical institutions which did not fall within those common categories.

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[32] *Ibid*., p. 5.

[33] See e.g. Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State; Directive 96/100/EC of the European Parliament and of the Council of 17 February 1997 amending the Annex to Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State; Directive 2001/38/EC of the European Parliament and of the Council of 5 June 2001 amending Council Directive 93/7/EEC; Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast); and Brussels I Recast Regulation, art 7(4).

[34] OJ L 159, 28.5.2014, pp. 1–10.

[35] Categories of object that may be classified as «national treasures» were set out in the Annex to Directive 93/7/EEC.

[36] Earlier, Council Directive 93/7/EEC made clear in the preamble that, «[…] the Annex to this Directive is consequently not intended to define objects which rank as "national treasures" within the meaning of the said Article 36, but merely categories of object which may be classified as such and may accordingly be covered by the return procedure introduced by this Directive; […]»" (OJ L 74/74, 27.3.1993). Essentially, European law recognises in respect of cultural objects an exception to the principle of free movement of goods within Member States: «The Member States are allowed to prohibit the removal of cultural objects from their territory and to enforce these prohibitions by bringing suits for return of the illegally removed objects in law courts of any Member State where the object is located» (K. Siehr, «The Protection of Cultural Heritage and International Commerce», *International Journal of Cultural Property* (1997) 6(2) 304 at 315).

[37] Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (OJ L 39, 10.2.2009, p. 1).

However, although the preferred terminology in the EU is «cultural objects», the term «cultural goods» is also used.[38] For the purposes of Council Regulation (EC) No 116/2009, article 1 provides a bespoke definition of «cultural goods», referring to the items listed in Annex I thereof, which, in turn, echoes the approach taken in Directive 93/7/EEC to «cultural objects». Regulation (EU) 2019/880, for its purpose, adopts in article 2(1) a definition of «cultural goods» which replicates the definition of «cultural objects» set out in article 2 of the 1995 UNIDROIT Convention.

In drafting a special choice of law rule for cultural property, the terminology to be adopted likely would depend on whether or not the instrument in question were to be a potentially global one, compiled, for example, under the auspices of the Hague Conference (in which case the more widely used term «cultural property» probably would be preferred), or a purely European measure (in which case «cultural objects» is likely to be the favoured terminology, as being more commonly employed than «cultural goods»).

State designation/classification

More significant than terminology, an important point to determine in relation to the property falling within the scope of any special rule, would be the requirement, or not, of formal state designation.

Under both the UNESCO and European definitions, to be classed as cultural property or cultural objects, the property/objects must be, in the case of UNESCO Contracting States, «specifically designated»[39] by the relevant State as being of importance for archaeology, prehistory, history, literature, art or science, and, in the case of EU Member States «classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the "national treasures possessing artistic, historic or archaeological value" under national legislation or administrative procedures within the meaning of Article 36 TFEU; …».[40]

The UNIDROIT approach is less strict, being to the effect that the Convention applies to all objects «which, on religious or secular grounds, *are of importance* for archaeology, prehistory, history, liter-

[38] See e.g. Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (OJ L 39, 10.2.2009, pp 1–7); and Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods (OJ L 151, 7.6.2019, pp. 1–14).

[39] Art. 1, 1970 UNESCO Convention.

[40] Directive 2014/60/EU, art 2(1).

ature, art or science and belong to one of the categories listed in the Annex to this Convention»[41].

The UNIDROIT approach, on the face of things, is the simpler,[42] and has the capacity to capture within its scope more objects than a rule that requires specific designation of property. On the other hand, the benefit of a rule that rests upon state designation of property is that it renders the subject matter scope of the rule clearer and more certain, requiring that a decision as to the cultural importance or otherwise of an object is made anterior to the operation of the choice of law process.

III. THE IMPORTANCE OF APPLICABLE LAW

The question arises as to why a special choice of law rule for cultural property should be thought necessary or desirable, particularly in light of an already busy international legislative landscape. The contemporary looting of cultural property often stands at the crossroads between public law and private law. The intersectionality that arises in this area between public international law and private international law is complex, even before one takes into account the potentially related fields of international criminal law and international human rights law.

But given that there already exist two major, multilateral treaties on cultural property (the 1970 UNESCO Convention[43] and the 1995 UNIDROIT Convention[44]), is there room for, or need of, a uniform applicable law rule for cultural property?

The essence of the 1970 UNESCO Convention is that, «The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto shall be illicit»[45]. State Parties undertake to recover and return to the State Party of origin cultural property that has been stolen from a museum or public monument or similar institution in another State Party, provided, first, that the property features on that institution's inventory[46] and, secondly, that the requesting State pays just compen-

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[41] Emphasis added. There is no need for state designation or formal classification of the property in question.

[42] For background on the negotiations of the UNIDROIT Study Group that prepared the Preliminary Draft (1995) Convention, see Prott, L.V., *Commentary on the Unidroit Convention on Stolen and Illegally Exported Cultural Objects*, Institute of Art & Law (1997) at 25.

[43] As of 9 August 2024, there are 145 States Parties to the 1970 Convention (https://en.unesco.org/fighttrafficking/1970).

[44] As of 9 August 2024, there are 54 Contracting States to the 1995 Convention (https://www.unidroit.org/instruments/cultural-property/1995-convention/status/).

[45] Art. 3.

