

# Restitution of art and cultural objects and its limits

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## *Abstract*

Art and cultural objects have a complex nature and status. A legal approach cannot escape having to state which objects come within the scope of the definition, but an objective legal definition *in abstracto* is difficult to provide. Because the flows of licit and illicit objects are so intermixed, both the legitimate and underground art markets are implicated in the trade involving these objects. Global legal diversity further complicates the distinction between the licit and the illicit trade. This article takes stock of restitution and suitable dispute settlement mechanisms against this backdrop. Restitution processes have become more openly policy-oriented, and the meaning of 'restitution' now extends to overcoming the legal obstacles in the way of return. Law can provide the framework for negotiation and dispute settlement in many cases, but the ethical dimension is a particularly powerful agent for restitution of Nazi spoliated art and human remains.

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## INTRODUCTION

Like good ambassadors who are committed to promoting peace and good will, art and cultural objects express diverse cultural values without declaring a preference. This gives them the capacity to promote a shared sense of community in a pluralist world;<sup>1</sup> contribute to a dialogue of parity among the cultures of the world;<sup>2</sup> and encourage 'intercultural respect' or 'a culture of peace'.<sup>3</sup> If peace depends on an inter-cultural dialogue that

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<sup>1</sup> Bator 'An essay on the international trade in art' (1982) 24 *Stanford Law Review* 275 307; Jayme 'Neueste Entwicklungen im internationalen Kunstrecht' (2004) 15 *Kunst im Recht*; Van Woudenberg *State immunity and cultural objects on loan* (2012) 15–16; Fishman 'Locating the international interest in intranational cultural property disputes' (2010) 35 *The Yale Journal of International Law* 347 389.

<sup>2</sup> Pannikar *Cultural disarmament: the way to peace* (1995) 34.

<sup>3</sup> Objectives of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005 CLT–2005/Convention Diversite-

acknowledges and respects ‘being in the world’,<sup>4</sup> it is in the interest of future generations to defend artistic and cultural objects against pillage, theft, and destruction. After all, what is assimilated and created is co-determined by ‘culture’, which necessarily implies the co-existence of different cultures.<sup>5</sup>

Works of art, artefacts, and antiquities form separate classes of object that are undeniably significant to human expression and identity. Just as a mirror reflects the life conditions of individuals and communities, and speaks to the human condition, these objects reflect aspects of the culture of their time and place. Most of all, they reflect creative endeavour and the highest point of human achievement. A ‘cultural object’ is defined by the significance it has for states, individuals, non-state entities, and groups.<sup>6</sup> It may embody archaeological, ethnological or historical information about the creative process, and about the identity of the group responsible for its production. Regardless of whether the object achieves recognition beyond that group, culture makes ‘identity’ conceivable and converts longing into belonging and solidarity.<sup>7</sup> Both ‘property’ and ‘heritage’ have been used to describe the relationship between a particular social group and the objects they value, but ‘heritage’ is the more neutral term of the two.<sup>8</sup> Rather than denoting the international community as a title holder, or justifying an unfettered art market, the concept ‘cultural heritage of all mankind’<sup>9</sup> reflects a common

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Cult Rev available at:

<http://unesdoc.unesco.org/images/0014/00142919e.pdf>.

<sup>4</sup> Pannikar n 2 above at 100.

<sup>5</sup> Cf the cultural heritage agendas of UNESCO, UNIDROIT and UN Committee on Economic, Social and Cultural Rights. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions n 3 above; art 15 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966 993 UNTS 3; UN Committee on Economic, Social and Cultural Rights *General comment 21: right of everyone to take part in cultural life* 42 UN Doc E/C 12/GC21 (21 December 2009). In general, Caldoro ‘Towards a case law on the interface of trade and culture’ in Odendahl & Weber (eds) *Kulturgüterschutz – Kunstrecht – Kulturrecht: Festschrift für Kurt Siehr* (2010) 553 557ff; Fishman n 1 above at 393.

<sup>6</sup> This meaning is adopted in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1330; entry into force 1 July 1998, available at: [www.unidroit.org/english/conventions/1995culturalproperty/main.htm](http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm) (last accessed 4 October 2013).

<sup>7</sup> Hartman *The fateful question of culture* (1997) 180 211.

<sup>8</sup> It does not promote the commodification of these objects to the same extent. Ulph & Smith *The illicit trade in art and antiquities* (2012) 5.

<sup>9</sup> Used first in the Hague Convention of 1954, The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954; entry into force 7 August 1956; 249 UNTS 215. It appears also in the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972; entry into

concern that requires a common international commitment to preserve, protect, and keep safe.<sup>10</sup> States and national legal norms carry most of the responsibility for the protection of the cultural heritage within their own territories, and within territories occupied in wartime.<sup>11</sup>

The inter-continental trade in art has been a feature of the recorded development of the art market ever since its inception 5 000 years ago. Art and cultural objects are rather easily caught up in the quest for an instant personal history and a sense of belonging.

The misappropriation of art and cultural objects is shockingly high.<sup>12</sup> The prosperity of trafficking networks is evident from numerous news updates.<sup>13</sup> It seems sensible, therefore, to define ‘trade’ broadly so as to include legitimate, illegitimate, and illicit trade. A state that benefits from the trade is unlikely to prioritise strict regulation. Therefore, the unethical, immoral trade is not necessarily critically illegal in every market state,<sup>14</sup> even if it tends to be so in the source state.<sup>15</sup>

Research on the effects of global legal pluralism on the resolution of disputes involving the ownership and restitution of art and cultural objects, has highlighted the absence of uniform law and the social and legal factors that hamper the achievement of harmony. The effect of private international law argument in litigated art and heritage claims, continues to deserve close observation and study. The simultaneous application of different legal systems in one claim, and the technicality of solving competing claims and clashes, is a challenging and worthwhile area, and scholarly interest in this

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force on 17 December 1975; 1037 UNTS 151.

<sup>10</sup> Chechi *The settlement of international cultural heritage disputes: towards a lex culturalis?* (unpublished PhD Thesis EUI 2011) 30 125.

<sup>11</sup> Gerstenblith ‘The public interest in the restitution of cultural objects’ (2001) 16 *Conn J Int L* 197 201; Chechi n 10 above at 124.

<sup>12</sup> Report of Ministerial Advisory Panel on Illicit Trade, Department for Culture, Media and Sport, December 2000; Select Committee on Culture, Media, Sport, 7<sup>th</sup> Report 2000.

<sup>13</sup> The American Society of International Law provides regular updates, eg Durney *et al* ‘Art and antiquities trafficking news notes for May 2010–October 2010’ (2010) 1 *Cultural Heritage and Arts Review* 57. The *ICJP* and *International Lawyer* also supply chronicles and reports.

<sup>14</sup> Economically strong states where the demand for cultural objects is high, eg US and UK.

<sup>15</sup> States rich in cultural materials for which there is a world market, but the local demand for those materials keep the prices low. Examples include Mexico, India and Guatemala.

area has been significant.<sup>16</sup> Research has to be updated constantly because the contemporary context of restitution is so dynamic.

Since 1990 commentators have argued in support of recognising cultural heritage law as a new or separate category of law.<sup>17</sup> Prott predicted twenty-five years ago, that cultural heritage law would profoundly impact on the choice of law and its limits.<sup>18</sup> This has indeed proved to be the case. When national courts adjudicate trans-national claims to cultural objects and art, choice-of-law rules, overriding mandatory rules and statutory law in the forum make for unpredictable outcomes.<sup>19</sup> Restitution claims<sup>20</sup> in respect of art and cultural heritage are likely when proprietary rights and ownership of art and material culture are at issue. Restitution claims call forth value choices, which the choice-of-law process can shy away from. The diversity of standards under domestic law creates uncertainty, unpredictability and legal loopholes. These factors play a big role in the legal uncertainty surrounding the significance of art and cultural objects. They may also amplify the differences at the level of domestic and international law in the status of art and cultural objects,<sup>21</sup> and these differences could affect the recognition and enforcement of foreign judgments and arbitral awards.

Arbitration of claims to cultural property, has appealed to commentators since the 1990s,<sup>22</sup> but the last decade has seen more serious and critical work

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<sup>16</sup> Eg Prott 'Problems of private international law for the protection of the cultural heritage' 1989 *Recueil des Cours* 214 ff; Jayme 'Globalization in art law: clash of interests and international tendencies' (2005) 38 *Vanderbilt Journal of Transnational Law* 927; Siehr 'International art trade and the law' (1993) VI/243 *Recueil des Cours* 9; Symeonides 'A choice-of-law rule for conflicts involving stolen cultural property' (2005) 38 *Vanderbilt Journal of Transnational Law* 1177; Lee 'A choice of law dilemma: the conflict and reconciliation of laws governing cross-border transfers of stolen art' (2008–2009) *Cardozo Public Law Policy and Ethics Journal* 719 724; Jakubowski 'Return of illicitly trafficked cultural objects pursuant to private international law: current developments' in: the illicit traffic of cultural objects in the Mediterranean (EUI Working Papers 2009) 137.

<sup>17</sup> Prott n 16 above; Chechi n 10 above at 247 ff supports a new taxonomy.

<sup>18</sup> Prott n 16 above; Jakubowski n 16 above at 138.

<sup>19</sup> Gazzini *Cultural property disputes: the role of arbitration in resolving non-contractual disputes* (2004) 53.

<sup>20</sup> Analysed under **Restitution** below.

<sup>21</sup> Schönenberger *The restitution of cultural assets* (2009) 45.

<sup>22</sup> Gegas 'International arbitration and resolution of cultural property disputes' (1997) 13 *Ohio State Journal on Dispute Resolution* 129, 151ff; Sidorsky 'The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: the role of international arbitration' (1996) 5 *International Journal of Cultural Property* 19.

in this regard.<sup>23</sup> Attention has been drawn to the potential of alternative dispute resolution (ADR) mechanisms to settle claims.<sup>24</sup> More recent work has identified approaches that restrain the uncritical application of ordinary business norms to transactions involving cultural objects. So as to offer a path through the dense and complex terrain of an unstructured international legal order, they have been integrated into a set of culturally sensitive principles referred to as *lex culturalis*.<sup>25</sup> The core principles of the *lex culturalis* draw on dispute resolution mechanisms, substantive uniform law, application of a choice-of-law rule other than the very broad *lex situs* rule and its connecting factor,<sup>26</sup> and non-application of ‘cumbersome’ rules of private international law. The alternative rule is the *lex originis*<sup>27</sup> (ie the law of the nation of origin).

The ‘country of origin’ refers to the country that designates the object as part of its cultural heritage, or that classifies it as national treasure, or includes it in a record on an ad hoc basis. However, an object of indisputable significance may not be so designated; there may also be overlapping claims by more than one state; and a genuine cultural link could exist between country and object, independent of any formal designation. Such a link may

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<sup>23</sup> Gazzini n 19 above at 50; Daly ‘The potential for arbitration of cultural property disputes; recent developments at the Permanent Court of Arbitration’ 2005 *Law and Practice of International Courts and Tribunals* 261; Palmer ‘Arbitration and the applicable law in resolution of cultural property disputes’ in International Bureau of the Permanent Court of Arbitration (ed) *Resolution of cultural property disputes* (2004) 291; Varner ‘Arbitrating cultural property disputes’ (2012) 14 *Cardozo Journal of Conflict Resolution* 477.

<sup>24</sup> Granovsky ‘A permanent resolution mechanism of cultural property disputes’ (2008) 8 *Pepperdine Dispute Resolution Law Journal* 25; Bandle & Theurich ‘Alternative dispute resolution and art-law – a new research project of the Geneva Art-Law Centre’ (2011) 6 *Journal of International Commercial Law and Technology* 28.

<sup>25</sup> Chechi n 10 above at 202.

<sup>26</sup> *Ie* the law of the place where the moveable object was physically located when title is alleged to have been created, modified or terminated. Collins *et al* (gen eds) *Dicey, Morris and Collins on the conflict of laws* (14ed 2006) Rule 24 1164 with Second Cumulative Supplement (2008) 149; Crawford & Carruthers *International private law: a Scots perspective* (3ed 2010) 523; Carruthers *The transfer of property in the conflict of laws* (2005) 79; Fawcett & Carruthers *Cheshire, North & Fawcett private international law* (14ed 2008) 1212.

<sup>27</sup> Institute of International Law Wiesbaden Resolution ‘The Application of Foreign Public Law’ 20<sup>th</sup> Commission, Res 4, (1975) 56 *Institute of International Law Yearbook* 551–3; Institute of International Law Basel Resolution ‘International sale of works from the angle of the protection of the cultural heritage’ (1992) 64/II *Institute of International Law Yearbook* 403; Jayme ‘Die Nationalität des Kunstwerkes als Rechtsfrage’ in Reichelt (ed) *Internationaler Kulturgüterschutz* (1992) 7; Symeonides n 16 above at 1183–86.

also be forged with an ‘adoptive’ state or a community that attributes value to the object.<sup>28</sup> The *lex originis* can correct some of the ills and uncertainties inherent in the *lex situs*,<sup>29</sup> but it is not as watertight as many may have hoped. The ideal system which the *lex culturalis* envisages, would be able to reconcile ‘all moral, historical, cultural, financial and legal interests’.<sup>30</sup> Its attainability raises a question mark.

This article is set out in three parts. The first outlines the complex nature and status of art and cultural objects, and highlights the difficulty of defining these concepts. The second provides pertinent background information on the legitimate and underground art markets, in order to demonstrate that legal diversity complicates the distinction between the licit and the illicit trade, while the third takes a bold look at the state of play in regard to restitution and suitable dispute settlement mechanisms.