[46] Art. 7(b)(i).

sation to any innocent purchaser or to a person who has valid title to that property.[47]

Although one may applaud the sentiments that underpin the 1970 Convention, and recognise that it is an «important milestone in raising international awareness of, and promoting international action against, the illicit trade in cultural property»[48], concern can be expressed about the lack of clarity of some of its provisions, and about the fact that it imposes duties only upon States. The recovery of cultural property is dependent upon State intervention; the former owner or possessor of stolen cultural property (e.g. the victim of a theft) has no direct, personal right of action under the Convention. Moreover, the range of illicit practices attacked is relatively restricted[49] and, as described above, the range of objects caught by the Convention's net is narrow insofar as, to qualify as cultural property and thereby warrant protection, property must be specifically designated by a State as important for its archaeology, history, literature, art or science.[50] These requirements will foil many claims for the recovery of culturally significant assets by wrongfully dispossessed owners, demonstrating the difficult nature of the relationship between the Convention rules on cultural property and rules of private international law. Complications inevitably arise because the demarcation between cultural property looting and private market transacting is not clear or absolute. Cultural property that is potentially protected by international convention may pass into commercial channels and become unavoidably infected with private law consequences.[51]

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[47] Art. 7(b)(ii).

[48] UK House of Commons Select Committee on Culture, Media and Sport, "Seventh Report" (18 July 2000) (HC 371-I), para [109].

[49] The 1970 Convention does not cover, e.g., the unlawful taking from archaeological sites of formerly unrecorded objects.

[50] Arts 1 and 4.

[51] Consider, e.g., the proceedings raised in the English High Court by the Trustees of the British Museum against a former British Museum curator whom, it is alleged, stole and damaged up to 2,000 artefacts of cultural and historical significance. The Museum estimates that hundreds of the stolen or damaged items were sold or offered for sale by the former curator, predominantly utilising eBay and PayPal as platforms for the transactions: *https://www.independent.co.uk/news/uk/home-news/peter-higgs-british-museum-court-b2518926.html*; and https://www.bbc.co.uk/news/entertainment-arts-68665773. See also, in the Netherlands, *Village Communities of Yangchun and Dongpu v Van Overveem, Design & Consultancy BV, Design Consultancy Oscar van Overveem B.V.* (12 December 2018) Amsterdam District Court, Case No. C/13/609408 / HA ZA 16-558 (https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBAMS:2018:8919), discussed in Campfens, E (n 8) at 2.3.1. With regard to the subsequent lawsuit in China, see *The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V.*, Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626, (4 December 2020), discussed in Z Huo, "The Chinese villages win a lawsuit in China to repatriate a Mummified Buddha Statue hold by a Dutch Collector —What Role has Private International Law Played?" at https://conflictoflaws.net/2020/the-chinese-villages-win-a-lawsuit-in-china-to-repatriate-a-mummified-buddha-statue-hold-by-a-dutch-collector-what-role-has-private-international-law-played/.

The 1995 UNIDROIT Convention was a specific attempt to deal with the private law aspects of illicit trade in cultural objects. Applying to claims «of an international character»[52], it establishes a scheme which is largely dependent upon private action, offering a mechanism whereby a private individual may seek to recover a stolen cultural object, without need for governmental intervention and without the requirement that the stolen object be state-designated. The Convention incorporates, in article 8, a provision on jurisdiction:

> Article 8
> (1) A claim under Chapter II[53] and a request under Chapter III[54] may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.
> (2) The parties may agree to submit the dispute to any court or other competent authority or to arbitration.
> (3) Resort may be had to the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

Crucially, however, from a governing law perspective, there are serious defects within the 1995 Convention. Article 3, for example, declares that «The possessor of a cultural object which has been stolen [according to which law?] shall return it [to whom and on what legal basis?]». The rule is private international law-blind, and so it is questionable how well this provision fits with any Contracting State's private international law rules.

On a European level, Directive 2014/60/EU[55] (like its predecessor, Council Directive 93/7/EEC) operates only among Member States of the European Union and confers a right of action only upon Member States, not on private individuals.[56]

Recital (8) observes that, «The objective of Directive 93/7/EEC was to ensure the physical return of the cultural objects to the Member State from whose territory those objects have been unlawfully removed, irrespective of the property rights applying to such objects». It concedes that, «The application of that Directive … has shown the limitations

[52] Art. 1.
[53] «Restitution of stolen cultural objects».
[54] «Return of illegally exported cultural objects».
[55] N. 33.
[56] Art. 6: «The requesting Member State may initiate, before the competent court in the requested Member State, proceedings against the possessor or, failing him, the holder, with the aim of securing the return of a cultural object which has been unlawfully removed from its territory».

of the arrangements for securing the return of such cultural objects». Significantly, however, there is a serious limitation that remains unacknowledged, namely, the fact that, under article 16 of Directive 2014/60/EU, «This Directive shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States, by the requesting Member State and/or the owner of a cultural object that has been stolen»[57].

Fundamentally, «the right of action conferred on the member state from which the object was unlawfully removed does not extinguish any title acquired by a good faith buyer under a post-theft sale of the object, when the object was located in a country which regards that sale as conferring a good title»[58]. Directive 2014/60/EU does not supplant rules of private international law, and does not change national rules (domestic or choice of law) concerning particular transfers of movable property.[59] Indeed, the Directive expressly states that, «Ownership of the cultural object after return shall be governed by the law of the requesting Member State»[60]. In practice, therefore, rules of private international law dominate any question concerning the cross-border transfer of cultural objects, and benefits conferred by Directive 2014/60/EU may be subjugated by the transfer of ownership of an object in a manner that is compatible with the relevant governing law (most likely, the law of the *situs* of the object at the time of the transfer[61]).

Ultimately, therefore, it is not the grand gesture of the international conventions or of Directive 2014/60/EU that matters: «a conflict of laws issue —the question which country's law governs a given dispute— may frustrate the global co-operation needed to restrain the illicit traffic in cultural property»[62]. Rather, it is essential to consider the private international law dimension and, specifically, to examine choice of law rules pertaining to cultural property.

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[57] Art. 16. Cf., previously, Council Directive 93/7/EEC (n 33), art 15.

[58] N. Palmer (ed), *The Recovery of Stolen Art: A Collection of Essays* (Kluwer Law International) (1998) 21.

[59] K. Siehr, «The Protection of Cultural Heritage and International Commerce», *International Journal of Cultural Property* (1997) 6(2) 304 at 314.

[60] Art 13. The "requesting Member State" is defined in art 2(3) as meaning the Member State from whose territory the cultural object has been unlawfully removed. Cf. Council Directive 93/7/EEC, art 12. It is not clear whether "law" is to be construed narrowly, or "in the round", *i.e*. exclusive or inclusive of the requesting Member State's rules of private international law.

[61] See generally, J. M. Carruthers, The *Transfer of Property in the Conflict of Laws,* Oxford University Press (2015), chapter 3.

[62] *Ibid*., para 5-34. See also Fox, C. (n 10) at 255.

IV. POTENTIAL MODELS OF LEGISLATIVE INTERVENTION

One feature of modern private international law has been the move towards regulation in the form of legislation. This can be seen on a national level,[63] as well as regionally[64] and internationally.[65] As earlier stated, however, there is a lacuna as regards property law; private international law rules pertaining to property remain largely untouched by any major harmonisation instrument. Recently, however, there has been a swell of interest and activity regarding the formulation of uniform applicable law rules pertaining to property.

Regulatory ambition may vary in scale. At the most modest end of the spectrum, on the level of sector-specific projects, it would be possible to commence work on a specific project to devise a harmonised choice of law rule for cultural objects.[66] The aim would be to craft a private international law companion to existing UNESCO and UNIDROIT instruments[67] and, in the context of the EU, a counterpart to the rule of special jurisdiction found in article 7(4) of the Brussels I Recast Regulation.

At the other end of the spectrum, the boldest endeavour would be to undertake a global project, via the Hague Conference on Private International Law, on the law applicable to proprietary rights, more specifically, concerning the *inter vivos* transfer of title to immoveable

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[63] In Scotland and the UK, for example, in the closing decades of the 20th century and the early part of the 21st century, rules of choice of law were subject to substantial remodelling by way of statutes (e.g. the Family Law Act 1986, the Private International Law (Miscellaneous Provisions) Act 1995, and the Family Law (Scotland) Act 2006), some of which were later eclipsed by European legislative measures. See also, e.g., in France, the Draft Code of French Private International presented in March 2022 (see C. Nourissat, «The Draft Code of French Private International Law», *Yearbook of Private International Law* Vol. XXIV – 2022/2023, pp 237 – 246); and, in the USA, *Third Restatement of Conflict of Laws* (in respect of which, see K. Roosevelt III, and B. Jones, «What a Third Restatement of Conflict of Laws Can Do», in Special Issue on "Third Restatement of Conflict of Laws" *American Journal of International Law*, Volume 110 (2016), pp. 139-143).

[64] e.g. in the EU, see the Rome I Regulation (n 19); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II") (OJ L 199, 31.7.2007, pp 40–49); and Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ("Rome III") (OJ L 343, 29.12.2010, pp 10–16).

[65] In the 21st century to date, the Hague Conference on Private International Law has finalised five Conventions: Protection of Adults Convention 2000; Choice of Court Convention 2005; Securities Convention 2006; Child Support Convention 2007; and Judgments Convention 2019.

[66] See e.g. M. Frigo, «C*irculation des biens culturels, determination de la loi applicable et méthode de règlement des litiges*» (2015) 375 *Hague Collected Courses* 217; and M. Weller, *Rethinking EU Cultural Property Law: Towards Private Enforcement* (Nomos 2018).

[67] In relation to cross-border restitution claims, see Svoboda Report (n. 11).

and moveable property.[68] Widespread international agreement on the general use and application of the *lex situs* principle is a good starting point. Within such a framework, targeted consideration could be given to the topic of cultural objects. However, given the failure of past attempts by the Hague Conference to reform applicable law rules concerning sales of goods, the prospects of success of such a project may be limited.

A bold, but realistic, option is to contemplate a European regulation on international property law, to apply, in situations involving a conflict of laws, to property rights *in rem*. Such an instrument could seek to regulate the applicable law in respect of *all* types of property (immovable property, tangible movable property and intangible movable property, including digital assets) or, in the first place at least, it could be more limited in scope. In either case, an EU instrument seeking to regulate the law applicable to rights *in rem* in tangible movable property could incorporate a special provision to address the law governing rights *in rem* in cultural objects.

Projects in this regard are underway. In September 2023, the European Group for Private International Law ("GEDIP") completed its work on the law applicable to rights *in rem* in corporeal assets, by adopting special rules on stolen or illegally exported cultural goods and issuing a consolidated version of a proposed text.[69] Similarly, the work of the International Property Law Working Group of the European Association of Private International Law ("EAPIL") is at an advanced stage.[70] The aim of each group is to draw up proposals, in legislative form, for applicable law rules pertaining to rights *in rem* in tangible property.