## TOWARDS A DEFINITION

### The complex nature of art and cultural objects

Art and cultural objects have a complex nature and a unique status. Humans tend to have a deep sense of personal attachment to these objects, even if the objects are unaffected by the distance that may exist between the observers and the creating culture. The special status of these objects is linked to the human need for roots.<sup>31</sup> They are irreplaceable and priceless, possess more than pecuniary value, and challenge the relation that other types of personal property establish between law and time.

Particular value systems ascribe subjective importance to the specific interest that attaches to cultural objects. What a community or group recognises as part of its identity and as representative of its symbolic continuity beyond its contingent existence, helps to identify that group. Education can further both the significance and the level of appreciation shown for these objects. Consumer goods disappear over time, but despite

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<sup>28</sup> Cornu & Renold ‘New developments in the restitution of cultural property: alternative means of dispute resolution’ (2010) 17 *IJCP* 1 16–17.

<sup>29</sup> Carducci ‘The growing complexity of international art law: conflict of laws, uniform law, mandatory rules, UNSC Resolutions and EU Regulations’ in Hoffman (ed) *Art and cultural heritage: law, policy and practice* (CUP 2006) 68 70.

<sup>30</sup> Chechi n 10 above at 204.

<sup>31</sup> For more, see Weil *The need for roots* (2002) 41 51.

inevitable changes in the identity they foster, cultural objects endure from generation to generation,<sup>32</sup> and tend to appreciate in value over time.<sup>33</sup>

As repositories of knowledge with commercial value, cultural objects possess both cultural and economic value. Art is not necessarily universally valued in the way in which objects that produce and reproduce cultural identity are. Cultural objects evoke respect and demand protection, although their status may also change over time.<sup>34</sup> Economically, they are part of the functions of the life process of society.<sup>35</sup>

While easily identifiable for their uniqueness, art and cultural objects are less prominent in international trade compared to fungible goods.<sup>36</sup> In fact, the relationship between trade and culture is an awkward one.<sup>37</sup> The EU and the World Trade Organisation allow exceptions for restrictions imposed for the protection of national treasures<sup>38</sup> possessing artistic, historical, or archaeological importance. Notwithstanding the recognition given to cultural diversity as legitimate public policy at the international level, the major supporters of free trade and trade liberalisation construe these exceptions restrictively. Restrictions on free trade in state cultural policy are no easier to reconcile with the commercial imperative – unless they are supported by

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<sup>32</sup> For more see Gerstenblith 'Identity and cultural property: the protection of cultural property in the United States' (1995) 75 *Boston University Law Review* 559 569–570; Francioni 'Culture, heritage and human rights: an introduction' in Francioni & Scheinin (eds) *Cultural human rights* (2008) 1 6; Francioni 'Beyond state sovereignty: the protection of cultural heritage as a shared interest of humanity' 2004 *Michigan JIL* 1209 1221.

<sup>33</sup> Demarsin 'The third time is not always a charm: the troublesome legacy of a Dutch art dealer: the limitation and act of state defences in looted art cases' (2010) 28 *Cardozo Art and Entertainment Law Journal* 255 257; Hawkins 'A tale of two innocents: creating an equitable balance between the rights of former owners and good faith purchasers of stolen art' (1995) 64 *Fordham Law Review* 49 50.

<sup>34</sup> Certain cultural objects belonging to the Zuni Pueblo tribe are left in open air to disintegrate naturally. See Schönberger n 21 above at 17; also Cornu & Renold n 28 above at 17.

<sup>35</sup> Hartman n 7 above at 56, in response to Arendt *Between past and present* (1961) 208.

<sup>36</sup> Gerstenblith n 32 above at 569; Merryman 'Cultural property, international trade and human rights' (2001) 19 *Cardozo Arts and Entertainment* 51 52.

<sup>37</sup> Caldoro n 5 above at 553.

<sup>38</sup> The definition ought to be uniform but the nomenclature differs in the context of export controls (eg 'Kulturgut' in German; 'patrimonio nazionale' in Italian). The CJEU has not defined the concept when it considered the compatibility of a governmental measure of protection of cultural property with free trade requirements in case 7/68 *EC Commission v Italy* [1969] CMLR 1 (ECJ) and case 48/71 *EC Commission v Italy* [1972] ECR 527.

a human rights imperative that enables restitution. Restitution claims are not within the reach of free trade institutions. Restitution is, at best, incidental to any finding such a body might make.<sup>39</sup>

Some legal systems are more inclined than others to treat cultural objects as having solely commercial value. For instance, there is scope for arguing that the regulation of archaeological activity in England does not do justice to the rationale of protecting the archaeological and scientific qualities and value of the resources. Penalties under the Ancient Monuments and Archaeological Areas Act 1979 and the Treasure Act 1996, reflect the monetary value of the object. Monetary compensation is generally considered appropriate relief in the event of damage or theft. In this respect, English law contrasts with the Archaeological Resources Protection Act of 1979 (ARPA)<sup>40</sup> and Sentencing Guideline<sup>41</sup> in the United States. These instruments capture the intangible values that are harmed when cultural heritage resources crimes are committed. ARPA requires that a monetary value be placed on the scientific and archaeological information associated with a resource that has been looted, stolen, or misappropriated, and the civil penalties imposed by federal land managers and in sentencing, exceed the market value of the object. The offence level of a defendant is not calculated exclusively with reference to repair and restoration costs.

### **No standard definition possible**

A legal approach to cultural heritage cannot escape defining which objects come within the scope of the definition. The question is whether legal norms can hope to define the notion without reference to other disciplines.<sup>42</sup> An objective definition *in abstracto* is difficult to provide. A claim to ownership or title based on an international instrument, would be guided by the categories enumerated therein; it is up to national courts to recognise these categories in international cases. National laws cannot supply a standard definition. They offer only one definition among many possibilities.

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<sup>39</sup> Gazzini n 19 above at 50.

<sup>40</sup> 16 US Code 3–6.

<sup>41</sup> 18 US Code Appx § 2B1.5 in respect of sentencing for cultural heritage resource crimes.

<sup>42</sup> Casini “‘Italian hours’: the globalization of cultural property law” in ‘The new public law in a global (dis)order: a perspective from Italy’ *Jean Monnet Working Paper 15* available at: <http://centers.law.nyu.edu/jeanmonnet/papers/10/101101.pdf> (last accessed 4 October 2013) 18.