V. BUILDING THE EUROPEAN LEGISLATIVE FRAMEWORK

Although the drafters of the Brussels I Recast Regulation eschewed any special jurisdiction rule in respect of movable property, as matters transpired, a much lighter-touch innovation was made in the form of the «new» rule of special jurisdiction to support civil claims for the cross-border revindication of cultural objects from an EU Member State.[71] Article 7(4) of the Regulation provides that a person domiciled in a Member State may be sued in another Member State,

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[68] For suggested models, including a draft Convention on the Law Applicable to the Transfer of Property, see Carruthers (n. 61) para 9.46 et seq.

[69] *https://gedip-egpil.eu/wp-content/uploads/2023/06/The-law-applicable-to-rights-in-rem-in-corporeal-assets-Consolidated-version.pdf.*

[70] *https://eapil.org/what-we-do/working-groups/group-on-property-law/.*

[71] See Gillies (n. 9).

> as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised.

Recital (17) narrates that the owner of a cultural object (as defined) should be able, under the Regulation, to initiate proceedings as regards a civil claim for the recovery, based on ownership, of such a cultural object in the courts for the place where the cultural object is situated at the time the court is seised. Such proceedings should be without prejudice to proceedings initiated under Directive 93/7/EEC.

Technically-speaking, it is unfortunate that article 7(4) defines its scope of application under reference to Directive 93/7/EEC, which has been replaced by Directive 2014/60/EU. The definition of cultural object as set out in article 2 of the later Directive is not identical to that set out in article 1(1) of the earlier one. One hopes that this drafting point will be corrected in a future re-casting exercise.

Article 7(4) applies where a defendant is domiciled in an EU Member State other than the one where the cultural object in question is situated. Importantly, it is restricted to actions against persons who are domiciled in a Member State, and confers special jurisdiction only on Member State forums. In one sense, favouring the (Member State) *forum rei sitae* is a very natural and predictable rule. But in another respect, the rule of special jurisdiction does not neatly align with the rule found in article 13 of Directive 2014/60/EU to the effect that «Ownership of the cultural object after return shall be governed by the law of the requesting Member State» (that is, the law of the Member State from whose territory the cultural object has been unlawfully removed[72]).

In effect, article 7(4) of Brussels I Recast confers special jurisdiction on what is described in article 2(4) of Directive 2014/60/EU as the «requested Member State», that is, the Member State in whose territory a cultural object (wrongfully removed from the territory of another Member State) is located. Thus, the "requested Member State" is competent to exercise jurisdiction, but, in terms of article 13 of Directive 2014/60/EU, it ought to apply the law of the "requesting Member State".

This dissonance, however, while worthy of note, is not in itself problematic insofar as it is the duty of a forum, in appropriate cases, to admit the application of foreign law. Moreover, this is not the only instance in EU legislation of such misalignment between rules of jurisdiction and rules of choice of law.[73]

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[72] Directive 2014/60/EU, art 2(3).

[73] E.g., in matters relating to a contract, the effect of the definition of «place of performance» in the Brussels I Recast Regulation, art 7(1)(a) (conferring special jurisdiction on the

VI. DRAFTING A SPECIAL CHOICE OF LAW RULE FOR A SPECIAL CATEGORY OF PROPERTY

As a preliminary point, it is important to state that, practically speaking, in the pursuit of uniform applicable law rules for tangible moveable property, until such time as there is agreement on the content and wording of a «general rule» on the law applicable to rights *in rem* in tangible movable property, the foundation upon which any bespoke choice of law rule for cultural objects may be laid would be necessarily unstable.

In devising a scheme of applicable law rules, the extent to which the general rule ought to prevail is a very important question, as is that of whether or not any "special rule" (that is, a specific exception to the general rule) ought to be admitted. Drafting a choice of law rule in respect of property rights in cultural objects *before* the general rule on the law applicable to rights *in rem* in tangible movable property has been finalised is placing the proverbial cart before the horse. Only when the general rule has been settled ought any exception to it be carved out, or its wording be refined for use in relation to particular categories of assets.

However, when it comes to applicable law rules pertaining to movable property, there is widespread international agreement on the general use and application of the *lex rei sitae* connecting factor.[74] Presupposing, therefore, a general rule based on the *lex rei sitae* principle[75] —that is, the law of the State where the asset is situated at the time when the property right is created or acquired— the point of enquiry is whether any other connecting factor ought to apply to rights *in rem* in cultural objects.

Many systems of private international law make no distinction between the transfer of cultural objects and the transfer of other types of movable property. In such systems, as far as choice of law rules are concerned, cultural objects effectively lose any privileged status as soon as they enter private law channels; the legal issues regarding cultural property are resolved simply by reference to the rules that apply

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courts of the Member State for the place of performance of the obligation, and indicating, in a sale of goods contract, the place where, under the contract, the goods were delivered or should have been delivered), appears to have the result of clothing with jurisdiction the court of the buyer's legal system. But, when art 4.1(a) of the Rome I Regulation is applied, the effect is that the buyer's court is enjoined to apply the seller's law, namely, the law of the country where the seller has his habitual residence.

[74] See L. D'Avout, «Property and proprietary rights», in Basedow, Ruhl, Ferrari and Asensio (n 1) 1429, and at 1430.

[75] See, e.g., GEDIP proposal, art 4.

to movable property generally.[76] As has been said, «[t]rading in objects of art is only one kind of trading in movables. The national systems of conflict of laws have developed general rules applicable to *all* kinds of trade»[77]. The policy position within such legal systems is that cultural property is not so idiosyncratic as to merit a unique, tailored rule, separate from the general rule that applies to movable property.

However, application of the *lex rei sitae* principle is capable of causing particular difficulties as regards rights *in rem* in stolen movable property or objects that have been unlawfully removed[78] from a given state. The struggle between an «original owner» of goods whose property is stolen or otherwise unlawfully removed from them and taken abroad to be sold, and a subsequent good faith purchaser of those goods is well known to conflict of laws scholars.[79] In such cases, routine application of the law of the *situs* may give rise to an injustice to the deprived «owner» since there was no voluntary act on their part (authorisation or consent to removal of the object from the «original» *situs*), leading to any legitimate connection being established between the property and the «new» *situs*. Where the domestic law of the *situs* protects the good faith acquisition of stolen property, that destination is liable to become a haven in which to launder stolen property.

Sometimes, as a corrective measure, it may be possible for a court to have resort to the forum's public policy, as a safeguard to oust application of the (new) *lex rei sitae* where that law (or its application[80]) would be contrary to the forum's public policy. This, however, is a high threshold and public policy is an arbitrary and inexact mechanism.

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[76] See, e.g., P. B. Carter, «Transnational Trade in Works of Art: The Position in English Private International Law», in Lalive, P. (ed.) *International Sales of Works of Art* (Institute of International Business Law and Practice/International Chamber of Commerce/Law Faculty, University of Geneva) (1988), at 322.

[77] Emphasis added. O. Sandrock, «Foreign Laws Regulating the Export of Cultural Property», in Lalive (n. 76) 457.

[78] See, e.g., definition of «unlawful removal» in Directive 2014/60/EU. The directive applies to any «cultural object» that, by definition (article 2(1)), has been «unlawfully removed» from the territory of a Member State that has classified or defined the object (whether before or after its removal), as being among the «national treasures possessing artistic, historic or archaeological value» under national legislation or administrative procedures within the meaning of Article 36 TFEU. The concept of «unlawful removal» is defined in article 2(2) of Directive 2014/60/EU, viz.: «(2) "unlawfully removed from the territory of a Member State" means: (a) removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EC) No 116/2009; or (b) not returned at the end of a period of lawful temporary removal or any breach of another condition governing such temporary removal».

[79] See, e.g., in England, *Winkworth v Christie, Manson & Woods Ltd* [1980] Ch. 496. For detailed commentary, see Carruthers (n 61), paras 3.24 – 3.59 and 8.36 – 8.51. See also A. M. Garro, « 'The Recovery of Stolen Art Objects from *Bona Fide* Purchasers», in Lalive, P (ed,) *International Sales of Works of Art* (1988) (University of Geneva) 511, at 512.

[80] See Carruthers (n 61), paras 8.47 – 8.50.

Likewise, overriding mandatory provisions may be brought into play,[81] especially in the context of rules of a public law character (e.g. rules preventing export of property), but the application of such provisions invariably is uncertain.

When dealing with rights *in rem* in stolen or unlawfully removed movable property, it would be better directly to empower a court to take account of the property's provenance, including, in particular, any act of wrongful removal from the original *situs* and, ultimately, to enable the court to apply to the matter of rights *in rem* in the asset not the (new) *lex rei sitae*, but rather the *lex loci originis,*[82] that is, the law of the state from which the property was stolen or unlawfully removed.

Strictly, in terms of semantics, the connecting factor of «the law of the place from which the property was stolen or unlawfully removed» might be more accurately referred to as the *lex loci furti*,[83] given that the place in which an object «originated» will not coincide, in all cases, with the place from which the object was wrongfully taken.[84] In any event, the purpose of the bespoke rule should be to «neutralise» the impact of the theft or wrongful removal, and to enable application of the law of the country from which the object was taken in breach of the proprietary rights attributed to the deprived party.

This cross-border, wrongful removal problem can affect any type of asset, and it may be that a special choice of law rule to encompass all types of stolen property ought to be considered by European law-makers.[85] But the problem is particularly acute in relation to cultural objects. Notably, as seen above, article 7(4) of the Brussels I Recast Regulation is restricted to the cross-border recovery of cultural objects from an EU Member State, and does not apply to the revindication of

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[81] Cf. Rome I, art 9 and Rome II, art 16.

[82] See Carruthers (n 61), para 3.50 and pp 265-266, Model 1 (Draft Transfer of Property Convention), para 22(1).

[83] See Z. Chen, «Is a Mummy a Person or a Property: The Classification and Choice of Law of Cultural Objects in Private International Law» (2022), *Chinese Journal of Comparative Law*, Volume 10(2) 274, 280. In referring to the «country of origin» of a stolen item, Garro (n 79) recommended (at 514) application of «the law of the jurisdiction with the most significant interest in protecting the property which is the object of the transaction». Such a connecting factor, however, would be indeterminate: e.g. as regards protection of "Mona Lisa"/"La Gioconda", would it be considered that France, the country in whose national collection the painting rests and in which it is exhibited, has a greater interest than, say, does Italy, the country of which the artist was a national and in which the artist, and the work, are highly respected? Similarly, as regards protection of the Elgin/Parthenon Marbles, would it be considered that the UK or Greece has a more significant interest in their protection? See also G. Reichelt (n 1), which, at 91 refers, as regards the transfer of cultural property, to the law of closest connection.

[84] Since this chapter argues in favour of a bespoke choice of law rule for cultural objects, the term "*lex loci originis*" is favoured. The term "*lex loci furti*", it is suggested, should be reserved for use in relation to a choice of law rule that applies to all types of stolen property.