Diverse definitions within a single domestic legal system can limit overlaps between different sets of rules for different types of cultural property. In US law various treaties and policies identify particular objects of material culture that are worthy of legal protection. US federal statutes define designated archaeological material (CCPIA<sup>43</sup>); archaeological resources (ARPA<sup>44</sup>); cultural items (NAGPRA<sup>45</sup>); historical property and resources (NHPA<sup>46</sup>); commemorative works; and objects of cultural heritage (18 US Code Appx § 2B 1.5).<sup>47</sup> Cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party, represents a category for purposes of the implementation of article 7(b) of the UNESCO Convention.<sup>48</sup> Endangered archaeological and ethnological materials designated by the President subject to determinations by the Cultural Property Advisory Committee,<sup>49</sup> form an independent category for purposes of implementing article 9 of the UNESCO Convention. Bilateral treaties set out importation restrictions, provisions with regard to seizure if they have been violated and provisions for the repatriation of specific archaeological and ethnographic materials.<sup>50</sup> For instance, Chinese archaeological items dating from between 75 000 BC to 907 AD are covered by a bilateral agreement between the US and China, which has been effective as of 16 January 2009.<sup>51</sup> China has undertaken to step up its own efforts to protect its cultural heritage on the insistence of the US,<sup>52</sup> but unexpected tensions have cropped up between the participating

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<sup>43</sup> Cultural Property Implementation Act, Pub L 97–446, Title III, 96 Stat 2350 (1983)(19 US Code 2601–2613).

<sup>44</sup> See n 40 above.

<sup>45</sup> Native American Graves Protection and Repatriation Act, 25 US Code § 3001–3013 (2000).

<sup>46</sup> National Historic Preservation Act, 16 US Code § 470 ff (2000).

<sup>47</sup> Gerstenblith ‘Recent developments in the legal protection of cultural heritage’ in Brodie, Kersel, Luke & Walker Tubb (eds) *Archaeology, cultural heritage and the antiquities trade* (2006) 68–75.

<sup>48</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231; 10 ILM 289.

<sup>49</sup> Pearlstein ‘Buying and selling in today’s market’ (2012) 3 *Spencer’s Art Law Journal* 1ff; Papa-Sokal ‘The US legal response to the protection of the world cultural heritage’ in Brodie *et al* n 47 above at 44–45.

<sup>50</sup> A list of states is available at: <http://exchanges.state.gov/culprop/chart.html> (last accessed 4 October 2013).

<sup>51</sup> Schechter ‘Preventing pillage and promoting politics: the dual goals of the 2009 US-China Bilateral Agreement to Restrict Imports of Chinese Cultural Property’ (2009) 14 *Art, Antiquity & Law* 317–325.

<sup>52</sup> Schechter n 51 above at 322–325.

countries.<sup>53</sup> The cultural relations between the two nations are under strain due to the need for certification of Tibetan and Taiwanese archaeological finds for import into the US under this Agreement.

For purposes of its application of the 1970 UNESCO Convention, the UK confined its use of the term ‘cultural property’ to the items referred to in instruments of EU law.<sup>54</sup> Age and minimum financial value of certain types of objects function as criteria.<sup>55</sup> While EU member states may request the return of cultural treasures, the owner may also institute proceedings in respect of a stolen object. No special definition exists for cultural objects in either England or Scotland, apart from what is contained in the Return of Cultural Objects Regulations 1994,<sup>56</sup> the 1970 UNESCO Convention, and the 2003 Cultural Objects (Offences) Act.<sup>57</sup>

The law cannot impose a permanent illegal status on an item. It can only proscribe particular conduct on the part of a person,<sup>58</sup> such as theft, looting, unprofessional excavation, and illegal export as defined in domestic legislation. Relevant international instruments do not provide autonomous definitions of such conduct, and no standard definition appears in any of the international instruments.

Any special law would define the field of its application. In instances where claims for return are not based on special laws or international instruments, the question of classification will remain unanswered.<sup>59</sup> Domestic legal

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<sup>53</sup> *Id* at 235–239.

<sup>54</sup> Regulation 116/2009 of 18 December 2008, OJ L 39/1 (2009); Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of Member States Council Directive (EEC) 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state OJ L 74/74, 27.3.93 (with amendments in 1997 and 2001).

<sup>55</sup> Ulph & Smith n 8 above at 42, 263.

<sup>56</sup> Return of Cultural Objects Regulations 1994, SI 1994/501 as amended by SI 1997/1719; SI 2001/3972.

<sup>57</sup> The implications of introducing limitation rules for cultural objects have been considered. Scottish Law Commission Discussion Paper on Prescription and Title to Moveable Property No 144 (Edinburgh 2010) Chapter 4; Carey Miller, Meyers & Cowe ‘Restitution of art and cultural objects: a re-assessment of the role of limitation’ 2001 *Art Antiquity and Law* 1ff.

<sup>58</sup> Elderman ‘The ethical trade in cultural property: ethics and law in the antiquity auction industry’ 2008 *CILSA* 1 13.

<sup>59</sup> Schönenberger n 21 above at 42.

frameworks that pay due attention to illegal export and import, could catch looted objects that may, otherwise, be evidentially out of reach for a court.<sup>60</sup>

## THE LEGITIMATE AND UNDERGROUND MARKETS

### The art market

The multibillion dollar transnational industry,<sup>61</sup> the art market, consists in a ‘myriad, often over-lapping, subspecialties that may be limited by region (for instance, Asian or North-American), by date (mediaeval, contemporary), by medium (paper, bronze), or by form (paintings, furniture) ... and archaeological and ethnographic materials ... [which] their countries of origin consider cultural heritage ...’.<sup>62</sup> Distinct from other markets, and highly organised but largely unregulated, the art market makes an economic and cultural contribution which governments cannot ignore.

The art trade readily crosses national borders.<sup>63</sup> Specialised small businesses, large auction houses, and dealers have a seemingly insatiable appetite for antiquities and objects that are finite, scarce, and fragile, regardless of origin. They tend to be indifferent to the questionable provenance<sup>64</sup> of what is on display.<sup>65</sup> International disputes<sup>66</sup> and claims involving the recovery of art and cultural objects regularly demand the attention of international courts or tribunals. There may be fortuitous or deliberate connections with a variety of potentially applicable laws, when cultural objects have passed across jurisdictional lines. The international or transnational dimension is well illustrated in *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc.*<sup>67</sup> An art dealer had bought the Kanakaria mosaics, which originated from Cyprus, in the free port area of Geneva airport in 1988, and the court, which sat in Indiana, weighed the substantive rules of Swiss law and Indiana law, before deciding to apply Indiana law.

<sup>60</sup> MacKenzie ‘The market as criminal and criminals in the market: reducing opportunities for organised crime in the international antiquities market’ in Manacorda & Chappell (eds) *Crime in the art and antiquities world* (2011) 69, 73.

<sup>61</sup> Chappell & Polk ‘Unravelling the “Cordata”: just how organized is the international traffic in cultural objects?’ in Manacorda & Chappell (eds) n 60 above at 99 101.

<sup>62</sup> Coggins ‘A licit international traffic in ancient art: let there be light’ (1995) 4 *International Journal of Cultural Property* 61 65–6.

<sup>63</sup> Schönerberger n 21 above at 27.

<sup>64</sup> Provenance explains its history as cultural property and its conveyancing history.

<sup>65</sup> Chappell & Polk n 61 above at 101.

<sup>66</sup> Chechi n 10 above at 43.

<sup>67</sup> *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F Supp 1374 (SD Ind 1989) affirmed 917 F2d 278 (US Court of Appeals 7<sup>th</sup> Circuit 1990) no 89–2809 cert denied 112 S Ct 377 (1992).

The art trade has proven exceptionally lucrative so that economic incentives are huge.<sup>68</sup> Whereas New York has the largest sales turnover in the world, London is the global centre of cultural trade.<sup>69</sup> The trade tends to be open and licit in the major commercial centres. Objects move through the art market to auction houses, dealers, collectors, and museums. Dealers and museums represent portals of entry to the legitimate world of trade in art. Dealers redistribute the merchandise while museums make the works accessible and visible. End-users tend to be drawn from the social elite.<sup>70</sup> Nonetheless, the illegal market intersects with the legitimate market, and the link between the two is undeniable.<sup>71</sup>

### The underground market

The illegal trade in cultural objects has seen spectacular globalisation in recent decades, and illicit trafficking has now spiralled out of control. The art trade is clearly distinguishable from forms of organised crime, but the art and antiquities market is grey. Virtuoso and commissioned theft from cultural institutions may be perpetrated without institutional support, or the collusion of dishonest curators could be a vital element. Art heists occur frequently. Readily identifiable art can be partitioned to create several marketable works from a single unmarketable parent work. Break-ins at museums are common<sup>72</sup> and, like the wealthy, they are vulnerable to art-napping.<sup>73</sup>

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<sup>68</sup> See eg the *French statue of Maria* case (*De Raad v Ov*) NJ 1983 445, rev'd on appeal to the Hoge Raad); *Fondation Abegg v Ville de Genève* D 1988,325; note Maury decision of the *Cour de Cassation*, reversing the decision of the *Cour d'Appel* Montpellier 18 December 1985 *Recueil Dalloz Sirey* 1985 205; *Autocephalous Greek-Orthodox Church v Goldberg & Feldman Fine Arts Inc* 717 F Supp 1374 (SD Ind 1989) affirmed 917 F2d 278 (7<sup>th</sup> Circuit 1990) cert denied 112 S Ct 377 (1992).

<sup>69</sup> Browne & Valentin 'The art market in the United Kingdom and recent developments in British cultural policy' in Gibbon (ed) *Who owns the past?* (2005) 97.

<sup>70</sup> Chappell & Polk n 61 above at 104, 111.

<sup>71</sup> Watson 'Convicted dealers: what we can learn' in Brodie *et al* n 47 above at 93 95.

<sup>72</sup> '10 Most wanted missing paintings' (*The Telegraph* 25 July 2013) available at: <http://telegraph.co.uk/culture/art/art-news/10191072/The-10-most-wanted-missing-paintings.html?fb>.

<sup>73</sup> The capture of works of art for future ransom. The National Museum in Stockholm refused to pay a ransom for three paintings by Rembrandt and Renoir in 2001 (Grandell, 'Ransom demand for stolen pictures' (*The Guardian* 2 January 2001), but the Tate allegedly paid to have two Turners that were stolen in 1995, returned (Rayner 'Lord Myners faced questions over £3m ransom for stolen Turners' (*The Telegraph* 28 February 2009).

Antiquities are looted directly from the ground in ancient habitation areas and burial sites in order to supply the art market.<sup>74</sup> Dismemberment makes it possible to trade fragments. The loss of meaning and integrity caused by decontextualisation and dismemberment is irreparable. The natural attachment of a detached part restores the integrity of the monument,<sup>75</sup> but deprivation of the state of origin could impact negatively on everyone's understanding of local and regional history.<sup>76</sup>

The aesthetic value of objects compensates for lack of context, and this enables market players to remain indifferent to the questionable provenance<sup>77</sup> of what is on display.<sup>78</sup> Traffickers and dealers may also buy back objects at auction on the 'open market', to launder title and to set prices.<sup>79</sup> They may use artworks for initial collateral in other criminal transactions (such as the narcotics trade), and to launder the profits. It is often claimed that organised crime rings are involved.<sup>80</sup> Once stolen, a painting or a wall carving may remain undiscovered for years.

Not only are licit and illicit market flows intermingled,<sup>81</sup> they also form part of a complex and multi-dimensional network of trade, travel, banking, multinational entities, and international regulatory bodies. Traffickers devise mechanisms to erase, cover, and convert the illicit origins of objects to allow them to be presented as licit material ready to be sold legally at destination. Traffickers may succeed in concealing sites by obtaining false permits to order excavation and export.<sup>82</sup> Provenance can be forged in locations where this could increase commercial value.<sup>83</sup> Fake documentation enables

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<sup>74</sup> Gerstenblith n 11 above at 203.

<sup>75</sup> Provenance places the object in its original context and gives it meaning.

<sup>76</sup> Lane, Bromley, Hicks & Mohoney 'Time crime: the transnational organization of art and antiquities theft' (2008) 24 *Journal of Contemporary Criminal Justice* 243 255; Cornu & Renold n 28 above at 18.

<sup>77</sup> Provenance explains its history as cultural property and its conveyancing history.

<sup>78</sup> Chappell & Polk n 61 above at 101; Gerstenblith n 11 above at 207.

<sup>79</sup> Watson n 71 above at 94.

<sup>80</sup> Chappell & Polk n 61 above at 99. They indicate that the traffic in cultural material is organised (as the organigram of the Medici Conspiracy and the chart of distribution routes of the Salisbury Hoard show) but argue that the involvement of organised crime is an altogether different matter.

<sup>81</sup> MacKenzie n 60 above at 72.

<sup>82</sup> *Kingdom of Spain v Christie's* 1986 [WLR] 1120 (further circulation of Goya's 'La Marquesa de Santa Cruz' was prevented by the granting of the declaration sought by Spain that the export permit had been forged).

<sup>83</sup> Chappell & Polk n 61 above at 105.

eventual sale to buyers in good faith.<sup>84</sup> The tentacles of the illicit trade reach into the cultural life of communities in developed and developing economies alike. Demarcation difficulties increase the risk of litigation for innocent dealers in the legitimate art market.<sup>85</sup>

Preliminary work reveals that the route by which looted and misappropriated art and antiquities travel, depends upon their original location, market demand, and low levels of checks and security in carefully chosen transit states.<sup>86</sup> If the origin of an object is not immediately apparent, a dealer or intermediary may pose as owner when transferring for value. If origin is disputed, or it is unknown when excavation and export occurred, it cannot be established if laws that seem relevant will apply.<sup>87</sup> Most source states have not documented and excavated all their important sites, and need to take steps to prevent further unsupervised and illegal excavations of sites on public or private land. The state that claims restitution, may assume the status of legal owner only upon the commission of the crime, after the context of the find has already been damaged or destroyed.<sup>88</sup>

Organised criminals<sup>89</sup> may exploit the difficulty of distinguishing between the licit and illicit trade; they may also capitalise on the complex interface of private law, private international law, and treaty law as applied by states. The internal market is as vulnerable to the illicit trade, because as one of the policies regulated by the Treaty on European Union, the internal market consists of a space without internal frontiers in which persons, goods, services, and capital move freely.