[85] See, e.g., art 92 («Law applicable to stolen goods») of the 2004 Belgian Code of Private International Law.

stolen goods generally. Given the magnitude of the problem of illicit trafficking in cultural objects, a uniform, special choice of law rule for cultural objects is necessary. Creating such a rule not only would circumvent problems that derive from the mechanical application of the *lex rei sitae*[86] (including, for example, the calculated use of free ports[87] to effect the transfer of rights *in rem* in cultural objects), and would be broadly consistent with article 3 of the 1995 UNIDROIT Convention,[88] but also it would actively promote the EU's stated objective of «preventing and combating unlawful trafficking in cultural objects»[89].

Opponents of a special choice of law rule for cultural objects might argue that fashioning a multi-layered choice of law rule, comprising a general rule plus specific exception(s), would be liable to generate problems of classification,[90] and potentially would risk the body of relevant law growing to an unwieldy extent.[91] Against that, however, there is precedent in EU law for developing special choice of law rules[92] and, more importantly, special rules to protect cultural objects.

While difficulties concerning the definition of «cultural objects» have been noted, for the purpose of a new European choice of law rule, the same definition of «cultural object» as found in article 2(1) of Directive 2014/60/EU could be employed.[93] Alternatively, and better serving the principle of universal application, a broader definition that is not reliant upon (Member) State classification of objects could be utilised, such as that found in article 2 of the 1995 UNIDROIT Convention, namely, «objects which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science».

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86 See L. V. Prott, «Problems of Private International Law for the Protection of the Cultural Heritage» (1989-II) 217 *Recueil des Cours* 215, 306 and 314.

87 See R. Worthy, «The Impact of Free Ports on the Art Market» (2020) 25 *Art Antiquity & Law* 253; and D. Tanico, «The Secret Lives of Freeports: An Analysis of the Regulation of Freeports and the Illicit Antiquities Inside» (2021-2022), 45 *Fordham International Law Journal* 717.

88 «The possessor of a cultural object which has been stolen shall return it».

89 Directive 2014/60/EU, recital (17).

90 See, e.g., Rome I, art 4(2).

91 Sandrock (n 77) 462.

92 In EU private international law pertaining to the law of obligations, for example, there has been a tendency towards the specialisation or fragmentation of applicable law rules. See the contract-specific rules in Rome I, art 4; and the tort or delict-specific rules in Rome II, arts 5 – 9.

93 That is, «an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the "national treasures possessing artistic, historic or archaeological value" under national legislation or administrative procedures within the meaning of Article 36 TFEU».

VII. EXISTING MODELS AND ALTERNATIVE SOLUTIONS

The significance of the link between cultural property and the *lex loci originis* was recognised by the *Institut de Droit International* in its 1991 Basel Resolution on «The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage»[94]. Convinced that it was «opportune to propose to States guidelines for the development of their internal law, including rules of private international law […]», the Institute declared, in article 2 of the Resolution, that, «The transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country»[95].

More recently, some individual legal systems have adopted the *lex loci originis* principle within their national choice of law rules for cultural property. Belgian private international law[96] and Hungarian private international law,[97] respectively, have special choice of law rules in respect of cultural property/assets. Both systems' rules, which

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[94] Twelfth Commission, Rapporteur – de Arruda Ferrer-Correia, A. See English translation of the authoritative French text at *https://www.idi-iil.org/app/uploads/2017/06/1991_bal_04_en.pdf*. For comment, see E. Jayme, «Protection of Cultural Property and Conflict of Laws: The Basel Resolution of the Institute of International Law» (1997) *International Journal of Cultural Property*, Vol 6(2) 376. The Basel Resolution has no binding force, the Institute being merely a learned society without official standing, the purpose of which is to promote the progress of international law («Statutes of the Institute of International Law»).

[95] By art 4(1), «If under the law of the country of origin there has been no change in title to the property, the country of origin may claim, within a reasonable time, that the property be returned to its territory, provided that it proves that the absence of such property would significantly affect its cultural heritage».

[96] The 2004 Belgian Code of Private International Law provides in article 90 («law applicable to cultural property») that, «If an item, which a State considers as being included in its cultural heritage, has left the territory of that State in a way, which is considered to be illegitimate at the time of the exportation by the law of that State, the revindication by the State is governed by the law of that State, as it is applicable at that time, or at the choice of the latter, by the law of the State on the territory of which the item is located at the time of revindication. Nevertheless, if the law of the State that considers the item part of its cultural heritage does not grant any protection to the possessor in good faith, the latter may invoke the protection, that is attributed to him by the law of the State on the territory of which the item is located at the time of revindication» (*Loi du 16 juillet 2004 portant le Code de droit international privé,* English translation by Clijmans, C. and Torremans, P.) *https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf.*

[97] Section 46 of the Hungarian Act XXVIII of 2017 on Private International Law states that, (1) If a thing considered to be part of the cultural assets of a state leaves the territory of that state in a manner which is unlawful under the law of that state at the time of exit, the law of that state, or the law of the state in the territory of which the given thing is located at the time of the assessment of the ownership claim, shall govern the ownership claim made by the state, subject to the choice of the state enforcing the ownership claim. (2) If the law of the state which considers the unlawfully taken thing a part of its cultural assets does not provide protection to the possessor of the thing who is acting in good faith, the possessor acting in good faith may request the protection of the law of the state in the territory of which the thing is located at the

operate in circumstances where the property in question has unlawfully left the state of origin, apply only in respect of State-designated cultural property and so are narrower in scope than potentially would be an EU rule having universal application.

Article 10 of the GEDIP proposal on the law applicable to claims for the recovery of stolen or illegally removed cultural objects[98] proposes that a claim for the recovery of a stolen or illegally removed cultural object shall be governed, at the choice of the claimant, by any one of «(a) the State in which the object was located at the time of its theft or illegal removal from that State; (b) the State in which the object was located at the time of the acquisition of possession by the defendant subsequent to the theft or illegal removal; or (c) the State in which the object was located at the time of the filing of the action». Paragraph (a) permits application of the *lex loci originis*, but only at the claimant's discretion. Such a rule of «alternative» reference compromises certainty of applicable law and would be unhelpful in cases where competing claimants should choose different laws to govern their respective claims; it would not be clear in such cases which law should resolve a priority conflict between the competing claimants.

Notably, in China, in the context of a claim for return of a stolen, 1,000-year-old, mummified Buddhist monk contained in a golden statue, the Sanming Intermediate People's Court of China, in the Province of Fujian, ordered Dutch defendants to return the object in question to the original owner (two village committees in the Province).[99] The Chinese court applied the choice of law rule set out in article 37 of the Chinese Private International Law Act 2010,[100] to the effect that the governing law was the law of the country in which the movable property was situated «at the time when the legal fact took place». In an innovative interpretation of the *tempus inspiciendum*, the Chinese court held that the «legal fact» in question included the act of theft and, accordingly, the place where the theft occurred (the Fujian Province, China) was regarded as the place where the legal fact took place. By application of the Chinese law of the place of the theft (*lex furti*) *qua*

time of the assessment of the ownership claim. (English translation by Hungarian Ministry of Justice (*https://njt.hu/jogszabaly/en/2017-28-00-00*).

[98] (n. 69).

[99] *The Committee of Yunchun Village and the Committee Dongpu Village v. Oscar Van Overeem, Design & Consultancy B.V. and Design Consultancy Oscar van Overeem B.V.*, Sanming Intermediate People's Court (2015) Sanmin Chuzi No. 626, (4 December 2020), discussed in Z Huo, "The Chinese villages win a lawsuit in China to repatriate a Mummified Buddha Statue hold by a Dutch Collector —What Role has Private International Law Played?" at https://conflictoflaws.net/2020/the-chinese-villages-win-a-lawsuit-in-china-to-repatriate-a-mummified-buddha-statue-hold-by-a-dutch-collector-what-role-has-private-international-law-played/. See, for detail, Z. Chen (n. 83).

[100] Chen, *ibid*., 278-279.

lex rei sitae, the court concluded that the Dutch defendants should return the statue to the Chinese claimants.[101]

"Soft law" solutions

Increasingly the interest of the *lex loci originis* in the resolution of *in rem* disputes concerning cultural objects is being recognised. It is time for the European lawmaker to act. If no action is taken then, absent a bespoke choice of law provision for cultural objects, it is highly possible that "soft law" solutions will prevail, potentially undermining the very purpose and integrity of choice of laws rules.[102] Such solutions have been deployed, particularly in relation to wartime looted art, the model being the Washington Conference Principles on Nazi-Confiscated Art, released in connection with the Washington Conference on Holocaust Era Assets.[103] The Conference developed «a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art», recognising, however, that among participating nations there are differing legal systems and that countries act within the context of their own laws.[104] Similar in nature is the follow-up "Prague Holocaust Era Assets Conference: Terezin Declaration,"[105] issued pursuant to the Conference that was organised by the government of the Czech Republic concerning, inter alia, Nazi-confiscated and looted art, Judaica and Jewish cultural property. As with the Washington Principles, the Terezin Declaration acknowledges its «legally non-binding nature […] and moral responsibilities", and concedes that it is "without prejudice to applicable international law and obligations»[106].

Regardless of how well-intentioned such principles and declarations may be, the serious flaw from which they suffer is that they are not legally binding; they represent, at best, a moral commitment among nations. They do not deal adequately with the private law or international private law dimension. Nevertheless, the soft law solution has been embraced. In the UK, for example, the Spoliation Advisory Panel ("SAP") exists to consider claims in respect of cultural objects looted during the Nazi era (1933-1945), principally where such an object is

[101] Chen, *ibid*., 280.

[102] See, e.g. N. Palmer, «The Best We Can Do? – Exploring a Collegiate Approach to Holocaust-related Claims», in Campfens, E. (ed), *Fair and Just Solutions – Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments*, Eleven International Publishing, The Hague (2015), 153-186; and in Campfens, E. (n 8), at paras 2.4 and 5.2.4, a recommendation to establish a European ADR claims procedure.

[103] Released on 3 December 1998 (*https://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf*).

[104] Preamble to the Washington Conference Principles on Nazi-Confiscated Art.

[105] Released on 30 June 2009.