The scope for manipulation of legal principles is highlighted next.

### **Legal diversity complicates the distinction between licit and illicit trade**

The legal diversity factor provides a convenient laundering mechanism in respect of cultural objects. Unprovenanced objects may change hands many times before a lawsuit for recovery is filed. A transferor who does not own the object, may deliberately seek to move it through an intermediate

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<sup>84</sup> Ulph & Smith n 8 above at 258.

<sup>85</sup> Carey Miller *et al* n 57 above at 10–11.

<sup>86</sup> Lane *et al* n 76 above at 257.

<sup>87</sup> *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2007] EWHC 705 (QB).

<sup>88</sup> Carducci n 29 above at 77.

<sup>89</sup> MacKenzie n 60 above at 69.

jurisdiction that permits good title to pass even if it were to transpire later that the object had been stolen.<sup>90</sup> A subsequent transfer may give a good faith possessor the opportunity to divest the owner of legal title, because the location of the moveable may purge a title from vices when the object transits through a jurisdiction whose law will not permit restitution.<sup>91</sup> Compliance with non-demanding good faith purchaser standards<sup>92</sup> and short prescription periods further enable title to objects of dubious provenance to be laundered.<sup>93</sup> Some states are used as intermediary or transit states, but serve equally well as an end point once title has been laundered.<sup>94</sup> Clarification of the role of these jurisdictions in transaction chains could have an impact on law enforcement, and may raise standards for European agencies that are seen to be less aggressive than their American counterparts.<sup>95</sup>

## STATE OF PLAY IN REGARD TO RESTITUTION AND SUITABLE DISPUTE SETTLEMENT MECHANISMS

### Restitution

From a strictly legal point of view, restitution implies return of the object to the legal owner in accordance with what the law prescribes. However, there are instances where compliance with the law cannot function as a precondition to restitution.<sup>96</sup> A sense of unlawfulness or moral discontent, may continue to linger even if a defence of good faith is available, or a statutory limitation prevents the merits of a case from being addressed. Removal may have been lawful at the time, consented to by state agents or the communities responsible, or the wrong may have been purged by time; and yet the cultural link between the state and the object that has been trafficked might be indisputable and exclusive, and the object valued highly

<sup>90</sup> Siehr 'The Protection of Cultural Heritage and International Commerce' 1997 *IJCP* 304, 305–307; MacKenzie *Going, going, gone: regulating the market in illicit antiquities* (2005) 6; Ulph & Smith n 8 above at 5; Cornu & Renold n 28 above at 14.

<sup>91</sup> *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496; Arts 1153–1157 Italian Civil Code permit the good faith purchaser to acquire title immediately if (a) good faith existed when the thing is bought (b) the transaction is capable of transferring ownership (c) the documents evidencing the sale are capable of transferring title. The potential intermediate status of Italian law was not considered by Slade J.

<sup>92</sup> *Bumper Development Corporation Ltd v Commissioner of Police of the Metropolis and Others* [1991] 1 WLR 1362 CA (1991).

<sup>93</sup> Gazzini n 20 above at xxiii.

<sup>94</sup> *Eg the UK. See Koush 'Fight against the illegal antiquities' traffic in the EU: bridging the legislative gaps* (2011) 16.

<sup>95</sup> Pearlstein n 49 above at 12.

<sup>96</sup> Cornu & Renold n 28 above at 15.

by that state.<sup>97</sup> If the more policy-oriented approach that gained currency in the 90s is understood correctly, the meaning of restitution now extends to the overcoming of legal obstacles standing in the way of return.<sup>98</sup> Technical defences based on jurisdiction, choice of law, conceptual devices in choice of law, legal title or de-accessioning provisions, and even the good faith defence, may be applied less strictly in the light of the historic background and special circumstances of a case. The demand for restitution may also be strong enough to suspend statutory limitations in the light of the extreme injustice of the past.<sup>99</sup> This may be by virtue of new legislation, ‘soft law’ that creates special commissions, or because ADR is preferred to litigation.<sup>100</sup>

Restitution is inappropriate when the desire to control cultural property is absent, or where intangible heritage is in question. Certain communities, for example, the people of the Rai Coast in Papua New Guinea, forego claims because they regard their cultural material as being more productive in circulation than when returned.<sup>101</sup>

Restitution can be contentious if a modern nation that geographically exists in the same place as an ancient civilisation, claims buried objects associated with that civilisation. Should Greeks be permitted to lay claim to Athenian, Byzantine, or Ottoman artefacts?<sup>102</sup> Restitution is bound to be contested if illegalities or crimes have been committed by both the state of origin, and the state that is petitioned for return. The Cultural Heritage Law Committee of the International Law Association proposed a ‘Principle of Repose’ at its Berlin Conference in 2004.<sup>103</sup> Cultural material that has reposed in the

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<sup>97</sup> As with the agreement concluded between France and Nigeria in 2002 concerning return by France of the Nok statues subject to a long-term loan. For more, see Cornu & Renold n 28 above at 14.

<sup>98</sup> Schönerberger n 21 above at 228. Veraart & Winkel (eds), *The Post-war restitution of property rights in Europe* (2011).

<sup>99</sup> Veraart & Winkel n 98 above.

<sup>100</sup> Schönerberger n 21 above at 228; Coggins n 62 76.

<sup>101</sup> Brown ‘Heritage trouble: recent work on the protection of the intangible cultural property’ (2005) 12 *International Journal of Cultural Property* 40 47.

<sup>102</sup> *Greece v British Museum* is pending in the 1978 UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin in respect of the Parthenon Marbles. See Merryman ‘Thinking about the Elgin Marbles’ 1985 *Michigan Law Review* 1881, 1915–1921; Merryman *Thinking about the Elgin Marbles* (2ed 2009); Papa-Sokal ‘Beyond the nationalist-internationalist polarisation in the protection of the archaeological heritage’ (2009) 14 *Art Antiquity and Law* 237.

<sup>103</sup> <http://www.ila-hq.org/> (last accessed 4 October 2013).



territory of a state for at least 250 years, is proposed to be exempt from return to its place of origin. The state where cultural material is located when the claim is made, is to consider, in good faith, any requests from the requesting state for the loan of such cultural material, unless the size or condition of the object or its extraordinary significance to the state where the object is presently located, precludes a loan.