[106] Preamble to the Prague Holocaust Era Assets Conference: Terezin Declaration.

in the possession of a UK national collection, or other UK museum or gallery established for the public benefit, albeit a Panel may also be designated to advise about any claim for an item in a private collection at the joint request of the claimant and the owner.[107]

The SAP's task, as prescribed by its Terms of Reference, includes a duty to evaluate, on the balance of probability «the validity of the claimant's original title to the object, recognising the difficulties of proving such title after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object» [108] and «the validity of the institution's title to the object»[109]. This exercise, however, is conducted subject to the critical reservation that the Panel's conclusions on questions of law are not determinative of the parties' legal rights. It is explicitly stated in SAP's Terms of Reference that, «In exercising its functions, while the Panel will consider legal issues relating to title to the object (see paragraph 15(d) and (f)), it will not be the function of the Panel to determine legal rights, for example as to title»[110]. The impression given is that the evaluation of title to the object is secondary to the Panel's other prescribed tasks, namely, «to give due weight to the moral strength of the claimant's case»[111] and (if it is necessary in order to arrive at a fair and just recommendation) to «consider whether any particular moral obligation rests on the institution»[112], taking into account any relevant consideration, including the circumstances of its

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[107] Spoliation Advisory Panel, Constitution and Terms of Reference (updated 2016) (*https://www.gov.uk/government/groups/spoliation-advisory-panel*), para 6. Similarly, see, in Germany, the «Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property» (*https://www.beratende-kommission.de/en*). On 13 March 2024, however, the German Federal Government, the Governments of the Laender and the Representatives of the German Municipalities, announced the replacement of the «Advisory Commission» with an arbitration framework. For information and comment, see M. Weller, «German "Advisory Commission" to be Replaced by an Arbitration Framework» (*https://ial.uk.com/german-advisory-commission/*) (20 March 2024). In France, see *Commission pour la restitution des biens et l'indemnisation des victimes de spoliations antisémites*, one of the purposes of which is to recommend the restitution of cultural property looted in the context of Nazi anti-Semitic persecution, including outside France, between 1933 and 1945, when such property is kept in a public or similar collection in France (*https://www.civs.gouv.fr/actualites/nouvelles-competences-civs/*). In the Netherlands, see the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (*https://www.restitutiecommissie.nl/en/*).

[108] Spoliation Advisory Panel, Constitution and Terms of Reference (updated 2016), para 15(d).

[109] *Ibid.*., para 15(f).

[110] *Ibid.*., para 8. See, e.g., Report of the Spoliation Advisory Panel in respect of a Painting now in the possession of the Tate Gallery (HC111), 18 January 2001, para 6(2); also Report of the Spoliation Advisory Panel in respect of a Painting now in the possession of Glasgow City Council (24 November 2004), paras 4 and 26.

[111] Spoliation Advisory Panel, Constitution and Terms of Reference (updated 2016), para 15(e).

[112] *Ibid.*., para 16.

acquisition of the object and its knowledge at that time of the object's provenance.

SAP proceedings are intended to be an alternative to litigation, not a process of litigation, and in their conduct, therefore, it is considered entirely legitimate to take into account non-legal obligations, such as the moral strength of the claimant's case.[113] Any recommendation made by the Panel is not intended to be legally binding on the claimant, the institution or the Secretary of State[114] (albeit, if a claimant accepts the recommendation of the Panel and that recommendation is implemented, the claimant is «expected» to accept the implementation in full and final settlement of the claim[115]).

Soft law solutions leave the legalities of ownership in limbo. In the UK, given the remit and status of the SAP, it is extremely unlikely that any national museum or gallery would refuse to honour or implement the Panel's recommendations. In cases, however, where the Panel is invited, at the joint request of the claimant and the owner, to advise on a claim for an item in a private collection, if either party should be dissatisfied with what they perceive to be an adverse recommendation, the option of litigation remains. Since both parties must support a reference to the Panel, one might suppose that an «owner» would not lightly spurn the Panel's recommendation. But if application of the relevant rule of private international law (most likely, the law of the State where the asset is situated at the time when the property right is created or acquired – the *lex rei sitae*) should corroborate the «owner's» title, then even although the SAP recommendation might deny such a title, it is probable that the «owner» would refuse to implement the Panel's recommendation. In such a case, a claimant's only resort would be to litigation. In that event, any court charged with making a conclusive determination of ownership would apply the relevant choice of law rule, and not simply look for the "moral favourite".

VIII. CONCLUSION

Trading in cultural objects, both licit and illicit, is very important to the international community. Private international law has a role to play in the regulation of such trade, but the lack of any uniform choice of law rule pertaining to cultural objects is detrimental to the overall scheme of protection of such property. Not only does it undermine the operation of existing international mechanisms, such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, but it also

113 *Ibid..*, para 9.
114 *Ibid..*, para 10.
115 *Ibid.*, para 11.

detracts from the effectiveness of European instruments that seek to protect cultural objects; the EU objective of preventing and combating unlawful trafficking in cultural objects is betrayed.

Application of the default, general *lex rei sitae* rule to rights *in rem* in cultural objects is liable to work against the interests of owners whose property has been stolen or unlawfully removed from them, and taken abroad for the purpose of sale. The European legislator has acknowledged, through provision of a rule of special jurisdiction to deal with claims for revindication, that cultural objects have a special status. Likewise, Directive 2014/60/EU recognises the interest of the *lex loci originis* in the resolution of disputes about ownership of cultural objects. At present, however, there is no choice of law counterpart to these rules, even though, increasingly, the interest of the *lex loci originis* in the resolution of *in rem* disputes concerning cultural objects is being recognised by national legal systems.

With cultural objects, legal issues may run parallel to, or be intertwined with, ethical and policy questions, but if the resolution of some cross-border disputes pertaining to cultural objects is left to soft law solutions, there is a serious risk that moral sentiment will dictate the handling and resolution of issues that more appropriately fall within the ambit of due legal process.

It is an opportune time for the European lawmaker to step up and take forward the drafting of a special choice of law rule for rights *in rem* in cultural objects, utilising the connecting factor of the *lex loci originis*, the law of the state from which the property was stolen or unlawfully removed.