Some categories of restitution necessitate special treatment, such as Nazi spoliated art and human remains. The jurisdictional and normative aspects of the restitution of Nazi spoliated art, are a growing problem for museums the world over. While the theft of paintings was ‘relatively low on the totem pole of Nazi atrocities’,<sup>104</sup> the national policy of plundering cultural property featured among the social priorities of the state at the time.<sup>105</sup> An efficient mechanism is yet to be found for the resolution of these claims.<sup>106</sup> This quest qualifies as one of the most important challenges faced by the community of states, and requires re-opening a legal problem the world has been trying hard to forget.<sup>107</sup> The proposal that an international tribunal be set up as a forum for mediation in disputes for recovery of art and cultural objects,<sup>108</sup> has no real prospect of success. National mediation commissions in five EU member states participated in a symposium in November 2012, to compare their criteria and procedures for mediation.<sup>109</sup> These national commissions represent the only progress on this issue to date.

In disputes over the repatriation of human remains, cultural affiliation is the determining factor. They are often settled upon identification of the ethnic

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<sup>104</sup> Platoni ‘The ten million dollar woman’ *East Bay Express* (4 August 2004) available at: <http://www.eastbayexpress.com/eastbay/the-ten-million-dollar-woman/Content> (last accessed 4 October 2013).

<sup>105</sup> Torsen ‘National reactions to cultural property looting in Nazi Germany: a window on individual effort and international disarray’ 2005 *EJCL* 1 3.

<sup>106</sup> Pell ‘Using arbitral tribunals to resolve disputes relating to Holocaust-looted art’ in International Bureau of the Permanent Court of Arbitration (ed) *Resolution of cultural property disputes* (2004) 307 310.

<sup>107</sup> Kowalski ‘General observations: claims for works of art and their legal nature’ in International Bureau of the Permanent Court of Arbitration (ed) *Resolution of cultural property disputes* (2004) 31; Ritchie ‘Victorious youth in peril: analyzing arguments used in cultural property disputes to resolve the case of the Getty Bronze’ (2009) 9 *Pepperdine Dispute Resolution Law Journal* 325 334.

<sup>108</sup> Tompkins ‘A permanent international art crime tribunal?’ (2009) 2 *The Journal of Art Crime* 35.

<sup>109</sup> Meeting of Five European Committees, Symposium in the Peace Palace in The Hague, 26/27 November 2012, available at: <http://www.restitutiecommissie.nl/en/committees.html> (last accessed 4 October 2013).

group most closely affiliated to the dead person, or of his or her 'homeland'.<sup>110</sup> These cases can be distinguished from cultural heritage cases, on the basis that they intermingle with issues of indigenous people's rights and human rights.<sup>111</sup> In the US, statutory law attributes a repatriation right to Indian tribes or Native Hawaiian organisations, and alters property law accordingly.<sup>112</sup> For instance, the NAGPRA obliges US federal agencies and federally funded museums, to return human remains and funerary objects, sacred objects, and cultural patrimony.<sup>113</sup> Recognised indigenous groups have ownership and control of human remains and cultural objects found on federal and tribal lands. Museums tend to treat such remains as readily amenable to repatriation. Several voluntary returns have been made to communities and heirs. In January 2007, the University of Aberdeen returned nine preserved tattooed heads of Maori people from its museum collections to Te Papa Tongarewa Museum in New Zealand.<sup>114</sup> Scottish museums have made more than twenty repatriations of this kind. However, similar decisions have been challenged successfully in French courts.<sup>115</sup> The mortal remains of persons of Khoikhoi descent, have been returned to South Africa on different occasions. A French museum returned the remains of Sara Baartman after a poem inspired a single article French law.<sup>116</sup> An Austrian museum returned the remains of Klaas and Trooi Pienaar after de-

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<sup>110</sup> *Bonnichsen v US*, 969 F Supp 614 (D Or 1997); 969 F Supp 628 (D Or 1997); 217 F Supp 2d 1116 (D Or 2002); affirmed and remanded by 367 F3d 864 (9<sup>th</sup> Circuit 2004) (connection between Holocene human skeleton and modern Native American tribe difficult to prove).

<sup>111</sup> Forrest *International law and the protection of cultural heritage* (2010) 165.

<sup>112</sup> National Museum of the American Indian Act of 1989 and NAGPRA.

<sup>113</sup> NAGPRA provides notification and inventory procedures pursuant to which Indian cultural objects and burial remains unearthed on federal lands shall be repatriated to the appropriate Indian Tribe.

<sup>114</sup> Curtis 'Thinking about the right home: repatriation and Marischal Museum, University of Aberdeen' in Gabriel & Dahl (eds) *UTIMUT – past heritage future partnerships: discussions on repatriation in the 21st century* (2008) 44.

<sup>115</sup> Rouen Municipal Council decision, session of 19 October 2007, was annulled by the Administrative Tribunal of Rouen (judgment of 27 December 2007). The Administrative Court of Appeal in Douai upheld this decision (judgment of 24 July 2008).

<sup>116</sup> France acceded to President Nelson Mandela's request for the return of the mortal remains of Sara (Saartjie) Baartman to South Africa on 6 March 2002 by virtue of Loi No 2002-323 du 6 mars 2002 relative à la restitution par la France de la dépouille mortelle de Saartjie Baartman à l'Afrique du Sud. Cornu & Renold n 28 above, 9 11 maintain that the same result could have been achieved by way of an administrative decision that reversed the inalienability of the human remains, but that legislation was warranted by the passivity on the part of the administration.

accessioning and changing their curious classification as cultural artefacts to that of human remains.<sup>117</sup>

The idea of return or compensation is found in various peace treaties concluded from the 17<sup>th</sup> century onwards.<sup>118</sup> Restitution may also be made on the basis of customary international law;<sup>119</sup> special domestic legislation;<sup>120</sup> or pertinent administrative decisions that change the classification of an object as no longer being in the public domain.<sup>121</sup> Contemporary international instruments contain regulations and supra-national standards, but practice remains uneven.

The basic distinction between a legal and a non-legal point of view, goes some way towards explaining why the restitution and anti-restitution movements co-exist, but it fails to explain every instance where restitution is sought and refused.<sup>122</sup> A ‘rights based argument’ co-exists with other paradigms. The law does not provide a corrective for the morality of society, yet it aspires to guard and keep open the path to justice. Law and basic moral standards shape and inform each other. While specious moral claims will only contribute to inefficiency in the process by which property is allocated, a single version of truth will stifle the debate.<sup>123</sup>

Restitution is central to the reconciliation process as it recognises past wrongs and reconstitutes identity.<sup>124</sup> Nonetheless, there is no presumptive right of restitution. The law needs to be ascertained on a case-by-case basis;

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<sup>117</sup> The bodies were returned on 20 April 2012 after having been smuggled out of South Africa into Austria by an Austrian anthropologist in 1909. Rassool ‘Human remains, the disciplines of the dead and the South African memorial complex’ available at: [http://sitemaker.umich.edu/politics.of.heritage/files/rassool\\_human\\_remains.doc](http://sitemaker.umich.edu/politics.of.heritage/files/rassool_human_remains.doc) 17–18 (last accessed 4 October 2013).

<sup>118</sup> Gazzini n 19 above at 5.

<sup>119</sup> *Factory at Chorzow (Ger v Pol)* 1928 PCIJ, Series A, No. 9 (July 26), 21.

<sup>120</sup> German and Austrian post-war laws repudiated all spurious ‘transactions’ of the Nazi era, including art ‘deals’ that were just made to appear legal; arts 90 and 92 of the Belgian Code of Private International Law, OJ 27 July 2004 supports re-vindication.

<sup>121</sup> Formal legal procedures may be needed to enforce an administrative decision in some instances.

<sup>122</sup> *Eg* differences of Russian and German opinion in respect of restitution of art taken from Germany by Soviet forces during WWII. See <http://www.bbc.co.uk/news/world-europe-23001274> (last accessed 4 October 2013); <http://www.tagesschau.de/ausland/beutekunst104.html> (last accessed 4 October 2013).

<sup>123</sup> Schönenberger n 21 above at 229.

<sup>124</sup> Chechi n 10 above at 33.

and legislative amendments to enable restitution to take place, can take time.

**Identifying the most suitable mechanism for restitution  
or dispute settlement**

The negative publicity of a public trial can impact severely on a sensitive art market. If title or authenticity remains clouded or unresolved in the course of the trial, the marketability of the cultural object decreases. Even unmeritorious claims can affect marketability and value.<sup>125</sup> Litigation is ‘gladiatorial’, expensive, time-consuming, and unpredictable.<sup>126</sup> Culturally related interests are not always considered alongside the positions of the parties, but some options can offer relief.<sup>127</sup> The settlement of the intra-national dispute between St Gallen and Zürich over books, paintings, manuscripts, and astronomical instruments suggests that an amicable solution may be found to the territorial removal of cultural objects during times of war.<sup>128</sup> The advisory committees or special restitutions commissions that operate in Germany, France, Austria, the UK, and The Netherlands<sup>129</sup> are able to provide a non-adversarial, extra-legal setting, where moral persuasion, professional responsibility, or diplomacy can meet the special dispute resolution needs of Nazi spoliated art disputes.<sup>130</sup> Choice-of-law complications that are associated with litigation that may arise in arbitration, are avoided. Mediation is unconstrained by precedent or adversarial procedure, but similar cases cannot be resolved along similar lines, and procedural safeguards are absent.<sup>131</sup> In the worst case scenario, ADR amounts to ‘little more than a tentative moratorium that neither precludes nor prejudices subsequent litigation or arbitration’.<sup>132</sup>

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<sup>125</sup> Pearlstein n 49 above at 57.

<sup>126</sup> Sykes ‘Recovery of stolen and looted works of art: London December 10 1998’ (1999) 4 *Art, Antiquity and Law* 81.

<sup>127</sup> *Eg* art 5.3 Unidroit Convention; NAGPRA in respect of repatriation on human remains; ILA Principles for Co-operation in the Mutual Protection and Transfer of Cultural Material, reprinted in 2006 *IJCP* 409; Schönenberger n 21 above at 259–261.

<sup>128</sup> Cornu & Renold n 28 above at 12 18, with reference to the cumulative application of various different techniques for dispute resolution in this case: the mediation by the Swiss Confederation resulted in restitution with a long term loan, a donation, the production of a replica as well as the formal recognition of the importance of certain objects to the identity of the counter-party.

<sup>129</sup> Note 110 above.

<sup>130</sup> Cornu & Renold n 28 above at 3.

<sup>131</sup> Gazzini n 19 above at 62–63.

<sup>132</sup> *Id* at 63.

Private ordering processes that depend to a high degree on party power, may be suitable for parties who are eager to maintain their commercial relationship, but these processes may be unsuitable where power is asymmetrical. While there is ample room for arbitrating disputes involving art and cultural objects in theory, there are very limited practical indications of its viability. Complex multi-party, non-contractual disputes may be at stake, and resolution may well depend on the very legal technicalities that ADR seeks to avoid. Arbitration is appropriate when parties have a large differential in power, but fundamental questions are left unanswered in the complex setting of ownership and restitution disputes.<sup>133</sup> Utmost caution is advised when choosing between different mechanisms for dispute resolution.<sup>134</sup> At this point, the nature of the remedy gives an indication of the route to be followed. Restitution simple, is not the only option in the quest to effect a reconciliation. Identity may also be reconstituted through the uncoupling of ownership and rights of enjoyment and use, special ownership regimes, donations, financial compensation, or transfer of ownership to a museum. Restitution may be made for consideration, subject to conditions, or as part of broader cooperation measures.<sup>135</sup> Long-term loans (in which case the beneficiary of the loan could face restitution actions from another claimant), and the formal recognition of the importance of the object to cultural identity, offer further options. Dual nationality and collective ownership may become feasible in future.<sup>136</sup>

## CONCLUSION

The more distinct the traditions and way of life of those who have overlapping interests in art and cultural objects, the greater the demand made on the tolerance of cultural difference; the greater the potential need for suitable dispute resolution methods; and the more urgent the search for peace. When the claim of one party – be it a state, a private actor, or a non-state entity – in respect of art or cultural heritage is met by a counter-claim or refusal of the claim by the other party, it may be the facts, the law, or the

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<sup>133</sup> *Id* at 65ff.

<sup>134</sup> *Id* at 67.

<sup>135</sup> *Eg* agreement of 21 February 2006 between Italy and the Metropolitan Museum of Art. Contel, Soldan & Chechi ‘Case Euphronios Krater and other archaeological objects – Italy and Metropolitan Museum of Art’ available at: <https://plone.unige.ch/art-adr/cases-affaires/euphronios-krater-and-other-archaeological-objects-2013-italy-and-metropolitan-museum-of-art/case-note-2013-euphronios-krater-and-other-archaeological-objects/view> (last accessed 4 October 2013).

<sup>136</sup> Cornu & Renold n 28 above at 18.

policy that causes disagreement. Legally, definition and the legal diversity factors pose challenges. A private cross-border restitution claim to a stolen cultural object that is based on title, may depend on the validity of its transfer in the category of property. Choice of law provides little support for restitution if it is not accompanied by the value judgments required to give direction. Restitution has particularly important symbolic value in certain categories of art claims, such as the repatriation of human remains, and Nazi spoliated art. Legal diversity affects the art market, creates opportunities for trafficking, and increases the risk of litigation.

The efforts of incompatible legal systems to find ways of co-existence and the reconciliation of radically opposing interests among the cultures of the world contribute to the construction of a path to peace. The most suitable means of dispute settlement is not self-evident. Thus far, little independent study has been done in respect of technical conflicts of jurisdiction in claims to art and cultural objects. Current research on the issue addresses the suitability of arbitration, or the development of culturally sensitive principles in dispute resolution. It is time for further work in this regard.